

LAND USE COMMISSION  
STATE OF HAWAI'I

Hearing held on December 30, 2020  
Commencing at 9:00 a.m.

Held via ZOOM by Interactive Conference Technology

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. CONTINUED ACTION

A89-642 C. BREWER PROPERTIES, INC. (Maui)  
Consider Petitioners Wailuku Plantation LLC,  
Edgar Somera, Fay Somera, Larry S. Sky, Dayong  
Shao, Xiu Xiang Fang, Bong Hwa Shi Jordan,  
Wenxiao Liu and Elise Travis' Motion for Order  
Bifurcating Docket No. A89-642

V. Legislative matters impacting the LUC

VI. Adjournment

BEFORE: Jean Marie McManus, CSR #156

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## 1 APPEARANCES:

2 JONATHAN SCHEUER, Chair (Oahu)  
NANCY CABRAL, Vice Chair (Big Island)  
3 GARY OKUDA (Oahu)  
LEE OHIGASHI (Maui)  
4 ARNOLD WONG (Oahu)  
DAWN CHANG (Oahu)  
5 DAN GIOVANNI (Kauai)

6

STAFF:

7 DANIEL A. MORRIS, ESQ.  
Deputy Attorney General

8

DAN ORODENKER, Executive Officer  
9 RILEY K. HAKODA, Chief Clerk  
SCOTT DERRICKSON, Chief Planner  
10 NATASHA QUINONES, Program Specialist

11 DAWN T. APUNA, ESQ.  
AARON SETOGAWA, Planner  
12 State Office of Planning  
Oahu, Hawaii

13

MICHAEL HOPPER, ESQ.  
14 JORDAN HART, Deputy Director  
Deputy Corporation Counsel  
15 County of Maui

16 RANDALL SAKUMOTO, ESQ.  
RCFC Kehalani, LLC

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JASON McFARLIN, ESQ.  
18 Wailuku Plantation, LLC

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CHAIRPERSON SCHEUER: Aloha, mai kakou;  
good morning.

This is the December 30th, 2020 Land Use Commission meeting, and it is being held using interactive conference technology linking videoconference participants and other interested individuals of the public via ZOOM internet conferencing program. We're doing this in order to comply with State and County official operational directives during the COVID-19 pandemic.

Members of the public are viewing the meeting via the ZOOM webinar platform. For all meeting participants, I would like to stress to everyone the importance of speaking slowly, clearly and directly into your microphone. Before speaking, please state your name and identify yourself for the record.

Also, please be aware that all meeting participants are being recorded on the digital record of this ZOOM meeting. Your continued participation is your implied consent to be part of the public

1 record of this event.

2 The ZOOM conferencing technology allows the  
3 parties and each participating Commissioner  
4 individual remote access to the meeting proceedings  
5 via our personal digital devices.

6 Also please note that due to matters  
7 entirely outside of our control, occasional  
8 disruptions to connectivity may occur for one or more  
9 members of the meeting at any given time. If such  
10 disruptions occur, please let us know, and be patient  
11 as we try to restore the audiovisual signals to  
12 effectively conduct business during the pandemic.

13 In that regard, if you are attending the  
14 meeting via phone as an attendee, you can use star 9  
15 key sequence, star 9 to virtually raise your hand if  
16 you're having connectivity issues.

17 My name is Jonathan Likeke Scheuer, I'm  
18 currently serving as LUC Chair. With me is  
19 Commission Aczon -- Aczon is absent today --  
20 Commissioner Chang, Okuda and Wong, our LUC Executive  
21 Director, Daniel Orodener, our Chief Planner Scott  
22 Derrickson, our Chief Clerk Riley Hakoda, and our LUC  
23 Deputy Attorney General Dan Morris, as well as our  
24 Court Reporter Jean McManus are all on the Island of  
25 Oahu, Commissioner Cabral is on Hawaii Island,

1 Commissioner Ohigashi is on Maui, and Commissioner  
2 Giovanni is on Kauai. We currently have eight seated  
3 Commissioners of a possible nine.

4 Now, as is appropriate for a meeting on the  
5 next to the last day of the end of a tumultuous year,  
6 we have some transitions. I'm going to ask Dan  
7 Orodenker to make a couple announcements.

8 EXECUTIVE OFFICER: Thank you, Mr. Chair.

9 First of all, I would like to thank  
10 everybody for a very difficult year, and for the  
11 Commissioners' hard work in getting us through the  
12 year and to this point.

13 As you all may be aware, we have been  
14 involved in a long arduous search for just the right  
15 person to assist us in both our administrative  
16 function and on some of our more substantive  
17 functions, and after much work and effort, we have  
18 finally found Natasha Quinones, who I would like to  
19 introduce to you right now.

20 She will be taking on both a lot of our  
21 administrative functions, quote/unquote, Ariana's  
22 functions, as well as transitioning into doing a lot  
23 of Riley's work, and so we can move some of the  
24 workload from Riley, and he doesn't collapse on us.

25 Also, and please, if you get a phone call

1 from Natasha, you know who she is and we hope you all  
2 will enjoy working with her. Please call on her for  
3 any administrative problems that you may have in the  
4 past that you addressed to Riley or Ariana.

5 Also after 30 long years at the State, our  
6 Planner 5, Bert Saruwatari, is retiring, and we would  
7 like to thank him for his tremendous service and good  
8 work and his assistance in keeping the Land Use  
9 Commission historically sound for over 30 years.

10 We're going to miss him, and we really appreciate  
11 everything he's done for us. Natasha has a lei for  
12 him.

13 CHAIRPERSON SCHEUER: Did any of the  
14 Commissioners wish to say something regarding Bert?  
15 You can at the end of the meeting as well.

16 Oh, Commissioner Okuda.

17 COMMISSIONER OKUDA: I can wait until the  
18 end of the meeting if you want.

19 CHAIRPERSON SCHEUER: Please, go ahead.

20 COMMISSIONER OKUDA: Bert, I would like to  
21 thank you for your work. A lot of negative things  
22 sometimes are said in the community about -- and I  
23 put this in quotes -- "state workers", but what I've  
24 found not only with you, but the other staff members  
25 at the Land Use Commission are truly dedicated

1 servants to the community who have -- who do and  
2 continue to do and have done tremendous work in  
3 upholding the obligations which the constitution has  
4 imposed on the Commission and the government, and  
5 also what the community expects.

