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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 8:00 a.m. on November 16, 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

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Docket No. A94-706 KA'ONO'ULU RANCH (Maui)

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

TOM PIERCE, JR., ESQ.

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Deputy Corporation Counsel
JANE LOVELL, ESQ.
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WILL SPENCE, Planning Drtr.
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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

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1 CHAIRPERSON CHOCK: (gavel) Good morning.
2 This is a continued hearing on A94-706 Ka'ono'ulu
3 Ranch. Mr. Pierce, your witness.

4 WILLIAM SPENCE
5 being previously duly sworn to tell the truth, was
6 examined and testified as follows:

7 CROSS-EXAMINATION

8 BY MR. PIERCE:

9 Q Good morning, Mr. Spence.

10 A Good morning, Mr. Pierce.

11 Q Was your testimony yesterday that there was
12 no breach of the 1995 Order?

13 A I believe my testimony was I don't see a
14 breach. From the conditions on the Decision and Order
15 I cannot tell if there was a breach on that Order.

16 Q What did you review in the process of
17 reaching that decision?

18 A I reviewed the Decision and Order. I
19 reviewed the minutes -- it's contained in the
20 testimony that we provided to this Commission.

21 Q Did you review the -- did you read the
22 entire market assessment report?

23 A No, I did not.

24 Q Did you review the entire traffic study?

25 A No, I did not.

1 Q Did you read the entire transcript?

2 A I read most of the transcript.

3 Q And you said you did read the entire
4 Decision and Order.

5 A I read the conditions on the Decision and
6 Order.

7 Q Did you read the Findings of Fact --

8 A Actually, correct, I did read the entire
9 Decision and Order.

10 Q You read all the Findings of Fact.

11 A Yes, I did.

12 Q So you said one of your reasons, if I
13 understand it, that you reached your opinion, is that
14 your testimony is that there are no express conditions
15 in the 1995 Order?

16 A Well, there's a couple of reasons why. One
17 is -- I mean -- excuse me. The one condition's
18 representations made when I reviewed the record the
19 representations made to the Commission at that time
20 were that there could be many different uses on this
21 property.

22 So with that in mind and lacking an express
23 condition -- so, in other words, the representations
24 to the Commission were there could be a preponderance
25 of commercial. There *could* be apartment. If there's

1 no express condition to the contrary I cannot conclude
2 that there is any kind of breach of that condition.

3 Q Did you review the Petition filed by
4 Ka'ono'ulu Ranch?

5 A The original Petition?

6 Q Correct.

7 A No, I did not.

8 Q So you've reached this conclusion without a
9 full review of the record.

10 A I would say that is probably an accurate
11 statement.

12 Q In reaching your opinion did you review the
13 Administrative Rules that govern the Land Use
14 Commission?

15 A Yes.

16 Q So now Condition 15 of the Decision and
17 Order has been something that's been discussed a lot
18 so I'm sure you're familiar with it. Says,
19 "Petitioner shall develop the property in substantial
20 compliance with the representations made to the
21 Commission." Do you recall that condition?

22 A Yes.

23 Q That's an express condition, isn't it?

24 A No, it's not.

25 Q What is not express about that?

1 A Well, the reason it's not express is the
2 very reason we're all sitting here today is there's an
3 argument of whether that is an express condition or
4 not.

5 Q Doesn't it in fact say exactly what it
6 means? "Petitioner shall develop the property in
7 substantial compliance with the representations made
8 to the Commission"?

9 A Yes, that's exactly what it says. And the
10 representations made to the Commission also include
11 that apartments could be built there, and that there
12 could be a preponderance of commercial but the market
13 will dictate.

14 Q So what you're saying is not express is
15 what the representations are.

16 A I'm not...

17 Q You basically jumped ahead one part here.
18 There's nothing -- can you understand Condition 15 in
19 terms of what it says?

20 A Yes.

21 Q For the moment let's agree that we dispute
22 what "representations" means.

23 A Okay. I can agree.

24 Q But otherwise it's very clear what it says,
25 right?

1 A Actually no. In order to understand that
2 condition I have to look into the record at what the
3 representations were made. It includes -- granted it
4 includes a light industrial subdivision, but it also
5 included all of the uses under the light industrial
6 zoning.

7 The record, the representations to me --
8 the representations made to the Commission at that
9 time includes *all* of those uses.

10 Q Now, you've gone to something that's
11 different from what I asked.

12 A Okay.

13 Q So the Condition 15 you're aware that that
14 is a statutory requirement?

15 A Yes.

16 Q Okay. It's part of the Land Use Commission
17 rules as well, right?

18 A I don't know if that specific condition is
19 part of the rules.

20 Q Let me strike that. It is part of Chapter
21 205 which governs the Land Use Commission?

22 A I would have to look at it chapter and
23 verse.

24 Q So you said you did review the rules for
25 the Commission.

1 A Yes.

2 Q Chapter 15-15?

3 A Yes.

4 Q And did you review the district boundary
5 amendment application rules?

6 A I'm not -- not specifically in this case
7 but I have read them before.

8 Q All right. So there's about 30 of them.
9 This is under 15-15-50(c) is the ones I want to focus
10 on. I'm just going to identify three of them for you
11 which you may recall. 15-15-50(c)(6) says -- these
12 are requirements or what are required to be in the
13 Petition that the Petitioner provides when he's
14 requesting a district boundary amendment.

15 15-15-50(c)(6) says, "Type of use or
16 development being proposed including without
17 limitation a description of any plan, development,
18 residential, golf course, open space, resort,
19 commercial, or industrial use."

20 Were you aware of that condition -- or
21 requirement?

22 A I'm aware that there're -- in any petition,
23 district boundary amendment petition before this
24 Commission, there should be a description of the
25 desired use.

1 Q Let's go on to the next one. Section
2 15-15-50(c)(7) requires a statement of projected
3 number of lots, lot size, number of units, densities,
4 selling price, intended market, and development time
5 tables. Were you aware of that requirement in the LUC
6 rules?

7 A I'm aware that that's a part of what should
8 be a part of an application.

9 Q Well --

10 A Mr. Pierce, you're asking me specific
11 questions about a document that I do not have in front
12 of me. I'm aware that this is the kind of thing that
13 goes into an application. If I was a consultant and I
14 had reviewed -- if I was a consultant this is what I
15 would put into it.

16 And I have reviewed petitions before all
17 for the Land Use Commission. And that's the kind of
18 information that goes into it. Like I said, I'm not
19 going to quote chapter and verse every time you
20 disagree with me about that.

21 Q I'm not asking you to do that. Are you
22 aware that 15-15-50(c)(15) requires "the Petitioner to
23 include an assessment of need for the reclassification
24 based upon the relationship between the use for the
25 development proposed and other projects existing or

1 proposed for the area, and consideration of similarly
2 designated land in the area"?

3 A I believe that's correct.

4 Q Isn't the reason that those, those types of
5 requirements are on the Petitioner is so that the
6 Commission when it's reaching a decision can evaluate
7 whether the proposed use is the right use for the
8 place? Isn't that one of the reasons -- isn't that
9 the reason for those kinds of detailed requirements?

10 A That would be correct.

11 Q And also to evaluate what conditions should
12 be placed on the property in light of the proposal?

13 A Say that again.

14 Q One of the other reasons that those rules
15 are in there is so the Commission can understand what
16 the impacts will be from the Project, right?

17 A Yes. That's part of the -- that's part of
18 the process.

19 Q Then so the Commission can establish
20 conditions that are consistent with the impacts that
21 it sees from the Project, right?

22 A I would say that is true.

23 Q So wouldn't you say that it's very
24 important what the Petitioner proposes?

25 A Yes.

1 Q But what you're saying is that once the
2 Petitioner's made that proposal and obtained a
3 district boundary amendment, anything thereafter is
4 fair game for the Petitioner?

5 A I think that's a mischaracterization of
6 what I've said.

7 Q Well, you've said that -- or you testified
8 yesterday that the landowners are permitted to do any
9 use in M-1 zoning, right?

10 A That's correct.

11 Q So let's just look at County Exhibit --
12 this was County Exhibit 2, County Exhibit 2B.

13 MS. LOVELL: If we just could have a moment
14 to give the exhibit to the witness, please.

15 THE WITNESS: Okay.

16 Q (By Mr. Pierce) So Exhibit, County
17 Exhibit 2B is some of the information that was part of
18 the market feasibility study submitted by the
19 Ka'ono'ulu Ranch, right?

20 A Yes.

21 Q And it included an exhibit that's been
22 referred to many times -- or excuse me, pages that
23 have been referred to many times, identifying what is
24 internally an Exhibit A which was B-1, B-2, B-3 and
25 M-1 zoning, right?

1 A That's correct.

2 Q And your testimony is that any of these
3 uses are permitted because they're all -- B-1, B-2,
4 B-3 uses are permitted because they're all in M-1
5 zoning, right?

6 A Lacking any specific condition on a county
7 level by the county council, they are permitted to do
8 any of these uses, yes.

9 Q And it's your testimony that there were no
10 land use, there were no express conditions in the 1995
11 Order, right?

12 A That's correct.

13 Q And you're saying that they're-- you're
14 also saying that when Ka'ono'ulu Ranch got a change in
15 zoning there were no conditions placed on the property
16 then either by the county council, right?

17 A That's correct.

18 Q And it's also your statement that the
19 Kihei-Makena community plan, its only function is to
20 guide zoning, but it is not enforceable as to the
21 Petitioner, is that right?

22 MS. LOVELL: I object that that misstates
23 the testimony.

24 CHAIRPERSON CHOCK: Would you restate your
25 question, Mr. Pierce.

1 THE WITNESS: That's true.

2 Q (By Mr. Pierce): I'm sorry?

3 THE WITNESS: No. The objection is
4 correct. That is a misstatement of my testimony.

5 Q (By Mr. Pierce) Why don't you go ahead and
6 restate what your testimony was yesterday if you'd
7 like.

8 CHAIRPERSON CHOCK: Briefly.

9 THE WITNESS: Okay. The community plans
10 are guides. They are a framework for the
11 decision-making by the various bodies within the
12 county. There are certain laws within the Maui County
13 Code that specify when the community plans are
14 applicable.

15 One of them is when the council enacts
16 zoning. There's a couple -- Title 19 says the county
17 council must follow the community plans when they
18 enact zoning. So in that sense there's some places
19 where it's -- where it acts as a guide for the council
20 when they go to implement.

21 In other cases, SMA, we must be consistent,
22 that's case law. But other than that CIP, specific
23 instances.

24 Q Can I interrupt you for a moment?

25 A Yes.

1 Q Is it safe to say that, then, you are not
2 finding any kind of obligation upon -- strike that.
3 There's no limitations on the landowners with respect
4 to the Kihei-Makena Community Plan. That's your
5 opinion, correct?

6 MS. LOVELL: I object to the form of the
7 question. It misstates the testimony.

8 Q (By Mr. Pierce): Isn't that the result of
9 what you just said?

10 CHAIRPERSON CHOCK: Hang on, Mr. Pierce. I
11 didn't rule on her objection yet.

12 MR. PIERCE: Sorry.

13 CHAIRPERSON CHOCK: I think we've heard
14 from this witness about the difference between a
15 community plan like the Kihei-Makena community plan
16 and what you're asking. Do you want to maybe refocus,
17 reframe so that it's consistent with his testimony?

18 Q (By Mr. Pierce) Mr. Spence, all I'm trying
19 to get at is a very simple thing. You're not finding
20 that there's any violation of the Kihei-Makena
21 community plan with respect to the landowners right
22 now, with respect to the new proposal, right?

23 CHAIRPERSON CHOCK: Do you know the answer
24 to that question?

25 THE WITNESS: I do not find a violation.

1 Q (By Mr. Pierce): Okay. So, just to step
2 back where I was headed before. Right now the reason
3 that you've reached your conclusion that they can go
4 forward with their Project is because there's no
5 conditions placed by the Land Use Commission, right?

6 A That's correct.

7 Q And there's no limitations in the county
8 ordinance that changed the zoning to M-1, right?

9 A That's correct.

10 Q Okay. So then what you're saying is that
11 any use, once they received county zoning for M-1
12 they're entitled to do any use in M-1, right?

13 A That's correct. The county council is
14 responsible to implement the community plans through
15 zoning. Lacking that, lacking other laws specifically
16 saying where the community plan applies, I don't see
17 how I can find a violation.

18 Q All right. So even though they proposed a
19 123-lot light industrial park, commercial and light
20 industrial, under B-1 zoning churches are allowed so
21 they could put a church there, right?

22 A Yes, they can.

23 Q And they could put -- under B-2 they could
24 put an auditorium.

25 A Yes, they could.

1 Q They could build a really big auditorium
2 there, right?

3 A Without looking, I assume that's one of the
4 listed uses, yes.

5 Q Outdoor stadium?

6 A Assuming -- now, I'm not looking
7 specifically at the list of permitted uses. If it
8 says "outdoor stadium" I would say yes it can.

9 Q Well, auditoriums are usually outdoors
10 aren't they?

11 A Not necessarily.

12 Q Okay. So let's say it's just a very large
13 structure that brings in 10,000 cars in one evening.
14 They could do that, right?

15 A I would have to look at the specific
16 proposal as compared to the zoning in order to make
17 that determination.

18 Q Well, we're looking at the zoning. This is
19 what you said the zoning is, Mr. Spence.

20 A Okay. Would you like to point out to me
21 the exact line that it says so I can tell you based on
22 that.

23 Q Sorry. Yes. If you'll turn to B-2
24 community business district.

25 A Okay.

1 Q Page 10.

2 MR. YEE: I'm sorry --

3 MR. PIERCE: It starts on page 9.

4 CHAIRPERSON CHOCK: Hang on, Mr. Pierce.
5 Mr. Yee?

6 MR. YEE: I believe we're headed into the
7 minutia of county zoning which isn't particularly
8 relevant. While I understand Mr. Pierce wants to make
9 his point, I think we have sort of belabored this
10 point at this point. So if he could either get to it
11 quickly or move on to another issue. I think it's
12 bordering on irrelevant at this point.

13 CHAIRPERSON CHOCK: Yeah, I appreciate the
14 comment. Where are we going with this line of
15 questioning, Mr. Pierce?

16 MR. PIERCE: I'll withdraw that question
17 and move on.

18 CHAIRPERSON CHOCK: Thank you.

19 Q (By Mr. Pierce): Now, yesterday your
20 attorney was asking you some questions about what kind
21 of public process was provided during the change in
22 zoning process.

23 A That's correct.

24 Q At the county level, right?

25 A Yes.

1 Q Now, you're aware that during that change
2 of zoning process at the county level the Project as
3 being proposed was Ka'ono'ulu Ranch's 123-lot
4 subdivision proposal, right?

5 A That was probably what was in the
6 application, yes.

7 Q And in fact the Ka'ono'ulu Ranch hired
8 Mr. Ng who was the traffic engineer to update the
9 traffic report. But the traffic report was evaluating
10 the impacts of the 123-lot proposal that Ka'ono'ulu
11 Ranch had initially submitted to the Commission. Did
12 you know that?

13 A No, I did not.

14 Q And are you aware that at the council
15 hearing at least some of the members believed that
16 what was going to be built were around 123 lots
17 because of the fact -- and they were excited that it
18 was going to provide the entrepreneurial opportunities
19 to the individuals. Were you aware of that?

20 MS. LOVELL: I object to the form of the
21 questions as lacking foundation.

22 CHAIRPERSON CHOCK: Please restate the
23 question.

24 MR. PIERCE: The foundation was actually
25 established, Mr. Chair, yesterday when this Ms. Lovell

1 went to great lengths to identify all of Mr. Spence's
2 participation in that process. He spoke in detail
3 about it.

4 CHAIRPERSON CHOCK: Why don't you try
5 restating the question, please.

6 MR. PIERCE: I'll withdraw the question.

7 Q There wasn't an opportunity for the public
8 to discuss the retail shopping centers during the
9 change in zoning process, was there?

10 A I'm not sure what you're asking. Was there
11 an opportunity for the public to participate in the
12 process?

13 Q No. That wasn't my question. So let me
14 start again. You testified just a moment ago that
15 it's your understanding that what was proposed during
16 the change in zoning was the 123-lot proposal.

17 A I said I believed that's what was in that
18 application.

19 Q Thank you. Let's assume for the moment
20 that it is. In that situation the public never had an
21 opportunity to review or discuss that shopping center
22 use that's right behind you right there that was part
23 of Petitioner's exhibits, right?

24 A I think that's fair.

25 Q They never saw a conceptual design like

1 that, did they?

2 A No. But during the course of that
3 proceeding the planning director at that time, Brian
4 Miskae, raised the issue that he would like to see a
5 limitation on the commercial. So the concept of this
6 could be entirely commercial or there could be a
7 preponderance of commercial, I didn't specifically
8 review those minutes of what he said or didn't say.

9 But his desire was clearly that there be a
10 limitation placed on the amount of commercial for the
11 Project. So the council was fully aware of it. And
12 they chose to not do that.

13 Q Doesn't this create an obligation on the
14 community to, when there's a project that's being
15 proposed under M-1, to ask about every one of these
16 uses? You mentioned yesterday there's a multitude of
17 uses. I mean we could look at these. There's
18 probably 50 or 60 uses that are permitted within M-1
19 and the underlying tiers: B-1, B-2, B-3.

20 So doesn't this require, then, us to
21 anticipate the worst case scenario? That all sorts of
22 impacts that were not being proposed by a Petitioner
23 are actually possibly on the table?

24 A When the county council grants zoning and
25 they -- I'm not exactly sure how you're, what answer

1 you're looking for. When the council grants zoning
2 they have the ability under 19.510 to condition zoning
3 to mitigate proposed or possible impacts of a project.
4 In this particular case they chose not to.

5 Q So they essentially have to assume that
6 even though there's a proposal that might be fairly
7 benign, low intense, low impacts, they have to assume
8 that it could, in fact, have much, much higher
9 impacts, right?

10 A I can't really speak for the county council
11 but that would -- they would have to discuss that.

12 Q So if, in fact, your opinion that you're
13 presenting today is, becomes the policy in the county
14 and the policy in the state, isn't that going to be
15 actually unfair to people who actually want to come
16 forward and propose a benign or low impact project and
17 actually do a low impact project?

18 Because isn't there going to be an
19 increased tendency hereafter as a result of your
20 opinion, for councilmembers, planning commissioners,
21 Land Use Commissioners to say, "You know, based upon
22 Mr. Spence's opinion we have to actually fear the
23 *worst* case scenario and we are going to place
24 conditions on these properties from now on"?

25 CHAIRPERSON CHOCK: Mr. Pierce --

1 Q (By Mr. Pierce): Isn't that the possible
2 policy?

3 CHAIRPERSON CHOCK: Mr. Pierce, that's a
4 pretty speculative question.

5 Q (By Mr. Pierce) Mr. Spence, you were, you
6 were qualified as an expert so you can answer
7 speculative questions.

8 CHAIRPERSON CHOCK: Mr. Pierce, why don't
9 you restate your question.

10 MR. PIERCE: I'll withdraw the question.

11 Q Mr. Spence, notwithstanding your opinion
12 that there's no breach of the 1995 Order, will you
13 agree that the impacts posed by the 123-lot commercial
14 and light industrial park as described in the Petition
15 in this matter originally back in 1995, that those are
16 substantially different from those posed by the
17 700,000 square foot shopping center and the 250-unit
18 housing project?

19 MS. LOVELL: I object to the form of the
20 question with respect to the word "impacts".

21 CHAIRPERSON CHOCK: Overruled. Proceed.
22 Do you need him to restate the question, Mr. Spence?

23 THE WITNESS: I think I can answer that. I
24 would say it could be different. A lot depends on
25 what are -- I mean supposing for a moment that there

1 was a 123-lot subdivision. It depends on who
2 purchases those lots. It depends on what businesses
3 go on those lots, what activities take place. There's
4 a whole range of 'what-ifs' that would have to be
5 taken into consideration before I could accurately
6 answer that question.

7 Q (By Mr. Pierce) You mentioned some of the
8 prefatory language in the comprehensive zoning
9 ordinance for the county earlier in Chapter 19. Do
10 you recall mentioning that?

11 A Specifically...

12 Q Well, actually strike that. Let me just
13 ask you you're generally familiar with all of the
14 preliminary provisions of Chapter 19.

15 A Yes, I am.

16 Q Are you familiar with 19.04.030 which is
17 called "interpretation in scope"?

18 A Do you mind if I look at this? This has a
19 copy of Title 19.

20 Q I have no objection to that.

21 A 19 point --

22 Q 19.04.030.

23 A Okay, 030. Interpretation in Scope.

24 Pardon me, Commissioners, 'cause when you're asked
25 very specific questions about sections of code or of

1 administrative rules, I generally don't trust my
2 memory to be exact. I like to go back and actually
3 have it in front of me. So I'm not trying to be vague
4 about some of Mr. Pierce's questions. I want to be
5 for sure what he's asking.

6 Q So I'm going to try to speed things along,
7 just paraphrase this one. Isn't this provision --
8 well, in fact I'll just focus you on the middle
9 sentence that says, "It is not intended by this
10 article to interfere with or abrogate or annul any
11 easements, covenants or other agreements between
12 parties."

13 Do you see that part of the provision?

14 A Yes, I do.

15 Q And this is a fairly basic principle, isn't
16 it, that whatever is the stricter encumbrance on a
17 property applies?

