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LAND USE COMMISSION

STATE OF HAWAI'I

HEARING)

A13-797 CMBY 2011 INVESTMENT, LLC, MAUI)

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TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for a Public Hearing at Marriott Courtyard Hotel, Haleakala Room, Kahului, Maui, Hawai'i commencing at 9:05 a.m. on September 6, 2013, pursuant to Notice.

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

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A P P E A R A N C E S

COMMISSIONERS:
SHELDON BIGA
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STAFF PLANNER: SCOTT DERRICKSON
DEPUTY ATTORNEY GENERAL: DIANE ERICKSON, ESQ.

AUDIO TECHNICIAN: WALTER MENCHING

Docket No. A13-797 CMBY 2011 Investment LLC

For the Petitioner: JENNIFER BENCK, ESQ.
CHARLES JENCKS

For the County: JAMES GIROUX, ESQ.
Deputy Corporation Counsel

For the State: BRYAN YEE, ESQ.
Deputy Attorney General

RODNEY FUNAKOSHI, OP

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1 CHAIRMAN HELLER: (gavel) Let's get
2 started. Petitioner, are you ready to proceed? This
3 is a continued hearing on Docket No. A13-797 CMBY 2011
4 Investment, LLC, Maui.

5 MS. BENCK: Good morning, Chairman and
6 Commissioners. Thank you very much. We are ready to
7 proceed. We'd like to call our next witness which is
8 Mr. Tom Nance. He's an expert in groundwater and
9 surface water development, hydraulics and water system
10 design, flood control, drainage and coastal
11 engineering.

12 CHAIRMAN HELLER: Any objections to
13 designating him as an expert?

14 MR. GIROUX: No objection.

15 MR. YEE: No objection.

16 CHAIRMAN HELLER: Commissioners, any
17 questions? He will be received as an expert witness.

18 MS. BENCK: Thank you very much.

19 TOM NANCE
20 being first duly sworn to tell the truth, was examined
21 and testified as follows:

22 THE WITNESS: I do.

23 CHAIRMAN HELLER: Please go ahead.

24 xxx

25 xxx

DIRECT EXAMINATION

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BY MS. BENCK:

Q Good morning, Mr. Nance.

A Good morning.

Q Nice to see you. Mr. Nance, before you do you have a copy of Petitioner's Exhibit No. 37?

A No.

Q Do you have a copy of your written direct testimony?

A Oh, sorry. That's this. I do have 37.

Q Thank you very much. In preparing your written direct testimony I note that you referenced a study that you had conducted.

A Yes.

Q Can you please tell the Commission the name of that study?

A The title is "Groundwater Resource and Water System Assessment for the Proposed Pu'unene Industrial Subdivision in Kahului, Maui."

Q I believe that a copy of that was provided with the Final Environmental Assessment.

A Yes.

Q Mr. Nance, would you please describe the scope of your study. What was it that you looked at and why?

1 A Two things. The first was to create a
2 layout, a concept for the private water system that
3 would serve the Project. The second aspect was to
4 take a look at the impact the Project may have on
5 groundwater and surface water resources.

6 Q Please go ahead, describe the water system.

7 A The water system would be privately owned
8 and operated by the Owners' Association. It would be
9 a dual system using the onsite only slightly brackish
10 groundwater for non-potable uses. And for potable
11 uses to run that feed water through an R/O plant to
12 produce the drinking water component.

13 There would be two storage tanks. The
14 larger tank would contain the onsite groundwater
15 without treatment for the brackish system or the
16 non-potable system. And then a smaller tank would
17 receive the product water from the desal plant for
18 distribution for drinking water use.

19 The tanks will be at grade and the site is
20 relatively flat. So in order to provide distribution
21 pressure to customers there will be separate booster
22 stations for the potable and the non-potable systems,
23 and the non-potable system having a larger pump to
24 also provide fire protection.

25 Q Thank you, Mr. Nance. Blanca Lafolette

1 just put a large poster of a diagram called "Well
2 infrastructure site plan" a copy of which was filed as
3 Petitioner's Exhibit 42. Are you familiar with that
4 site plan?

5 A Yes. It was prepared in my office.

6 Q Could you just identify the water system
7 components that are on there?

8 A Let me bring this up. We've shown the
9 wells and the water system infrastructure that I just
10 described at the northern end of the Project. We will
11 be doing some testing to determine whether the wells
12 located in this area or possibly somewhere on the
13 northeast part of the Project site, wherever we get
14 the best water quality, that's where the wells were.

15 This is just conceptual and it may slide a
16 bit in the northern third or so of the Project. We
17 do have on the southern end two disposal wells. These
18 would receive the concentrate out of the desal plant
19 about 80,000 gallons a day. It would run down a
20 pipeline, drop into the wells that are at the south
21 end.

22 Q Thank you very much. You indicated that
23 you think that there'll be about 80,000 gallons of
24 concentrate. So does that mean you have an estimate
25 of how much the water demand for the Project will be?

1 A Yeah. Let me preface that by saying that
2 the water demands both in my testimony and the report
3 are based on Maui Department of Water Supply design
4 standards for an industrial area which is
5 6,000 gallons per day. That happens to be 50 percent
6 higher than all the other municipal Departments of
7 Water Supply which is 4,000. And possibly five times
8 higher than what I think will be the actual use.

9 Where we've tracked it in industrial areas
10 such as this, actual use is more on the order of
11 1,200 gallons per day per acre rather than the 6,000
12 that we're using.

13 So the numbers I'm gonna say are
14 potentially four or five times higher than what I
15 think will actually occur but we just did it for the
16 design standard.

17 Using those design standards and rounding
18 off the numbers, the potable use would be on the order
19 of 120,000 gallons. The non-potable use will be on
20 the order of 300,000 gallons.

21 We have to pump a little more water than
22 the 120,000 for potable because 80,000 will become the
23 concentrate for disposal in the wells. And 120,000
24 would be the product water.

25 So if you take all of that together we're

1 going to pump out of the ground about a half a million
2 gallons a day. Now, through various processes,
3 irrigation return flow, return of the concentrate and
4 the like, the actual net use of groundwater will be
5 substantially less than we pump out because
6 infiltration of the various uses, wastewater disposal,
7 concentrate disposal. So the net use will be
8 substantially less than half.

9 Q But for your study you used the
10 conservative 6,000.

11 A Yes.

12 Q So with that conservative estimate on how
13 much water will be pumping out, could you please
14 describe the effect of pumping it out and then also
15 disposing it, the effects that that has on
16 groundwater?

17 A The numbers that I've tallied, given all
18 those returns as well as -- I'm not sure I can
19 remember the numbers -- but I think the net use of
20 groundwater -- let me back up a bit.

21 What I did in comparing the impact of the
22 Project was to make an estimate of how much is the
23 groundwater flow beneath the 86-acre site itself.
24 That number I estimated to be 4 million gallons a day.

25 The net with the withdrawal of groundwater

1 and the return ends up with about a 6 percent or so
2 change in the groundwater flow. That's directly
3 beneath the Project site. That's not the total flow
4 going to the shoreline which includes all of the
5 Ka'ahumanu isthmus, but just for the impact of the
6 groundwater flowing beneath the Project it's about
7 6 percent.

8 Q Is that a significant change in groundwater
9 flow?

10 A It's 6 percent of what's flowing beneath
11 the Project site period. As an aquifer auwai impact
12 it's not significant.

13 Q Thank you, Tom. There was some questions
14 yesterday and you weren't here to hear those
15 questions. I'm going to go ahead and see if you can
16 respond to them anyway. There were questions about
17 the relationship of where a potable well is located
18 and how the wastewater will be treated at this
19 Project.

20 And I'm sorry. I should back up. Are you
21 familiar with how wastewater is planned to be treated
22 at this Project?

23 A Generally so, yes.

24 Q And that is through?

25 A Onsite individual wastewater disposal

1 systems.

2 Q Thank you. So with that background
3 knowledge do you perceive an impact on our ability to
4 have both individual wastewater systems and the
5 potable wells in whatever location? You indicated it
6 could be at the north end, it could be mauka.

7 A The setback for individual wastewater
8 disposal systems from drinking water wells is a
9 thousand feet. So if you take a location where the
10 wells are and draw an arc of a thousand feet, no
11 individual wastewater disposal system can be placed
12 inside of that thousand foot circle.

13 There is a process where you can get a
14 variance to go inside that, but what you need to do is
15 propose an enhanced septic system, and the proper
16 kinds of material in the infiltration bed so that you
17 get removals that are acceptable to the Department of
18 Water Supply.

19 So you'll either have to put a conventional
20 septic system outside the thousand foot arc or if
21 you're inside the thousand foot arc you'll need an
22 enhanced septic system approved by DOH through a
23 variance process that they have.