6 So, Bert, thank you very much for your  
7 work. Thank you for your service to the community,  
8 and thank you for all the things you have personally  
9 done for me while I've been on the Commission.

10 Thank you, Mr. Chair.

11 CHAIRPERSON SCHEUER: Thank you. We can  
12 have time at the end. Is there anybody else who  
13 wanted to say anything at this time?

14 Commissioner Chang.

15 COMMISSIONER CHANG: Thank you, Chair.

16 I, like Commissioner Okuda, Bert, really  
17 greatly appreciate, one, all of your diligent work.  
18 I've advised a lot of boards and commissions in the  
19 past, but the Land Use Commission is probably one of  
20 the best run Commissions in the State, and that is  
21 really due to the hard work of the staff in preparing  
22 the Commission to take on some of these really major  
23 issues that come before us.

24 So thank you so much, Bert. Enjoy your  
25 retirement. We will miss you. But I'm sure you are



1 going to be doing very well. So take care. Thank  
2 you, again.

3 Thank you, Mr. Chair.

4 CHAIRPERSON SCHEUER: Thank you.

5 Commissioner Ohigashi.

6 COMMISSIONER OHIGASHI: Bert, I'm the  
7 newest member on the Land Use Commission, since  
8 nobody has been appointed to take over Aaron Mahi,  
9 but I appreciate your work, but more what I  
10 appreciate is the fact that you remain -- you still  
11 have black hair, not official enough, but compared to  
12 the rest of us. That gives me hope that my short  
13 time on the Commission will not result in additional  
14 whitening. I really appreciate you. Thanks a lot.

15 CHAIRPERSON SCHEUER: Commissioners? I  
16 don't want to cut anyone off. I'll just add, I've  
17 personally benefitted tremendously, Bert, from your  
18 vast experience and your really deep intelligence on  
19 these matters and how to apply the law.

20 I always knew I was treading on slightly  
21 thin ground, there was just a slight eyebrow raised,  
22 saying something, okay, Bert is not sure where  
23 Jonathan is going on this.

24 I appreciated your kind and smart guidance  
25 throughout this. Thank you so much.

1           And welcome, Natasha. You're in for a ride  
2 and it's a good one.

3           EXECUTIVE OFFICER: Well, she has already  
4 met Arnold.

5           CHAIRPERSON SCHEUER: It's all uphill.

6           MS. QUINONES: Looking forward to it.

7           CHAIRPERSON SCHEUER: Our next agenda item,  
8 our first, Call to Order, Adoption of the  
9 December 3rd, 2020 minutes.

10           Mr. Hakoda or Mr. Derrickson, has there  
11 been any written testimony submitted on this matter?

12           CHIEF CLERK: No testimony on the minutes.

13           CHAIRPERSON SCHEUER: Are there any members  
14 of the public who wish to testify on this matter? If  
15 so, use the "raise hand" function; or if you are  
16 dialing in, you can press the star 9.

17           Recognizing Mr. James Buika, he has raised  
18 his hand. This is regarding simply the adoption of  
19 the minutes, not the next agenda item.

20           I will admit you to be a participant in the  
21 meeting. If you can enable your video and unmute  
22 yourself.

23           MR. BUIKA: Mahalo.

24           CHAIRPERSON SCHEUER: This is to testify on  
25 our adoption of the minutes?

1 MR. BUIKA: No, I'm sorry, the next item  
2 A89-642.

3 CHAIRPERSON SCHEUER: I'm going to put you  
4 back to being an attendee and I'll call you again.

5 THE WITNESS: Sorry, I'm overanxious.

6 CHAIRPERSON SCHEUER: That's okay. We are  
7 a fun group to be with, I understand completely.

8 Is there anybody in the public who wishes  
9 to testify on the adoption of the minutes? If not,  
10 any comments or corrections? Seeing none, is there a  
11 Motion to Adopt?

12 COMMISSIONER WONG: Chair, Commissioner  
13 Wong. I move.

14 CHAIRPERSON SCHEUER: Commissioner Wong has  
15 moved to adopt the minutes. Is there a second?

16 COMMISSIONER OHIGASHI: Second.

17 CHAIRPERSON SCHEUER: Commissioner  
18 Ohigashi. Any discussion? If not, Mr. Orodener,  
19 please do a roll call vote.

20 EXECUTIVE OFFICER: Thank you, Mr. Chair.  
21 The Motion is to Adopt the Minutes.

22 Commissioner Wong?

23 COMMISSIONER WONG: Aye.

24 EXECUTIVE OFFICER: Commissioner Ohigashi?

25 COMMISSIONER OHIGASHI: Aye.

1 EXECUTIVE OFFICER: Commissioner Chang?

2 COMMISSIONER CHANG: Aye.

3 EXECUTIVE OFFICER: Commissioner Aczon is  
4 absent.

5 Commissioner Okuda?

6 COMMISSIONER OKUDA: Yes.

7 EXECUTIVE OFFICER: Commissioner Cabral?

8 VICE CHAIR CABRAL: Yes.

9 EXECUTIVE OFFICER: Commissioner Giovanni?

10 EXECUTIVE OFFICER: Aye.

11 EXECUTIVE OFFICER: Chair Scheuer?

12 CHAIRPERSON SCHEUER: Aye.

13 EXECUTIVE OFFICER: Thank you, Mr. Chair,  
14 the motion passes unanimously.

15 CHAIRPERSON SCHEUER: Thank you very much.

16 Mr. Orodenker, will you please continue  
17 with the next agenda item, our tentative meeting  
18 schedule?

19 EXECUTIVE OFFICER: Thank you, Mr. Chair.

20 On January 6th and 7, we will be meeting  
21 once again by ZOOM to discuss the Hokua Place matter.  
22 There's a motion for protective order, and at that  
23 time we will also be looking at the formation of a  
24 legislative committee with the Land Use Commission.