18 MS. LOVELL: I object to the form of the
19 question as overbroad. Again, I think we're getting
20 into the minutia of county zoning which is not really
21 before this body.

22 CHAIRPERSON CHOCK: I'd like to hear the
23 witness answer, but we are starting to drill down
24 beyond where we need to be, I think, Mr. Pierce.
25 Mr. Spence?

1 THE WITNESS: Okay. I'm reading that. I
2 would agree that county zoning does not generally
3 interfere with private contracts between two parties,
4 the covenants or the easements. Those are agreements
5 between individual parties. It's not a part of county
6 code.

7 Q (By Mr. Pierce) Well, it would even include
8 in this situation the -- and for the moment assuming
9 that the Land Use Commission Order was more strict
10 than the zoning -- and you're permitted to make that
11 assumption here for a moment -- we're not talking
12 about the Project right now just for the sake of
13 argument.

14 Assuming that the Land Use Commission Order
15 was more strict, that would apply, wouldn't it? The
16 more stricter encumbrance on title would apply, right?

17 CHAIRPERSON CHOCK: If you know the answer
18 to the question answer. If you don't know say you
19 don't know.

20 THE WITNESS: If there was a very
21 restrictive covenant -- or excuse me, condition, on an
22 order or on zoning I would say that would, that would
23 apply.

24 Q (By Mr. Pierce) Okay. And similarly -- now
25 you heard the testimony yesterday of Mr. Jencks,

1 right?

2 A Yes, I did.

3 Q All right. And you heard us talking about
4 Condition 1 of the Order which says, "The Petitioner
5 shall obtain a Community Plan Amendment and change in
6 zoning from the county of Maui"?

7 A Yes, I did.

8 Q Now, you heard Mr. Jencks testify. He
9 acknowledged that the Kihei Makena community plan for
10 this property does not identify shopping centers or
11 apartment units as light industrial uses. Do you
12 remember that testimony?

13 MS. LOVELL: I object to the question as
14 misstating Mr. Jencks' testimony.

15 CHAIRPERSON CHOCK: You want to restate
16 that, Mr. Pierce.

17 Q (By Mr. Pierce): You're familiar with the
18 Kihei-Makena community plan?

19 A Yes, I am.

20 Q You've reviewed the sections relating to
21 this, right?

22 A Relating to this particular --

23 Q Property.

24 A Yes.

25 MS. LOVELL: Before we go any further could

1 we please have a clarification as to which community
2 plan we're talking about?

3 CHAIRPERSON CHOCK: Which version,
4 Mr. Pierce? What year?

5 MR. PIERCE: 1998.

6 THE WITNESS: Yes, the one adopted after
7 this Decision and Order.

8 Q Right. There's -- do we -- do you agree
9 that it does not identify -- well, let's just go to
10 the language.

11 CHAIRPERSON CHOCK: Mr. Pierce, didn't we
12 cover some of this yesterday in terms of this plan,
13 Kihei Makena community plan? Are we going to be
14 redundant?

15 MR. PIERCE: I'm going to try not to be.

16 CHAIRPERSON CHOCK: Thank you.

17 MR. PIERCE: This is -- the attempt is to
18 be very short.

19 CHAIRPERSON CHOCK: Thank you.

20 MR. PIERCE: In fact, let me just
21 actually -- I'll step back from that.

22 Q Would you agree, Mr. Spence, that the
23 Kihei-Makena Community Plan has the force and effect
24 of law?

25 MS. LOVELL: I object to the question as

1 overbroad without being more specific.

2 CHAIRPERSON CHOCK: Overruled. Just answer
3 the question if you know.

4 THE WITNESS: I think in certain cases it's
5 a guide and in other cases it does have the force and
6 effect of law.

7 Q (By Mr. Pierce) Are you familiar -- I
8 noticed that you were citing case law in your
9 testimony. Do you recall that?

10 A Yes. Blane vs. Gatri.

11 Q You also cited on a Lana'i case I believe,
12 the Lanai Company case?

13 A No, I didn't cite that. I know our county
14 attorneys have raised that case as have other
15 attorneys. I don't think I've ever cited it.

16 Q Do you have your written testimony in front
17 of you?

18 A Yes, I do.

19 Q Would you turn to page 8.

20 A Okay.

21 Q Do you see the first full paragraph there?

22 A Yes, I do. And that does cite Lanai
23 Company. I know you were going to ask it so I might
24 as well answer.

25 Q So in fact you did cite the law. You

1 signed your written testimony, didn't you?

2 A Yes, I did.

3 Q So you did cite it.

4 A Yes.

5 Q So it appears that you are keeping in touch
6 with case law as part of your obligations as planning
7 director, right?

8 A I try to, not always successful.

9 Q So you're probably familiar with the case
10 that was handed down earlier this year that actually
11 names you as a party, you were a substitute party
12 because the case was started earlier. But it's called
13 Leong v. County of Maui and William Spence.

14 CHAIRPERSON CHOCK: Mr. Pierce, what does
15 that have to do with this proceeding?

16 MR. PIERCE: It has to do, Mr. Chair, to --
17 the offer of proof is that that case holds that -- in
18 fact if you'll give me two more questions I'm done
19 here.

20 CHAIRPERSON CHOCK: Go ahead.

21 MR. PIERCE: All right.

22 CHAIRPERSON CHOCK: Two more questions.

23 Q (By Mr. Pierce) Are you familiar with the
24 case?

25 A Not well.

1 Q So you don't know then -- that was an
2 Intermediate Court of Appeals case.

3 A That's correct. That I am aware of.

4 Q I'm just going to make, see if you're aware
5 of two very short quotes that are in that case. One
6 says, "The Supreme Court has determined --"

7 MS. LOVELL: Objection. Objection. I'm
8 sorry to interrupt. But I think that this particular
9 case, which is currently on appeal, it involves the
10 SMA. There are different kinds of legal issues and
11 they aren't fully settled yet because the case is
12 still on appeal.

13 So I object to reading from selected
14 portions of that Opinion. If we go there then, of
15 course, I will have to read from other selected
16 portions. And I really don't think it's relevant
17 given that was an SMA proceeding.

18 CHAIRPERSON CHOCK: Appreciate the basis of
19 your objection, Ms. Lovell. Mr. Pierce, if you can
20 show us where you're going with this thing and try to
21 wrap this up.

22 Q (By Mr. Pierce) I'm trying to get these
23 last two questions in. Are you aware that that case
24 says "The Supreme Court has determined that the
25 Kihei-Makena Community Plan before us is a legislative

1 enactment with the full force and effect of law"?

2 A No, I'm not aware of that.

3 Q And are you aware that they, that the Court
4 went on and said, "Under the express language of the
5 Maui County Code neither the director nor the planning
6 commission may approve land uses that are inconsistent
7 with the Kihei-Makena Community Plan"?

8 MS. LOVELL: Again, I object to the form of
9 the question because we don't have the full context of
10 that opinion which is currently on appeal to the
11 Supreme Court.

12 CHAIRPERSON CHOCK: Your objection is
13 noted. Do you know?

14 THE WITNESS: No, I do not know. And I
15 would say I would have to read it in the context in
16 which it was written.

17 MR. PIERCE: Thank you, Mr. Chair. No
18 further questions.

19 CHAIRPERSON CHOCK: Thanks, Mr. Pierce.
20 County, redirect?

21 MS. LOVELL: Yes, just a couple of
22 questions.

23 REDIRECT EXAMINATION

24 BY MS. LOVELL:

25 Q Mr. Spence, you were asked a series of

1 questions about the administrative rules of the Land
2 Use Commission and what has to go into a petition for
3 a district boundary amendment. And I'd like to direct
4 your attention to that area.

5 Is a marketing study something that's
6 commonly done by petitioners in district boundary
7 amendments to fulfill some of the requirements that
8 were mentioned earlier by Mr. Pierce?

9 A Is a marketing study required?

10 Q Or is it at least generally provided in
11 district boundary amendments?

12 A Yes.

13 Q And part of the reason is to fulfill the
14 requirements of 15-15-50 that were mentioned earlier
15 this morning, correct?

16 A Well, without having that in front of me I
17 assume that's the case.

18 Q We do have a marketing study in this case,
19 don't we?

20 A Yes, we do.

21 Q Okay. That marketing study is in evidence.
22 Does that marketing study advise the Land Use
23 Commission of the various uses that could be put to
24 this particular property if it were redistricted from
25 Ag to Urban?

1 A That's correct.

2 MS. LOVELL: No further questions.

3 CHAIRPERSON CHOCK: Commissioners, any
4 questions for this witness? Commissioner Inouye.

5 COMMISSIONER INOUE: Thank you, Chair.
6 I'm trying to grapple with your feeling about the
7 Commission, this Commission's Order in 1995, I
8 believe, and your feeling that by doing anything
9 within the county zoning M-1 industrial would allow a
10 whole array of other uses depending on marketing.

11 I'm just having trouble grappling with
12 there's Finding of Fact 21 and you're welcome to look
13 at it.

14 CHAIRPERSON CHOCK: Let's give everybody a
15 second to be pull it up.

16 COMMISSIONER INOUE: Sorry. I should have
17 pulled it up myself. I'm going to use Intervenor's
18 Exhibit 2 which I believe is the entire...

19 THE WITNESS: Okay.

20 COMMISSIONER INOUE: Basically it says
21 that "Petitioner proposed to develop the property as a
22 123-lot commercial light industrial subdivision." And
23 Condition 15 of that same Order indicates substantial
24 compliance with the representations made on the
25 subdivision.

1 So I'm trying to figure out whether what's
2 being proposed, a 4-lot commercial subdivision which
3 is part of the county zoning, how is that substantial
4 compliance? Or is that not part -- that should be
5 part of the Order is what you're saying and not a
6 finding of fact?

7 THE WITNESS: I think my opinion as I read
8 this Finding of Fact No. 21 it says, "Petitioner
9 proposes to develop the property as Ka'ono'ulu
10 Industrial Park, 123-lot commercial and light
11 industrial subdivision."

12 I think as a finding of fact I believe
13 that's true. But in the context of the overall
14 representations made to this Commission that there
15 could be a whole lot of different uses on this
16 property. And I believe from reviewing the record
17 that this is what they initially wanted to do but it
18 changed over time.

19 COMMISSIONER INOUE: Yes, I understand
20 that. I'm just trying to grapple with how the
21 Commission should have worded their Order if they
22 wanted to, wanted to limit it to substantially a
23 123-lot light industrial.

24 THE WITNESS: To me, and again I go back to
25 my earlier testimony, lacking a specific condition I

1 can't tell if there's a breach of this Order or not.

2 If this Commission back then had said, "You
3 shall only have" like it did in other cases say
4 "50 percent commercial only" or time limits or
5 something more specific, I would be happy to say there
6 is or there is not a violation. But in this
7 particular case I can't make that determination. If
8 there was a specific condition I'd be happy to give
9 you a better opinion.

10 COMMISSIONER INOUE: So that condition
11 needs to be in the Order itself as one of the
12 conditions is what you're saying.

13 THE WITNESS: Yes.

14 COMMISSIONER INOUE: Thank you.

15 CHAIRPERSON CHOCK: Thank you, Commissioner
16 Inouye. Commissioners, any other questions for
17 Mr. Spence? Thank you for your testimony.

18 THE WITNESS: Thank you, Commissioners.
19 County, next witness?

20 MS. LOVELL: The County rests.

21 CHAIRPERSON CHOCK: Thank you, Ms. Lovell.
22 State?

23 MR. YEE: The State will have one witness,
24 Mr. Rodney Funakoshi.

25 CHAIRPERSON CHOCK: Good morning. Can I

1 swear you in?

2 RODNEY FUNAKOSHI

3 being first duly sworn to tell the truth, was examined
4 and testified as follows:

5 THE WITNESS: Yes.

6 CHAIRPERSON CHOCK: Your name and address?

7 THE WITNESS: Rodney Funakoshi, 235 South
8 Beretania Street, Honolulu.

9 MR. YEE: Mr. Funakoshi's resumé has been
10 submitted into evidence. We would submit
11 Mr. Funakoshi as an expert in the field of planning.

12 CHAIRPERSON CHOCK: Parties, any
13 objections?

14 MR. KAM: No objection.

15 MR. STEINER: No objection.

16 MR. PIERCE: No objection.

17 CHAIRPERSON CHOCK: Proceed.

18 MR. YEE: He's deemed to be --

19 CHAIRPERSON CHOCK: He's admitted as an
20 expert.

21 DIRECT EXAMINATION

22 BY MR. YEE:

23 Q Thank you. Mr. Funakoshi, was OP
24 Exhibit 11 prepared by you or at your direction?

25 A Yes.

1 Q Does this accurately state the position of
2 the Office of Planning?

3 A Yes.

4 Q Would you please summarize your testimony.

5 A Okay. Based on the evidence in the record
6 and documents filed with the LUC, OP finds and
7 concludes that Petitioners have not substantially
8 complied with their representations as required by
9 condition 15 of the 1995 D&O.

10 Petitioners originally represented a
11 123-lot commercial and light industrial subdivision.
12 Petitioners are now proposing to develop residential
13 apartments and two shopping centers with no apparent
14 light industrial activity within the four major lots.

15 This new use was not accounted for in 1995
16 and consequently the conditions imposed at the time
17 may not reflect the impacts to issues of statewide
18 concern caused by the new use.

19 In the LUC's 1995 D&O Petitioner was
20 clearly on notice that any development in the Petition
21 Area must be in substantial compliance with its
22 representations.

23 Condition 15 states, and I quote,
24 "Petitioner shall develop the property in substantial
25 compliance with the representations made to the

1 Commission. Failure to so develop the property may
2 result in the reversion of the property to its former
3 classification or change to a more appropriate
4 classification."

5 Despite this clear notice Petitioner has
6 deviated substantially from its original
7 representations.

8 A comparison of the development approved in
9 1995 with the Petitioner's current proposal is shown
10 in the table on the wall extracted from OP Exhibit 11
11 page 7. The clear focus of the 1995 proposal was on
12 light industrial uses with the flexibility to include
13 an unspecified number of commercial lots.

14 The market study assessment report and
15 traffic study all focused on the Project's light
16 industrial uses. The Project was named Ka'ono'ulu
17 Industrial Park consistent with the Petitioner's focus
18 on light industrial uses.

19 The LUC also made a specific finding that
20 the Project would conform with the proposed light
21 industrial designation for the property. Light
22 industrial uses include warehousing, light assembly
23 and service and craft type industrial operations.

24 This is from Findings of Fact 32. The LUC
25 conditions imposed in 1995 were tailored to address an

1 industrial development. Different land uses,
2 residential, commercial, industrial and agricultural,
3 have different impacts on the economy, environment and
4 the community.

5 These impacts are what the LUC evaluates
6 when determining whether to grant a district boundary
7 amendment pursuant to HRS Chapter 205.

8 In 1995 the LUC considered a primarily
9 industrial project and its imposed conditions are
10 evidence of that. For example, Condition No. 8 goes
11 into careful detail about oil/water separators,
12 precautions on cleaning, repair and maintenance
13 activities, control of spills and storage of
14 industrial liquids.

15 Condition 16 requires a buffer zone between
16 lands designated for single-family housing in the
17 Kihei-Makena Community Plan to mitigate impacts from
18 the proposed industrial development.

19 The 1995 D&O does not address issues
20 relative to apartment buildings and two large shopping
21 centers and any impacts thereby on traffic, job
22 creation, energy use, water and utilities.

23 The LUC considered the market study would
24 focus on the future need for additional light
25 industrial uses.

1 The market study did not draw conclusions
2 regarding the Project's ability to fill a need in the
3 residential market or even in the commercial market.
4 The market study is silent on matters related to the
5 current proposal which includes apartment buildings
6 and two large shopping centers.

7 The LUC did note that the County's light
8 industrial zoning allowed a broad range of activities
9 even including apartments. When concerns were
10 expressed about this possibility that there might be a
11 preponderance of commercial uses in the Petition Area,
12 Petitioner's marketing consultant replied that this
13 was "possible but unlikely."

14 According to the consultant market forces
15 would restrict the commercial enterprises to those
16 which would service the light industrial complex such
17 as a hair dresser, restaurant, okazu or bank branch.

18 Regarding residential use. The quote from
19 the 1994 transcript page 100, Mr. Eichor says, "My
20 last question. As I understand it initially this was
21 viewed as a residential Project." And response by
22 Mr. Sodemani: "I guess it was a mixture of
23 residential, commercial, light industrial."

24 "Mr. Eichor: Is there a particular reason
25 why you switched concepts?

1 "Answer: Well, I think Mr. Kajioka had
2 expressed the concern about having residential units
3 in close proximity to light industrial properties."

4 This shows that residential component, that
5 a residential component within the Petition Area was
6 initially considered, then removed due to proximity
7 concerns.

8 In April of 2008 the Maui County Council
9 adopted Ordinance 3554 Wailea 670 zoning ordinance.
10 Honua'ula Partners was required to provide 250
11 workforce housing units within the Ka'ono'ula Petition
12 Area.

13 Consequently, Petitioners were aware as
14 early as 2008 the county had changed the land use from
15 the Petition Area to include residential units. Yet
16 they failed to notify the LUC until the most recent
17 annual report filed just a month ago.

18 Further evidencing the change in use and
19 updated traffic study for the Pi'ilani Promenade in
20 May 2012 analyzed the impacts of retail development
21 only. No industrial or residential uses were
22 assessed.

23 Regarding the frontage road. Condition 5
24 in the Decision and Order states in part that:
25 "Petitioner shall provide for a frontage road parallel

1 to Pi'ilani Highway." The roadway plans depicted in
2 the 2012 traffic study shows that no frontage road is
3 planned as required by Condition No. 5.

4 Typically petitioners return to the Land
5 Use Commission for an amendment to conditions they do
6 not intend to follow. While OP acknowledges the
7 questionable need for this frontage road, Petitioner
8 should have but did not file for an amendment to this
9 condition.

10 Petitioner proposed to develop 123 lots.
11 The size of the lots would range from approximately .3
12 to 1.2 acres. The current proposal is for four major
13 lots ranging from 13 to 30 acres. This constitutes a
14 significant difference in the lot configuration. We
15 wish to note that Petitioner Honua'ula Partners took
16 corrective steps to address non-conformance with its
17 representations.

18 In September 2012 Honua'ula Partners filed
19 a Motion to Bifurcate Docket A94-706 with the intent
20 to file a Motion to Amend the '95 D&O for the
21 residential portion of the development.

22 Office of Planning supports their
23 procedural efforts to amend the 1995 D&O.
24 Unfortunately, Honua'ula withdrew their motion. In
25 other district boundary amendment cases where

1 significant changes have been made to the nature of
2 the proposed development, petitioners have returned to
3 the LUC with a Motion to Amend.

4 Most recently this occurred with the
5 Department of Hawaiian Home Lands' project in Kalaeloa
6 where it was previously proposed for a sports complex
7 that's now being proposed for a regional mall.

8 There are other major developments on O'ahu
9 including the UH West O'ahu, the Kroc Center in 'Ewa,
10 and others in the past include the Princeville
11 Corporation and Kukuiula.

12 The Land Use Commission and parties with a
13 Motion to Amend are given the opportunity to review
14 the new proposed use, determine whether the
15 requirements for reclassification have still been met
16 and whether additional or revised conditions should be
17 imposed.

18 Accordingly, Petitioners should file a
19 Motion to Amend to reflect the currently proposed
20 retail and residential use, subdivision plan and
21 roadway improvements.

22 The Land Use Commission spends a
23 considerable amount of time evaluating boundary
24 amendment petitions and imposing conditions
25 appropriate to the proposed use. Condition 15 holds

1 petitioners accountable to what they represent to the
2 Commission.

3 In OP's opinion this is clearly a different
4 Project from what was initially proposed. In
5 configuration of use what was primarily a light
6 industrial small-lot subdivision as represented to the
7 Commission, has become a predominantly large-scale
8 commercial development with a new residential
9 component not previously considered.

10 Thus OP finds and concludes that
11 Petitioners have failed to substantially comply with
12 their representations as required by Condition 15.
13 Thank you for the opportunity to testify.

14 Q One follow up. Yesterday in oral
15 testimony, although we don't have it in writing, there
16 was a stated commitment to put in a home improvement
17 center. How does that affect OP's analysis?

18 A The home improvement center would be at
19 least partially a light industrial use, so that would
20 be an improvement to the current proposal which
21 currently has no industrial uses.

22 Although I would also add, though, that a
23 Home Depot-type operation is primarily
24 commercial/retail in nature. And also that the extent
25 of the use that 11 and-a-half acres in relation to the

1 88-acre total is perhaps an eighth of the Project size
2 and still does not represent what was proposed in '95
3 as a primarily industrial development.

4 Q Will you consider -- with respect to the
5 Honua'ula Apartments how does that affect that
6 analysis?

7 A The apartments was not considered in 1995.
8 And DOE testified pretty much as such, that they never
9 considered that as part of their initial review of the
10 1995 Decision and Order.

11 Q Given the inclusion of apartment buildings,
12 the predominantly retail nature of a home improvement
13 center and the size of the home improvement center
14 relative to the entire property, has the Office of
15 Planning changed its conclusion with respect to this
16 question of substantial compliance?