24 Q Thank you, Tom. Now, this is something
25 that Mr. Otomo spoke about yesterday. And, again,

1 this is more of purely engineering question but your
2 expertise is well-known, so I'm going to throw it at
3 you anyway. You just described how each lot would
4 have an individual wastewater and therefore there
5 would be this arc around it could impact that. Are
6 you aware of there being a requirement to get a
7 variance from the Department of Health in order to
8 have more than one lot use the same leach field?

9 A I don't know the answer to that question.

10 Q That was something Mr. Otomo spoke about
11 yesterday having up to three lots he said.

12 A I wasn't aware of that.

13 Q So going back to the arc. You described
14 the impact in the Project. And certainly that was
15 well-known throughout the Project design. But let's
16 talk about the impacts outside the Project. Are you
17 familiar with the land ownership and the land uses
18 generally adjacent this property?

19 A Generally. I think HC&S owns the land to
20 the northeast and south. And the State has a parcel
21 of land adjacent to the west side.

22 Q Correct. And at the north right across
23 from where the wells are shown on that exhibit is a
24 large reservoir?

25 A The HC&S reservoir, yes.

1 Q So taking those land uses into account do
2 you perceive that our potable well, wherever it may
3 go, will have a substantial impact on the --
4 precluding adjacent landowners from installing
5 individual wastewater systems?

6 A Well, they would be subject to the same
7 regulations that any lot owner inside the Project
8 would have to adhere to. So if somebody wanted to put
9 something on the adjacent property they'd be subject
10 to the same thousand foot rule and the possibility of
11 getting a variance to it from the Department of
12 Health.

13 Q And the use, again, you said you believe
14 it's HC&S so is it sugarcane?

15 A Yes, sugarcane on three sides.

16 Q This is another risky question. But in
17 your experience are sugarcane fields often filled with
18 individual wastewater systems?

19 A Not in sugarcane fields, no.

20 Q Thank you. Thank you very much. Another
21 question came up yesterday I think from Commissioner
22 McDonald. It had to do with the UIC line. Would you
23 please tell us what is the UIC line.

24 A The UIC line is a line drawn seaward of
25 which you're allowed to put disposal wells and inland

1 or mauka of which disposal wells are prohibited.

2 In the isthmus of Kahului essentially the
3 entire isthmus is makai of the UIC line. So this
4 Project is makai of the UIC line, an area in which
5 disposal wells are an allowed use.

6 Q So it's clear that we can have disposal
7 wells.

8 A Yes.

9 Q Now, another question that came up
10 related -- I think this came from Commissioner
11 Inouye -- was whether there was some kind of a
12 notification requirement either in connection with the
13 disposal well or with the potable well?

14 A They're actually one in the same. When
15 you -- and this is a very recent addition to the
16 Department of Health procedures because we have only
17 recently started to put drinking water wells on the
18 makai side of the UIC line.

19 But as a part of the process of getting the
20 drinking water wells certified for drinking water use
21 there is a formal notification process that the owner
22 will need to go through. You have to alert all
23 property owners within a quarter mile, 1320 feet of
24 the drinking water well.

25 Once the drinking water well goes in those

1 adjacent property owners inside that 1,320 foot radius
2 would not be allowed to put disposal wells in.

3 Whereas today they could put a disposal well in. But
4 that's a process.

5 We have to send certified mail to the, in
6 this case, just two landowners and also I think
7 publish in the newspaper and go through a process so
8 that the adjacent landowners have a chance to comment
9 on how that does or doesn't impact what they want to
10 do with their property.

11 Q Does that mean -- we have disposal wells.
12 Does that mean we're going to have to get rid of our
13 disposal wells?

14 A No. The disposal wells will be as near as
15 we might consider putting a potable on the Project
16 would be 1800 feet away from our own disposal wells.
17 So our disposal -- and likely be quite a bit more than
18 1800 feet away. That 1320-foot arc would not include
19 our onsite disposal.

20 Q Would anybody else, if there are nearby
21 disposal wells, do they need to get rid of them
22 because we want to put in a potable well?

23 A Well, there aren't disposal wells there.
24 But the reality is that they would be grandfathered in
25 if they exist inside that 1320-foot arc.

1 Q So everybody's notified both by mail and
2 newspaper publication.

3 A That's my understanding, yes.

4 Q Another question came up yesterday having
5 to do with PUC regulations. I know PUC regulation is
6 primarily a legal issue, but again you've got
7 considerable experience. I know you've worked on
8 public water companies. As far as -- well, let me
9 back up. What is your understanding of the ownership
10 of this water system?

11 A My understanding is that the water system
12 will be owned, operated and maintained by the owners
13 association.

14 Q So it will be developed first by?

15 A The developer and then turned over to the
16 association.

17 Q Thank you. So with that being the system
18 is completely owned by the members of this
19 association, meaning the lot owners, in your
20 professional experience would that require PUC
21 regulation?

22 A No. As long as the association is only
23 delivering water to members of its association there
24 won't be a PUC regulation. If they elected to try to
25 sell water to a neighbor, that would probably entail

1 the PUC process. But as currently envisioned an
2 owners association system serving water only to owners
3 within the Project.

4 Q Thank you very much. Now, that's good
5 because I mean it makes things perhaps more simple.
6 But sometimes regulation is a good thing because it
7 means a regulatory body has got oversight in making
8 sure that the water system's got adequate funding, and
9 that the water system has adequate permitting.

10 So if we don't have the PUC oversight on
11 this water system, is there another regulatory body
12 that's looking to make sure (A) That there's adequate
13 money for it? And (B) That the system is going to run
14 right?

15 A Yeah. When you serve more than 15 service
16 connections, which this system will, or more than 25
17 people, which this system will, it will come under the
18 regulatory authority of the Safe Drinking Water Branch
19 of the Department of Health. They'll have basically
20 three parallel approval processes.

21 One is to certify the wells for drinking
22 water use through a separate engineering report.
23 Another is to file and get approved what's called a
24 Capacity Report for which the entity that's gonna own
25 and operate the system has to be shown to have the

1 appropriate management, technical and financial
2 capability to run the system.

3 And then the third thing is that the
4 construction plans will need to be approved by the
5 same Safe Drinking Water Branch.

6 Q Thank you very much. Sticking with the
7 idea of costs a little bit, we've touched on it
8 briefly on that question, there have been concerns
9 expressed in this docket, and I think in other dockets
10 too, private water system: Is the water going to be
11 terribly expensive? Again, we don't have the PUC
12 oversight. What is your estimation of the water cost?

13 A I don't have an actual dollar estimate but
14 I can explain to you why in this situation it's not
15 particularly onerous. The first thing is that at
16 least 70 percent, probably more than 70 percent of the
17 water use on the Project will be simply pumped out of
18 the ground 120-foot lift and delivered to customers.

19 Operation of the non-potable component of
20 the system will be, in fact, substantially less
21 expensive than virtually every other water system on
22 this island, certainly including the Maui Department
23 of Water Supply system. So at least 70 percent of the
24 water is going to be available at a price which is a
25 bargain.

1 On the potable side it does have to go
2 through an R/O unit. But the realities are that the
3 water in this location -- Kahului Aquifer is kind of a
4 unique little groundwater body that's undervalued by
5 people. There's a pre-existing well on the Project
6 called -- I call it Elmer's well, was put in in 1944
7 by the military.

8 And we video logged it and ran a pump test.
9 We also did a complete sweep of drinking water
10 constituent analyses. The reality is the water
11 without treatment meets all drinking water primary
12 contaminant levels.

13 Here in Hawai'i the chlorides are about
14 240. EPA's suggested limit, not a requirement, is
15 250. Here in Hawai'i 240 is brackish to our taste.
16 So we're not going to be serving people 240 milligrams
17 per liter saying, "Drink it. It's good for you."

18 But the cost of desal is in direct
19 proportion to how much salt you have to take out of
20 the water. So if I'm taking a saline source, for
21 example, I've gotta push it through an R/O system that
22 might have 900 to 950 PSI requirement. That's
23 equivalent to pumping water more than 2,000 feet out
24 of a well is pretty expensive.

25 When we talk about a feedwater source with

1 as low a salinity as this will have, we're talking
2 about maybe only needing 150 or 200 PSI. So the
3 energy cost of both pumping it out of the ground and
4 running it through the R/O is almost equivalent to: I
5 have a 600 or 700-foot deep well and that's my source
6 without treatment. The electrical costs are about the
7 same.