25 On January 28th we will be hearing the

1 Barry Trust matter. We're assuming that will also be  
2 by ZOOM.

3 February 10th, Barry Trust Adoption of  
4 Order is scheduled. And the U of N Bancorp matter  
5 will request for us to be the accepting authority.

6 On February 11th, we will be holding a  
7 hearing to discuss the handling of the City and  
8 County of Honolulu Important Agricultural Land  
9 submission.

10 This is the first time that we've been  
11 handed a decision by a County. We felt that it would  
12 be best to hold an informational meeting to discuss  
13 how staff feels that that matter should be handled,  
14 and so that the public can fully understand how we  
15 will be proceeding on that matter.

16 The actual substantive hearings on that  
17 matter are scheduled for February 24th and 25th.

18 March 10th and 11th, we will also be  
19 hearing anything associated with the Hokua Place  
20 matter that has not been final.

21 March 24th and 25th, we also have the Oahu  
22 IAL matter scheduled.

23 That takes us through to April and the  
24 calendar from that point on is in flux.

25 CHAIRPERSON SCHEUER: Thank you very much,

1 Dan.

2 Any questions regarding our schedule?

3 Commissioner Giovanni.

4 COMMISSIONER GIOVANNI: We also have some  
5 mandatory training.

6 EXECUTIVE OFFICER: Yes, but that's not  
7 part of the Land Use Commission schedule. Riley  
8 should have been sending you some information with  
9 regard to the training that certain Commissioners are  
10 required to take, in particular, the Native Hawaiian  
11 law training.

12 And I think our Commissioner Giovanni -- is  
13 there anyone else, Riley? And Natasha will be  
14 attending those sessions by ZOOM.

15 COMMISSIONER GIOVANNI: Offhand do you know  
16 the dates? I don't need any other details now. It's  
17 January 11th and 12th?

18 CHAIRPERSON SCHEUER: And I hate to break  
19 it to you, Commissioner Giovanni, but I've been asked  
20 to speak as a lunch-time speaker there, so you'll be  
21 subjected to me once more.

22 COMMISSIONER GIOVANNI: I'll take a leave.  
23 That's okay.

24 CHAIRPERSON SCHEUER: Any other questions,  
25 Commissioners?

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2 A89-642 C. Brewer Properties, Inc. (Maui)

3 If not, the next agenda item is Continued  
4 Action regarding Docket A89-642 C. Brewer Properties,  
5 Incorporated (Maui) to Consider Petitioners Wailuku  
6 Plantation LLC, Edgar Somera, Fay Somera, Larry S.  
7 Sky, Dayong Zhao, Xiu Xiang Fang; Bong Hwa Shi  
8 Jordan; Wenxiao Liu and Elise Travis' Motion for  
9 Order Bifurcating Docket No. A89-642.

10 Will the parties please identify  
11 themselves?

12 MR. McFARLIN: Good morning. My name is  
13 Jason McFarlin. I represent the Petitioners in this  
14 matter that you just -- the names you just mentioned.

15 CHAIRPERSON SCHEUER: Good morning, Mr.  
16 McFarlin.

17 Mr. Sakumoto.

18 MR. SAKUMOTO: Thank you, Chair.

19 Randall representing Co-Petitioner RCFC  
20 Kehalani.

21 CHAIRPERSON SCHEUER: Maui County.

22 MR. HOPPER: Michael Hopper, Deputy  
23 Corporation Counsel representing Maui Department of  
24 Planning. With me is Deputy Director Jordan Hart.

25 CHAIRPERSON SCHEUER: Office of Planning?

1 MS. APUNA: Good morning, Deputy Attorney  
2 General, Dawn Apuna on behalf of State Office of  
3 Planning. Here with me is Aaron Setogawa.

4 CHAIRPERSON SCHEUER: Before we continue,  
5 let me update the record on this matter.

6 On September 9, 2020, the Commission met to  
7 consider the Petitioner Wailuku Plantation's Motion  
8 for an Order Bifurcating this docket, and we voted  
9 unanimously eight to zero to defer the matter till  
10 November 19, 2020, with position statements filed by  
11 November 5, 2020, and the Chair was authorized to  
12 sign the deferral order and to approve any extension  
13 request at Chair's discretion.

14 On September 22, 2020, the Commission  
15 received Wailuku Plantation's response to the LUC's  
16 request for information made at the September 9, 2020  
17 meeting.

18 On October 5th we issued an order deferring  
19 decisionmaking on this matter.

20 On October 9, 2020, we received the County  
21 of Maui Planning Department's Errata to their  
22 Position on Wailuku Plantation's Motion.

23 On October 21st, the Commission received  
24 Petitioner KCFC's Response to the LUC Order deferring  
25 decisionmaking and as well as their Exhibits 1



1 through 5.

2 On October 29th, the Commission received  
3 the original verification of Brian Ige in support of  
4 Petitioner RCFC's Response.

5 On December 1, 2020, the Commission  
6 received the County of Maui's response to Kehalani's  
7 response to the LUC.

8 On December 8, 2020, the Commission  
9 received the Parties' Stipulation: Decision and  
10 Order dated December 7, 2020.

11 On December 14, 2020, the Commission  
12 received the original signature pages for the  
13 Stipulation Decision and Order.

14 On December 17, 2020, the Commission mailed  
15 the Agenda Notice of the December 30, 2020 meeting to  
16 the Parties, Statewide, email and Maui mailing lists  
17 and also received OP's Position in Support of  
18 Petitioner's Motion for Order Bifurcating Docket No.  
19 A89-642.

20 Now, having updated the record, let me  
21 briefly describe our procedures for today, which will  
22 consider the timely filed Motions to Intervene -- no,  
23 excuse me -- no, sorry. Excuse me, kala mai.

24 Let me briefly describe our procedures for  
25 today.

1           First, I will give an opportunity for the  
2           Petitioner to provide comment on the Commission's  
3           Policy regarding reimbursement of hearing expenses.

4           Then I will allow for anybody who wishes to  
5           provide testimony on this matter, including the  
6           earlier self-identified individual, to provide  
7           testimony.

8           As people are called into testify, I will  
9           swear you in, ask you to identify yourself by name  
10          and address and allow you to testify.