17 A I'm sorry? No. Wait. Can you repeat
18 that?

19 Q Has the Office of Planning changed its
20 position in light of this new information?

21 A No.

22 MR. YEE: Thank you. Nothing further.

23 CHAIRPERSON CHOCK: Mr. Steiner.

24 xx

25 xx

CROSS-EXAMINATION

BY MR. STEINER:

Q Thank you. Good morning, Mr. Funakoshi. I'm going to go over some of your testimony in Office of Planning's Exhibit No. 11. Do you have that in front of you?

A Yes.

Q At page 2 of your testimony you testified that your opinion was there's no apparent industrial activity within the four major lots. And Mr. Yee just asked you about the representation made to the Commission yesterday by Mr. Jencks that there would be, in fact, a commitment to some light industrial activity.

You've stated just now in response to Mr. Yee's questions that that did not change or does not change the state Office of Planning's position with regards to whether this complies with the representations made to the Commission back in 1994-1995, is that correct?

A Yes.

Q Okay. And one of those reasons is you said that it's a 11 and-a-half acres of the 88 acres, correct?

A Yes.

1 Q You notice there's also the dedication of a
2 MECO lot of approximately 8 acres. Are you aware of
3 that?

4 A Yes, I did hear that testimony.

5 Q And that's considered a light industrial
6 use, right?

7 A Yes.

8 Q Does the Office of Planning have a position
9 as to how much light industrial use would need to be
10 on the property before it would comply with the
11 representations made to the Commission back in 1994?

12 A No specific proportion. Only to the extent
13 that it was represented primarily, and everything in
14 the original proposal referred to light industrial
15 development and commercial as almost a secondary use.

16 Q So sitting here today you can't say what
17 percentage of light industrial would need to be on the
18 property in order for it to comply with the Decision
19 and Order.

20 A I cannot.

21 Q If you cannot, how is a landowner supposed
22 to be able to determine or reasonably ascertain what
23 percentage?

24 A Well, it should primarily be to be, you
25 know, you would think that it would at least be a

1 majority of the proposed use. But, you know, what
2 proportion would essentially be for this Commission to
3 determine.

4 Q Okay. You also in the sort of general
5 conclusion on page 2 of your report you say that "The
6 conditions imposed back in 1994 in the Decision and
7 Order may not reflect the impacts to issues of
8 statewide concern caused by the new use." You see
9 that on page 2 of your report?

10 A Yes.

11 Q Are the issues of statewide concern that
12 you're referring to there, are they identified
13 anywhere in your report what those issues are?

14 A Not as specifically, but, you know, we did
15 discuss the traffic study for example. We did present
16 testimony in this proceeding relative to educational
17 impacts which were not considered in the original
18 proposal.

19 Q With regard to the traffic study you're
20 aware that there's been updated Traffic Impact
21 Analysis Reports along the way, a number of them
22 throughout the development in this Project, right?

23 A Yes.

24 Q Don't those assessments sort of address the
25 State's concerns regarding traffic? Isn't that --

1 I'll stop with one question.

2 A It does. But we're still talking about
3 what was considered originally in 1995 as opposed to
4 the traffic study has been updated to reflect the
5 currently proposed uses and not what was proposed or
6 decided upon by the Land Use Commission in '95.

7 Q In this case the state Department of
8 Transportation is reviewing those TIARs, right?

9 A Yes.

10 Q So the state Department of Transportation
11 would be concerned with issues of statewide concern
12 regarding traffic, right?

13 A Yes. Well, I would add that it is a fairly
14 standard practice to have updated traffic studies done
15 as the Project proceeds over time. So it's not
16 unusual certainly. Here, though, we are simply
17 talking about what was proposed and considered and the
18 conditions imposed at the time of the Project's
19 approval in '95.

20 Q Okay. On page 2 going on to page 3 of your
21 report you talk about remedies. And that's where, at
22 least in your written testimony you talk about the
23 fact that in other district boundary amendment cases
24 where a significant change is made to the nature of
25 the proposed development the Petitioners have returned

1 to the Land Use Commission with a Motion to Amend.

2 You testified about that this morning, right?

3 A Yes.

4 Q You gave some examples, for instance the
5 Princeville Development Corporation case.

6 A Yes.

7 Q Have you reviewed the record in that case?

8 A No.

9 Q Okay. Are you aware that in that case in
10 the Decision and Order that was originally issued that
11 there was a specific condition that said that a "golf
12 course shall be constructed on the property"?

13 A I'm not aware of that.

14 Q Are you aware of the fact that the Motion
15 to Amend was seeking to specifically amend *that*
16 condition? I think there were two Motions to Amend.
17 First to allow a tennis court, not just a golf course,
18 and later to allow residents, not just a golf course?

19 A That could be.

20 Q Have you reviewed the other examples of
21 Motions to Amend to determine whether they were
22 addressing the general condition of being in
23 compliance with -- that the Project be developed in
24 conformance or in substantial compliance with the
25 representations versus whether they addressed the

1 specific conditions and asked to be released from
2 specific conditions?

3 CHAIRPERSON CHOCK: Maybe you could start
4 over with that question if you don't mind.

5 MR. STEINER: I'm sorry.

6 THE WITNESS: No, I understand the
7 question. Not all of them. I was not involved in all
8 of them. I was involved in the most recent Department
9 of Hawaiian Home Lands. That was not in response to a
10 specific condition. It was simply a change in
11 proposed use.

12 I was also involved -- although I'm a
13 planning consultant with the Kukuuiula Project. And
14 that was also, not so much did not respond so much the
15 change in condition as it was a change to the overall
16 Master Plan for the project.

17 Q (By Mr. Steiner): The Hawaiian Housing
18 one, is that the Docket 99-728 if you know?

19 A Yes. 99-728(c).

20 Q And there was a number of these different
21 Motions to Amend that was filed as to the original
22 district boundary amendment in that case, right? A,B,
23 and C?

24 A Yes.

25 Q Yeah. That was because different

1 landowners bought portions of the property and then
2 were doing different projects?

3 A Yes.

4 Q Isn't it true that in those, in the relief
5 sought in those motions they listed specific
6 conditions and said which ones they wanted to be
7 relieved from and which ones that they didn't need
8 relief from?

9 A Yes.

10 Q So, in fact, they were addressing specific
11 conditions that they were -- that they felt needed to
12 be amended in order to proceed with their projects?

13 A Well, yes. But their original reason for
14 pursuing the Motion to Amend was because of the change
15 in use in, not in response necessarily to the
16 conditions.

17 Q In this case, though, the only condition
18 that would need to be changed that could possibly
19 apply would be the condition to develop the property
20 in substantial compliance with the representations
21 made to the Commission, is that correct?

22 MR. YEE: I'm going to object on the basis
23 of speculation. Until a Motion to Amend with the
24 analysis provided regarding the impacts to a different
25 Project are submitted, it's impossible for anyone to

1 answer that question. So we would object on the basis
2 of speculation.

3 CHAIRPERSON CHOCK: Noted your objection.
4 I'd like to hear the answer to the question. Proceed.
5 If you know, Rodney. If you don't know you don't
6 know.

7 A Again, you're asking -- that was the only
8 condition -- well, I mentioned as a Condition 5,
9 requiring a frontage road that's no longer being
10 planned.

11 Q (By Mr. Steiner): The frontage road and
12 the Condition 15 are the only two, right?

13 A Yes.

14 Q On page 3 of your report you talk about the
15 fact that the supporting documentation that was
16 submitted in support of the Petition focused on
17 proposed light industrial uses, right?

18 A Yes.

19 Q And the first thing that you cite in that
20 is the 1994 market feasibility study and economic
21 report, right?

22 A Yes.

23 Q And you specifically cite to where it says
24 that it will develop the Petition Area into a light
25 industrial subdivision containing approximately 122

1 lots. Could you please take a look at the market
2 study which is exhibit, I believe it's Petitioner's
3 Exhibit 3 not Petitioner's, Pi'ilani's Exhibit 3. Do
4 you have that in front you?

5 A Yes.

6 Q Now, the market study does address both a
7 commercial and light industrial subdivision in
8 multiple cases, right?

9 A Well, in going through it it seemed to
10 clearly focus on light industrial rather than
11 commercial.

12 Q Okay. But it did mention the --

13 A It did mention commercial, yes.

14 Q If you could look at page 6 of the market
15 study. At the bottom of page 6 this is the
16 absorption, expected absorption section of the market
17 study at the bottom. Didn't the market study
18 specifically state that one type of potential tenant
19 would be discount retailers?

20 A Yes.

21 Q And a discount retailer, is that a retail
22 or light industrial use?

23 A Retail.

24 Q Okay. The market study also states in that
25 same paragraph that there might be furniture and

1 appliance sales. Do you see that?

2 A Yes.

3 Q Would furniture sales be a retail or light
4 industrial use?

5 A Retail.

6 Q Okay. So like a CS Wo's or something.

7 A Yes.

8 Q And this market study, these are
9 representations that are being made to the Land Use
10 Commission, right?

11 A Yes. It also says that one-fifth of the
12 development should be programmed for these types of
13 lots.

14 Q Doesn't it say "approximately one-fifth?"

15 A Yes.

16 Q Did the Land Use Commission ever impose any
17 condition saying that one-fifth of the lots or any
18 percentage would be these commercial uses?

19 A No, but they did express concern for the
20 amount that would go in.

21 Q Looking at page 7 -- wait. Staying on page
22 6. Didn't that same section of this report speak to
23 the possibility of sales to investors who would
24 develop the land for multi-tenant use having long-term
25 leases?

1 A Yes.

2 Q So somebody's going to develop land for
3 multi-tenant use, that would probably involve a
4 consolidation of some of these 123 lots? Is that a
5 reasonable expectation?

6 A Yes.

7 Q Then on page 7 of the market study doesn't
8 it say in there that the "success of marketing the
9 Project would depend on obtaining popular and
10 internationally recognized outlets to occupy the
11 larger parcels"?

12 A Yes.

13 Q And isn't that referring to what's sort of
14 commonly known as anchor tenants?

15 A That could be.

16 Q The "popular and internationally recognized
17 tenants", do you think that's referring to retail or
18 light industrial?

19 A Retail.

20 Q Okay. 'Cause there aren't really any
21 popular internationally recognized light industrial
22 tenants out there, are there?

23 A Not that I know of.

24 Q Finally, on page 8 of the market study
25 didn't it also say the lot sizes, the number of lots

1 estimates the values are for planning purposes only
2 and it's only one conceptual plan?

3 A I'm sorry. Where does it say that?

4 Q This is on page 8 under "recommendations".
5 It's the second paragraph under "recommendations"
6 first sentence.

7 A Yes.

8 Q And it specifically says that "these
9 estimates would require reassessment and need to be
10 adjusted depending on the market conditions."

11 A Yes.

12 Q And these were all representations made to
13 the Land Use Commission, right?

14 A Yes.

15 Q On page 3 of your testimony you also
16 referenced the traffic study done by Julian Ng in
17 1994?

18 A Yes.

19 Q And you say that that study was based on a
20 description of the proposed Project as an industrial
21 park, right?

22 A Yes.

23 Q And you've reviewed that traffic study and
24 it is, it focuses on the use as an entirely industrial
25 park, right?

1 A That's my recollection.

2 Q Okay. So the traffic counts that are in
3 that study, those were done strictly using the
4 formulas they used using the space as light
5 industrial, right?

6 A The trip generation, right, is based on
7 light industrial uses.

8 Q But the market study in this case indicated
9 that at least some of the space would be used for
10 these popular and internationally recognized
11 retailers, right?

12 A True. I believe one-fifth was the
13 approximate proportion indicated.

14 Q So wasn't the Commission aware that even
15 though the TIAR was done based strictly on light
16 industrial, there would be retail involved and that
17 might impact the traffic?

18 A Yes. The Commission did acknowledge that
19 there would be some commercial.

20 Q In fact didn't Commissioner Kajiooka
21 specifically recognize the traffic impacts from retail
22 would be different when he was questioning
23 Mr. Sodetani?

24 A Yes.

25 Q You mentioned in your report that there's a

1 concern about a predominance of commercial, but that
2 that was raised by the Commission, but that it was
3 addressed through Petitioner's proposed plan to sell
4 vacant lots rather than construct the buildings and
5 lease those out. Do you recall that part of your
6 testimony?

7 A Yes.

8 Q So, in other words, just to sort of
9 paraphrase, the concern was raised by the
10 Commissioners about the possibility to Mr. Sodehani
11 that: Hey, this might be primarily retail. And
12 Mr. Sodehani, one of his responses was he talked
13 about: The proposed plan in this case is to sell
14 vacant lots rather than construct a big building and
15 lease it out, right?

16 A Yes.

17 Q Is there any restrictions on what -- if
18 that in fact, if this had been developed as a 123-lot
19 light industrial subdivision would there be any
20 restriction on what could be done on those lots once
21 they're sold?

22 A No.

23 Q And a purchaser could buy a block of those
24 vacant lots and then consolidate them, right?

25 A Yes.

1 Q That would be driven by the market, right?

2 A Yes.

3 Q Looking back to the market study page 1,
4 the very first page of the market study. There's a
5 section called the "considerations and assumptions".

6 A Yes.

7 Q Do you see that? These are the assumptions
8 that are built into this market feasibility study,
9 right?

10 A Yes.

11 Q So, you know, just to put this in context.
12 You talked about the fact that one concern -- one way
13 to address retail concerns was to sell vacant lots.
14 But one assumption is -- or the first three
15 assumptions are that the lots would be sold, leased as
16 vacant lots on the open market. That's consistent
17 with what we just said, right?

18 A Yes.

19 Q It also says the land will be available for
20 purchase in fee simple. You see that?

21 A Yes.

22 Q But it also not only for purchase in fee
23 simple, it says "the land will be available for
24 long-term lease." Do you see that?

25 A Yes.

1 Q So isn't this saying that all these options
2 are open? You can sell lots. You can lease lots.
3 You can sell the whole property in fee simple or you
4 could lease the whole property?

5 A Yes.

6 Q And it also says, "The covenants,
7 restrictions and conditions are similar to those in
8 effect for other light industrial subdivisions in
9 Kahului and Wailuku will encumber the Project." Do
10 you see that?

11 A Yes.

12 Q And we heard testimony regarding what's
13 been developed as far as retail in these other light
14 industrial subdivisions in Kahului and Wailuku
15 yesterday, right?

16 A Yes.

17 Q Some of these include a significant amount
18 of retail, right?

19 A Yes.

20 Q Finally, the other assumption in there is
21 it says, "No additional restrictions, prohibitions or
22 moratoriums will be imposed by any governmental
23 authorities." Do you see that?

24 A Yes.

25 Q So isn't Mr. Sodemani in his market

1 feasibility study making the assumption that other
2 than how the property's zoned, that there will be no
3 other prohibitions, restrictions imposed on the
4 property other than what....

5 A This is a marketing consultant study, so I
6 would not think that he would be in a position to, you
7 know, make this kind of a request.

8 Q But his assumptions when he's saying,
9 "Here's what I expect the market's going to put on the
10 property," he's assuming there's not going to be any
11 other restrictions. He's not guaranteeing it. That's
12 the assumption in his report.

13 A True.

14 Q Turning to the page 6 of your report. You
15 talk about the grading permits that were issued for
16 this property as being the first public document
17 discovered by OP that described the proposed shopping
18 center for the Petition Area, right?

19 A Yes.

20 Q What did you mean by the "first public
21 document discovered by OP"?

22 A Well, this is following our look, following
23 the Movant's Motion for Order to Show Cause. At that
24 point it triggered our review of what has transpired.

25 Q So are you saying that before that there

1 were no public documents out there? Or just the first
2 ones that were brought to your attention?

3 A None that we were aware of that we could
4 find.

5 Q And you guys went and looked for other
6 public documents? Or you just looked at the ones that
7 come into your office?

8 A Oh, no. We inquired including with the
9 county.

10 Q Okay. Could you look at Petitioner's
11 Pi'ilani's Exhibit 19. It actually just happens to be
12 open in front of you in that binder if that's easier.
13 That's it right there. Doesn't -- this is a document,
14 a public document that was filed, right?

15 A Yes.

16 Q The title of this map is "Ka'ono'ula
17 Marketplace", right?

18 A Yes.

19 Q Doesn't the fact that it's titled
20 "marketplace" indicate this is going to be a
21 potentially retail establishment?

22 A Could be.

23 Q You also say in your report -- I just want
24 to clarify this -- that the OP is aware of only three
25 Petitioner's annual reports filed in the 17 years

1 since the 1995 Decision.

2 Are you saying you're only aware of three
3 that are filed by *this* owner? Or you're only aware of
4 three period that were filed?

5 A That's all we could find in our files.

6 Q Okay. So you're not aware of the fact that
7 in the Land Use Commission's files when we requested
8 their files, the first nine reports they did have
9 copies of.

10 A No, not at the time this was written.

11 Q I guess this is an issue because we
12 didn't -- we're not aware that this was an issue that
13 those reports were not filed, but they are in the Land
14 Use Commission's files. I wanted to make the
15 Commission aware of that when we requested their files
16 that they were there.

17 There's a time period of about four reports
18 that we've been unable to find as you heard Mr. Jencks
19 testified.

20 MR. YEE: I'm sorry. Is there a question?

21 MR. STEINER: I guess that's more of a
22 statement.

23 MR. YEE: Okay.

24 MR. STEINER: I apologize.

25 THE WITNESS: Okay. Well, that's good.

1 And we stand corrected on that.

2 MR. STEINER: Thank you.

3 Q The argument section of your written
4 testimony starts out by saying "The issue before the
5 Land Use Commission is not whether the new use is
6 consistent with county planning, zoning or subdivision
7 as suggested by Petitioners." You see that?

8 A Yes.

9 Q So is the state Office of Planning in
10 agreement that compliance with respect to Kihei-Makena
11 Community Plan is not an issue for the Commission to
12 decide?

13 A We don't see that as a primary issue at
14 least.

15 Q Would the state Office of Planning agree
16 that that issue of whether there's compliance with the
17 Kihei community plan is an issue for the county to
18 enforce and decide?

19 A Yes.

20 Q And on Page 7 of your report you say that
21 "The focus was on light industrial uses with
22 flexibility to include an unspecified number of
23 commercial lots." You see that?

24 A Yes.

25 Q So the state Office of Planning agrees that

1 some commercial lots are allowed, right?

2 A Yes.

3 Q As you previously stated, though, you don't
4 have any position of how many commercial lots or what
5 percentage is allowed.

6 A Yes.

7 Q You mentioned that there were certain --
8 and you testified there are certain conditions which
9 were tailored to light industrial in the Decision and
10 Order. And you reference Condition 8 and Condition
11 16, right?

12 A Yes.

13 Q Are you saying -- you're not saying that
14 those conditions have been violated in this case, are
15 you?

16 A No.

17 Q If retail were built would those conditions
18 still need to be there, do you know?

19 A If exclusively retail probably not.

20 Q Wouldn't -- for the parking lot wouldn't
21 they still need the oil separators and so forth?

22 A Not necessarily.

23 Q So this might be a condition that wouldn't
24 need to be there?

25 A Yes.

1 Q Okay. But the fact that -- but it wouldn't
2 be violative if they built the shopping center?

3 A Yes.

4 Q And the buffer zone condition, would that
5 still need to be there if it was retail next to
6 single-family housing?

7 A No.

8 Q Only if it's light industrial.

9 A Yes.

10 Q But, again, not being violative it's just
11 that initial condition that wouldn't need to be there.

12 A Yes. But I think what it goes to is the
13 thinking of the Land Use Commission in imposing those
14 conditions targeted to a light industrial development.

15 Q But the report doesn't identify any
16 specific conditions that the state Office of Planning
17 is saying should be in there for a retail development
18 that aren't there now.

19 A No.

20 Q As you sit here today do you -- can you
21 think of any that should be in there?

22 A Not necessarily conditions. I think
23 condition 15 speaks to itself. If the proposal was
24 described as the currently proposed use, no condition
25 would be necessary aside from that. That would by

1 itself hold the Petitioner to the current plans.

2 Q I think that was a little bit of a
3 different question. Can you think of any conditions
4 to address issues of statewide concern that aren't
5 addressed in the current conditions that would need to
6 be therein?

7 MR. YEE: I'm going to object again. This
8 is -- you're asking the witness to speculate about
9 what a condition might be without any analysis of an
10 impact which would be required by a Petitioner on, for
11 example, a Motion to Amend.

12 While that certainly would be a good thing
13 to do in this case, the point is the Petitioner has
14 never done so.

15 So to ask the witness to provide that
16 information as if this was a Motion to Amend is
17 inappropriate and irrelevant to this particular
18 process.

19 CHAIRPERSON CHOCK: Sustained. Why don't
20 we move on, Mr. Steiner. Mr. Steiner, about how much
21 more time do you need?

22 MR. STEINER: Ten more minutes.

23 CHAIRPERSON CHOCK: Why don't we take a
24 break right now for our court reporter. We've been
25 going for about an hour and-a-half. Just to let all

1 the parties know, we're going to -- we have certain
2 Commissioners that have obligations and I believe
3 earlier flights to leave today. So we're going to
4 lose quorum at around noon. And the Chair's intention
5 is to try to wrap up today.

6 So I know we have one more witness I
7 believe on your end, Mr. Pierce?

8 MR. PIERCE: Two.

9 CHAIRPERSON CHOCK: Two witnesses. Do you
10 think we'll be able to wrap up? Well, it's hard for
11 you to say right now. Just to let the parties know
12 that's the intent. We'd like to try to get the case
13 put to bed at least in terms of the presentation of
14 evidence today.