8 So that if the owner in selling the lots or
9 doing whatever he's doing, has recovered the cost of
10 capital for the water system, and the owners
11 association is just having to operate and maintain and
12 replace, and only 30 or less percent of the water is
13 doing this process, the realities are it's gonna be an
14 affordable source of both potable and non-potable
15 water. But I don't have a dollar number.

16 Q That's helpful to have a good comparison
17 like that. Tom, going back to the disposal wells down
18 at the end of the property. You indicated that that's
19 where we're going to put the R/O discharge.

20 A Yes.

21 Q Will anything else be put into that
22 disposal well?

23 A No.

24 Q It's strictly just for the R/O discharge.

25 A Right.

1 Q And the nature of that is what you were
2 just describing?

3 A Yeah. We come out of the ground, the
4 salinity in parts per thousand, if you'll bear with
5 me, is .7 or .8 whatever it is. The concentrate
6 that's going into the ground has a salinity of 2 PPT.
7 Seawater is 35. So what's going back in the ground is
8 not a brine. It's not somethin' real salty. It's
9 actually a brackish water that in some situations you
10 would reuse for irrigation if you had salt-tolerant
11 plants. We're not going to do that here. So that the
12 disposal wells are designed not to deliver the water
13 into the lens. But we go into what's called the
14 transition zone below the lense and we deliver that 2
15 PPT concentrate from the R/O into the zone of
16 groundwater where the salinity is 2 or more PPT. So
17 it just mixes into the transition zone. It's not
18 going into the basal lens above.

19 Q Thank you, Tom. About how deep -- or how
20 deep are the disposal wells?

21 A They will go about 150 feet into
22 groundwater. And the lower 40 to 45 feet would be the
23 zone where the concentrate actually moves into the
24 receiving ground.

25 Q My last series of questions are going off

1 the last page of your testimony. That had to do with
2 the Office of State Planning's Position Statement that
3 they filed on July 18.

4 There was a question or an issue raised by
5 OP regarding whether there could be any impacts on
6 Ma'alaea Bay and other downstream properties. I know
7 we're going to have Steve Dollar discuss that. But
8 could you address that as well?

9 A Okay. I guess they had a comment about
10 groundwater where it discharges along the Ma'alaea Bay
11 shoreline which wasn't cited as to the source so I
12 will just confess I'm the source.

13 We have wells downgradient of the Project
14 site in the Kealia Wildlife Refuge. There are wells
15 that were put at my direction and tested by me. We
16 kinda have a unique situation down there. It covers,
17 maybe, the southern two-thirds of Ma'alaea Bay. We've
18 got a thick mud layer 40 to 50 feet thick that acts as
19 a caprock.

20 So when we drilled the wells in the Kealia
21 Wildlife Refuge, we go down, pass through the mud, no
22 yield. We're just going through mud. We get into the
23 unweathered volcanics below and the water plugs up the
24 hole above the level of the mud, demonstrating to you
25 that the mud is a cap keeping the groundwater below

1 under pressure.

2 The second thing we've done to become the
3 source for that statement, "it's not going to be a
4 problem in Ma'alaea Bay" is that Steve Dollar and
5 Marlin Atkins and I did a study for looking at what's
6 happening within the Ma'alaea Bay shoreline.

7 We tracked from the south end to the north
8 end walking, taking samples, taking measurements early
9 in the morning at low tide where you *can* catch
10 groundwater moving from land into the marine
11 environment.

12 And until you get to about two-thirds of
13 the way up toward the harbor you can't find any
14 groundwater at all in the nearshore environment. That
15 mud layer, that capping layer forces the groundwater
16 to go further offshore before it can get up into the
17 marine environment.

18 Once you get up basically by the condos
19 near the harbor, that mud caprock cover disappears.
20 And you can pick up groundwater being discharged into
21 the marine environment right at the shoreline.

22 MS. BENCK: Thank you, Tom. I have no
23 further questions for this witness.

24 CHAIRMAN HELLER: Mr. Giroux?

25 MR. GIROUX: We have no questions.

1 CHAIRMAN HELLER: Mr. Yee?

2 CROSS-EXAMINATION

3 BY MR. YEE:

4 Q Thank you for your testimony. I just have,
5 hopefully, a few questions. The salinity level that
6 you're going to -- of the brackish water to be pumping
7 up, what is that? What is the salinity level of the
8 brackish water you'll be pumping?

9 A It's probably around .7 or .8, something
10 like that as parts per thousand.

11 Q Parts per thousand.

12 A The chlorides are probably gonna be around
13 240.

14 Q And after treatment?

15 A We'll shoot to probably have the drinking
16 water, the product water maybe around 80. That's a
17 selectable thing. It's not necessarily established at
18 this point in time. But it'll be something that makes
19 it a good drinking water source with some taste.

20 Q Then with respect to impacts to nearby
21 properties, I think you went over the individual
22 wastewater system, the impacts to the ability to
23 construct individual wastewater systems.

24 I wanted to go back over the impacts from
25 the construction of the wells. I take it the

1 injection well on the south side of the property
2 would, after construction, means that anyone else
3 within -- is it 1,325 feet?

4 A No. There's no setback from the disposal
5 wells.

6 Q That was my question.

7 A Anything can happen around them. They're a
8 legal use in this area makai of the UIC line. Other
9 than the fact that we're putting concentrate in the
10 transition zone, otherwise have no impact on adjacent
11 landowners.

12 Q If adjacent landowners wanted to dig a
13 potable water source, what impacts would this property
14 have on them?

15 A If -- let's say they wanted to do that
16 within, near to that. What the -- you are not
17 prevented from putting a drinking water well within
18 1320 feet of that.

19 What will happen is that once that's done
20 that existing disposal -- well, first off that owner
21 is going to have to prove to the Department of Health
22 that the well, the pre-existing disposal well doesn't
23 impact them. That's step 1.

24 But the pre-existing disposal well gets
25 grandfathered in. And the only caveat is that

1 whatever is the then ongoing or certified disposal
2 rate can't be increased.

3 Q And that potable water well would have to
4 be constructed more than a thousand feet away from any
5 existing individual wastewater system leach field?

6 A No, that's not -- the same thing, it's
7 strangely but it's kind of a one-way thing. I can put
8 a drinking water well 50 feet from a pre-existing
9 individual wastewater disposal system. Once I put
10 that in all those that are within a thousand foot
11 radius are grandfathered. No new ones can be
12 constructed.

13 Q I noticed in your statement you said that
14 the injection well would have no aquifer-wide impacts.
15 Would there be any local impacts?

16 A No, not really.

17 MR. YEE: Okay. Thank you. Nothing
18 further.

19 CHAIRMAN HELLER: Commissioners, any
20 questions? Okay. Go ahead, Commissioner Inouye.

21 COMMISSIONER INOUE: Thank you, Chair. I
22 didn't quite understand the answer to that last
23 question. So if an adjacent landowner wanted to
24 build an individual waste system within a thousand
25 feet of -- I know we're talking about the discharge

1 wells -- but within a thousand feet of the system the
2 pump, would they be able to?

3 THE WITNESS: The only way they would be
4 able to be within that thousand foot radius is if they
5 got a variance from the Department of Health.
6 Certainly as a part of that variance, if it were
7 granted, would be to have one of their approved
8 advanced septic systems which do a far better job of
9 cleaning up the wastewater than a conventional septic
10 system would.

11 COMMISSIONER INOUE: Okay. So that's
12 different from the, whether it's 1300 or a thousand
13 feet?

14 THE WITNESS: 1320 is associated with
15 disposal wells. A thousand foot with the individual
16 wastewater systems.

17 COMMISSIONER INOUE: I think you testified
18 that the notification -- there is a notification
19 requirement. What happens to comments that might come
20 out?

21 THE WITNESS: They get reviewed by the
22 Department of Health. If it's considered to be sort
23 of a fatal whatever, they'll turn to the Applicant and
24 say, "Work it out."

25 COMMISSIONER INOUE: Okay. Thank you.

1 CHAIRMAN HELLER: Commissioner McDonald.

2 CHAIRPERSON McDONALD: Thank you,
3 Mr. Nance. I'm not sure if you know the answer to
4 this question. But you mentioned total potable use of
5 120,000 gallons per day. That's based on the
6 Department of Water Supply standards. You also
7 mentioned that you feel that's a conservative number.

8 THE WITNESS: Yes.

9 COMMISSIONER McDONALD: Any idea what you
10 would estimate the wastewater?

11 THE WITNESS: I have it estimated here
12 around a hundred thousand. But that's based on a
13 hundred twenty thousand being the drinking water
14 supply and virtually all of that being within building
15 uses. So just used a hundred thousand being the
16 wastewater.

17 But, for example, if the actual use is one
18 quarter of that, then the wastewater would be
19 similarly less. But right now using Maui Department
20 of Water Supply standards I have a number of about a
21 hundred thousand.