11          After your testimony you will be asked to  
12          stay available for questioning by the Petitioners,  
13          the County, Office of Planning and the Commissioners.

14          After the completion of public testimony,  
15          Mr. McFarlin will make his presentation in support of  
16          his motion.

17          After Mr. McFarlin's presentation, we will  
18          hear from Mr. Sakumoto.

19          After that we will hear from the County,  
20          and then the State Office of Planning.

21          And finally, after all parties have  
22          presented their arguments on the Motion of the Order  
23          to Bifurcate, the Commission will conduct our  
24          deliberations and (possibly) issue a decision on the  
25          Motion.

1           Are there any questions on our procedures  
2 today, beginning with Mr. McFarlin?

3           MR. McFARLIN: No, Chair, no questions.

4           CHAIRPERSON SCHEUER: Mr. Sakumoto?

5           MR. SAKUMOTO: No questions, Mr. Chair.

6           CHAIRPERSON SCHEUER: Mr. McFarlin, have  
7 you reviewed HAR 15-15-45.1 with regard to the  
8 reimbursement of LUC hearing expenses?

9           MR. McFARLIN: I have. We have already  
10 addressed the expenses pertaining to this matter.

11          CHAIRPERSON SCHEUER: Thank you very much.

12          Now to public testimony. If you would,  
13 again, using the "raise-the-hand" function in the  
14 attendee meeting room if you wish to testify on  
15 recognizing these matters. Mr. Buika, followed by  
16 Livit Callentine.

17          I'm promoting you to be a panelist again,  
18 and ask you to enable your audio and video.

19          MR. BUIKA: Good morning. Aloha, Chair.

20          CHAIRPERSON SCHEUER: Do you swear or  
21 affirm the testimony you're about to give is the  
22 truth?

23          THE WITNESS: Yes.

24          CHAIRPERSON SCHEUER: State your name and  
25 address for the record.

1 JAMES BUIKA

2 Was called as a witness by and on behalf of the  
3 Public, was sworn to tell the truth, was examined and  
4 testified s follows:

5 DIRECT EXAMINATION

6 THE WITNESS: My name is James Buika,  
7 address 514 Komo Ohia Street, Wailuku, Hawaii in  
8 Kehalani.

9 CHAIRPERSON SCHEUER: Please continue.

10 THE WITNESS: Thank you.

11 My testimony is on today's agenda item  
12 A89-642. I would like to wish you all a healthy and  
13 Happy New Year and mahalo for your dedication to the  
14 people in the State of Hawaii, and Maui County for  
15 all you do. I know it's a tough job.

16 I have submitted written testimony a couple  
17 days ago, which I'm surprised has not been received  
18 for your convenience.

19 It includes a draft condition for  
20 consideration as part of this bifurcation request,  
21 and I will read this condition as part of my  
22 testimony for you today.

23 At this point I am against bifurcation,  
24 unless the master developer for Kehalani is held  
25 responsible for his commitment to the LUC to fulfill

1 its original conditions agreed to in 1990.

2 That seems obvious, but sadly, it's not  
3 true from my perspective. If you include my  
4 condition, I will be for the bifurcation.

5 My ask today is simple. To bifurcate is to  
6 dedicate. And what do I mean? The master developer  
7 has not dedicated the land for a Kehalani Community  
8 Center as required under LUC Condition No. 7, 1990.

9 The master developer is far behind in  
10 dedications with some major dedications as far in  
11 arrears as of August 2005 from a major punch list  
12 produced by Public Works 15 years ago.

13 My proposed condition creates a trigger for  
14 the master developer to meet its obligation to the  
15 LUC prior to bifurcation by completing all these  
16 required dedications. Sadly, from my past experience  
17 as a voting member of the Kehalani Community  
18 Association, we have not been promised a community  
19 center on five acres of dedicated land, as required  
20 by the LUC, and it won't happen without this  
21 condition in place today, from what I understand.

22 In conclusion. First, please ask about the  
23 status of the community center from the master  
24 developer. Please deliberate and vote to include the  
25 following condition required to protect the

1 homeowners of the Kehalani Community Association and  
2 the County of Maui and its taxpayers.

3 And I'll just conclude by reading this  
4 condition of approval that I'm proposing to you. So  
5 here it goes.

6 That prior to the execution of the  
7 bifurcation of the two unrelated projects, Piihana  
8 Project District 2, and Kehalani Project District 3  
9 parcels referenced in the 1990 Decision and Order,  
10 this bifurcation amendment shall not be approved  
11 until;

12 A. The Kehalani Community Association  
13 receives the community center parcel of land from the  
14 master developer as part of this transaction under  
15 the original Condition No. 7 by the LUC in the 1990  
16 Decision and Order, and;

17 B. All outstanding Kehalani associated  
18 dedications are completed and confirmed in writing to  
19 the satisfaction of the County of Maui, Department of  
20 Public Works, Department of Planning, and the  
21 Department of Parks and Recreation.

22 That's the end of the condition.

23 Mahalo for your time today. Please  
24 consider my request to include this vital condition  
25 as a trigger for the master developer to meet the

1 conditions agreed to in 1990 with the LUC.

2 Thank you. That concludes my testimony.

3 CHAIRPERSON SCHEUER: Mr. McFarlin, are  
4 there any questions for the witness?

5 MR. MCFARLIN: No questions, Chair.

6 CHAIRPERSON SCHEUER: Mr. Sakumoto?

7 MR. SAKUMOTO: No questions, Chair.

8 CHAIRPERSON SCHEUER: Maui County?

9 MR. HOPPER: No questions, Chair.

10 CHAIRPERSON SCHEUER: Commissioners?

11 Commissioner Ohigashi.

12 COMMISSIONER OHIGASHI: Can I call you  
13 James? I have a hard time pronouncing your last  
14 name.

15 THE WITNESS: Sure, Buika.

16 COMMISSIONER OHIGASHI: Mr. Buika, who do  
17 you want the community center dedicated to?

18 THE WITNESS: The land should be dedicated  
19 to the Kehalani Community Association to finance  
20 Building A, community center as part of a master  
21 planned development, or whatever entity it should be.  
22 But it's in Condition No. 7, and right now the master  
23 developer is not planning on giving us the community  
24 center, and that's why I bought my parcel for a  
25 master planned community, living in a master planned

1 community with a community center.