15 And we're going to lose quorum at noon. So
16 why don't we take a quick 10 minute break and be back
17 and start with you, Mr. Steiner.

18 (Recess held 9:35.)

19 CHAIRPERSON CHOCK: (9:50) We're back on
20 the record. Mr. Steiner.

21 MR. STEINER: In light of Chairman Chock's
22 comments trying to get through this today, I have no
23 further questions. Thank you, Mr. Funakoshi.

24 CHAIRPERSON CHOCK: Thank you. Mr. Kam.

25 MR. KAM: Thank you, Chair.

CROSS-EXAMINATION

BY MR. KAM:

Q Good morning, Mr. Funakoshi. I'm going to ask you a few questions about the residential aspect of the Project. I'm not going to ask you any questions about the commercial, just so that know. I'm not going to overlap what Mr. Steiner asked you.

In your testimony earlier and also in your written report I think you said that the residential component -- or there was a residential component within the Petition Area that was initially proposed, but that that was removed because of concerns with proximity to the light industrial uses. Do you remember that?

A Yes.

Q The residential component that was removed wasn't that a single-family residential component not an apartment component?

A I don't know.

Q Okay. Well, you quoted from a portion of the transcript from the 1994 hearings. And just for that Commission's -- to let the Commission know I have made a copy, a full copy of the transcript from the '94 hearing available to the witness. He has it in front of him. We also have more copies of the

1 transcript if the Commissioners would like to see it.

2 CHAIRPERSON CHOCK: Does anybody need a
3 copy of the transcript? Commissioner Makua.

4 MR. KAM: Chair, I've also made copies of
5 the transcript available to the other parties.

6 CHAIRPERSON CHOCK: Thank you, Mr. Kam.
7 Proceed.

8 Q (By Mr. Kam) So, Mr. Funakoshi, I believe
9 you quoted from page 100 of the transcript. If you
10 could turn to that page please. It's tabbed with a
11 red tab there. And I think you were referring -- I'll
12 give the Commissioners a minute. (pause) This is a
13 section of the transcript where I believe it's Lloyd
14 Sodetani who was the Petitioner's marketing consultant
15 being questioned by Mr. Eichor who was one of the
16 attorneys for, I believe the State at that time, is
17 that correct?

18 A Yes.

19 Q And you said that Mr. Eichor asked the
20 question about a mixture of residential, commercial
21 and light industrial, correct?

22 A Well, he asked: "As I understand it
23 initially this was viewed as a residential Project?"

24 Q Mr. Sodetani's answer was, "I guess it was
25 a mixture of residential, commercial and light

1 industrial" right?

2 A Yes.

3 Q And then Mr. Eichor asked; "Is there a
4 particular reason why you switched concepts?"
5 Correct?

6 A Yes.

7 Q And Mr. Sodetani answered, "Well, I think
8 Mr. Kajioka had expressed a concern about having
9 residential units in close proximity of light
10 industrial properties," correct?

11 A Yes.

12 Q So Mr. Sodetani is referring to a concern
13 of Mr. Kajioka who was a Commissioner at the time had
14 expressed earlier in the proceedings, correct?

15 A I believe so.

16 Q And do you know where in the transcript
17 that concern by Mr. Kagioka was expressed?

18 A Not offhand.

19 Q I'll make the representation to you and to
20 the Commission that I believe it's at Page 22 of the
21 transcript. And I've marked that with a red tab. If
22 you could turn to that page please.

23 A 22. Okay.

24 Q So looking at line 10 on Page 22 this is an
25 exchange between Commissioner Kagioka and the witness.

1 I believe the witness at the time was Mr. Tom Witten,
2 who was one of the planners for the Project at the
3 time. And Commissioner Kajioka is asking Mr. Witten
4 "Tom, on the northeast side of the property it kind of
5 appears that one of the exhibits it abuts a
6 single-family zoned area about half of that northeast
7 portion. Would you consider it prudent to perhaps
8 offer a buffer zone, landscape buffer zone in the
9 single-family area?" You see that?

10 A Yes.

11 Q Mr. Witten answered Mr. Kajioka's question,
12 "I'm not specifically aware where and if there's
13 single-family abutting that. Later the other planner
14 may be able to respond more specifically. If we do
15 about a single-family residential use, I think some
16 consideration should be given to what the allowable
17 land uses are and if additional landscaping may be
18 desirable."

19 So would you agree, Mr. Funakoshi, that the
20 concern about residential uses abutting light
21 industrial is a concern about single-family
22 residential abutting light industrial and not
23 apartment abutting light industrial based on this
24 exchange?

25 A That's true. Single-family is referenced

1 here. But in general any residential abutting light
2 industrial is of concern.

3 Q Well, the proposed zoning that was, the
4 zoning that was being proposed by the original
5 Petitioner was light industrial, correct?

6 A I'm sorry? The...

7 Q In 1994 the Project, the Petitioner
8 anticipated applying for a change in zone for the
9 property to light industrial, is that correct?

10 A Yes. Yes.

11 Q And apartment use is a specific and at the
12 time was a specifically approved use in light
13 industrial, correct?

14 A Yes.

15 Q So the concern could not have been for
16 apartment use abutting light industrial because that
17 was a specific, a specifically approved use under the
18 proposed zoning. Isn't that true?

19 A Well, the Commission at the time did not
20 drill into that probably as much as they could have.
21 But it seems pretty clear to me in looking at the
22 transcripts, the Decision and Order, everything that
23 residential was not proposed.

24 Q Okay. You agree that there's no mention
25 about apartment use in the exchange between

1 Commissioner Kagioka and Mr. Witten, though?

2 A Right. Not specifically apartment use but
3 it is reflected ultimately in the Decision and Order
4 as a condition to establish a buffer from surrounding,
5 any surrounding residential uses that may occur.

6 Q Okay. Turning to page 5 on your written
7 report. It's OP Exhibit 11 in your written testimony.

8 A Yes.

9 Q Right before the last paragraph on that
10 page you say "Consequently Petitioners were aware as
11 early area as 2008 that the county had changed the
12 land use for the Petition Area to include residential
13 units." Do you see that?

14 A Yes.

15 Q And I believe you also testified earlier to
16 the same effect, correct?

17 A Yes. Yes.

18 Q Now, what do you mean that the county had
19 changed the land use? Exactly what are you referring
20 to there?

21 A Well, maybe that's somewhat of a
22 misstatement. Not so much that the county had changed
23 the land use but that the land use -- well,
24 essentially it kind of legitimized the different land
25 use than was originally envisioned for that property.

1 Q You're referring the condition in the
2 Waiale 670 Project District Ordinance that required
3 the affordable housing on this property, is that
4 right?

5 A Yes.

6 Q But the county actually didn't change
7 anything. There was no change in the zoning, for
8 example, in 2008, correct?

9 A True.

10 Q Because the zoning was changed in 1999,
11 correct?

12 A Yes.

13 Q And on page 8 of your written testimony
14 here you say that, "The addition of apartments would
15 have made a difference in the LUC's analysis of
16 impacts to educational facilities." I believe you
17 also testified to that earlier, correct?

18 A Yes.

19 Q Were you present at the hearings when Heidi
20 Meeker from the Department of Education testified?

21 A Yes.

22 Q Do you recall what Ms. Meeker testified
23 about what would likely have been included in the D&O
24 in 1994 as an educational impact requirement if the
25 apartments had been included as part of the conceptual

1 plan?

2 A Not specifically, but you can refresh my
3 memory.

4 Q Okay. I will. I'll read back to you my
5 question to her, then her response.

6 A Okay.

7 Q My question to her was, "So is it fair to
8 say that if the 250 affordable units that are being
9 proposed now for the Project had been" -- and I'll
10 paraphrase -- "had been known to the Commission back
11 in 1994-'95, that the fair-share contribution of the
12 impact fee would have been in the same order of
13 magnitude as what was imposed against Honua'ula on the
14 Makawao Project?"

15 And Ms. Meeker's response was, "The Wailea
16 670 condition is unusual in that it was rather
17 detailed and actually set the amount. What we asked
18 for and had generally gotten in the past was very
19 general language that said, quote, "The developer must
20 satisfy the Department of Education," closed quote.
21 And sometimes would go on to say they "must have a
22 written agreement." Do you recall that in general?

23 A Yes.

24 Q Would you agree, then, that Ms. Meeker was
25 essentially saying that had the apartments been

1 included as part of the conceptual plan, the likely
2 condition or at least what Department of Education
3 would have asked for from the Commission, would have
4 been just a general condition that says "developer
5 must satisfy the DOE"?

6 A Yes. But at least there would have been a
7 condition as well as a finding of fact to that
8 residential use.

9 Q Do you recall her testimony that unlike in
10 1994 the DOE now has the authority to impose impact
11 fees on its own through statute?

12 A Yes.

13 Q Do you recall her testimony that the
14 current impact fee required by statute for a
15 residential project in this area would be a
16 multi-family residential project in this area, that is
17 an apartment project, would be \$2,451 per unit. Do
18 you recall that?

19 A Generally.

20 Q And do you recall her testimony that the
21 developer would be required under that statute to
22 obtain an agreement from the DOE regarding the impact
23 fee before it could proceed with the Project?

24 A Yes.

25 Q So based on the fact that this is something

1 that the developer now has to require, what's the
2 difference between the current situation and what
3 would have been the likely condition imposed in 1994?

4 A Unknown because that was not proposed in
5 1994.

6 Q Okay.

7 MR. KAM: Nothing further. Thank you,
8 Chair.

9 CHAIRPERSON CHOCK: Thank you, Mr. Kam.
10 County?

11 CROSS-EXAMINATION

12 BY MR. HOPPER:

13 Q Thank you, Mr. Chair. Just a few
14 questions. Mr. Funakoshi, referring back to the
15 market feasibility study, I don't know if you still
16 have that. That's, I believe, Petitioner's Exhibit 3.

17 A Yes.

18 Q On page 3 of that study if you could turn
19 to page 3, please.

20 A Yes.

21 Q The bottom of the page 3, what is the title
22 of the paragraph that, the last paragraph on the
23 bottom of page 3?

24 A "Permitted uses".

25 Q Isn't that where the landowner at that time

1 is setting forth a representation of the permitted
2 uses for the property in the marketing study?

3 A Yes.

4 Q Then the later section that was discussed a
5 bit more on page -- I believe it starts at page 5 that
6 was discussed a bit earlier, that first paragraph or
7 the last paragraph with the new section at the bottom
8 of page 5, what's the title of that section?

9 A "Projected absorption."

10 Q So would it be fair to say that that's
11 obviously a projection based on the market how this
12 Project would be developed based on the market?

13 A Yes.

14 Q So wouldn't it be -- the most appropriate
15 place to go to determine the legally permitted uses on
16 this Project the "permitted uses" section of this
17 document rather than the "projected absorption"
18 sections?

19 A Rarely would you look at a market study to
20 determine what is the permitted uses. A market
21 study's intent really to demonstrate the need for the
22 Project and, as you mentioned, the absorption.

23 The permitted or proposed uses are either
24 reflected directly in the Petition or in this case the
25 Project Assessment report that was prepared. So in

1 there these were not outlined as specifically as in
2 this market study.

3 Q But there is a section entitled "permitted
4 uses" in that study.

5 A In the market study.

6 Q Yes.

7 A Yes. But as I said that was not normally
8 where you go do. The market study is very focused
9 relative to its intent.

10 Q Now, the marketing study, the permitted
11 uses section does discuss that the M-1 light
12 industrial district zoning ordinance sets forth
13 certain permitted uses which are attached to the
14 marketing study as Exhibit A, correct?

15 A Yes.

16 Q Now, if an approval is granted by the Land
17 Use Commission for a quote "commercial use" normally a
18 landowner can shift from one permitted use under the
19 zoning to another permitted use under the zoning
20 without coming to the Commission for an amendment. Is
21 that generally correct?

22 A Generally yes. Except that the Maui M-1
23 ordinance is fairly unusual in the latitude it allows
24 under light industrial.

25 Q But I mean if a landowner -- if a shop

1 closed, for example, like a clothing store closed and
2 a landowner wanted to go and develop a grocery store,
3 you know, and change the use. Normally in all cases
4 they wouldn't have to go to the Commission for an
5 amendment to a Decision and Order.

6 A Yes.

7 Q So shouldn't the proper question to ask in
8 this case, not necessarily be whether the Project is
9 different, but whether or not this is in violation of
10 the Commission's Decision and Order issued in 1995?

11 A That's for the Commission to decide.

12 Q I wanted to go a bit into some of the
13 questions regarding the design of the Project,
14 structure of the Project. The Commission didn't, the
15 Land Use Commission didn't impose any conditions
16 requiring that portions of the property be sold in fee
17 simple, correct, rather than leased?

18 A Yes.

19 Q There was a conceptual site plan proposed
20 in this case, correct?

21 A Yes.

22 Q That was discussed. Now, couldn't the
23 Commission have stated in an express condition that,
24 "The property shall conform to the attached site plan"
25 and referenced that specific site plan in the

1 condition?

2 A I've never seen that in any Decision and
3 Order.

4 Q Could the Commission have done that in your
5 opinion?

6 A It's possible. I've not seen that in any
7 condition or the Decision and Order.

8 Q And this particular Decision and Order does
9 not have that type of condition.

10 A Yes.

11 Q There's also no condition that requires the
12 property to be subdivided into 123 lots prior to
13 anything being built, correct?

14 A Not specifically, no.

15 Q Okay. Did the planning director at the
16 time of the district boundary amendment -- I think
17 you've read Mr. Miskae's testimony -- did the planning
18 director mention the possibility of limiting the
19 amount of commercial uses in the Project or the
20 percentage of commercial uses in the Project by
21 express condition?

22 A I'm not sure. I believe so.

23 Q Didn't the director say that, and in fact
24 isn't there a finding of fact on this point that he
25 would recommend to the county council that they impose

1 a condition limiting the percentage of commercial uses
2 on the property?

3 A I believe so.

4 Q Okay. Have you reviewed, this is I
5 believe, County's Exhibit 3 which is Condition 19 of
6 the Decision and Order by the Land Use Commission in
7 the Maui Business Park phase 2 Project. If not then
8 we can get you a copy or if you need to get one it's
9 Petitioner's exhibit -- I'm sorry -- it's County's
10 Exhibit 3.

11 A I can get it.

12 CHAIRPERSON CHOCK: I think Mr. Steiner has
13 a copy right there too, Rodney.

14 Q (By Mr. Hopper): Director Spence I believe
15 read that condition in his testimony. So I won't ask
16 you to read that condition again. Does that condition
17 provide a clear restriction on the retail use of the
18 property in that particular docket?

19 A Yes. That was very unusual.

20 Q Could the Commission have imposed, in your
21 opinion, a similar condition in this particular
22 Project for this particular Project?

23 A I'm not familiar with the details of the
24 Project at the time. This was 2003. This was eight
25 years previous to that. Commissioners going to

1 varying lengths of detail in analyzing and imposing
2 conditions. I'm not familiar with the particulars of
3 this condition to comment.

4 Q Now, Mr. Funakoshi, wouldn't this case be
5 much simpler had the Commission just said that:
6 Retail uses would be limited to a certain percentage
7 of the property by an express condition?

8 MR. YEE: I'm going to argue on the grounds
9 of relevance as well as the foundation. Whether
10 something is simpler or not doesn't seem to be
11 particularly relevant.

12 CHAIRPERSON CHOCK: Maybe you can restate.

13 Q (By Mr. Hopper): Would it be more clear to
14 the landowner and the County and the Commission if
15 there was a specific condition saying that a certain
16 percentage of the property, only a certain percentage
17 of the property was allowed for retail uses?

18 THE WITNESS: Yes, but I've hardly ever
19 seen that level of detail imposed in a condition. You
20 do mention Maui Business Park. Again, that's highly
21 unusual but it would have certainly made our job here
22 much simpler.

23 MR. HOPPER: Thank you, Mr. Funakoshi. I
24 have no further questions.

25 CHAIRPERSON CHOCK: Mr. Pierce?

1 MR. PIERCE: No questions.

2 CHAIRPERSON CHOCK: Redirect, Bryan.

3 MR. YEE: Yes.

4 REDIRECT EXAMINATION

5 BY MR. YEE:

6 Q Mr. Funakoshi, you were asked about an
7 assumption statement in the market study regarding no
8 further restrictions. Is that assumption in the
9 market study considered to be a representation by the
10 Petitioner that there would be no further conditions?

11 A Normally the market study lays out the
12 qualifications, parameters of the study. So it more
13 so is focused on the scope of his research and
14 projections.

15 Q There was a statement that the larger lots,
16 which would contain either retail or industrial, would
17 be approximately 20 percent or one fifth of the total
18 area. Do you remember that?

19 A Yes.

20 Q And that's a statement of, I suppose, by
21 the market study his assumption of what the Project
22 would be comprised of, correct?

23 A Yes.

24 Q Is there a -- I'm sorry. You were also
25 asked, then, as to whether or not there is such a

1 thing as a big box retailer -- I'm sorry, big box
2 industrial, light industrial activity. I think you
3 said no. Do you remember that?

4 A Yes.

5 Q Is that in part because something like a
6 Home Depot or home services, I'm sorry, home
7 improvement center, would be considered more of a
8 retail operation than a light industrial use?

9 A Well, there are retail and light industrial
10 components. But I would say it's primarily retail.

11 Q But a Home Depot-type operation would be a
12 large lot-type of operation.

13 A Yes.

14 Q You answered a number of questions
15 regarding the market study where the market study
16 indicated that certain final conclusions would be
17 driven by the market such as the number of lots. Do
18 you remember that?

19 A Yes.

20 Q When you answered the question that it
21 would be driven by the market, would that decision
22 also be subject to any LUC conditions?

23 A I'm sorry?

24 Q Let me rephrase. I'm being, perhaps, a
25 little unclear. I'm just asking when the market study

1 makes determinations or conclusions that certain
2 decisions will be driven by the market, the market
3 study does not analyze whether there might be other
4 restrictions imposed by the Land Use Commission,
5 correct?

6 A Right. That's a fairly standard assumption
7 on the part of marketing studies, that they always
8 acknowledge changing circumstance in the economy, the
9 market, so forth.

10 Q I think I'm going to leave it at that.
11 Thank you. Nothing further.

12 CHAIRPERSON CHOCK: Commissioners,
13 questions for this witness? Commissioner Inouye?

14 COMMISSIONER INOUE: No.

15 CHAIRPERSON CHOCK: Just a couple
16 questions, Rodney. In your estimation as a planner do
17 you feel this is a good Project, bad Project,
18 notwithstanding the original D&O, just your own
19 opinion as far as this type of use?

20 THE WITNESS: That's a value judgment.

21 CHAIRPERSON CHOCK: Absolutely.

22 THE WITNESS: Certainly it's a good Project
23 back then and now.

24 CHAIRPERSON CHOCK: Would you have concerns
25 if we were reconsidering the Project today regarding

1 the compatibility of uses on the proposed Project
2 that's in front of us today, the combination of light
3 industrial, retail, residential?

4 THE WITNESS: It would certainly be subject
5 to a different type of analysis than what was given in
6 1995. So it would -- certainly traffic impacts,
7 educational impacts and in particular are the main
8 ones that would be, you know, addressable and more
9 specifically looked at by the Commission today.

10 CHAIRPERSON CHOCK: So generally speaking
11 in terms of compatibility of uses, I'm just asking
12 just 'cause I'm curious to hear your judgment on the
13 close proximity of some of these uses, that is some of
14 the subject of debate here today with residential,
15 commercial, light industrial.

16 THE WITNESS: Yeah, that would be a
17 concern. It was back then. Residential next to
18 industrial is always a concern. It can always be
19 addressed by setbacks, buffers, landscape buffers,
20 those kinds of mitigation that would make it
21 compatible.

22 CHAIRPERSON CHOCK: I have no further
23 questions. Any other questions from the Commission?
24 Thanks for your testimony, Rodney.

25 THE WITNESS: Thank you.

1 MR. YEE: The Office of Planning has no
2 further witnesses.

3 CHAIRPERSON CHOCK: Mr. Pierce?

4 MR. PIERCE: Intervenors' first witness is
5 Mike Foley. And while he's approaching, to the extent
6 that it was admitted we're withdrawing the written
7 testimony of Victoria Huffman. She will not be
8 testifying. That was Exhibit I36.

9 CHAIRPERSON CHOCK: Got it.

10 MR. PIERCE: My understanding is,
11 Mr. Chair, that right now that was the other two
12 experts who will be testifying that their written
13 testimony has not been admitted yet.

14 CHAIRPERSON CHOCK: Whenever you're ready
15 to proceed I need to swear in your witness.

16 MR. PIERCE: I'm ready.

17 MICHAEL FOLEY
18 being first duly sworn to tell the truth, was examined
19 and testified as follows:

20 THE WITNESS: I do.

21 CHAIRPERSON CHOCK: Your name and address
22 for the record?

23 THE WITNESS: Michael Foley, 3625 Pi'ikea
24 Place in Makawao.

25 xx

DIRECT EXAMINATION

BY MR. PIERCE:

Q Good morning, Mr. Foley.

A Morning.

Q Do you have a copy of your written testimony in front of you?

A I do.

Q Is your resumé attached to it?

A I believe it was.