22 COMMISSIONER McDONALD: Hundred thousand.
23 You may want to refresh my memory, but Department of
24 Health individual wastewater systems I thought would
25 allow only up to a thousand gallons per day of

1 discharge per system.

2 THE WITNESS: That's a little outside my
3 expertise. But I think that related to cesspools.
4 That if they were more than a thousand they had to
5 convert to septic systems. But that's not my field
6 I'm sorry.

7 COMMISSIONER McDONALD: I was just trying
8 to get a feel as far as -- because we may be, well,
9 the Project may be tight on space as far as locating
10 all the necessary infrastructure that's required to
11 service the development. The amount of individual IWS
12 systems that's required might be a little bit
13 challenging.

14 THE WITNESS: It will be difficult for
15 sure.

16 COMMISSIONER McDONALD: Thank you,
17 Mr. Nance.

18 CHAIRMAN HELLER: Commissioners, anything
19 else? Let me continue on the topic of wastewater
20 systems. Is there any restriction on how close
21 together the individual lots, wastewater systems and
22 leach fields can be?

23 THE WITNESS: Not to my knowledge.

24 CHAIRMAN HELLER: Now, going back to the
25 location of the potable well and the thousand foot

1 radius, the effect that can potentially have on uses
2 by adjacent landowners. Is it your understanding that
3 it's just a notification process to the adjacent
4 landowners? Or is there a consent actually required?

5 THE WITNESS: To my knowledge the
6 notification on wastewater systems doesn't actually
7 happen. The notification process is tied to the
8 disposal wells and tied to the UIC regulations because
9 these landowners being makai of the UIC line have the
10 ability to put in disposal wells.

11 By putting in our drinking water wells
12 we're taking away that ability within the 1,320-foot
13 radius. That has a formal notification process. I'm
14 not aware that they're -- it's certainly never come up
15 in however many wells that I've taken through the
16 certification process of notifying people regarding
17 the wastewater systems.

18 CHAIRMAN HELLER: Okay. Actually I shifted
19 topics. I was asking about the well for the potable
20 water supply.

21 THE WITNESS: Right.

22 CHAIRMAN HELLER: And as I understand put
23 the thousand foot radius around, that you can't put in
24 a leach field or a septic system within that thousand
25 foot radius, correct?

1 THE WITNESS: That's correct.

2 CHAIRMAN HELLER: So that you would affect
3 a neighboring landowner's ability to do certain things
4 on certain parts of their land.

5 THE WITNESS: That's correct.

6 CHAIRMAN HELLER: And my question is: Is
7 there any process required to get their consent as
8 opposed to just telling them what you want to do?

9 THE WITNESS: You don't tell them or
10 notify. With regard to that part there isn't that
11 notification process. The only notification process
12 is not associated with individual wastewater systems.
13 It's associated with disposal wells.

14 CHAIRMAN HELLER: Okay. So as far as any
15 notification about where the potable well's going to
16 go, if that's being done, it's just a voluntary
17 notification?

18 THE WITNESS: If it's being done at all,
19 yes.

20 CHAIRMAN HELLER: Okay. And so
21 potentiality a neighboring landowner could be
22 restricted in terms of where *they* can put a septic
23 system on *their* property without even being told?

24 THE WITNESS: That's true.

25 CHAIRMAN HELLER: Okay. Shifting gears a

1 little bit, but still on the topic of wastewater
2 systems. Since this is proposed as an industrial
3 Project, and there may be manufacturing type uses and
4 other industrial uses, what about the potential
5 wastewater issues of any kind of chemicals or solvents
6 or anything like that? Is there anything specific to
7 address those?

8 THE WITNESS: Well, my understanding is
9 that there will be built into the CC&R's, not
10 specifically familiar with that, but the issue has
11 come up and will be dealt with in the CC&R's to put
12 certain requirements on people if they're going to
13 have that kind of wastewater generation and disposal.

14 CHAIRMAN HELLER: Once those individual
15 systems are in place is there any kind of program or
16 system to make sure that they're properly maintained?

17 THE WITNESS: I'm sorry. That's not really
18 my field. I don't know the answer to that question.

19 CHAIRMAN HELLER: Okay. Commissioners,
20 anything else? Thank you.

21 THE WITNESS: Okay.

22 CHAIRMAN HELLER: Ms. Benck, your next
23 witness.

24 MS. BENCK: Thank you. Our next witness
25 and very likely our last witness is Mr. Steve Dollar

1 or Dr. Steve Dollar. He's an expert in coral reef
2 ecology and costal oceanography. His resumé, it was
3 submitted as Petitioner's 46. Like to have him
4 qualified as an expert, please.

5 CHAIRMAN HELLER: Any objections?

6 MR. GIROUX: No objection.

7 MR. YEE: No objection.

8 CHAIRMAN HELLER: Commissioners, any
9 questions? He will be received as an expert.

10 STEVE DOLLAR

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

13 THE WITNESS: I do.

14 CHAIRMAN HELLER: Go ahead.

15 DIRECT EXAMINATION

16 BY MS. BENCK:

17 Q Good morning, Steve.

18 A Good morning.

19 Q Thank you for being here. Steve, did you
20 prepare a report for the Environmental Assessment?

21 A No. I did not prepare a specific report
22 for this Project as part of the Environmental
23 Assessment. But as Tom alluded to, back in 2010 and
24 '11 I was the principal investigator on a project,
25 award from the County of Maui to do a very in-depth

1 study of the chemistry and biology aimed at looking at
2 what the impacts were to coral reefs in Ma'alaea Bay.

3 And as part of that study we did extensive
4 sampling in the areas downslope from the Project site.
5 So I relied both on Mr. Nance's testimony and his
6 report and on the results from this study to provide
7 my opinions on the Project today.

8 Q Mr. Dollar, how did you get involved with
9 the Project? At what point did you get involved with
10 the Project?

11 A I was asked by you a month or so ago to
12 provide testimony.

13 Q And would you please tell the Commission
14 why I asked and why Petitioner asked you to get
15 involved?

16 A Yes. Apparently there were some questions
17 and letters from the Department of Health and I think
18 the Planning Commission?

19 Q The Department of Health and the Office of
20 Planning.

21 A The Office of Planning regarding the
22 potential effects of the Project on some of the marine
23 resources downslope.

24 Q Did you review the Office of Planning's
25 Statement of Position and those Department of Health

1 letters?

2 A Yes, I did. I read those letters,
3 documents.

4 Q So with that background would you please
5 just tell the Commission your analysis of those
6 comments and summarize your testimony please.

7 A Yes. The basis of the comments were: What
8 is the potential for effects to the nearshore ocean,
9 marine biology and water quality?

10 As I said based on the information provided
11 by Mr. Nance and the changes in groundwater
12 composition they're very small compared to what the, I
13 don't want to say 'natural' but what the present state
14 is. The reason I say 'not natural' is because there's
15 a lot of effects to the groundwater in this area from
16 other human activities primarily sugarcane. On top of
17 that the Project will result in very small changes.

18 The second point that's relevant is what
19 Mr. Nance described about the mud caprock fronting the
20 Project on the southern half of Ma'alaea Bay, which
21 results in the groundwater flowing under the site not
22 reaching the shoreline.

23 It discharges far offshore, deep water and
24 it's very diffuse. So there really isn't any effect
25 to the nearshore marine biology. And that pretty much

1 sums it up.

2 Q In your professional opinion, then, will
3 the development of this Project in the way that you
4 understand this heavy industrial Project have any
5 effect on the nearshore environment?

6 A No. Based on what I've just said and on
7 our previous work through the bay, Ma'alaea Bay, this
8 Project should have no detectable effect whatsoever on
9 the nearshore marine biology or water quality.

10 Q Mr. Dollar, my last question will be:
11 Approximately how close is this Project to the ocean?

12 A Sorry?

13 Q How close is this Project to the ocean? Is
14 it on the shoreline?

15 A Oh, it's not on the shoreline. It's
16 several miles inshore. I'm not sure the exact
17 distance but it's not on the shore.

18 Q It's a ways away.

19 A Yes.

20 Q Thank you.

21 MS. BENCK: That's my last question.

22 CHAIRMAN HELLER: Mr. Giroux?

23 MR. GIROUX: We have no questions.

24 CHAIRMAN HELLER: Mr. Yee.

25 CROSS-EXAMINATION

1 BY MR. YEE:

2 Q Were you able to quantify -- you said
3 there'd be small changes. Would you be able to
4 quantify the small changes?

5 A Mr. Nance did. The small changes were the
6 percentage increases in salinity and nutrients that
7 are recorded in his report.