2 Many of us have no opportunity to meet each  
3 other here. It's just basically urban sprawl without  
4 a community center. So I'm going on, but hopefully I  
5 answered your question.

6 COMMISSIONER OHIGASHI: Who would hold  
7 ownership to the community center under your  
8 proposal?

9 THE WITNESS: To the Kehalani Community  
10 Association.

11 CHAIRPERSON SCHEUER: Thank you.

12 Commissioner Okuda.

13 COMMISSIONER OKUDA: Thank you very much,  
14 Mr. Chair.

15 Mr. Buika, thank you very much for your  
16 testimony today. I have a clarifying question.

17 When you use the term "master developer",  
18 who -- can you name specifically the entity or person  
19 who you want to be directed to do these things?

20 THE WITNESS: Well, it would be the RCFC  
21 Kehalani LLC, and I believe it's Everett Dowling is  
22 in receivership now, and Brian Ige, who I know, who  
23 is diligent and a good representative, I guess, of  
24 these guys here. So that would be -- that hopefully  
25 clarifies it.



1           COMMISSIONER OKUDA: Thank you very much  
2 for providing that information.

3           Thank you, Mr. Chair, no further questions.

4           CHAIRPERSON SCHEUER: Commissioners?

5           Commissioner Cabral.

6           VICE CHAIR CABRAL: Thank you. Trying to  
7 find a "raise-hand" function.

8           Thank you for coming and testifying. It's  
9 important we're hearing from the community.

10           In terms of dedicating this to the  
11 homeowners association, then for ever, ever, ever the  
12 homeowners association will have to pay the dues to  
13 maintain the upkeep, et cetera, et cetera.

14           Has it been considered -- there is so much  
15 history here. Has it been considered in the past  
16 that this land should be dedicated to the County for  
17 their -- the County Parks and Recreation Division  
18 could be the owner of it and maintain it into the  
19 future, and then, therefore, usable by the entire  
20 island?

21           THE WITNESS: Well, those are -- thank you  
22 for the question.

23           Those are two options, and those are two  
24 options for moving forward. Right now the bank owns  
25 it. The past master developer Stanford Carr claimed

1 bankruptcy, walked away from the required dedications  
2 in 2009, and now he's in Makena and Turtle Bay, and  
3 Big Island, wherever, but he left us holding the bag  
4 for \$2 million for dedications that were his  
5 responsibility.

6           And those are -- there are many millions of  
7 dollars of dedication that are not happening.

8           But I think that Kehalani Community  
9 Association, through a vehicle called the Community  
10 Facilities District, which I would promote, would  
11 raise dues or taxes on people here to envision and  
12 build out a community center for the public and for  
13 us that will be of value to us.

14           So the other option is Parks and Recs, but  
15 Parks and Recs is very, very far behind on building  
16 out another park here. So, you know, Parks and Recs,  
17 Department of Parks and Recs has many, many  
18 priorities on Maui Island, and very limited budget.  
19 And it would, I think, behoove, because there is a  
20 taxing mechanism now in place in Maui to actually pay  
21 for it out of our association dues to develop a  
22 beautiful, worthwhile community center for the  
23 community.

24           And it would meet the vision of the Land  
25 Use Commission in 1990, I believe.

1           Thank you, hopefully that answered your  
2 question.

3           VICE CHAIR CABRAL: Thank you for your  
4 input. Thank you.

5           CHAIRPERSON SCHEUER: Commissioners,  
6 further questions for the witness? If not, if I may.

7           Have you had the opportunity to review the  
8 proposed stipulated agreement between the parties on  
9 this matter that's posted to our website?

10          THE WITNESS: Yes, I have. And I -- it was  
11 sent by -- it was sent to the community, I do  
12 believe, and I did read -- I didn't read what was on  
13 the website, but it was a six, seven-page document.  
14 And I understand what is on the agenda today to  
15 bifurcate the two projects, but the reason I bring up  
16 my testimony is because it's a rare opportunity from  
17 30 years ago that Kehalani is on the agenda. Thank  
18 you.

19          CHAIRPERSON SCHEUER: I appreciate that.

20          Specifically my question was, that the --  
21 and I will intend, and I'm sure my fellow  
22 Commissioners will intend, when we question the  
23 parties and the County when we get into this further.

24          But the construction of the stipulated  
25 agreement does not waive any conditions. It does

1 separate the assignment of conditions between the two  
2 parties in the bifurcation, but any condition that  
3 was part of the original document is not waived.

4 THE WITNESS: May I respond to that?

5 CHAIRPERSON SCHEUER: Yes.

6 THE WITNESS: I fully understand that. But  
7 all I'm saying in my condition is to create a trigger  
8 for the master developer to meet his obligation,  
9 because our past experience is they will take their  
10 money and run. They are just about finished with the  
11 homes here, and they have millions and millions of  
12 dollars of dedications before them, and they will  
13 claim bankruptcy and the pandemic, take their money  
14 and run, and leave the County, and KCA and the LUC  
15 holding the bag. It's happened before, and it will  
16 happen again.

17 And that I believe is the truth, and that's  
18 why I'm testifying today, because we need a trigger.  
19 This is a trigger.

20 CHAIRPERSON SCHEUER: Thank you so much for  
21 your testimony. Very much appreciate it.

22 Any further questions, Commissioners? If  
23 not, I'm going to put you back to being an attendee  
24 and bring in our next --

25 THE WITNESS: Mahalo.

1 CHAIRPERSON SCHEUER: Livit Callentine. If  
2 you can unmute yourself and turn on your video.

3 THE WITNESS: Aloha.

4 CHAIRPERSON SCHEUER: Aloha and good  
5 morning.

6 Do you swear or affirm the testimony you're  
7 about to give is the truth?

8 THE WITNESS: I do.

9 CHAIRPERSON SCHEUER: I think you know the  
10 drill. Give your name and address and proceed.

11 LIVIT CALLENTINE

12 Was called as a witness by and on behalf of the  
13 Public, was sworn to tell the truth, was examined and  
14 testified as follows:

15 DIRECT EXAMINATION

16 THE WITNESS: My name is Livit Callentine,  
17 and I live at 631 Mehakana Lane, Apartment 101 in  
18 Wailuku, Hawaii.