Q That's, for the record that's Exhibit I-26. Would you briefly describe your educational experiences. I'm sorry. Strike that. Would you briefly describe your education.

A I have undergraduate degrees in Architecture and Urban Geography and a master's degree in Community Planning and Urban Design.

MS. LOVELL: Chair, the County at least would be willing to stipulate to Mr. Foley's expertise which I believe the Commission is very familiar with.

CHAIRPERSON CHOCK: Thank you. Parties, any objections to having this witness admitted as an expert?

MR. STEINER: No objections.

CHAIRPERSON CHOCK: He's so admitted.

1 MR. PIERCE: Thank you. We would also ask
2 for the admission of his written testimony.

3 MR. YEE: No objection.

4 CHAIRPERSON CHOCK: 36 I believe is in.

5 MS. LOVELL: Actually, Chair, I believe
6 that the parties had objected --

7 CHAIRPERSON CHOCK: 26.

8 MS. LOVELL: -- to portions of Mr. Foley's
9 testimony on the basis of relevance. Certainly the
10 County had objected to the portion dealing with the
11 community plan.

12 CHAIRPERSON CHOCK: Your objection is
13 noted. Chair's going to admit the Exhibit 26.

14 MR. PIERCE: Thank you. So we have that as
15 I-35 was Mike Foley's testimony, written testimony.

16 CHAIRPERSON CHOCK: Okay. I-35 is in.

17 Q (By Mr. Pierce) Mr. Foley, on page 2 of
18 your written testimony you identified the documents
19 that you reviewed, correct?

20 A Yes.

21 Q That included reviewing the Findings of
22 Fact, Conclusions of Law and Decision and Order that
23 was filed back in 1995, correct?

24 A Correct.

25 Q Based on what you reviewed and based on

1 your background and experience in community planning,
2 and from the perspective of a community planner, is
3 development of the property into a retail shopping
4 center, an outlet mall and workforce housing a
5 different set of uses compared to a light industrial
6 use?

7 A Yes.

8 Q How are they different in your opinion?

9 A The light industrial uses typically are
10 warehouses and storage and assembly of materials and
11 very light impact with few employees and large
12 buildings.

13 The retail is more typically small shops
14 with, perhaps, large big box anchors and far more
15 employees and far more traffic than an industrial use.

16 Q I'm going to direct your attention to the
17 bottom of page 3 of your written testimony. Would you
18 please tell us some of the ways that you identify
19 differences with respect to the Maui County code. And
20 you're welcome to read that in if you'd like.

21 A Well, the question was asked "How are the
22 industrial uses different than retail uses?" And my
23 answer was they're different in many ways both in
24 terms of basic use as understood in the community
25 planning field and in terms of impacts.

1 First, at the very basic level, planners
2 categorize light industrial uses into one set of
3 activities, retail and commercial uses into another,
4 and housing into a third. The activities and impacts
5 of each are entirely different. One may look at the
6 Maui County Code to confirm this.

7 For instance, the Maui County's
8 Comprehensive Zoning Ordinance contains separate
9 definitions and regulations for each. Residential
10 districts are defined in section 19.08. Commercial
11 including retail uses are defined in section 19.16,
12 19.18, 19.20 and light industrial uses are defined in
13 section 19.24. Reading those definitions of each is
14 instructive. Do you want me to go through all of
15 these? Or basically just ...

16 Q Well, let's just take the next one that you
17 talk about here, the Maui County code contains
18 chapters on housing. Why is that important to you?

19 A Well, the Maui County Code in many ways
20 differentiates residential uses from commercial and
21 industrial uses. They have different concerns with
22 respect to compatibility of adjacent uses. And they
23 have different impacts. Obviously, they have school
24 impacts, whereas there's no school impacts for
25 commercial or industrial uses.

1 Q You identified Maui County chapter 19.18
2 which is the B-2 zoning entitled community business
3 district?

4 A Correct.

5 Q What was relevant to you in your analysis
6 on that?

7 A Well, the B-2 district includes a variety
8 of retail uses allowing sales of goods and services
9 for the community. And those services are different
10 in terms of the types of buildings and the number of
11 employees that are occupying that versus light
12 industrial.

13 Q You also mentioned a specific provision
14 from chapter 19.24 of the county code. That's the
15 chapter entitled "light industrial district". Would
16 you read that provision you identified please.

17 A "The M-1 Light Industrial District is
18 designed to contain mostly warehousing and
19 distribution type of activity and permits mostly
20 compounding assembly and treatment of articles or
21 materials with the exception of heavy manufacturing
22 and processing raw materials. Residential uses are
23 excluded from this district."

24 Q Now, that was a quotation that you were
25 reading right now directly from the County Code,

1 correct?

2 A Correct.

3 Q And you mentioned -- and part of that quote
4 says "Light Industrial District is designed to contain
5 mostly warehousing and distribution type activity."
6 Do you see that part?

7 A Yes.

8 Q What, as a planner, does that mean to you?
9 Let me just say: What does that mean to you with
10 respect to interpreting M-1 zoning?

11 A Well, it would mean that the majority of
12 the development should be light industrial,
13 warehousing types of uses or similar industrial uses
14 should be the majority of the Project.

15 Q Let me stop you here for a second,
16 Mr. Foley. Did you hear about other projects in Maui
17 that maybe were not mostly light industrial even
18 though they were zoned light industrial? Did you hear
19 some of that testimony earlier?

20 A Yes.

21 Q Does the planning department just go out
22 and actively enforce every bit of zoning on the island
23 of Maui?

24 A No.

25 Q Why not?

1 A It would be impossible.

2 Q What happens if someone challenges it,
3 though?

4 A Well, if there's a complaint or a
5 challenge, then it is actively investigated by the
6 planning department and perhaps referred to the
7 corporation counsel.

8 Q Okay. Let's continue on with your written
9 testimony. Now, after you identified this provision
10 from 19.24 you say that -- if you'll just read what
11 you have to say right after that at the bottom of the
12 page.

13 A "This same explicit differentiation is
14 found in the definitions contained in the Kihei-Makena
15 Community Plan. Single family includes single family
16 and duplex dwellings. Business/commercial includes
17 retail stores, offices, entertainment enterprises and
18 related accessory uses.

19 "Light industrial. This is for
20 warehousing, light assembly, service and craft type
21 industrial operations."

22 Q Now, those that you were just reading you
23 have those in quotations, correct?

24 A Correct.

25 Q That's directly from the Kihei-Makena

1 Community Plan?

2 A Correct.

3 CHAIRPERSON CHOCK: Which version of the
4 plan are you referring to?

5 Q (By Mr. Pierce): Once again we're
6 referring to the 1998 Community Plan?

7 A Yes.

8 Q And doesn't that Kihei Community Plan say
9 that it's effective through 2010?

10 A I believe so. I would have to look.

11 Q It hasn't been updated since then, has it?

12 A No.

13 Q So it's still the applicable community
14 plan?

15 A Yes.

16 Q Now, next in your written testimony what
17 you've just identified, the Maui County Code, and with
18 respect to the Kihei community plan, tell us how this
19 fits in with general planning. And you're free to
20 read that if you'd like.

21 A You want me to read the section after the
22 portion I just read?

23 Q Correct.

24 A "The above distinctions between retail,
25 light industrial and residential uses are consistent

1 with literature in the field of planning where it is
2 commonly understood that light industrial uses include
3 such things as warehouses, self storage, contractor
4 offices, and building material storage and light
5 fabrication, automobile repair shops, body shops, tire
6 repair and replacement businesses, boat storage and
7 often with some small component of commercial activity
8 targeted at serving the needs of the light industrial
9 users such as a café serving lunch.

10 "On the other hand, typical retail and
11 commercial uses include such things as big box
12 retailers and department stores, banks, restaurants
13 serving lunch and dinner that appeal to the broader
14 community, specialty retailers such as outlet stores
15 and those selling books, jewelry, electronics, office
16 equipment, supplies, construction and garden supply
17 stores, phone stores, gas stations."

18 Q Let me stop you there. What we've been
19 talking about so far would be generally definitional
20 differences?

21 A Yes.

22 Q Would you please tell the Commissioners
23 what you see as a planner as some of the functional
24 differences? And first of all, what would -- you have
25 that in your written testimony. What do you mean by

1 "functional differences"?

2 A Well, I believe you mean by "functional
3 differences" that the retail services are providing
4 opportunities for people to come in from the
5 neighborhood, from the community, to purchase goods.
6 They range all the way from the big box retailers to
7 the small individual shops.

8 The industrial uses, as we said, are more
9 typically storage with less activity and perhaps
10 manufacturing or light assembly of materials with
11 fewer employees and a lot less activity on the site
12 than on a retail site.

13 Q Mr. Foley, what is your opinion as to
14 whether the proposed Pi'ilani shopping center and
15 outlet mall developments are substantially similar to
16 the Ka'ono'ulu Industrial Park that was presented to
17 the Land Use Commission back in 1995?

18 MS. LOVELL: I have an objection to the
19 form of the question. That is not the question before
20 the Commission whether the proposed Project is
21 substantially similar to a different project, but
22 rather whether there has been a violation of a
23 condition in the D&O from 1995.

24 CHAIRPERSON CHOCK: Would you mind maybe
25 restating the question, Mr. Pierce.

1 MR. PIERCE: I'll restate the question but
2 I believe that I have the right to ask Mr. Foley that
3 question. Then the Commission can decide whether it's
4 relevant or not.

5 CHAIRPERSON CHOCK: Sure, go ahead.

6 Q (By Mr. Pierce): Okay. Do you find them
7 substantially similar, Mr. Foley?

8 A No. I find that the currently proposed
9 retail shopping center to be substantially different
10 than the industrial park proposed in 1994.

11 Q What's your opinion with respect to the
12 proposed 250 housing units?

13 A Well, that also, it wasn't thoroughly
14 discussed or considered by the Land Use Commission in
15 1994.

16 Q Do you have an opinion whether the Pi'ilani
17 shopping center and outlet mall comply with the
18 Kihei-Makena Community Plan?

19 A They do not.

20 Q Would you please explain why they don't.

21 A The Kihei-Makena Community Plan
22 specifically designates the subject property for light
23 industrial, not for commercial. It is shown on the
24 map as light industrial and it's referred to in the
25 text as light industrial.

1 Q I want to turn you to the -- do you have a
2 copy of the Kihei-Makena Community Plan with you?

3 A Yes.

4 Q We have excerpts of that as Exhibit I-9 in
5 the Intervenor's exhibits. Would you turn to page 18,
6 section K.

7 A Yes.

8 Q Have you read that section before?

9 A Yes.

10 Q What is pertinent to our discussion here in
11 that section?

12 MS. LOVELL: If I could first put an
13 objection on the record. We're dealing with a 1998
14 Kihei community plan which was not in existence in
15 1995 when the D&O was entered into this docket.

16 CHAIRPERSON CHOCK: I think we all agree.

17 MR. PIERCE: May the witness answer the
18 question?

19 CHAIRPERSON CHOCK: Go ahead.

20 THE WITNESS: This section K on page 18
21 specifically designates this area for light industrial
22 and says that "These areas should limit retail
23 business or commercial activities to the extent that
24 they're accessory or provide service to the
25 predominant light industrial use. These actions will

1 place industrial use near existing and proposed
2 transportation arteries for the efficient movement of
3 goods."

4 Q (By Mr. Pierce) So in your own words why is
5 that important to you as a planner as well as the
6 former director of the county of Maui -- former
7 director of planning in the county of Maui?

8 A The community plans have the force and
9 effect of law. The community plans must be complied
10 with in all land use activities. So this is a direct
11 statement that, as well as the indication on the map,
12 that this area is for light industrial, not
13 commercial.

14 Q Now, you said that the Kihei-Makena
15 Community Plan has the force and effect of law?

16 A Yes.

17 Q Was that your position when you were the
18 director of planning of the county of Maui?

19 A Yes. There was some debate about that. So
20 I requested and received a legal opinion from the
21 corporation counsel at the time, Brian Moto, that the
22 community plans were a portion of the Maui General
23 Plan and that they'd been adopted by ordinance not by
24 resolution and that they had the force and effect of
25 law.

1 Q Mr. Foley, have you read the letter that
2 Mr. Spence wrote to the mayor earlier this year?

3 A Yes. I don't have it in front me but I read
4 it recently.

5 Q Pi'ilani Exhibit 23. I believe that might
6 be the black binder that's next to you there.

7 A Yeah, I have it.

8 Q All right. Can you describe this letter?
9 Let me actually just cut to the chase on this. This
10 letter is signed by Mr. Spence, correct?

11 A Correct.

12 Q It's addressed to Mayor Alan Arakawa and
13 also to Honorable Donald Couch who's a councilmember?

14 A Correct.

15 Q This is dated April 13, 2012?

16 A Yes.

17 Q The subject is "Review of Eclipse
18 Development Group's Pi'ilani Promenade Project
19 documents and consistency with the Kihei-Makena
20 Community Plan". Do you see that heading there?

21 A Yes.

22 Q I want to direct your attention to page 2
23 the second from the bottom paragraph that starts as
24 follows: "The Kihei-Makena Community Plan designates
25 the Project site for light industrial use." Do you

1 see that?

2 A Yes.

3 Q And I'm going to continue reading. "Light
4 Industrial is described in the community plan as
5 warehousing, light assembly, service and craft type
6 industrial operations." Do you see that part?

7 A Yes.

8 Q That's Mr. Spence writing this. Do you
9 agree with him up to that stage?

10 A No.

11 Q With that part right there?

12 A Well, yes, I agree that it designates it as
13 light industrial.

14 Q All right. So let's continue reading.
15 "Although the community plan describes light
16 industrial in this plan the County's M-1 Light
17 Industrial District is a tiered system allowing for
18 business uses in addition to light industrial uses.
19 Therefore the proposed retail center is deemed to be
20 consistent with the community plan."

21 Do you agree with Mr. Spence's opinion?

22 A No.

23 Q Why?

24 A Because the community plan designates this
25 Project as Industrial. And in the community plan it

1 describes it as just industrial uses and says that
2 commercial uses can be accessory or can be subordinate
3 or serve the industrial uses.

4 But it clearly indicates that the majority
5 of the Project is to be industrial, not commercial.

6 Q And would your opinion be the same with
7 respect to the 250 housing units?

8 A Yes.

9 MR. PIERCE: Thank you. No further
10 questions.

11 CHAIRPERSON CHOCK: Mr. Steiner.

12 MR. PIERCE: If I may, Mr. Chair. If I
13 may -- I'm sorry, Mr. Chair before we begin.

14 Q Mr. Foley, did you hear the testimony of
15 Mr. Jencks either, I think maybe yesterday morning
16 when he mentioned that he'd had a meeting with you and
17 the mayor back in 2006?

18 A Yes.

19 Q Do you remember that meeting?

20 A No.

21 Q Did you hear Mr. Jencks describe that
22 meeting?

23 A Yes.

24 Q What kind of meeting would you call that?

25 A We had hundreds of meetings like that. So

1 I don't remember that specific meeting. We would
2 often have meetings where various department heads
3 would meet with the mayor and the developer so that
4 the developer could explain a project that he was
5 proposing. But it was a common occurrence, happened
6 every week.

7 Q Would that meeting and any discussions have
8 any legal significance from your perspective?

9 A No.

10 MR. PIERCE: Thank you. No further
11 questions.

12 CHAIRPERSON CHOCK: Thanks, Mr. Pierce.
13 Mr. Steiner, go ahead.

14 CROSS-EXAMINATION

15 BY MR. STEINER:

16 Q Thank you, Mr. Foley. In your written
17 testimony that you submitted on page 2 it talks about
18 the different documents that you reviewed, is that
19 right?

20 A Yes.

21 Q And this lists all the documents that you
22 reviewed in forming your opinion in this case, is that
23 correct?

24 A I may have read other documents as well. I
25 don't know.

1 Q One document that's not listed here is the
2 transcript of the proceeding before the Land Use
3 Commission. Did you review that document?

4 A No.

5 Q So you don't know what was represented by
6 the landowner to the Land Use Commission in that
7 hearing, is that correct?

8 A I know what was in the Decision and Order.
9 And this doesn't comply with it.

10 Q But you don't know what was represented to
11 the Commission at the hearing before the Commission in
12 1994-1995, is that correct?

13 A Well, I've seen descriptions that included
14 the 153-lot industrial subdivision.

15 Q Okay. But again you don't know
16 everything --

17 A That's in the Findings of Fact.

18 Q But you don't know what's in that
19 transcript and what was said to the Commission, is
20 that correct, everything that was said.

21 A Everything that was said?

22 Q Yes.

23 A No.

24 Q In your opinion starting on page 4 and 5 of
25 your opinion, you talk about how each of the following

1 are distinct: residential, retail, and light
2 industrial, right?

3 A Right.

4 Q And as to demonstrate this you make
5 reference to the zoning code, right?

6 A Right.

7 Q And you note first that chapter 19.08
8 defines and regulates the residential district, right?

9 A Right.

10 Q That's where we find the regulations
11 regarding residential.

12 A Right.

13 Q Okay. Are apartments included or allowed
14 in this district?

15 A I would have to read this more detailed.

16 Q You don't know whether they allow
17 apartments in the residential district under the Maui
18 County zoning?

19 A In the residential district? Yes.

20 Q They *do* allow them.

21 A Apartments allowed in the residential
22 district? I believe so.

23 Q Okay. Isn't there a separate Chapter 19.12
24 that is the apartment district that is different from
25 the residential district?

1 MR. PIERCE: I'm going to object,
2 Mr. Chair. If Mr. Steiner would like to provide
3 Mr. Foley with a copy of the county code or I may,
4 because I do have a copy here.

5 CHAIRPERSON CHOCK: I don't think that
6 would be a problem, Mr. Steiner.

7 THE WITNESS: Well, could I just clarify
8 that apartments are one of the different kinds of
9 residential uses?

10 Q (By Mr. Steiner): I'll just move on. We
11 want to get done today. The chapter -- you note that
12 chapters 16, 18, and 20 are the, 19.16, 19.18 and
13 19.20 those are the business districts, right?

14 A Right.

15 Q And that's where retail is provided for,
16 right?

17 A Right.

18 Q And generally what's referred to commonly
19 as the B-1, B-2, B-3, right?

20 A Right.

21 Q And then the light industrial districts are
22 addressed in what you refer to as M-1 under 19.24,
23 right?

24 A Right.

25 Q But the M-1 district under M-1 itself it

1 allows apartment houses, doesn't it?

2 A It says "residential uses are excluded from
3 this district."

4 Q Okay. Could you take a look at Pi'ilani
5 Exhibit 5 please. I'm sorry. It's Pi'ilani
6 Exhibit 3. I apologize. Which is the market
7 feasibility study?

8 A Not in my book.

9 MR. STEINER: May I?

10 CHAIRPERSON CHOCK: Yes, please.

11 (Approaching witness)

12 MR. PIERCE: I'm sorry, what was the
13 Exhibit No.?

14 MR. STEINER: Pi'ilani 3 market study.

15 MR. PIERCE: Thank you.

16 Q (By Mr. Steiner) If you look through the
17 market study starting on page 9 is the different uses
18 allowed in the B-1, B-2, B-3 and M-1 back at the time
19 this was submitted. Do you see that?

20 A Yes.

21 Q And if you could turn to page 12. Do you
22 see page 12?

23 A Yes.

24 Q Doesn't it say right there the first use n
25 the M-1 Light Industrial District that any use

1 permitted in B-1, B-2 or B-3 is allowed?

2 A Yeah. But if you read section P on page 9
3 it says, "One single-family dwelling per lot provided
4 the lot is sufficiently large to provide a lot area of
5 6,000 square feet for the dwelling and the area for
6 the business parking and other accessory uses for the
7 business have been subtracted, or living and sleeping
8 quarters for a single family constructed above the
9 ground floor of the business building."

10 Q Okay.

11 A This doesn't sound like that an apartment
12 building.

13 Q Okay. Looking further under M-1, though,
14 if you look at the final page, page 14, isn't
15 apartment houses specifically listed as an M-1 use,
16 No. 32?

17 A Yes.

18 Q You heard testimony. You were here
19 yesterday during the testimony regarding what's
20 allowed, of Mr. Spence regarding what's allowed under
21 the M-1 zoning and what apartment uses are included,
22 right?

23 A Right.

24 Q Do you disagree that apartment houses are
25 allowed under M-1 zoning?

1 A I believe that's in conflict with the
2 community plan.

3 Q Okay. But just on the zoning. Apartment
4 houses are included, right?

5 A Apparently.

6 Q So at least under the zoning code retail,
7 apartment and light industrial uses aren't actually
8 treated separately and distinctly from each other.
9 They're all included under the M-1 zoning, aren't
10 they?

11 MR. PIERCE: Objection. Misstates his
12 testimony.

13 MR. STEINER: I wasn't stating his
14 testimony. I was asking him a question.

15 CHAIRPERSON CHOCK: Repeat your question,
16 please.

17 MR. STEINER: I'll move on.

18 Q Could you take a look at page 6 of your
19 testimony. There you said that, "The use of the
20 subject property for retail and apartment doesn't
21 comply with the Kihei-Makena Community Plan light
22 industrial categories," right?