8 Q Okay. So based upon the reverse osmosis
9 system those were the changes you're referring to.

10 A I think...yes.

11 Q Okay. Did you do an analysis of other
12 types of pollutants? It's a heavy industrial project.
13 So if aside from the reverse osmosis system there was
14 other pollutants introduced into the groundwater
15 system, did you analyze whether or not any of that
16 would have an impact on the nearshore waters and/or
17 Kealia Wildlife Refuge?

18 A No, I didn't.

19 Q So the constituents you were looking at
20 would be the constituents that would be reinjected
21 back into the injection well for the reverse osmosis
22 system?

23 A Well, let me clarify that again, is that
24 the percentage change as reported in Mr. Nance's
25 report are small. So quantitatively and qualitatively

1 they're gonna lead to essentially indistinguishable
2 changes to the discharge at the ocean.

3 And that would also apply to pretty much
4 anything else that might be injected or reach
5 groundwater for the reason I said about the mud plug.
6 Nothing gets to the shoreline. It's all discharged
7 far offshore in deep water, very diffuse.

8 So by the time it would *potentially* affect
9 anything near the shoreline it would be diluted to
10 background levels and be indistinguishable.

11 Q So regardless of what the constituents are,
12 so regardless of the type of pollutants that are in,
13 assuming -- maybe I should call salt a pollutant --
14 but regardless of the constituent, whether it's salt
15 or some sort of chemical from the heavy industrial
16 use, the percentage of change would be similar?

17 A We don't know that. As Mr. Nance testified
18 there's no indicate-- there will be requirements to
19 prevent anything from getting, any chemicals as you're
20 referring to, to get into the groundwater. But if
21 they *did* they would *not* be discharged at the
22 shoreline. That's my point.

23 Q Well, I mean in other cases I've been told
24 there's always a linkage. That there are different
25 levels of barriers and different degrees in which

1 water is prevented from mixing. But there's always
2 some degree of mixing, even through solid rock. Is
3 that a misunderstanding on my part?

4 A I would say it is, yes.

5 Q The mud caprock prevents any water from one
6 side getting to the other side.

7 A Based on the extensive sampling we did for
8 the Maui County project we saw no indication of any
9 groundwater reaching the shoreline downslope from the
10 site offshore of the ponds based on salinity, which is
11 a very, it's a good measure. You can measure to very,
12 very low levels.

13 So when you see oceanic salinity right up
14 to the shoreline you're pretty assured there's no
15 mixing of groundwater.

16 Q So then the constituent, the type of
17 constituent in the water is irrelevant to whether or
18 not there is or isn't mixing because of the mud
19 caprock.

20 A It's a physical process. It's dilution.
21 So....

22 MR. YEE: Thank you. Nothing further.

23 CHAIRMAN HELLER: Commissioners, any
24 questions? Thank you. Oh, redirect?

25 MS. BENCK: May I have one question on

1 redirect?

2 CHAIRMAN HELLER: Yes, go ahead.

3 REDIRECT EXAMINATION

4 BY MS. BENCK:

5 Q Mr. Dollar, do you recall the day that we
6 got together to go over testimony and to prepare for
7 this hearing?

8 A Yes.

9 Q And you and Mr. Jencks and I were together.
10 And that day actually was the day we received the
11 Office of Planning's testimony. And there were
12 certain proposed conditions in that testimony. Do you
13 recall that?

14 A Right.

15 Q And I presented you with -- it's their
16 Condition 4, the pollution prevention Best Management
17 Practices conditions. And overall I asked you to
18 rereview that condition and for your opinion of that
19 condition.

20 Would you let the Commission know if you
21 felt that that proposed condition seemed fair and
22 adequate to address the industrial uses of this
23 property?

24 A As I recall we reviewed it and it did seem
25 fair and adequate. I think the only thing I suggested

1 in addition to it is to instill some sort of
2 monitoring to make sure things are happening as we
3 predicted they will be, which is typically part of the
4 permitting process.

5 MS. BENCK: Thank you, Mr. Dollar. That's
6 my last question.

7 MR. YEE: Mr. Chairman, could I follow up
8 on that last question?

9 CHAIRMAN HELLER: Go ahead.

10 RE CROSS EXAMINATION

11 BY MR. YEE:

12 Q What type of monitoring would you suggest?

13 A Well, right now as an example I'm doing a
14 monitoring program for two projects here on Maui
15 Makena and Honua'ula which were required as part of
16 the zoning changes.

17 We have a set of stations off of these
18 project sites where we collect water quarterly four
19 times a year, and look at the, specifically at the,
20 there's, like, 12 constituents that are listed by the
21 State Department of Health Water Quality Standards.
22 We look at those. And over the course of time I look
23 at they're changing, if they're changing.

24 We can detect what the input from land is
25 and how it's affecting the nearshore reefs, the biota.

1 So that would be an example of the kind of
2 monitoring.

3 Now, for this Project, because it is a
4 heavy industrial Project, which these other ones
5 aren't, we might add some constituents, oil and
6 grease, things like that that would be more specific
7 to heavy industry than to resorts.

8 But that's a matter of negotiation between
9 whatever agency stipulates the monitoring and those of
10 us that are going to do it.

11 MR. YEE: Okay. Thank you.

12 CHAIRMAN HELLER: Commissioners? Just to
13 follow up on that point. Is it your understanding
14 that monitoring program you're describing was imposed
15 as a condition of county zoning?

16 THE WITNESS: County zoning? I think this
17 is. Yes. Both of those projects had the same
18 conditions. So because they're adjacent I run 'em
19 together. But they're both -- both projects have the
20 same zoning condition word-for-word.

21 CHAIRMAN HELLER: Thank you. Ms. Benck,
22 anything further?

23 MS. BENCK: No, thank you, Chairman. That
24 concludes our case.

25 CHAIRMAN HELLER: Mr. Giroux, do you have

1 any further witnesses to present?

2 MR. GIROUX: I do not.

3 CHAIRMAN HELLER: Mr. Yee.

4 MR. YEE: We have one witness, Mr. Rodney
5 Funakoshi.

6 RODNEY FUNAKOSHI

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

9 THE WITNESS: Yes.

10 CHAIRMAN HELLER: Go ahead, please.

11 MR. YEE: We've submitted Mr. Funakoshi's
12 resumé. We'd like to submit him as an expert in the
13 field of land use and environmental planning.

14 CHAIRMAN HELLER: Any objections?

15 MS. BENCK: No objection.

16 MR. GIROUX: No objection.

17 CHAIRMAN HELLER: Commissioners, any
18 questions? He will be accepted as an expert.

19 DIRECT EXAMINATION

20 BY MR. YEE:

21 Q Mr. Funakoshi, what is your position within
22 the Office of Planning?

23 A I'm planning program administer with the
24 land use division.

25 Q Was OP Exhibit 2 your written testimony

1 prepared by you or at your direction?

2 A Yes.

3 Q Would you please summarize the Office of
4 Planning's position in this case.

5 A Okay. The Office of Planning recommends
6 approval of the Petition to reclassify 86 acres from
7 the Agricultural District to the Urban District
8 subject to 2 conditions.

9 Essentially what the Petitioner plans are
10 improved lots providing the basic infrastructure to
11 the land including grading, roads and utility service
12 to lots. The proposed uses will be dependent upon who
13 actually purchases the lot.

14 These are represented to be prior
15 industrial uses along the lines of manufacturing,
16 warehousing and baseyard uses. Petitioner has
17 explicitly stated that the Petition Area will not be
18 used as a landfill which is permitted within the
19 County MC, III district unless the Petitioner seeks
20 approval of a Land Use Commission such as through a
21 Motion to Amend. So we appreciate and support this.

22 We have also noticed that the proposed
23 county zoning does not permit residential, retail and
24 office uses except for accessory uses to the
25 industrial uses. We support such exclusions as well.

1 Relative to issues of concern to the state there's no
2 municipal water service to the Petition Area.

3 Petitioner proposes a private water system
4 including potable wells 23 non-potable and drinking
5 water purposes. The desal system is proposed.

6 The Kahului Aquifer under the circumstances
7 is not within a water management area subject to
8 regulation by the State Commission on Water Resource
9 Management.

10 The Water Commission does, however,
11 encourage water efficiency, conservation and reuse
12 practices, low-impact development practices and also
13 that alternate water sources should be used if
14 possible.

15 Flora and fauna. Surveys have been
16 conducted and there are no major species of concern.
17 Office of Planning is recommending conditions to
18 ensure the down-shielding of exterior lighting. And
19 also in response to comments from the U.S. Fish and
20 Wildlife Service that barbed wire not be used on the
21 Petition Area.