19 Should I just start?

20 CHAIRPERSON SCHEUER: Yes, please.

21 THE WITNESS: First of all, I want to thank  
22 the previous testifier for his testimony. I very  
23 much support what he had to say. I wanted to  
24 correct -- he referenced Condition No. 7 of the 1990  
25 D&O. It's actually Condition No. 10.

1           I am one of the original owners of Kehalani  
2 Gardens. It's a neighborhood of 132 workforce  
3 housing units which is in the makai portion of the  
4 Kehalani Project District.

5           I bought my condo in 2005, and I've lived  
6 here continuously. My neighbors are nurses and  
7 technicians, public safety employees, and teachers,  
8 hotel staff and service workers.

9           I did submit written testimony yesterday,  
10 but from comments made, I'm not sure that you had a  
11 chance to review it. I checked this morning and it  
12 wasn't yet posted on the LUC website. I'm very  
13 sorry, because I went into some detail there about  
14 several issues, but I had determined, given the time  
15 limitations, that I would focus my remarks today on  
16 another subject of parks.

17           When I submitted the testimony yesterday, I  
18 wanted to just reiterate something that is in my  
19 written testimony which is that I have no objection  
20 to the bifurcation proposed once I and others are  
21 assured that unfulfilled promises to the community,  
22 and representations and conditions made before the  
23 LUC have been satisfied, specifically Kehalani  
24 Community was promised and desires a community center  
25 in order to gather, hold meetings and events.

1           There are several sub-associations within  
2 Kehalani, and I am in one such. And there are boards  
3 of directors, and we were promised a place to hold  
4 our board of director's meetings, and that has not  
5 happened. So we have been forced, as a workforce  
6 housing community, to go out and rent space to hold  
7 our meetings because the developer didn't provide us  
8 an onsite gathering spot.

9           And I support the condition that was  
10 proposed by Mr. Buika.

11           Within the Wailuku Project District,  
12 Kehalani is comprised of a large aggregate parcel  
13 mauka of the Honoapiilani Highway, and that is  
14 referred to as Kehalani Mauka; and another aggregate  
15 parcel makai of the Honoapiilani Highway, and that is  
16 Kehalani Makai.

17           Within Kehalani Makai, one parcel has been  
18 dedicated to the County of Maui as a park. However,  
19 this "makai park", and I say that in quotes, it's  
20 approximately seven-and-a-half acres, and it should  
21 more appropriately be classified as a drainage basin,  
22 and it's what it functions as. Every time it rains  
23 it fills with water. It's a great place to store  
24 your boat.

25           It has been closed under padlock for a very

1 long time. I've never been in the park. It's across  
2 the street from my unit. It is undeveloped, and it  
3 is the only park planned in the makai portion of the  
4 Kehalani Project District, and it's a very dense  
5 portion of the project district, the more lower end  
6 homes, and we are denser here, and we need more open  
7 space.

8 The only lucky user of the park, in case  
9 you haven't ever heard this, is a herd of goats. I  
10 kid you not. I don't know where they came from. And  
11 they are there using the park, having a great time.  
12 It would be nice to go in there and walk around with  
13 them.

14 CHAIRPERSON SCHEUER: If you could  
15 summarize your testimony.

16 THE WITNESS: Yes. Neither of the owners  
17 within Kehalani nor the community at large have  
18 access to this park, therefore, this seven-and-a-half  
19 acre parcel should not be counted as fulfilling the  
20 park's obligation set forth in Finding of Fact 85 of  
21 the January 30th, 1990 order, which reads:

22 Petitioner proposes to develop and dedicate  
23 approximately 110 acres of park and open space as  
24 well as a community center within the Wailuku Project  
25 District.



1           I will just close by saying that 27 acres,  
2           which is the amount of acreage that you were provided  
3           in a document from the County of Maui's Planning  
4           Department dated 12/1/20, and the document is labeled  
5           Kehalani Park Summary, and it concludes that 27 acres  
6           of land have been dedicated for parks within the  
7           Kehalani Project District.

8           This may satisfy the County's requirement  
9           for parks. 27 acres is a far cry from the 110 acres  
10          of park and open space required by the 1990 Decision  
11          and Order.

12          Where are the additional park -- Condition  
13          No. 10 requires substantial compliance. I do not  
14          think 27 is substantially compliant against the total  
15          of 110 acres promised.

16          Thank you for your time and consideration  
17          of my testimony.

18          CHAIRPERSON SCHEUER: Thank you very much.

19          Are there questions for the witness from  
20          Mr. McFarlin?

21          MR. McFARLIN: No questions, Chair.

22          CHAIRPERSON SCHEUER: Mr. Sakumoto?

23          MR. SAKUMOTO: No questions, Chair.

24          CHAIRPERSON SCHEUER: Mr. Hopper?

25          MR. HOPPER: No questions, Chair.

1 CHAIRPERSON SCHEUER: Ms. Apuna?

2 MS. APUNA: No questions.

3 CHAIRPERSON SCHEUER: Commissioners?

4 If not, this is more of a response, Ms.  
5 Callentine, than a question for you, but part of the  
6 dilemma that the LUC has is that once an area has  
7 been substantially developed, we lack enforcement  
8 power. We have repeatedly said at the legislature to  
9 have enforcement power to have conditions required,  
10 but when conditions need to be enforced against, or  
11 there is a question of whether or not conditions have  
12 been met for areas where substantial commencement of  
13 development has occurred, that then falls to the  
14 County in question rather than to the Commission.

15 We have -- and I think we will continue to  
16 seek greater powers of enforcement -- but just as a  
17 transparency, we do lack, I think, some of the remedy  
18 you would be seeking us to impose.

19 THE WITNESS: Thank you.

20 CHAIRPERSON SCHEUER: Anything further,  
21 Commissioners?

22 If not, thank you very much for your  
23 attention and for your testimony, for taking the time  
24 to be with us, very valuable.