23 A Where are you reading?

24 Q It's page 6. It says, "Do you have an
25 opinion as to whether the proposed outlet mall --

1 A Oh, okay.

2 Q -- complies with the Kihei community plan."

3 A Okay.

4 Q You're basically saying no, it doesn't
5 comply with the community plan, right?

6 A Right.

7 Q So is it your position today there can be
8 no retail uses that are in the areas that are
9 community planned light industrial?

10 A No, I didn't say.

11 Q So what are you saying?

12 A Some of the industrial projects can have
13 community -- or can have commercial uses. But the
14 majority of the uses must be industrial.

15 Q Okay. Where does it say that in the Kihei
16 community plan?

17 A Well, we just read it.

18 Q This is this K, section K on page 18 of the
19 community plan?

20 A Well, that's where it says it for this
21 specific property.

22 Q Okay. The actual designations are -- the
23 plan designations are on page 54 and 55, right? They
24 start on page 54. It's got the land use map, land use
25 categories and definitions.

1 A Yeah.

2 Q And for light industrial it's on page 55.

3 A I don't have that page.

4 MR. PIERCE: If I may, to your left is the
5 Intervenor's exhibits. You can go to I-9 which would
6 be tabbed there.

7 THE WITNESS: Okay.

8 MR. PIERCE: Mr. Chair, if I may, let me
9 just give the witness --

10 THE WITNESS: I'm sorry, I don't see it in
11 there either.

12 CHAIRPERSON CHOCK: We've got it coming
13 right up.

14 MR. PIERCE: Here we go. (document handed
15 to witness.)

16 Q (By Mr. Steiner): What does it say on the
17 definition for the light industrial area?

18 A "This is for warehousing, light assembly,
19 service and craft type industrial operations."

20 Q Okay. But you're saying that even though
21 it doesn't mention retail in here there's *some*
22 retail's allowed under light industrial.

23 A Yes.

24 Q How much?

25 A A minority portion of the project. So less

1 than 50 percent.

2 Q So 49 percent would be allowed in the light
3 industrial area.

4 A It might be. It would have to be evaluated
5 by the planning commission, the council as to whether
6 or not the impacts were appropriate.

7 Q So it would be up to the county council to
8 provide further limitations.

9 A Yes.

10 Q All right. But you're saying in no
11 instance if it's light industrial, 51 percent not
12 allowed.

13 A That would be my interpretation.

14 Q Okay. And you disagree that the light
15 industrial category for the community plan follows the
16 zoning, the tiered zoning, the Euclidian zoning that
17 Mr. Spence described?

18 A Well, I identified conflicts.

19 Q Okay. Are you familiar with the Maui
20 Marketplace in Kahului?

21 MR. PIERCE: Objection. This goes outside
22 the scope of questions to the witness.

23 CHAIRPERSON CHOCK: I'm going to give him a
24 little latitude. Go ahead.

25 THE WITNESS: No.

1 Q (By Mr. Steiner): Sorry?

2 A No.

3 Q How long have you lived on Maui?

4 A Fourteen years.

5 Q You're not aware of what's at the Maui
6 Marketplace in Kahului?

7 A I'm not familiar with that name, frankly.
8 If you described the shopping center I probably shop
9 there.

10 Q I think it's where the Sports Authority is
11 located.

12 A Oh, okay.

13 Q Do you know Sports Authority, is that light
14 industrial or retail?

15 A Retail.

16 Q Do you know what the community plan
17 designation for the Maui Marketplace is?

18 A No.

19 Q Would it surprise you to learn that it's
20 light industrial?

21 A No.

22 Q Why wouldn't it be surprising?

23 A Well, we've had previous testimony that
24 there are other shopping centers that are zoned light
25 industrial.

1 Q What about -- and, would it surprise you
2 it's also community planned light industrial?

3 A Surprise me? I guess not.

4 Q So you basically -- is it your position
5 that shopping center is non-compliant with the
6 community plan?

7 A Well, I would, I would need to know more
8 about the circumstances. I don't know when that
9 shopping center was approved and what the regulations
10 were at that time.

11 Q Okay. You were planning director for the
12 county of Maui from 2003 through 2007, right?

13 A Correct.

14 Q When you were planning director was it the
15 County's position that there couldn't be more than
16 50 percent retail uses on projects that were community
17 planned light industrial?

18 MR. PIERCE: Objection. That's an
19 ambiguous question, Mr. Chair, with respect to the
20 County's position. Are we talking about the mayor?
21 Are we talking about, you know, an employee? We would
22 object to that line of questioning.

23 CHAIRPERSON CHOCK: Mr. Steiner, would you
24 mind restating your question --

25 MR. STEINER: I'll rephrase that.

1 CHAIRPERSON CHOCK: -- in a more ambiguous
2 manner.

3 MR. STEINER: When you were the planning
4 director of the county of Maui back in 2003-2007 was
5 it your position as planning -- in the scope of your
6 duties as planning director of the county of Maui that
7 there could be no retail -- or that there could be not
8 more than 49 percent retail use in areas that were
9 community planned light industrial?

10 A Yes.

11 Q When projects on the island of Maui would
12 come before the planning department for approval,
13 would the planning department check and see if the
14 proposed use in the Project was consistent with the
15 community plan?

16 A Yes. In fact I was the planning director
17 who recommended that the Land Use Commission limit the
18 amount of commercial in the large industrial park
19 currently under construction.

20 Q So in that case you made a recommendation
21 that the Land Use Commission put a limit on the amount
22 of retail that was allowed.

23 A Correct.

24 Q But that wasn't done in this case, right?

25 A Correct.

1 Q The light industrial designation that we
2 read in the Kihei community plan that talks about
3 light industrial being for warehousing, light
4 assembly, service and craft type industrial
5 operations, is that the same definition throughout the
6 different community plans on the island of Maui?

7 A I believe so. I don't have the six
8 community plans in front of me. But the community
9 plan definitions tend to be more specific than that
10 one sentence we read.

11 Q Do you know whether it's the same for the
12 West Maui community plan?

13 A I don't know offhand. I hope it is.

14 Q Could you take a look at Exhibit 44. It's
15 at the end of the black binder in front of you.

16 MR. PIERCE: This is Pi'ilani Exhibit 44?

17 MR. STEINER: Yes.

18 THE WITNESS: West Maui community plan?

19 MR. STEINER: Yes.

20 MR. PIERCE: We'll just renew our objection
21 this is outside the scope of the direct.

22 Q (By Mr. Steiner): This is the excerpts
23 from the West Maui community plan. If you could turn
24 to the third page which is page 62. Do you see that?

25 A Yes.

1 Q Under the L-I designations says this is for
2 warehousing, light assembly, service and craft type
3 operations, correct?

4 A Correct.

5 Q So same as the Kihei, Maui. Are you
6 familiar with the Lahaina Gateway Project?

7 A Hmmm, yes.

8 Q Okay. Could you take a look at Exhibit 43
9 the one right in front of you there. It's two pages.
10 If you could look at the --

11 MR. PIERCE: Mr. Chair, one other question
12 is I'm not sure if these exhibits were ever admitted.

13 CHAIRPERSON CHOCK: Let me check. What's
14 the exhibit number again?

15 MR. STEINER: We talked about 44. And now
16 we're talking about 43.

17 CHAIRPERSON CHOCK: We don't have that in.

18 MR. STEINER: I would request these be
19 admitted. They're county documents that --

20 CHAIRPERSON CHOCK: What's its relevance to
21 this?

22 MR. STEINER: This is directly relevant to
23 his testimony that he, that light industrial does not
24 allow retail use. I'll be demonstrating that in fact
25 it does.

1 CHAIRPERSON CHOCK: I note your objection,
2 Mr. Pierce and admit the exhibit. Proceed.

3 Q (By Mr. Steiner): Exhibit 44 --

4 CHAIRPERSON CHOCK: That's Exhibit 44.

5 MR. STEINER: And Exhibit 43.

6 CHAIRPERSON CHOCK: Same. 43 and 44 in.

7 Q (By Mr. Steiner): Exhibit 44 is a map
8 showing the different community plan designations for
9 the different lots. The second page is a blow-up of
10 exhibit, of an area off Lahaina on that same map. Do
11 you see the property where the Lahaina Gateway is?

12 A I haven't found it yet. It's 43 not 44.

13 Q I'm sorry 43. Do you see Kahoma Stream?

14 A Yeah.

15 Q Do you see where it intersects with the
16 highway?

17 A Yes.

18 Q And it's just above that the HWY is in the
19 parcel where the Lahaina Gateway is located, isn't it?

20 A Yeah.

21 Q What's the community plan designation for
22 the Lahaina Gateway?

23 A Light industrial.

24 Q Okay. Do you know what's at the, at that
25 location Lahaina Gateway?

1 A What is this?

2 Q The Lahaina Gateway. Is there any light
3 industrial at that location?

4 A There is in the mauka portion but not on
5 the lower, the portion along the highway. That's
6 strictly retail.

7 Q And isn't it true that under, while you
8 were director of planning that you, that you approved
9 building permits for retail use for that light
10 industrial?

11 A No.

12 Q No?

13 A I don't approve -- never approved building
14 permits.

15 Q Isn't that the function of the planning
16 department?

17 A No.

18 Q No.

19 A It's public works.

20 Q But doesn't the planning department review
21 and either approve or disapprove of building permits
22 as they are applied for?

23 A No.

24 Q Could you take a look at Exhibit 40,
25 please?

1 CHAIRPERSON CHOCK: 40's not in.

2 MR. PIERCE: We'll just have the same
3 objection.

4 CHAIRPERSON CHOCK: Chair's going to admit
5 40 with the objection noted. Holly, how you doing?
6 Do we need a 5-minute bathroom break?

7 THE REPORTER: Yes, okay. (laughter)

8 CHAIRPERSON CHOCK: Why don't we take a
9 5-minute quick bathroom break. We're going until
10 11:50. We probably need a quick executive session
11 before we break and then cover the calendar for
12 December 6-7 briefly.

13 So probably come back in 5 minutes and up
14 for another 40 minutes. And then we're going to have
15 to resume. 5 minute recess.

16 (Recess was held. 11:15)

17 CHAIRPERSON CHOCK: Okay. We're back on
18 the record. Who's up? Mr. Steiner, you're up.

19 Q (By Mr. Steiner): Thank you. Taking a
20 look at what's been marked and admitted as Exhibit 40,
21 this is a summary of a building permit for the Lahaina
22 Gateway, is that correct?

23 A I've never seen a building permit. So I
24 believe you. But the planning department doesn't
25 review building permits.

1 Q They don't look at the building permits at
2 all to check for compliance in zoning or community
3 plan?

4 A The planning director certainly doesn't.

5 Q What about the planning director's
6 department?

7 A Not to my knowledge.

8 Q Could you look at page 3 of Exhibit 40. Do
9 you see there's -- at the third up from the bottom of
10 the page it says "Planning Department
11 re-submittal/additional information"? Do you see
12 that?

13 A Right.

14 Q And then there's an A in the column, the
15 second-to-the-last column. Do you see that?

16 A Yes.

17 Q Doesn't that indicate that the planning
18 department has looked through this and at least
19 approved what was submitted to them?

20 MR. PIERCE: Objection. The witness said
21 that he had never seen this kind of document before.

22 CHAIRPERSON CHOCK: Mr. Steiner, maybe has
23 he reviewed this or had a chance to review this?

24 THE WITNESS: Obviously I've never reviewed
25 a building permit. It's not something the planning

1 director does. So it seems totally irrelevant.

2 Q (By Mr. Steiner): You're saying the
3 planning department never looked at building permits
4 to see whether they're --

5 THE WITNESS: I didn't say that. I said
6 the planning director doesn't. And I have not as a
7 planning director ever reviewed a building permit.

8 CHAIRPERSON CHOCK: Does that answer your
9 question, Mr. Steiner? Are we clear on the
10 distinction? He's never reviewed a building permit
11 but perhaps his staff has.

12 Q (By Mr. Steiner) Do you know whether your
13 staff, when you were at the planning department, would
14 check whether building permits, what was going to be
15 built, would comply with the zoning and community plan
16 and district boundary amendments?

17 A I don't know exactly, you know, what they
18 may or may not have reviewed.

19 Q Who is responsible at the county of Maui
20 for enforcement of zoning?

21 MR. PIERCE: Objection. Ambiguous as to
22 time.

23 CHAIRPERSON CHOCK: That's pretty relevant.
24 Please answer the question if you know.

25 THE WITNESS: There's a division of the

1 planning department that's responsible for zoning
2 enforcement.

3 Q (By Mr. Steiner): And who -- so the
4 planning department is responsible for zoning
5 enforcement, right?

6 A Yes.

7 Q And is the planning department also
8 responsible for enforcement of the community plans?

9 A Yes.

10 Q And is the planning department also
11 responsible for enforcement of the Land Use
12 Commission's district boundary amendment conditions?

13 A I heard that in testimony, but frankly
14 before this recent testimony I'd never been aware of
15 that personally.

16 Q You heard the testimony yesterday of
17 Mr. Jencks regarding a meeting with Mayor Arakawa and
18 yourself regarding this particular Project. He
19 testified about how he presented a plan that included
20 apartment use and included retail use. Do you recall
21 that meeting?

22 A No.

23 Q You don't recall any such meeting like that
24 occurring?

25 A No.

1 Q Okay. Do you deny that that meeting took
2 place?

3 A No.

4 Q You just don't remember.

5 A Yeah, like I said there were hundreds of
6 those meetings.

7 MR. STEINER: No further questions.

8 CHAIRPERSON CHOCK: Mr. Kam.

9 MR. KAM: Thank you, Chair.

10 CROSS-EXAMINATION

11 BY MR. KAM:

12 Q Good morning, Mr. Foley.

13 A Morning.

14 Q I want to draw your attention to page 5 of
15 your written testimony. At the bottom of the page,
16 the second-to-the-last bullet you say that "retail" --
17 and I'm paraphrasing -- "employs more people than
18 light industrial uses," correct?

19 A Correct.

20 Q So is it your opinion that the Pi'ilani
21 Promenade Project would employ more people than a
22 similarly sized light industrial, purely light
23 industrial project?

24 A Yes.

25 Q Turning to page 7 of your written

1 testimony. Let me shortcut that. You've testified, I
2 think several times already, that you believe that an
3 affordable housing use on the subject property would
4 violate the community plan, is that correct?

5 A Yes.

6 Q And the reason why it would violate the
7 community plan is because it's designated light
8 industrial on the community plan map. Is that one
9 reason?

10 A And in the text, yes.

11 Q Right. I think the text that you're
12 referring to and that Mr. Pierce was asking you about
13 was on pages 17 and 18 of the community plan. That's
14 part of Intervenor's Exhibit 9. If you would turn to
15 that exhibit, please.

16 A Okay.

17 Q So looking on page 17 it says up at the top
18 that these are "objectives and policies". I assume
19 that's objectives and policies of the Kihei-Makena
20 Community Plan for this area, correct?

21 A Correct.

22 Q Now, would you look at objective F,
23 paragraph F on page 17.

24 A Yes.

25 Q Would you read that please?

1 A "Establish a distribution of land uses
2 which provides housing, jobs, shopping, open space and
3 recreation areas in close proximity to each other in
4 order to enhance Kihei's neighborhoods and to minimize
5 dependence on automobiles."

6 Q Now, you just testified that the Pi'ilani
7 Promenade Project would create a lot of jobs, correct?

8 A Correct.

9 Q And an affordable housing use would, if
10 developed, would put a housing use in close proximity
11 to those jobs, correct?

12 A Correct.

13 Q Would you read objective G please.

14 A "Encourage the establishment of
15 single-family and multi-family land use designations
16 which provide affordable housing opportunities for
17 areas which are in close proximity to infrastructure
18 system and other urban services."

19 Q Were you here for Mr. Jencks' testimony
20 where he described the various types of infrastructure
21 improvements that are going to be built as part of
22 this Project?

23 A Yes.

24 Q So would you agree that if an affordable
25 housing use is established on the property, that use

1 would be in close proximity to those infrastructure
2 improvements? Let me rephrase the question.

3 A Yeah.

4 Q Would the affordable housing use be in
5 close proximity to the first increment of the Kihei
6 Upcountry Highway that's expected to be built for this
7 Project?

8 A Yes.

9 Q Is there any other objective or policy on
10 page 17 or 18 that says you cannot have a
11 multi-family, an apartment use mauka of Pi'ilani
12 Highway?

13 A I think what's interesting is that section
14 H on 17 describes where commercial properties should
15 be. And none of 'em are mauka of the Pi'ilani
16 Highway. They're all makai, below the highway.

17 Q My question is about residential apartment
18 use. Is there any objective or policy that's listed
19 on pages 17 and 18 that says you cannot have an
20 apartment use mauka of Pi'ilani Highway?

21 A No.

22 MR. KAM: Thank you. No further questions.

23 CHAIRPERSON CHOCK: County.

24 XX

25 CROSS-EXAMINATION

1 BY MS. LOVELL:

2 Q Thank you. Good morning, Mr. Foley.

3 A Good morning.

4 Q You are a member of the board of directors
5 of Intervenor Maui Tomorrow, aren't you?

6 A Yes.

7 Q And you've been a member of Maui Tomorrow
8 for quite some time.

9 A Yes.

10 Q I understand from looking at Maui
11 Tomorrow's website that Maui Tomorrow advocates for,
12 among other things, affordable housing.

13 A Yes.

14 Q However, in *this* particular docket Maui
15 Tomorrow is advocating to not build affordable
16 housing, is that correct?

17 A What we're saying is --

18 MR. PIERCE: I'm sorry --

19 MS. LOVELL: Let me rephrase the question.

20 MR. PIERCE: Wait. Let me just actually --
21 mine's more general.

22 CHAIRPERSON CHOCK: Are you going to
23 object?

24 MR. PIERCE: Yes. And the generalized is
25 that the questioning is relating to his position or

1 his relationship to Maui Tomorrow. And he was not
2 introduced as a witness for Maui Tomorrow. He was
3 introduced as an expert. So we would object to this
4 line of questioning.

5 CHAIRPERSON CHOCK: I'm going to note your
6 objection, going to give you a little latitude but not
7 too much latitude.

8 MS. LOVELL: Thank you.

9 CHAIRPERSON CHOCK: Given the amount of
10 time we have left.

11 MS. LOVELL: Thank you.

12 Q Let me rephrase my last question. In this
13 particular docket Maui Tomorrow is advocating against
14 affordable housing being built on this particular
15 Ka'ono'ula parcel, correct?

16 A No. What we're saying is that the Decision
17 and Order by the Land Use Commission did not include
18 an apartment project or affordable housing. The issue
19 is the Decision and Order, not whether or not I think
20 it's a good idea.

21 Q I tend to agree with you on at least that
22 last point. On page 2 of your testimony you indicated
23 that one of the things that you looked at in preparing
24 your written testimony was the rezoning ordinance for
25 the Honua'ula or Wailea 670 Project enacted by the

1 county of Maui in 2008, as well as the Final EIS for
2 that Project. Is that correct?

3 A Yes. I haven't reviewed them real recently
4 though.

5 Q You are aware, though, aren't you, that a
6 condition of the zoning for the Honua'ula or Wailea
7 670 Project requires Honua'ula to build 250 affordable
8 housing units on this particular Ka'ono'ula piece of
9 property?

10 A Yes.

11 Q And you're aware also that those affordable
12 housing units must be built before Honua'ula can
13 proceed with the Wailea 670 Project?

14 A Yes.

15 Q Okay. And both you personally and Maui
16 Tomorrow have express option to the Honua'ula and/or
17 Wailea 670 Project in the past; is that correct?

18 MR. PIERCE: Same objection as before,
19 Mr. Chair.

20 CHAIRPERSON CHOCK: So noted. Thank you,
21 Mr. Pierce.

22 THE WITNESS: Yes.

23 Q (By Ms. Lovell): So one way to stop the
24 Honua'ula or Wailea 670 Project that neither you nor
25 Maui Tomorrow favors, would be to get the Land Use

1 Commission to stop the development of 250 affordable
2 houses -- housing units on this Project.

3 CHAIRPERSON CHOCK: Are you asking a
4 question --

5 MS. LOVELL: Yes.

6 CHAIRPERSON CHOCK: -- or making a
7 statement?

8 MS. LOVELL: Yes. Asking a question.

9 THE WITNESS: What we're asking the Land
10 Use Commission to do is to agree with us that this
11 Project does not conform to the Decision and Order
12 approved by the Land Use Commission in 1994.

13 I personally support affordable housing
14 including apartments. And I don't necessarily have
15 any objection to it on this property. But I think it
16 should go through a community plan amendment and Land
17 Use Commission amendment to be properly approved
18 instead of this 'round about way of doing it.

19 Q (By Ms. Lovell): But if you are successful
20 in stopping the 250 housing units from being built on
21 this property.

22 A I don't object to the 250 units being built
23 on this property. I just want them approved by the
24 county and the state Land Use Commission.

25 Q So it wasn't part of the strategy of Maui

1 Tomorrow to stop the Honua'ula or Wailea 670 Project
2 by getting the Land Use Commission to stop the 250
3 units from being built on the Ka'ono'ula parcel?

4 MR. PIERCE: Same objection, Mr. Chair. At
5 this stage this is entirely irrelevant and
6 prejudicial.

7 COMMISSIONER TEVES: I agree.

8 CHAIRPERSON CHOCK: Let's move on, please.

9 Q (By Ms. Lovell): Mr. Foley, in your
10 written testimony you quoted from a part of the
11 County's M-1 zoning ordinance, is that correct?