22 An Archaeological Inventory Survey and
23 Cultural Impact Assessment was conducted that
24 concluded with recommendations that no further work or
25 mitigation measures are necessary on site. Only in

1 the event than an alternate access road alignment is
2 pursued, archaeological monitoring then is recommended
3 for that alternate roadway alignment.

4 There are no agricultural concerns. The
5 Land Study Bureau Productivity Rating is D. And the
6 soils are unclassified in the ALISH system.

7 A sustainability plan was not provided in
8 the Petition. However, these are simply improved
9 lots. OP is recommending conditions related to energy
10 and water conservation. The State Department of
11 Transportation has commented that the Traffic Impact
12 Study needs to be revised and all recommended
13 improvements required to mitigate traffic impacts
14 implemented in particular along the Mokulele Highway
15 including turn lanes and dedication of roadway
16 rights-of-way. Also a fair-share contribution is
17 needed.

18 Relative to water quality: Given the
19 industrial character of the Project there is a concern
20 for preventing potential contaminants from
21 infiltrating into soils and groundwater sources as
22 well as being discharged to surface waters.

23 The Department of Health has provided
24 various conditions related to injection wells,
25 drainage catch basins and pollution prevention plans

1 that would be employed during construction and
2 operation of the industrial subdivision use.

3 So we are recommending that such conditions
4 be imposed as part of this approval.

5 The State Civil Defense has recommended
6 that one Civil Defense siren be installed by the
7 Petitioner. Condition is provided for this as well.
8 The wastewater concern has been discussed relative to
9 the 1,000-foot separation distance from a drinking
10 well source. So Petitioner has indicated intention to
11 comply with the Department of Health requirements.
12 This may require redesign of subdivision layout as
13 necessary.

14 We do support the Project for the
15 employment opportunities that will be provided on the
16 order of 33 direct jobs during infrastructure
17 development and 70 jobs during individual lot
18 construction.

19 All in all the Petition meets the standards
20 for determining the State Urban District boundaries.
21 The Petition Area has historically been in various
22 urban uses with the Pu'unene Naval Air Station and
23 Plantation Camp.

24 The Petition is generally consistent with
25 the Hawai'i State Plan, Coastal Zone Management

1 Program and contributes favorably to the creation of
2 jobs and business opportunities.

3 The Petition Area does not meet the
4 criteria for Important Agricultural Lands.

5 Relative to the county planning, the
6 Project is within the Urban Growth Boundary of the
7 approved Maui Island Plan and is consistent with the
8 County's plans for the Kihei-Makena area.

9 Then, finally, I do wish to summarize some
10 of the proposed conditions. These are on OP Exhibit 2
11 beginning on page 11. For highway and road
12 improvements these are basically reflective of the DOT
13 concerns. The traffic study shall be revised and
14 resubmitted for review and acceptance by DOT prior to
15 tentative subdivision approval by the County of Maui.

16 The Petitioner would prefer that this be
17 deferred to final subdivision approval, but we believe
18 that there is adequate time given the review
19 timeframes before actual submittal. So if you recall
20 Petitioner has testified in terms of their anticipated
21 submittal time for the subdivision application to
22 occur following the approval by the Planning
23 Commission. And the County has testified that this is
24 not expected until the second quarter of 2014.

25 And so following that Application there's

1 also a 45-day timeline for the County to review and
2 accept the subdivision application and to grant
3 tentative subdivision approval.

4 So we would estimate that there seems to be
5 at least 9 months from now to then to get a revised
6 and accepted Traffic Impact Study which would be more
7 than sufficient given only minor revisions to the
8 traffic study are needed as well as only fairly minor
9 improvements are required for the roadway system.

10 All in all we believe that deferral to
11 final subdivision is too far down the line and not
12 necessary in this case.

13 Petition: We also have revised OP's
14 recommended condition for completing the
15 transportation improvements from the final subdivision
16 approval to Certificate of Occupancy prior to the
17 first building in the subdivision being issued by the
18 County of Maui.

19 As previously noted we have energy and
20 water conservation conditions. In cooperation with
21 the Department of Health we have a number of
22 conditions relative to pollution, Best Management
23 Practices.

24 So during both construction and operation
25 pollution prevention plans, and Best Management

1 Practices will need to be implemented by Petitioner
2 and lot owners.

3 During the operational phase of the Project
4 all pollutants that may be associated with specific
5 industrial uses, to prevent specific industrial uses
6 from being released into the environment. And so
7 measures such as oil/water separators, detention
8 ponds, lined containment pits, and stormwater
9 filtration units should be used.

10 There's a number of conditions too relating
11 to the cleaning, repair and maintenance of equipment
12 being done on concrete floors; that drainage be passed
13 through separator sumps before being discharged. That
14 containers used for storage of oil and other
15 industrial liquids be kept on concrete surfaces and
16 bermed as needed.

17 That employees shall be informed to
18 immediately collect and contain any spills from
19 industrial sources and be taught on how to handle such
20 spills.

21 For parking areas essentially that these
22 need to be kept clean.

23 For injection wells these need to comply
24 with Department of Health rules as well as demonstrate
25 that the injection shall not adversely affect

1 downgradient streams near Kealia Pond National
2 Wildlife Refuge and coastal waters.

3 The drainage injection wells or
4 sub-surface structures should also be designed with a
5 debris catch basin. Storm drainage features should
6 include low-impact development measures for stormwater
7 capture and release. And these should be included in
8 the CC&R's for the Project.

9 Beyond this we have some fairly standard
10 conditions relative to civil defense provision of
11 siren, the Right to Farm Act, flora and fauna and the
12 Hawaiian Hoary Bat, and provisions to down-shield
13 exterior lighting and prohibit the construction of
14 barbed wire fences.

15 The archaeological condition also includes
16 that monitoring should be conducted if an alternate
17 access road alignment is pursued. I believe
18 Petitioner has also represented that they're in
19 agreement with these conditions, perhaps with the
20 exception of the traffic impact condition, the
21 acceptance of the TIAR. So with that that concludes
22 my testimony.

23 MR. YEE: Thank you. I have nothing
24 further.

25 CHAIRMAN HELLER: Ms. Benck?

1 MS. BENCK: Thank you.

2 CROSS-EXAMINATION

3 BY MS. BENCK:

4 Q Good morning, Mr. Funakoshi.

5 A Good morning.

6 Q Thank you for your testimony. I noticed
7 something very interesting in your testimony. I'm
8 going to bring your attention to it. It's on page 10.
9 Are you familiar with that case, *Kauai Springs vs.*
10 *Planning Commission*?

11 A Not intimately. I did read a summary of
12 it.

13 Q It's a recent case from the Intermediate
14 Court of Appeals, correct?

15 A Yes.

16 Q And based on your summary and what you have
17 in our testimony it appears that the Office of
18 Planning has considered the public trust issues that
19 were raised in the Kaua'i Springs Case.

20 Would you please summarize the Office of
21 Planning's position on the public trust analysis in
22 this case?

23 A We did not do an analysis per se specific
24 to this. It's simply an acknowledgment that we did
25 consider it. And I think what we're looking at here

1 is essentially that -- just our acknowledgment that we
2 are aware of it.

3 Q If I may read it: The evaluation has been
4 integrated into your analysis and the Office's
5 recommendation in this matter?

6 A Yes. So we consider our analysis
7 consistent with this.

8 Q Thank you. It's an interesting case. So
9 I'm very excited to see you mention it in your
10 testimony. Moving on to our discussion or the
11 discussion that you just gave us about the conditions
12 of approval.

13 To your knowledge are the conditions of
14 approval that the Office of Planning is recommending
15 exactly consistent with what is in your testimony? Or
16 have there been some revisions to these conditions?

17 A I believe we have talked about some
18 non-substantive wording changes. I think those are
19 fine to the extent that we've agreed to those.

20 Q Okay. Thank you very much. So going to
21 those non-substantive wording changes I think they're
22 primarily within the Condition 4 which is the
23 Department of Health's condition.

24 A Yes.

25 Q Petitioner thought they were maybe not

1 completely non-substantive, but certainly they were
2 dealing with practicalities on who will be owning
3 these lots versus who will be operating these lots.

4 A Yes, that's fine.

5 Q What condition -- and you did mention this
6 in your testimony -- what condition is it that is your
7 understanding that there is a dispute with Petitioner
8 over?

9 A It's the first Condition 1A where we
10 propose that the traffic study be revised and
11 resubmitted to DOT for review and acceptance prior to
12 tentative subdivision approval by the County of Maui.
13 My understanding is Petitioner wants that, an extended
14 time to final subdivision approval.

15 Q Thank you. There's actually -- you're
16 correct but there's 2 pieces to OP's original
17 condition which is submit the revised TIAR for review.
18 That's piece 1. Then piece 2 is have DOT actually
19 accept the TIAR.