25 THE WITNESS: Mahalo.

1           CHAIRPERSON SCHEUER: Is there anybody else  
2 who wishes to provide public testimony on this  
3 matter? If so, I am going to recognize Karin  
4 Phaneuf. And you can correct my pronunciation when  
5 you come in and enable your audio and video.

6           There, I can see you. Good morning, aloha.

7           THE WITNESS: Hi. Good morning.

8           CHAIRPERSON SCHEUER: Do you swear or  
9 affirm the testimony you're about to give is the  
10 truth?

11          THE WITNESS: Yes.

12                           KARIN PHANEUF

13 Was called as a witness by and on behalf of the  
14 Public, was sworn to tell the truth, was examined and  
15 testified as follows:

16                           DIRECT EXAMINATION

17          THE WITNESS: My name is Karin Phaneuf. I  
18 live at 550 Akuleia Place in Wailuku, which is the  
19 Kaimana section of the Kehalani neighborhood.

20                       I would like to support both of the people  
21 who just testified. I did also submit testimony  
22 yesterday. Was that received?

23          CHAIRPERSON SCHEUER: If we may, I will ask  
24 further confirmation from the Commission, but I will  
25 say, due to the pandemic, we don't have many physical

1 staff in the office, so things submitted right before  
2 the hearings are in non-pandemic times, sometimes  
3 they're not fully processed.

4 THE WITNESS: Will you be able to take a  
5 look at that before you make any decisions?

6 CHAIRPERSON SCHEUER: Mr. Hakoda?

7 CHIEF CLERK: Yes, Chair?

8 CHAIRPERSON SCHEUER: Has there been  
9 written testimony received as indicated by the  
10 witnesses?

11 CHIEF CLERK: I checked yesterday's emails  
12 to the Commission and did not see any emails  
13 addressed to the Commission in our inbox, so I'm  
14 puzzled by how testimony was provided to the  
15 Commission.

16 THE WITNESS: It was via email.

17 CHIEF CLERK: It was via email. If it came  
18 in after I did a sweep in the late afternoon, it may  
19 not have cleared the sever in time to be noticed by  
20 me. I apologize. I will recheck our server inbox  
21 again after this meeting concludes.

22 CHAIRPERSON SCHEUER: I'm going to restart  
23 the time if you want to share with us orally your  
24 concerns.

25 THE WITNESS: Sure, thank you.

1           My concerns are basically very similar to  
2 those of Jim. The community center has been  
3 promised, it never has come about. The park at --  
4 the makai park has been promised. It's been locked  
5 up for seven years. We used to use it before, and  
6 now it's locked up. We cannot use that. The road  
7 has not been dedicated. Crosswalks are unpainted.

8           Basically, the developers have been, like  
9 Jim said, making their money, running away and  
10 leaving us with whatever is leftover. The residents  
11 have had no attention whatsoever from the developer  
12 it seems.

13           So I've lived there since 2000. I love my  
14 neighborhood. It's a wonderful place. We really  
15 love to gather, and we think that a community center,  
16 a park, the things that we -- should be mandated.

17           I understand you don't have enforcement  
18 power, but the County has just done this again,  
19 again, again without really following through, I  
20 think, on these conditions.

21           And so, please, I hope you can find my  
22 written testimony also, and I want to support Livit  
23 and Jim and all my neighbors.

24           CHAIRPERSON SCHEUER: Thank you very much.

25           Are there questions for the witness, Mr.

1 McFarlin?

2 MR. McFARLIN: No questions, Chair.

3 CHAIRPERSON SCHEUER: Mr. Sakumoto?

4 MR. SAKUMOTO: No questions, Chair.

5 CHAIRPERSON SCHEUER: Mr. Hopper?

6 MR. HOPPER: No questions, Chair.

7 CHAIRPERSON SCHEUER: Ms. Apuna?

8 MS. APUNA: No questions.

9 CHAIRPERSON SCHEUER: Commissioners,  
10 starting with Commissioner Okuda.

11 COMMISSIONER OKUDA: Thank you very much,  
12 Mr. Chair.

13 Thank you, Ms. Phaneuf, for your testimony.  
14 Can I ask you this?

15 The different groups of owners that live in  
16 the community, do you have like an organizer, elected  
17 board of directors?

18 Like your area that you live in, is there  
19 like an elected board of directors or community  
20 association elected residents of the community?

21 THE WITNESS: Yes, we have an elected  
22 board, homeowners association. It's a little bit  
23 dysfunctional. We each have a representative, or we  
24 should have a representative for each section.

25 At this point they deny us representation

1 if we don't have enough votes. And right now a lot  
2 of people just haven't voted lately, so I think it's  
3 a very small board right now.

4 COMMISSIONER OKUDA: Whether you have an  
5 active board or a more informal board, would it be  
6 fair to say that there is, at least, some  
7 organization of residents who get together to discuss  
8 community concerns? Would that be a fair statement?

9 THE WITNESS: I think that's a fair  
10 statement.

11 COMMISSIONER OKUDA: Do you know of the --  
12 do you know whether or not the developer has  
13 attempted to talk with residents about these issues  
14 that are being raised now during this public  
15 testimony?

16 Have there been any discussions that you're  
17 aware of between the developer and the community  
18 about these concerns?

19 THE WITNESS: I am not aware of anything  
20 except for that paper that we received in the mail,  
21 the bifurcation, frightening six-page whatever, that  
22 was -- that we didn't really understand.

23 I am not aware of any attempts made to just  
24 have a meeting or even get together virtually to talk  
25 about this. That's a good question.

1                   COMMISSIONER OKUDA: I'm just trying to  
2 find out whether or not there was any outreach or  
3 attempt by the developer to communicate with the  
4 community.

5                   Let me ask you this. And I apologize if  
6 this is just sprung on you, but it kind of popped  
7 into my mind right now.