12 A Yes.

13 Q You didn't quote from the part that very
14 specifically allows apartments in the M-1 district,
15 did you?

16 A I believe that was covered earlier by a
17 previous attorney.

18 Q So the answer is, yes, you didn't mention
19 that?

20 A It's been described already.

21 Q Okay. Are you aware also that the zoning
22 ordinance has been very specifically amended recently?

23 A No.

24 Q At this point because our Exhibit 7 is not
25 in evidence I would offer it in evidence. Exhibit 7

1 is county ordinance 3975.

2 MR. PIERCE: We would raise the same
3 objections as before.

4 CHAIRPERSON CHOCK: So noted. We'll admit
5 the exhibit. And that's Exhibit No. 7, County's
6 Exhibit No. 7.

7 MS. LOVELL: Yes. I'll ask Mr. Hopper if he
8 could give a copy to Mr. Foley.

9 CHAIRPERSON CHOCK: Thank you. (pause)

10 Q (By Ms. Lovell) The recent amendment to the
11 County's M-1 zoning classification now makes
12 absolutely clear, doesn't it, Mr. Foley, that
13 apartments are allowed in the M-1 Light Industrial
14 District?

15 A You know, I still see a conflict. It still
16 refers to -- maybe you can explain this. On the
17 bottom of the first page it says, "Except for dwelling
18 units located above or below the first floor and
19 apartments..." is that being taken out?

20 Q That's the part in brackets, right?

21 A Okay. Yeah. On page 2 there's a section
22 about living quarters for watchmen or custodians of
23 industrial use property. Is that being taken out? I
24 find this very confusing.

25 Q Why don't you turn to page 3 of Exhibit 7.

1 A Okay.

2 Q It's got "underneath uses".

3 A Yeah. That's still got the part about
4 dwelling units located above or below the first floor.
5 I mean if that's not what they're looking for why do
6 they keep including it?

7 Q It says very specifically apartments are
8 allowed, doesn't it?

9 A Yeah.

10 MS. LOVELL: No further questions. Thank
11 you.

12 CHAIRPERSON CHOCK: Thank you, County.
13 State?

14 MR. YEE: No questions.

15 CHAIRPERSON CHOCK: Redirect?

16 REDIRECT EXAMINATION

17 BY MR. PIERCE:

18 Q Mr. Foley, there was a lot of attention
19 during the cross-examination on M-1 zoning. But let's
20 just go back to your opinion. You had an opinion with
21 respect to the 1995 Order.

22 Even if we assume all of the things that
23 the attorneys have directed your attention to with
24 respect to the underlying zoning, county zoning, does
25 that change your opinion with respect to the state

1 Land Use Commission 1995 Order?

2 A No.

3 Q And why not?

4 A The issue before the Commission, as I
5 understand it, is whether or not there's been a breach
6 of the Land Use Commission's Decision and Order with
7 respect to the Project that was presented and approved
8 in 1994 versus this retail shopping center.

9 And I don't think there's any question that
10 the retail shopping centers and the apartment
11 buildings now proposed are really significantly
12 different than the Project that was approved in 1994.

13 I think it's not unusual for projects to
14 change a little bit over the course of time. But this
15 change is extraordinary. This is a complete change
16 from industrial to commercial and residential.

17 And I think it would have been appropriate
18 for the Applicants to come back to the Land Use
19 Commission for an amendment rather than this end run.

20 MR. PIERCE: Thank you, Mr. Foley. No
21 further questions.

22 CHAIRPERSON CHOCK: Thank you very much.
23 Commissioners, questions for this witness? It's going
24 to be our last witness for the day. Commissioners,
25 any questions?

1 MR. STEINER: Chair Chock, we believe with
2 a little bit more time that we can finish today.
3 There's one more witness. We've agreed to try to
4 limit our cross. If possible if we could go a little
5 further, see if we can't get done?

6 CHAIRPERSON CHOCK: Okay.

7 MR. PIERCE: How much time do we have left?

8 CHAIRPERSON CHOCK: How much time do you
9 need? (Laughter). Because we've got 15 minutes.

10 MR. PIERCE: It would be really tough to
11 get through.

12 CHAIRPERSON CHOCK: Why don't we start.

13 MR. PIERCE: Okay.

14 CHAIRPERSON CHOCK: Do you mind just
15 starting, then we can maybe reserve the cross from
16 when we reconvene.

17 MR. PIERCE: While Mr. Mayer's approaching
18 the witness chair is there a stipulation --

19 CHAIRPERSON CHOCK: Your witness is hungry.
20 (laughter)

21 MR. PIERCE: We're asking that Mr. Mayer be
22 -- I'll just jump to the chase and see if there's a
23 stipulation with respect to him. We're asking for him
24 to be admitted as an expert.

25 CHAIRPERSON CHOCK: Any objections,

1 parties?

2 MR. STEINER: No objection.

3 CHAIRPERSON CHOCK: Admitting this witness
4 as an expert?

5 MR. PIERCE: And he will be an expert in
6 the areas of economics and in community planning.

7 CHAIRPERSON CHOCK: Expert in economics and
8 community planning. So admitted.

9 MR. PIERCE: Mr. Mayer, what I would like
10 for you to do very quickly is --

11 THE WITNESS: Do you want to swear me in
12 first?

13 MR. PIERCE: Sorry.

14 CHAIRPERSON CHOCK: There you go.
15 (laughter)

16 RICHARD MAYER
17 being first duly sworn to tell the truth, was examined
18 and testified as follows:

19 THE WITNESS: Yes.

20 CHAIRPERSON CHOCK: Name and address for
21 the record.

22 THE WITNESS: My name Richard Mayer.
23 Usually known as Dick Mayer. My address is 111 Lower
24 Kimo Drive, Kula, Maui.

25 CHAIRPERSON CHOCK: Thanks, Dick.

1 DIRECT EXAMINATION

2 BY MR. PIERCE:

3 Q I just want to have you reflect for the
4 record some of your involvement with community
5 planning issues on Maui in addition to the fact you
6 were a professor emeritus at the college, at the
7 community college, later Maui College of -- I'm sorry
8 what is the name of the college? (audience laughter)

9 A University of Hawai'i Maui College --
10 actually I retired just before the name change.

11 Q So could you just briefly describe some of
12 your community planning background?

13 A I would be glad to.

14 MS. LOVELL: I have no objection
15 whatsoever, and certainly we have the greatest respect
16 and aloha for Professor Mayer. But because all of
17 those items are in his written testimony, and in the
18 interest of time the County certainly would stipulate
19 to that portion of his written testimony so we could
20 move on.

21 MR. PIERCE: All right. That's fine.

22 CHAIRPERSON CHOCK: We have his testimony.

23 MR. PIERCE: Thank you.

24 Q So, Mr. Mayer, let's actually jump straight
25 to a summary of your opinions. And you summarized

1 those on page 4 of -- and also I would ask, Mr. Chair,
2 that we admit into evidence his written testimony. It
3 was Intervenor's I-37.

4 CHAIRPERSON CHOCK: I-37.

5 MR. STEINER: No objection.

6 MR. KAM: No objection.

7 MS. LOVELL: In light of some of the
8 evidentiary rulings we withdraw our objections.

9 CHAIRPERSON CHOCK: Thank you. Thank you.
10 Appreciate that. Submitted.

11 Q (By Mr. Pierce): Mr. Mayer, let's jump
12 straight to your summary. And that was on page 4. We
13 have a blow-up of page 4 of your written testimony.
14 Would you please put that on the easel. That may be a
15 bit hard for some of the Commissioners to read but
16 they can follow along on page 4 of the written
17 testimony.

18 What I'd like for you to do is to
19 summarize -- first of all, were you asked to give an
20 opinion with respect to the differences between light
21 industrial uses and the current proposed uses?

22 A Yes, I did.

23 Q Do you have an opinion?

24 A Yes, I do.

25 Q What's your opinion?

1 A There's distinctly different uses and will
2 have distinctly different impacts.

3 Q Would you please summarize for us what you
4 see as the primary differences and impacts and other
5 areas?

6 A I'll use the chart just to help guide us
7 through this. I see that the wages of the employees
8 would be significantly different. I think that's a
9 very important consideration.

10 The median wage for people working in a
11 facility like this would probably be on the order of
12 \$43,000 a year, something of the order of 1950. These
13 are federal Bureau of Labor Statistics numbers.

14 Whereas about half of that for the lower
15 wages that would be probably found in a retail area
16 for cashiers, salesclerks, food preparation people,
17 waiters and food service type things you would
18 commonly find in a retail setting.

19 The higher income -- No. 2, now -- the
20 higher income jobs multipliers would then take it,
21 come into effect as to their effect on both the Maui
22 economy and really the state economy.

23 By having lower wages you would have a
24 lower impact on the state because of the multiplier
25 effect. The multiplier would allow people in the

1 higher income to generate much more prosperity within
2 the community.

3 A light industrial park as originally
4 proposed would allow for the multiplier to work not
5 only in the private sector, but also government tax
6 revenues would be higher if we had the multiplier
7 operating that way.

8 Consequently there's a diminution to the
9 community by having a retail center as opposed to the
10 light industrial.

11 No. 3. The proposal was really what's
12 oftentimes called a feeder type of activity where the
13 goods are very often imported in a retail center from
14 elsewhere so there are no jobs created manufacturing
15 the goods and people are merely selling them in a
16 retail setting.

17 Whereas in an industrial park you would
18 have people making the goods, they would then be
19 producing it. It'd be a driver within the community.
20 Would reduce imports probably. And it would allow for
21 higher income jobs, as I said before.

22 No. 4. I'm really going through this very
23 quickly because of the time. Whereas, if you have an
24 industrial park as was originally represented to the
25 Commission, you would have sole proprietors here on

1 Maui, entrepreneurs, young people on Maui would have
2 the opportunity to go into business, to establish
3 themselves.

4 The original representation was there would
5 be 123 separate individual lots, most of them
6 privately owned. Some could be long-term leases, but
7 you have different buildings, different
8 establishments, people would become, really, their own
9 bosses with a chance to move up.

10 Whereas if you have a retail center, as
11 being proposed, you're going to have a lot of large
12 box stores and some smaller stores as well in the
13 outlet mall, for example, which would mean that the
14 profits would be leaving the state of Hawai'i.

15 It would also mean that there would be less
16 opportunity for local young people, for example, to
17 get jobs and be able to move up in the chain. There'd
18 probably -- the management would be coming from
19 mainland companies to run these operations. It would
20 be less -- in other words, there would be a major
21 difference between the two.

22 MR. YEE: Excuse me. I appreciate the
23 effort to get finished on time. But if I could
24 suggest he speak a little slower for the court
25 reporter.

1 CHAIRPERSON CHOCK: A little slower, Dick,
2 thank you. Mahalo.

3 THE WITNESS: Okay. Stretch it out. I
4 apologize to the court reporter. This also is
5 reflected now in a statement made by a former mayor
6 who at that time was a councilmember, Charmaine
7 Tavares, back in 1999 when this proposal, this Project
8 came before the county council. At that time she was
9 speaking at the zoning change. It's a relevant
10 statement. I'd like to quickly read it.

11 "The other thing that I particularly like
12 about this Project is that it's offering fee simple
13 terms to people who want to do light industrial
14 activities.

15 "This is not the case where it is to be a
16 leasehold land and some developer and somebody is
17 going to be managing this at great profit. It's for
18 entrepreneurs or whoever to really start their own
19 business. I look at this as an opportunity for
20 economic development in our county. And I don't have
21 any personal reason to hold this up."

22 In other words, a motivation for approving
23 this zoning was that local businessmen would be able
24 to get going and have their own businesses.

25 By contrast the proposal that's been

1 represented now more recently is for a retail center
2 owned by a company in California, Eclipse, who would
3 then lease out the land to large companies, whether it
4 be Target or Home Depot or Lowe's or some other large
5 establishments, outlet malls, which would all be owned
6 elsewhere and in quite contrast as to what would be
7 happening.

8 Another contrast No. 6. There would have
9 been on the one hand 123 independent businesses with
10 considerable diversity as opposed to 3 or 4 big box
11 stores and a number of smaller ones and one housing
12 Project. That's quite a contrast in the nature of
13 what would be actually going onto this land.

14 I mentioned this one already. There would
15 be a contrast in the type of skills. Whereas the
16 proposal originally represented was having
17 entrepreneurs, skilled craftsmen.

18 Q Mr. Mayer, let me take you back one --

19 A Please.

20 Q -- when you were talking about small
21 businesses versus big box stores.

22 A Yes.

23 Q Did you hear the testimony earlier about
24 Home Depot or a similar type of retailer?

25 A Yes, I did.

1 Q Would you give us your thoughts with
2 respect to that?

3 A I went ahead and looked at their website to
4 see how they represented themselves.

5 Q Let me actually ask you more keeping to the
6 economic side of it. The argument that's being raised
7 is that Home Depot really fulfills a lot of those
8 industrial uses. Is that your opinion?

9 A Not at all.

10 Q Can you explain why?

11 A The United States Economic Census, which
12 classifies industries and businesses, makes it very
13 clear that home improvement centers, home centers as
14 they call them, are retail. And they put it
15 unequivocally in the retail category because they have
16 certain characteristics which are of a retail nature.
17 They advertise to the general public. They expect a
18 large walk-in trade. They sell things in small
19 quantities.

20 By contrast a wholesaler or operation like
21 a big lumber yard stand-alone that might be going into
22 an industrial park, would be selling largely to
23 contractors. They would probably not have a walk-in
24 trade.

25 They would probably not have a large

1 parking lot out in front. They would do a lot of
2 their business by telephone with orders being given.

3 There would probably be long-established
4 relationships between the customers, namely the
5 contractors and builders and the owners and sales
6 people within the company.

7 In a retail operation the sales people do
8 not usually know the customers. Customers come in at
9 random. And it's a very, very different type of
10 operation. That's why Home Depot, Lowe's, other
11 companies of that kind definitely classified by the
12 federal government and that's something now that's
13 been -- this has been for quite a while -- classified
14 as retail operations. There's no question as to what
15 they're classified as.

16 Q Thank you. Would you continue to summarize
17 some of the other areas that you reviewed.

18 A I will do that. One of the other
19 characteristics in the original proposal most of the
20 workers would be full-time workers. And thereby,
21 whereas by contrast in a retail operation usually
22 nationally 37 to 40 percent of the workers are
23 part-time.

24 Very often high school kids, after school,
25 people looking for some nighttime employment in

1 addition to their regular work. They're part-time
2 personnel.

3 That creates a very interesting difference
4 between the two. When you're a full-time worker you
5 have full-time employee benefits: Healthcare, life
6 insurance, perhaps, pension plans, vacations.

7 When you're a -- and medical care.

8 Whereas if you're a part-time worker, as I
9 said 37, 40 percent of the people might be part-time
10 in a retail complex, you then don't have that type of
11 a relationship. The Bureau of Labor Statistics gives
12 this distinction.

13 For example, when you're full-time workers
14 59 percent have retirement benefits. Part-time
15 workers 19 percent have work. That's a major
16 contrast. Medical care: 64 percent have medical care
17 and only 13 percent of part-time people get care.

18 And here in Hawai'i if you're less than 20
19 hours you're not guaranteed medical care by the
20 employer. Life insurance, the same kind of contrast.
21 Vacations, the same.

22 Q I want to ask so you're saying that if it
23 had been 123 separate lots there would have been a
24 greater opportunity for fulltime employment?

25 A There would be a greater opportunity for

1 fulltime employment.

2 Q Why is that?

3 A Because those would be businesses that
4 would depend on skilled craftsmen. They would not be
5 wanting people coming in on a part-time basis. They
6 would be people who are owning the business themselves.
7 The whole nature of the operation is very self
8 contained businesses which are, I think, in general
9 full time.

10 Q I'm sorry. Why isn't it like that with the
11 larger retailer stores?

12 A They operate on a much longer day schedule.
13 They're operating from early morning 'til very often
14 late in the nighttime. So it's more than an 8-hour
15 shift.

16 So they will have maybe some people during
17 the day 8 hours and then from, let's say, 6 to 9 or 6
18 to 10 at night they would have part-time people.

19 They also operate on weekends. And
20 consequently they're having people come in, let's say,
21 just from Saturdays and Sundays. They may have
22 another job elsewhere. So it just creates a very
23 different atmosphere within the type of establishments
24 that are there.

25 Q Is there a differences in the quantity of

1 jobs that you evaluated, the number of jobs?

2 A I did not evaluate the total number of
3 jobs. It's tough to say because as Mr. Foley
4 previously said, there are more employees. One reason
5 for that is that they're operating longer hours than
6 would usually a self-contained, let's say, craft shop
7 or auto repair shop which usually might not operate on
8 Saturdays and Sundays.

9 So you may end up with more employees but
10 not necessarily higher wages and certainly less
11 benefits.

12 Q So your focus was on the quality of the
13 jobs?

14 A The quality of the job and the quality of
15 impact, the income to the employees, and the fact that
16 they're getting much lower wages.

17 Q If we have time we'll continue on with your
18 summary.

19 A Do you want me to proceed?

20 CHAIRPERSON CHOCK: Go ahead.

21 THE WITNESS: Okay. The other important
22 question now with greater impact to the community
23 itself, South Maui lacks industrial sites in general.
24 And one of the reasons why this Project I believe was
25 approved by the Land Use Commission at that time was

1 that there was a claim -- and I think it's still
2 justified -- that there is a need for a light
3 industrial site in South Maui.

4 If this retail center were to go in, where
5 would the light industrial go? It would have to go
6 somewhere else. In other words, we have no site.

7 There is a need in a community that's
8 growing as rapidly as South Maui is, which is growing
9 at around 5 to 10,000 people per decade, you will need
10 those light industrial -- and this is an ideal site
11 for that type of activity.

12 It also strengthens the local community by
13 offering diversity. South Maui is very dependent --
14 and Maui in general -- but South Maui more
15 specifically -- is very dependent on the tourist
16 industry.

17 Many of the employees in South Maui are
18 tourist based. That means that if the economy
19 suddenly goes up or goes down, the tourism economy is
20 very much affected.

21 By diversifying the economy you can help
22 stabilize it, make it a healthier community for the
23 general broader population so that a husband may lose
24 a job in the tourist industry. The wife may work or
25 vice versa. That you can have a diversity there.

1 Whereas, if you have a retail trade that it
2 will largely cater, as their website says, they're
3 really going to be heavily dependent on the tourist
4 sector.

5 You can read the website for this complex.
6 They're claiming the thousands or millions actually of
7 tourists who come to Maui. And they're very heavily
8 dependent on these visitors coming there.

9 They're going to be much more dependent on
10 the tourism sector and less stable for the community.

11 Another difference, and I have it up there
12 on the chart No. 12, was compliance with the LUC
13 Order. I think that the retail center would be
14 violate -- I just want to mention one or two things
15 that were not mentioned previously in terms of
16 impacts.

17 The retail center will have very large
18 parking lots. I don't think the drainage issues have
19 been considered for such a large complex. Whereas, if
20 there were smaller, independent things where you would
21 have a building, small parking area, perhaps grass
22 area around it or whatever, it would be much easier to
23 control drainage issues. Those are things which are
24 not looked at in terms of the impacts.

25 Certainly the frontage roads are an issue.

1 And let me go on to the -- because of time. The other
2 one was with regard to the Kihei Makena plan. I think
3 that that is a very important -- there's some things
4 which have not yet been mentioned. I'll try to focus
5 on those.

6 The Kihei Makena plan talks about where
7 commercial space should be located. They give four
8 locations, all makai of the highway. When the Order
9 was given by the LUC for this Project it stated that
10 the community plan and the zoning should be gotten by
11 the Applicant because at that time the community plan
12 said "residential" in this area.

13 And when they went ahead and got the
14 approval for the community plan at this stage, the
15 commercial things were all located makai of the
16 highway. They could have put in this site but they
17 did not.

18 It also said very clearly, as was mentioned
19 a few minutes ago, in Item K that in this area
20 particularly, these areas should limit retail business
21 or commercial activities to the extent that they are
22 accessory or provide service to predominant light
23 industrial use.

24 Very clearly that for this particular
25 Project it said there can be commercial uses there,

1 but they should be subsidiary to the industrial uses.
2 In other words, a restaurant for the workers in the
3 industrial plant or maybe some other repair facility
4 that would help the industrial. Not retail.

5 Finally, there was also a statement in
6 there with regard to the tourist trade which this
7 commercial, this retail center is advertising where it
8 said -- this is Item J in the Kihei community plan
9 "locate resort-related retail commercial facilities as
10 strategic points in the Wailea and Makena destination
11 areas."

12 It doesn't say this should be a site for
13 it. It says specifically for those retail activities
14 to attend to the tourists they should be down in
15 Wailea Makena, where the bulk of the tourists are
16 located.

17 Going on. And, lastly, the other item that
18 was mentioned previously was with regard to the Maui
19 zoning thing. It says very clearly that commercial
20 areas can be found in an industrial thing.

21 We heard all the Exhibits B-1, B-2, B-2, et
22 cetera that can be in there. But it says very clearly
23 at the beginning "mostly --"

24 MR. STEINER: I'm going to object to this
25 witness's ability to testify about zoning. He wasn't

1 offered as an expert in legal or zoning or --

2 MR. PIERCE: We're ready to move on,
3 Mr. Chair.

4 CHAIRPERSON CHOCK: Okay. Fair enough.

5 Q (By Mr. Pierce) Mr. Mayer, I'd like to draw
6 your attention to the 16th one which relates to jobs.
7 You have it labeled as "can't supply construction jobs
8 nows versus the alternative". Can you explain that,
9 please?