20 So is it your understanding that Petitioner
21 is looking -- or that Petitioner wants to defer
22 submitting the revised TIAR 'til final subdivision
23 approval?

24 A Submittal is not -- is maybe almost
25 secondary or incidental. The key here is really the

1 acceptance by DOT. Although we say "review and
2 acceptance" the key point is really the acceptance
3 point.

4 Q Is it your understanding the Petitioner is
5 eager and intends to submit the Revised TIAR for DOT
6 review within the next few months? Or is it your
7 understanding that Petitioner wants to wait until
8 final subdivision approval to do that?

9 A I thought I heard yesterday that maybe
10 within a couple weeks or something to that effect
11 could be submitted.

12 Q Yeah, thank you. So it's acceptance. It
13 seems like that's where our dispute is. What will
14 constitute DOT acceptance? And the Office of Planning
15 believes that *acceptance* should be done prior to final
16 subdivision approval?

17 A Prior. Well, we are recommending prior to
18 preliminary subdivision approval.

19 Q Mr. Funakoshi, in your experience,
20 considerable experience both with the Office and also
21 in the private sector, does the Department of
22 Transportation necessarily always provide some kind of
23 documentation to show that they have accepted a TIAR?

24 A Huh. Well, a lot of times it's sort of
25 implicit in their signoff on documents. It's not

1 necessarily a letter per se.

2 Q What sort of documents?

3 A Construction drawings, for, say, roadway
4 improvements would implicitly convey acceptance by
5 DOT.

6 Q Understood. So are construction drawings
7 signed off at the preliminary or tentative subdivision
8 stage? Or are those signed off by agencies at the
9 final subdivision stage?

10 A They could be. They could be, but DOT
11 normally takes a little longer.

12 Q It's more typical that construction plans
13 are presented and signed off immediately prior to
14 final subdivision approval?

15 A Yes. I would say, though, that, you know,
16 like in a lot of cases what DOT has been requiring is
17 an MOA, Memorandum of Agreement. So that *is* a signed
18 document that incorporates both the approved or
19 accepted traffic study along with responsibility and
20 timeframe for improvements and updates. So that is
21 more typically for big projects how those are actually
22 put in writing.

23 But in this case, as I mentioned, the
24 proposed revisions are very minor. And assuming --
25 and DOT has expressed very clearly what improvements,

1 what revisions they want to see in the traffic study.
2 And on that basis I don't see a problem with them
3 issuing a letter well within the 9-month timeframe.

4 Q Would Petitioner be violating OP's proposed
5 Condition 1 if DOT didn't issue a letter? If
6 Petitioner submits the revised TIAR and begins its
7 subdivision process, and we won't know for maybe a
8 year when construction plans are signed off on, but if
9 DOT doesn't issue a letter actually explicitly stating
10 that they have accepted the TIAR, would Petitioner be
11 in violation of OP's Condition 1A?

12 A I would say yes.

13 Q Would Petitioner be able to go forward and
14 get final subdivision approval without DOT signing off
15 on construction plans?

16 A Well, we're talking about the tentative or
17 final?

18 Q No. I'm sorry. At the final.

19 A Yes, that would be necessary before final.

20 MS. BENCK: Okay. That's my last question.
21 Thank you very much.

22 CHAIRMAN HELLER: Mr. Giroux?

23 CROSS-EXAMINATION

24 BY MR. GIROUX:

25 Q Rodney, normally I wouldn't ask any

1 questions but this is bothersome for me. The DOT is
2 asking for a condition that could possibly put the
3 developer in a Catch 22.

4 Basically you're asking them to update
5 their TIAR, but you're asking the DOT to accept that
6 before the developer has even put pencil to pen to
7 show what that subdivision is going to possibly look
8 like. I mean is that what's happening?

9 A Yes. But if you recall these are
10 improvements in a far offsite on Mokulele Highway that
11 really have nothing to do with the subdivision layout
12 itself.

13 So, you know, it's perfectly reasonable for
14 the Department to want to have a clear understanding
15 of what highway improvements are needed or triggered
16 by the development and have an understanding of that
17 at an early stage.

18 Q But isn't that satisfied by the fact that
19 they're doing on amendment to the TIAR and actually
20 submitting it? Doesn't that give the agency the time
21 and space and room to have the assurance that those
22 improvements will be done?

23 A Yes. So that's all that's being required
24 here, that an accepted TIAR. So exactly that, a clear
25 understanding with DOT and the Petitioner of what is

1 being needed and will be developed to support the
2 Project.

3 Q But the issue is how is the developer
4 assured that there will ever be an acceptance?

5 A It would need to obtain a letter from the
6 DOT basically saying that your TIAR and the
7 recommended mitigation is acceptable.

8 Q Okay. But there's no guarantee that DOT
9 will review that or even submit a letter.

10 A There's no requisite time frame. That's
11 true. So as with any other agency review, you know,
12 would require or may require some prodding.

13 Q You know, I think we went over this, what
14 the process would look like over the next couple of
15 years. The preliminary subdivision is, again, very,
16 very preliminary.

17 But throughout the process when you go
18 through the Planning Commission, which reviews its
19 recommendation, there's suggestions to the Council
20 about density, other requirements, concerns.

21 And those are added to the Project as it
22 goes along and then it gets to Council. The developer
23 is basically dealing with a moving target throughout
24 that whole process. Isn't DOT, as far as its
25 concerned, its impacts have to be protected by the

1 time of subdivision, right? Final subdivision?

2 A Yes. I would imagine that if there are
3 significant changes that warrant changes in, say,
4 highway impacts, that certainly would need to be
5 communicated and possibly worst case revision of the
6 TIAR, but I kind of don't suspect that would happen.
7 But it's certainly possible.

8 I think it's reasonable, again, reasonable
9 to have the TIAR which simply outlines what mitigation
10 is needed to support the Project layed out. So if
11 it's extending a left-turn lane, providing a
12 right-turn acceleration lane, providing additional
13 rights-of-way.

14 So long as those are clearly set out in the
15 TIAR I can't imagine that they would be changed very
16 much by anything the Planning Commission would impose.

17 But, of course, if it is something
18 significant it may warrant revisiting the traffic
19 study.

20 Q I guess the one question too much is then
21 why cannot that be worked out during the preliminary
22 subdivision stage where the developer will be working
23 all of those details out with all of the other
24 agencies including the County?

25 A Well, we're talking about the simply --

1 yeah, it's possible. I'm not saying that, you know,
2 it has to be. But it's a reasonable request, an
3 adequate timeframe to ask that the TIAR be revised and
4 accepted.

5 Q And the reality is that at any stage of the
6 process --

7 MR. YEE: I'm sorry. At this point I'm
8 going to ask that we sort of get to a question a
9 little more quickly in this. I've noticed there's a
10 very long preamble which amounts to argument. So I'd
11 ask that we get to the question more faster.

12 CHAIRMAN HELLER: Mr. Giroux, there will be
13 an opportunity for argument at a later point.

14 MR. GIROUX: Bryan's correct. I've been
15 arguing too much.

16 Q The reality is is that the TIAR can be
17 revised at any point in the process to assure safety
18 of the highways, is that correct?

19 A I'm not aware that that's automatic, that
20 they can revise, require a revision in time.

21 Q DOT will not sign off on anything that it
22 feels is unsafe, is that correct?

23 A Yes.

24 MR. GIROUX: No further questions.

25 CHAIRMAN HELLER: Mr. Yee, before we do any

1 redirect, let me ask if our reporter needs a break.

2 THE REPORTER: I'm okay.

3 CHAIRMAN HELLER: Okay. Redirect.

4 REDIRECT EXAMINATION

5 BY MR. YEE:

6 Q In this particular case -- let's backtrack.
7 In this particular case do you anticipate that *if* the
8 LUC imposes a requirement to have the acceptance of
9 the TIAR prior to tentative or preliminary subdivision
10 approval, do you anticipate that DOT will wait for
11 construction documents before signing off?

12 A Yes. Well, sign off on...?

13 Q Do you think DOT won't sign off until they
14 sign off on the construction documents?

15 A No. I think it's separable.

16 Q Why do you think it's unlikely that DOT
17 won't just wait for construction documents?

18 A Well, we have here a specific condition
19 that has a deadline for them to act. So there's no
20 reason to wait for construction drawings.

21 Q So is it your view the Department of
22 Transportation will try to meet this deadline if given
23 a reasonable opportunity to do so?

24 A If they're satisfied that the changes and
25 the mitigation addresses their concerns, then I see no

1 reason they would not accept the traffic study.

2 MR. YEE: Thank you. I have nothing
3 further.

4 CHAIRMAN HELLER: Commissioners, any
5 questions? (no response) Thank you. Commissioner
6 Inouye.

7 COMMISSIONER INOUE: Just a couple
8 questions. I'm a little bit concerned about this
9 issue about notice to adjacent landowners when a
10 potable source water system is constructed and the
11 thousand foot raise we talked about.

12 Are there any regulations or, yeah,
13 regulations from the state or county that would notify
14 landowners that their land might be, have some
15 restrictions once that water system is constructed?

16 THE WITNESS: Okay. Offhand I did not
17 revisit the regulations. And we did not specifically
18 consult DOH on this issue. But, you know, I'm advised
19 this was a similar problem on a Big Island petition,
20 the 'O'oma Project, that had similar, kinda similar
21 problem that had some restrictions because of the
22 thousand foot separation distance. It's certainly
23 something we can follow up on.

24 COMMISSIONER INOUE: So it's the
25 Department of Health that has these regulations.

1 THE WITNESS: Yes. Either they do or don't
2 have a notification consent requirement. If anything
3 I would imagine it's a notification. But I'm not sure
4 but we can certainly check that.

5 COMMISSIONER INOUYE: Okay. I think the
6 testimony has been through the Chair's questions that
7 there is no such notice requirement. I'm just a
8 little bit concerned that there isn't by somebody,
9 some government.

10 THE WITNESS: We can certainly look into
11 that and verify that. That's a -- that's a good idea.

12 COMMISSIONER INOUYE: The second line of
13 questioning actually is I believe and was trying to
14 find it. I couldn't find it. But the Petitioner has
15 indicated that they would provide a fair-share
16 contribution towards regional roadway improvements.

17 If legislation adopting regional traffic
18 impact fees prior to final subdivision approval, if
19 legislation is enacted before final, are you -- is OP
20 comfortable with that statement?

21 THE WITNESS: Ah, no. Because, you know,
22 such deadlines have not been clarified or necessarily
23 agreed to by DOT.

24 COMMISSIONER INOUYE: So I may have
25 misrepresented what Petitioner stated. So correct me

1 if I'm wrong.

2 MR. YEE: Commissioner, I think you've
3 correctly stated, I think, what might be in the
4 record. What was stated in oral testimony was that
5 Petitioner was willing to agree with the Office of
6 Planning's proposed Condition 1C which does not have
7 that caveat in it.

8 So 1C says they provide their fair-share
9 contribution but not subject to legislation. That
10 "subject to legislation" is not contained in Condition
11 1C.

12 COMMISSIONER INOUYE: Okay. Just wanted to
13 confirm that that's not Petitioner's position.

14 MS. BENCK: Yes, it is.

15 COMMISSIONER INOUYE: Very good. Thank
16 you.

17 CHAIRMAN HELLER: Anything further? Thank
18 you. Mr. Yee, anything else?

19 MR. YEE: No. At this point the Office of
20 Planning rests.

21 CHAIRMAN HELLER: Given that the parties
22 have completed their presentation of evidence before
23 the Land Use Commission I declare the evidentiary
24 portion of this proceeding to have been completed
25 subject to the receipt of any followup reports or

1 answers that may have been requested during the course
2 of the hearing.

3 In that connection I actually have a
4 request I'd like to make of the Petitioner.

5 Mr. Dollar in his testimony referred to a monitoring
6 plan that he's engaged in with respect to certain
7 other properties regarding possible groundwater
8 pollution.

9 I'm assuming that document would be a
10 public record document. I'd like to ask that the
11 Petitioner, if they can, locate a copy of it and
12 supply that to us.

13 If it turns out you can't get a copy just
14 notify us that you can't get it. But I'd make that
15 request as a follow up item.

16 MS. BENCK: Chairman, Mr. Jencks is
17 involved with those projects. Could he respond to
18 your question directly?

19 CHAIRMAN HELLER: Sure.

20 MR. JENCKS: That's not a problem. I just
21 want to be clear. Mr. Dollar does these reports on a
22 yearly basis for us. It's Honua'ula, it's Wailea
23 Resort, A&B Wailea and Makena Resort as I recall.
24 We're all sharing in data gathering and paying for the
25 reports.

1 So what I will provide to you is the latest
2 report that was done by Mr. Dollar so you can see the
3 depth, the extent of analysis. Is that what you're
4 asking for?

5 CHAIRMAN HELLER: That's fine. What I was
6 actually asking for, and I'm sorry if I wasn't clear,
7 is whatever document it is that imposes the
8 requirement --

9 MS. BENCK: The zoning condition?

10 CHAIRMAN HELLER: The zoning condition.

11 MR. JENCKS: Be happy to provide that.

12 CHAIRMAN HELLER: Thank you. I direct that
13 the parties draft their individual Proposed Findings
14 of Fact, Conclusions of Law and Decision and Order
15 based upon the record in this docket and serve the
16 same upon each other 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.

21 In addition to the transcript, exhibits in
22 evidence should also be referenced where applicable. I
23 note for the parties that the Commission has standard
24 conditions which we would like the parties to consider
25 in preparing proposed orders.

1 A copy of the standard conditions may be
2 obtained from the Commission staff. Of course, should
3 any of the parties desire to stipulate to any portion
4 or all of the Findings of Fact, Conclusions of Law and
5 Decision and Order, they are encouraged to do so.

6 Again, I would note there seems to be
7 agreement on a number of proposed conditions. We can
8 simplify the process to the extent the parties
9 actually stipulated to those.

10 Regardless of whether the parties pursue a
11 partial or fully stipulated order, I direct that each
12 party file its proposal with the Commission and serve
13 copies on the other parties no later than the close of
14 business on September 20, 2013.

15 All responses or objections to the parties'
16 respective proposals shall be filed with the
17 Commission and served upon the other parties no later
18 than the close of business on October 4, 2013.

19 Any responses to the objections must be
20 filed with the Commission and served on the other
21 parties no later than the close of business on
22 October 10, 2013.

23 Deliberation and decision making is
24 tentatively scheduled for October 17, 2013. Could I
25 prevail upon the parties to consult with staff early

1 in the process to ensure that any technical and
2 non-substantive formatting protocols observed by the
3 Commission are adhered to.

4 Are there any questions with respect to
5 post-hearing procedures? Mr. Yee.

6 MR. YEE: Thank you. We would ask that the
7 Office of Planning be waived from submitting a D&O in
8 this case. We will restrict our reply to the comments
9 and objections due on October 4. Obviously would then
10 not have any reply to the comments and objections.

11 MR. GIROUX: The County would join in that
12 request.

13 CHAIRMAN HELLER: Any objection?

14 MS. BENCK: No objection.

15 CHAIRMAN HELLER: Okay. That's fine then.
16 Any other questions from the parties? Ms. Benck.

17 MS. BENCK: I want to go back to your
18 request for a copy of the zoning ordinance. Of
19 course, we will provide that. Is that something that
20 you want us to formally file one original?

21 Actually you can't do one original, but 16
22 copies in the normal course? Or is that a more
23 informal submittal to the Commission?

24 CHAIRMAN HELLER: I think it would be
25 better to make it a part of the record. So why don't

1 you submit it as an additional exhibit. And I'll ask
2 now Mr. Giroux, Mr. Yee, do you have any objections to
3 that as an exhibit?

4 MR. GIROUX: I have no objection. I
5 believe it falls under your rules that allows you to
6 talk judicial notice of documents that are readily
7 available. And I was involved in those cases so I
8 know what those conditions are. So I have no
9 objection.

10 CHAIRMAN HELLER: Mr. Yee?

11 MR. YEE: We have no objection. I just
12 wanted to inquire as to whether you wanted us to
13 follow up on the DOH requirements and to submit
14 whatever rules or laws we find on that issue.

15 CHAIRMAN HELLER: Yes. I think that would
16 be helpful. If you can let us know whether there is a
17 formal notification requirement of consent
18 requirement.

19 MS. BENCK: Thank you very much. Again,
20 it's just the zoning ordinance? Or do you also want
21 to see the most recent report that Mr. Dollar
22 prepared?

23 CHAIRMAN HELLER: I think the report would
24 be helpful too. But I was mainly asking for either
25 the ordinance or the decision that imposes the

1 condition.

2 MS. BENCK: Thank you.

3 CHAIRMAN HELLER: Anything further,
4 Commissioners? Anything else on this docket? Any
5 other business for this meeting? Then we are
6 adjourned. Thank you.

7

8 (The proceedings were adjourned at 9:30 a.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 _____ day of _____ 2013;

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 matters.

DATED: This _____ day of _____ 2013

HOLLY M. HACKETT, HI CSR #130, RPR #5910
Certified Shorthand Reporter