10 A If, as I believe that this Project, the
11 retail Project is not compliant with the LUC Order,
12 not compliant with the community plan provisions with
13 regard to retail, and is not compliant with the zoning
14 requirement mostly. It probably will need to be
15 reviewed, perhaps amended by the LUC.

16 If an industrial thing, which was put in
17 there already 17 years ago, 1995, and has all its
18 entitlements, LUC, zoning, community plan, all are
19 lined up, they could go ahead tomorrow and build that
20 shopping center, provide the construction jobs for the
21 carpenters, plumbers, any other people who may be
22 sitting on the bench right now.

23 Q I want to ask you what I think may be the
24 final question which is: You've sat through the
25 entire testimony of this hearing, haven't you?

1 A I have.

2 Q And you've heard that there's a difference
3 of opinion with respect to whether you can look to the
4 Decision and Order or whether you need to look at the
5 entire transcript. But you've heard all the testimony
6 that was presented on both of those parts, haven't
7 you?

8 A Try to remember it.

9 Q Now, Condition 15 says that, "The
10 Petitioner shall substantially comply with the
11 representations made to the Commission" back in 1995.
12 Do you remember that condition?

13 A I do remember that.

14 Q Would you please just give us a final
15 summary as to whether or not the current proposed uses
16 are meeting that Condition 15?

17 MR. STEINER: I'm going to object to that.
18 That calls for a conclusion that I don't think this
19 witness is qualified to make.

20 CHAIRPERSON CHOCK: Maybe you can restate
21 the question.

22 Q (By Mr. Pierce): Do you feel that the
23 representations made back in 1995 are reflective of
24 what you see here with the new proposed uses?

25 A I do not. I think it's an entirely

1 different Project both in terms of the housing as well
2 as the large amount of retail. This does not
3 represent, I think, the impacts on traffic, on
4 drainage, and other issues are entirely different. I
5 think it's a very different project.

6 MR. PIERCE: Thank you, Mr. Mayer.

7 CHAIRPERSON CHOCK: Thank you, Mr. Pierce.
8 Mr. Steiner.

9 MR. STEINER: We have about 10 minutes,
10 then, maybe 5 to 10 minutes then we could be done I
11 believe.

12 CHAIRPERSON CHOCK: We are going to lose
13 Commissioner Matsumura, but we're going to have
14 Commissioner Makua for 10 more minutes. So if you can
15 get through we'll continue along. Mr. Steiner, go
16 ahead.

17 MR. STEINER: Mr. Kam is going to handle
18 the cross.

19 CHAIRMAN CHOCK: Mr. Kam, go ahead.

20 CROSS-EXAMINATION

21 BY MR. KAM:

22 Q Good morning, Mr. Mayer.

23 A Morning, Mr. Kam.

24 Q You've been admitted as an expert in
25 economics and community planning, correct?

1 A Right.

2 Q Do you consider yourself an expert in
3 market analysis?

4 A Expert? No.

5 Q Okay. You've never been hired to perform
6 an appraisal or a market study for a real estate
7 project, have you?

8 A No, I have not.

9 Q Have you ever testified in court or before
10 a government tribunal as an expert in real estate
11 market analysis?

12 A Not real estate market analysis.

13 Q On page 5 of your written testimony, if you
14 would turn to that page, please.

15 A Page 5.

16 Q Page 5?

17 A Okay.

18 Q Sort of at the top third of that first
19 paragraph you say, "At the same time the data show
20 that jobs associated with light industrial" -- excuse
21 me -- "At the same time the data show that jobs
22 associated with light industry work garner
23 significantly higher wages including those you would
24 expect to find in the approved Ka'ono'ula Industrial
25 Park." Do you see that statement?

1 A Yes, I do.

2 Q Now, that statement assumes that the
3 Ka'ono'ulu Industrial Park would actually be
4 constructed, correct?

5 A Yes.

6 Q Because unless it is built there would be
7 no jobs, correct?

8 A That's correct.

9 Q Would you agree that the industrial park
10 wouldn't be built unless a developer believed that it
11 was economical to do so?

12 A I agree.

13 Q Because if a developer believed that there
14 was no return to be earned from a 123-lot industrial
15 park, they would never take the risk and build the
16 Project, correct?

17 A Right. And the owner of the land would
18 then probably -- because that's what was
19 represented -- would probably want to go to the
20 Commission and say, "I want something else."

21 Q Now, I know you said just now that you're
22 not an expert in market analysis. But do you happen
23 to know what the term "absorption" means in
24 relationship to our real estate concepts?

25 A I have a vague idea but maybe you want me

1 to have a more definite idea.

2 MR. PIERCE: Mr. Chair, I'm going to make
3 an objection. This line of questioning appears to be
4 on whether or not the current landowners could, right
5 now, build 123 lots. That's not the issue before the
6 Commission. That might be an issue for the next phase
7 but not now.

8 MR. KAM: I'll move on, Chair.

9 CHAIRPERSON CHOCK: Thank you.

10 Q (By Mr. Kam): Mr. Mayer, you testified a
11 lot about the different types of benefits that are
12 associated with jobs arising from a true light
13 industrial subdivision as compared to retail, correct?

14 A Correct.

15 Q And one of those benefits that you
16 described was the fact that, according to you, there's
17 more part-time jobs in a retail development than you
18 would expect to find in a true light industrial
19 development.

20 A I said that.

21 Q Did you analyze what percentage of
22 part-time workers you would typically find in the
23 light industrial sector?

24 A Not per se.

25 Q So you don't know exactly what percentage

1 of true light industrial employment is part-time,
2 correct?

3 A Correct.

4 Q The benefits that are associated with light
5 industrial employment compared to retail we would not
6 have those benefits if the light industrial park is
7 never built, correct?

8 A Of course. I don't think that was what was
9 represented.

10 Q I understand. Turning to page 11 of your
11 written report, sir. I'm referring to section 8.

12 A Page 11?

13 Q I want to draw your attention to the bottom
14 of the first paragraph of section Roman VIII where you
15 say "Allowing unplanned retail growth to spread
16 outside the boundaries...."

17 A I'm sorry. I don't have the line.

18 Q I'm sorry. It's the first paragraph.

19 A Okay.

20 Q On page 11.?

21 A I see it now.

22 Q Sort of the bottom third.

23 A I see it.

24 Q The sentence that says, "Allowing unplanned
25 retail growth to spread outside the boundaries

1 established in the community plan will deny South Maui
2 the ability to develop select areas of commercial
3 centers or villages that could give Kihei a sense of
4 place."

5 Is it your opinion that the proposed
6 Project does not provide a sense of place?

7 A Correct.

8 Q And how would an industrial park, a 123-lot
9 light industrial park provide a sense of place?

10 A It would be a form of sprawl up the hill.
11 I think that the industrial park -- would you state
12 the question again, that last question.

13 Q I guess what I'm wondering about is isn't
14 an industrial park by definition sort of a hodgepodge
15 of different uses and building types? It isn't really
16 going to have a common architectural theme, correct?

17 A I think what it's going to do it's gonna --
18 the sense of place right now in South Maui we have a
19 community that's there with the commercial area along
20 South Kihei Road, et cetera.

21 If this Project is built probably much of
22 that shopping center will die. This will take over
23 and close down the community that right now is South
24 Maui. That I think it's one of the impacts I didn't
25 go into in detail when I went through my thing.

1 But I think this is a zero sum -- jobs
2 will shift and go into this area outside the general
3 community where people will now have to drive as
4 opposed to the area where people now shop which are a
5 series of malls. It will be a very serious impact on
6 local businesses and local owners all along South
7 Kihei Road.

8 I think that's the sense of place that the
9 community now has in South Maui.

10 Q In section 9 you said that the Pi'ilani
11 Shopping Centers and to some extent the affordable
12 housing Project, fit the classic definition of urban
13 sprawl. Do you see that first sentence?

14 A Yes, I do.

15 Q Would a 123-lot light industrial
16 subdivision in the same area also, wouldn't that also
17 constitute sprawl?

18 A It would place an activity that's generally
19 not considered something that should be in the core of
20 city industrial area, outside of a residential area
21 and probably an appropriate place. Because one of the
22 characteristics of sprawl is a community that's
23 dependent on auto traffic.

24 The shopping center would draw all that
25 traffic outside the community into that area up there.

1 This would be a work site, a work area that would be
2 concentrated, focused and probably would provide jobs
3 and certainly less traffic than the 3700-car parking
4 lots that would be found at the shopping centers.

5 Q I guess I'm wondering how one urban use can
6 be considered sprawl and not another use would be
7 considered sprawl. Isn't it sprawl or infill
8 regardless?

9 A You could argue that.

10 Q My last question has to do with the fact
11 that you said that the 123-lot subdivision is ready to
12 go right now, could be built. We would have all these
13 construction jobs, whereas the proposed Pi'ilani
14 Promenade may need to go through some other approvals,
15 is that correct?

16 A I didn't say that it was ready to go. I
17 said it *could* be ready to go. I said it could be
18 ready to go because they have all their entitlements
19 and they have had them for 17 years.

20 And the landowners -- and it's gone through
21 a succession of landowners -- could at any one time
22 have initiated that project which their studies show,
23 their market studies shows is something that this
24 community very much needs.

25 They have not gone ahead and fulfilled what

1 they said they would do by the year 2000. They would
2 start doing this and doing that. The Land Use
3 Commission listened to that urgent need and authorized
4 it. I hold them in default, really, the landowners
5 who didn't fulfill their representations to the
6 Commission and could have done that. I didn't say
7 it's ready at this time.

8 Q If the 123-lot light industrial subdivision
9 were developed, who would construct the buildings that
10 comprise that subdivision?

11 A The buildings would probably -- that's a
12 major difference between what I think would be those
13 123 buildings and the retail. Example might be Home
14 Depot or Target or Lowe's or any of those. They
15 probably have the designs all set up at their main
16 headquarters on the mainland somewhere for these box
17 stores that they can just come into the community and
18 get approvals for. No local architects, engineers
19 would necessarily be needed except to fine-tune some
20 arrangements.

21 Whereas, if you had the 123 separate
22 buildings that would provide many jobs for architects
23 locally, engineers locally, people to get the building
24 permits locally, everything would be -- you'd probably
25 have many more jobs involved there.

1 The construction may or may not be the same
2 number of workers to build the buildings. But there
3 would be many other jobs that would be lost if we
4 allowed these big box stores and mainland shopping
5 center owners to come in here and bring their
6 blueprints, everything with them.

7 Q Mr. Mayer, my question is just: Would the
8 developer of the light industrial subdivision
9 construct the buildings on each of the 123
10 hypothetical lots?

11 Or wouldn't those buildings be constructed
12 by the individual owners, the ultimate individual
13 owners of those individual lots?

14 A Probably by the owners.

15 Q Okay. Before the buildings could be
16 constructed wouldn't the lots need to be sold to
17 individual owners?

18 A Yes, they would.

19 Q Wouldn't those individual owners have to go
20 out and prepare plans, obtain permits, possibly obtain
21 financing before those buildings could be constructed?

22 A Yes.

23 Q Okay.

24 MR. KAM: Thank you. No further questions,
25 Chair.

1 CHAIRPERSON CHOCK: County?

2 CROSS-EXAMINATION

3 BY MS. LOVELL:

4 Q Thank you. Mr. Mayer, you're aware, aren't
5 you, that the relief that's been asked for in the
6 Petition is that this property be reverted to its
7 original Ag designation?

8 A I'm not sure exactly if that's correct.

9 Q Okay. Do you know what the Land Use
10 Commission is required to do by statute if it finds a
11 material breach?

12 MR. PIERCE: Objection. This is Phase 1.
13 The Commission previously bifurcated this hearing in
14 two parts. Ms. Lovell's questioning relates to Phase
15 2.

16 CHAIRPERSON CHOCK: Want to rephrase that
17 question?

18 MS. LOVELL: I will try to rephrase it.

19 Q Mr. Mayer, you've done, I think, a very
20 good job of contrasting between the kinds of jobs and
21 kinds of wages that are available in a light
22 industrial park versus a retail shopping center. But
23 if this particular property is reverted to an Ag
24 designation there won't be any jobs for anyone, will
25 there?

1 A I don't see any necessity for it to be Ag.
2 If it's not the retail it could be built exactly as
3 it's been proposed and represented to the Commission.
4 That's something, the point we are trying to argue.
5 If it's not Ag it's not one of the issues.

6 It's the representation of a light
7 industrial park or this proposal now for a retail
8 shopping center, two retail shopping malls.

9 Q But the Commission doesn't have the power,
10 does it, to force the owner to develop a 123-lot
11 subdivision?

12 MR. YEE: I'm going to object as outside
13 the scope of this witness --

14 CHAIRPERSON CHOCK: I'm not sure he's in a
15 position to answer that specific legal question.

16 Q (By Ms. Lovell) Okay. Would there be any
17 jobs whatsoever if this parcel were rezoned as Ag?

18 A If it were rezoned it would have to go --
19 I'm not sure if the zoning is an issue here.

20 Q Redesignated by the Land Use Commission.

21 A If it were redesignated, that were the
22 outcome, then there would be agricultural jobs
23 potentially. But there would not be retail jobs.

24 Q How many agricultural jobs would you
25 foresee on an 88-acre parcel?

1 A Minimum.

2 MS. LOVELL: Thank you.

3 MR. YEE: No questions.

4 CHAIRPERSON CHOCK: Any redirect?

5 MR. PIERCE: No.

6 CHAIRPERSON CHOCK: Commissioners, any
7 questions for this witness? So thank you, Mr. Mayer,
8 for your testimony. Thank you, Parties. We're going
9 to reconvene, I believe, on December 6th, is that
10 correct?

11 This closes the evidentiary portion of
12 these proceedings. I'd like to direct the parties to
13 draft your individual proposed Findings of Fact,
14 Conclusions of Law, and Decision and Order based upon
15 the record in this docket and served upon each other
16 and the Commission.

17 The proposed Findings of Fact must
18 reference the witness as well as the date, page and
19 line numbers of the transcripts to identify your
20 facts. In addition to the transcript, exhibits in
21 evidence should also be referenced.

22 Should any of the parties desire to
23 stipulate to any portion or all of the Findings of
24 Fact, Conclusions of Law, Decision and Order they're
25 encouraged to do so.

1 Regardless of whether the parties pursue a
2 partial or fully stipulated Order I'd like to ask each
3 party to file its proposal with the Commission and
4 serve copies on the other parties no later than the
5 close of business on December 21, 2012.

6 All comments or objections to the parties'
7 respective proposals shall be filed with the
8 Commission and served upon the other parties no later
9 than close of business on January 4th, 2013.

10 MR. STEINER: Mr. Chair, we have a concern
11 by the developers regarding the market and the ability
12 to develop this Project. They were really hoping for
13 a decision this year.

14 I have spoken to the court reporter who
15 indicated that transcripts could be ready if they're
16 expedited by the 26th of this month.

17 We would be prepared to submit our proposed
18 Findings of Fact if the other parties would be in
19 agreement much sooner than the 21st in an effort to
20 have this matter decided at the December 6th meeting.

21 MR. YEE: Chair, for the record we have no
22 objection if Petitioner wants to submit theirs early.
23 We're not sure we would be prepared to submit ours
24 significantly early.

25 CHAIRPERSON CHOCK: I think that's somewhat

1 extraordinary given staff resources and our time line
2 to try get this all done by December 6th. So I don't
3 think we're going to be able to accommodate that request.

4 MR. STEINER: Would it be possible to
5 accommodate it such that we could be deciding this at
6 the first meeting in January as opposed to -- it
7 sounds like we wouldn't be meeting on this 'til
8 sometime in late January the way it's set up.

9 CHAIRPERSON CHOCK: January 10th, 11th, is
10 what we're targeting.

11 MR. STEINER: So if we could -- I guess
12 what I'm striving for is something so that the
13 submissions could be in both the original submission
14 and the responses such that maybe by the end of the
15 year, so we'd be ready to have a decision on Phase 1
16 during that 10th and 11th meeting in January.

17 CHAIRPERSON CHOCK: Yeah, I understand and
18 appreciate your sensitivity to time. I'm just not
19 sure practically speaking staff, given some of the
20 vacations that are -- I don't know -- I don't know all
21 the details, Mr. Steiner. I apologize. But I don't
22 think we're going to be able to accommodate that at
23 that time. So let's stick to this proposed staff
24 schedule.

25 If in the meantime you guys can talk and

1 work with our executive officer to see what we might
2 be able to do to value engineer the schedule and time
3 a little bit, let's try to work towards doing that.

4 MR. STEINER: I appreciate that. Thank
5 you, Chair.

6 MR. KAM: Chair, what is the proposed date
7 that we are targeting under the proposed schedule?

8 CHAIRPERSON CHOCK: Dan?

9 MR. ORODENKER: January 24th.

10 MR. STEINER: I'm sorry. I got a little off
11 track when you mentioned the 21st and 4th. What is it
12 we're submitting on the 4th?

13 MR. KAM: Objections.

14 MR. STEINER: Objections. Okay. Thank
15 you.

16 CHAIRPERSON CHOCK: Where did I leave off?
17 Any responses to the objections must be filed with the
18 Commission and served on the other parties no later
19 than close of business on January 11, 2013.

20 Like to prevail upon the parties to consult
21 with staff early in the process to ensure that
22 technical and non-substantive formatting protocols
23 observed by the Commission are adhered to.

24 Oral arguments will be scheduled after
25 receipt of the Parties' respective filings. Any

1 questions?

2 MS. LOVELL: Yes. I had just one question.
3 Will we be proceeding the way we have so far with the
4 electronic exchange of documents and filing? That
5 certainly makes it easier for us folks on Maui to get
6 stuff to the Land Use Commission and the other parties
7 in Honolulu.

8 MR. ORODENKER: We have to adhere to our
9 rules with regard to submission. However, if it's
10 agreeable to the parties they can transmit by
11 electronic means.

12 MR. PIERCE: We have no objection.

13 MR. YEE: No objection.

14 MS. LOVELL: So basically the filing date
15 will be the date of electronic exchange, but we will
16 then follow up with hard copies. That's how we've
17 been doing it throughout this docket.

18 MR. ORODENKER: As far as the Commission is
19 concerned the filing date will actually be the date we
20 get the hard copy because we have to have a file
21 stamped hard copy.

22 MS. LOVELL: All of the deadlines so far we
23 have been treating the filing date as the electronic
24 date. That's only because otherwise the people in
25 Maui have to submit, like, at least two days earlier

1 in order to get it to Honolulu. So it shaves two days
2 off everything for the Maui parties but not for the
3 O'ahu parties.

4 MR. STEINER: We don't have a problem with
5 waving that rule for the Maui parties.

6 MR. ORODENKER: If the parties agree to
7 that then that's not a problem.

8 MS. LOVELL: Thank you.

9 MR. YEE: Just so the record is clear my
10 understanding is there's a rule requiring the hard
11 copy to be submitted to the Land Use Commission on
12 this particular date. The request is, I believe, is
13 asking the Chair to waive that rule because it is a
14 non-jurisdictional rule is the argument and the
15 parties have no objection to that.

16 But I think it does require a Chair
17 approval or agreement for that waiver.

18 CHAIRPERSON CHOCK: Chair's going to
19 entertain a motion to waive our rules to allow the
20 parties to submit based on the -- would it be the
21 electronic date on the submission? Bryan, does that
22 make sense?

23 MR. YEE: Yes. With the understanding that
24 it is the mailing date and electronic date are the
25 same.

1 CHAIRPERSON CHOCK: So we're going to waive
2 our rules to allow the submission of the material so
3 that the electronic and the hard copy filing date are
4 the same, is that right?

5 MR. YEE: Yes. Mailing date. Is that what
6 I said?

7 CHAIRPERSON CHOCK: Mailing and electronic
8 date.

9 MR. YEE: So, in other words, the date you
10 postmark and send by electronic copy of these
11 documents will be considered the submission date.

12 CHAIRPERSON CHOCK: We're making total
13 hamburger out of this thing. (laughter) We're just
14 going to stick to our existing rules. We've never
15 made these kinds of exceptions in the past generally
16 speaking, so let's keep to what's in our rules.

17 MR. PIERCE: Will there be a written Order
18 of the times that you gave us a moment ago?

19 CHAIRPERSON CHOCK: Staff, can you work
20 with the parties on that? Maybe not necessarily in
21 writing but maybe a call or whatever is most
22 convenient.

23 MR. PIERCE: An e-mail is fine.

24 CHAIRPERSON CHOCK: Any other questions?

25 MR. PIERCE: Oh, one more. It's my

1 understanding that the parties do not need to be
2 present on December 6th.

3 CHAIRPERSON CHOCK: Yes.

4 MR. PIERCE: Okay. Thank you.

5 MR. STEINER: I'm sorry. So our matter
6 won't be scheduled for December 6th as I was just
7 clarifying. Thank you.

8 CHAIRPERSON CHOCK: Okay. Any other
9 questions? Commissioners, any questions before we
10 adjourn? Okay. Thanks, everybody. Have a good
11 weekend.

12
13 (The proceedings were adjourned at 12:20 p.m.)

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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 16th 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