8                   Do you think there would be anything that  
9 would be harmful, or whether it might be helpful if  
10 for some reason this matter about bifurcation was  
11 continued by the Land Use Commission to a later date  
12 to allow the developer to try to address these  
13 concerns with the community, with no guarantees that  
14 that would actually work out to any positive  
15 agreement? Do you see anything harmful to the  
16 community by saying, let's put in this request for  
17 bifurcation and have it heard at some later date next  
18 year, and give the developer time to meet with the  
19 community to see whether or not you all can reach a  
20 mutual agreement, you know, to see how this community  
21 will move forward from a development standpoint?

22                   THE WITNESS: I feel like it's not been  
23 bifurcated for a very long, long time, and I don't  
24 think a few more months would make a difference. I  
25 think we would love to talk with -- my community



1 would love to talk with anybody.

2 We've been talking amongst ourselves for a  
3 long time and feel like we're not really being heard.

4 COMMISSIONER OKUDA: I do share the Chair's  
5 evaluation of the state of the law, which is the  
6 facts under the case Bridge Aina Lea. The Hawaii  
7 Supreme Court has made it pretty clear that if there  
8 is substantial commencement of use of the property by  
9 an applicant, the power of the Land Use Commission to  
10 revert the boundary designation is very limited or  
11 must follow a more complicated procedure.

12 So the Chair's evaluation of enforcement  
13 powers, I do believe, is correct. But I might just  
14 add to it that at the same time I believe the  
15 Commission has a discretion when a party is asking  
16 for leave or certain treatment or certain remedies  
17 from the Commission, the Commission can also take  
18 into account all other facts in deciding whether or  
19 not to grant what the applicants asking for.

20 So without getting too technical, let me  
21 just say thank you very much for spending your time,  
22 and giving your testimony. Democracy always works  
23 better when everybody participates.

24 Thank you, Mr. Chair. No further  
25 questions.

1                   CHAIRPERSON SCHEUER: Thank you.

2                   For this witness, as well as for the  
3 written of Ms. Callentine, that's now been  
4 electronically delivered to our mail box. There was  
5 some kind of delay with the State server which was  
6 beyond our staff's control.

7                   Furthers questions of this witness from the  
8 Commissioners?

9                   If not, thank you very much for, again,  
10 echoing Commissioner Okuda, taking your time to  
11 participate and giving us your ideas. Appreciate it.

12                   I'm going to move you back to being an  
13 attendee.

14                   Any further individuals who are attendees  
15 who wish to provide public testimony on this matter?  
16 If so, please use the "raise-your-hand" motion. If  
17 there are none, then I'll close public testimony in  
18 this matter and declare a ten minute recess until  
19 10:02m and resume the presentation by Mr. McFarlin.

20                   Any concern with that procedure? Public  
21 testimony is closed. We are going to take a  
22 ten-minute recess.

23                   (Recess taken.)

24                   CHAIRPERSON SCHEUER: It's 10:02 A.M.,  
25 we're back in session, and we're going to begin with

1 the presentation from Mr. McFarlin.

2 MR. McFARLIN: Good morning, LUC panel  
3 members and members of the public.

4 At the last hearing we heard Petitioner's  
5 Motion for Order for Bifurcating A89-642. At that  
6 time, a number of questions and concerns were raised  
7 about the bifurcation, and that's why we continued  
8 this matter until today.

9 Since then, the parties, RCFC Kehalani LLC,  
10 Petitioner, my client, the County of Maui, Department  
11 of Planning and the State of Hawaii, Office of  
12 Planning.

13 We've entered into a stipulation decision  
14 and order, which I believe the LUC received on  
15 December 8th. This was basically a negotiation  
16 between the parties, and one of the issues that did  
17 come up during the stipulation negotiation was --  
18 I'll let Kehalani LLC speak for themselves -- but  
19 they did -- there was an update on the status of the  
20 remaining conditions, and the remaining conditions  
21 were addressed in that stipulation.

22 In terms of Petitioner, my client, we've  
23 also stipulated --

24 CHAIRPERSON SCHEUER: Sorry, Mr. McFarlin,  
25 is there like a lot of back underground noise?

1           THE WITNESS:  There's a lawnmower going by  
2 every few minutes.  I'm sorry about that, I'm pretty  
3 sure --

4           CHAIRPERSON SCHEUER:  There's a deep  
5 reverberation.

6           MR. McFARLIN:  My apology.

7           CHAIRPERSON SCHEUER:  Please continue.

8           MR. McFARLIN:  In terms of my client, the  
9 concerns raised at the previous hearing regarded my  
10 client's ability to fulfill the conditions as they've  
11 been set forth in the 1990 DOA, and my client's  
12 financial -- demonstrating my client's financial  
13 capabilities to fulfill these conditions as well as  
14 updating the LUC on progress and timelines towards  
15 achieving these conditions.

16                   As part of the stipulation, my client has  
17 agreed to three conditions within the stipulation.

18                   Within six months the Piihana Project  
19 District, Petitioner, shall provide a statement of  
20 current cost for the remaining development and  
21 improvement, and a detailed schedule for necessary  
22 approvals and development.

23                   No. 2, verify the financial capability to  
24 complete the development according to LLC rules and  
25 the 1990 DOA conditions; and also provide a report

1 detailing substantial compliance with the conditions  
2 being achieved.

3           Within the stipulation there's been a  
4 six-month -- Petitioners is to provide all of these  
5 things within six months to the LUC.

6           Again, all the parties, State of Hawaii,  
7 Office of Planning, County of Maui, Department of  
8 Planning, RCFC Kehalani, they have all signed on to  
9 the stipulation, as I have for Petitioner.

10           Just to recap, what this Motion for  
11 Bifurcating, Docket No. A89-642 is about, this is a  
12 procedural matter to bifurcate the current docket  
13 between the Piihana Project District and the Kehalani  
14 Project District.

15           Kehalani would maintain the current Docket  
16 Number. The Piihana Project would get a new docket  
17 number, and also incorporate all pleadings, papers,  
18 legal memorandum, exhibits and filings for Docket  
19 A89-642 into the docket.

20           And in other words, Piihana Project  
21 District and Kehalani will remain obligated to  
22 fulfill all of the conditions as set forth in the  
23 1990 DOA, and there is no -- none of the conditions  
24 have been eliminated.

25           The other purpose of the bifurcation is

1 that Kehalani and Piihana Project District shall not  
2 be subjected -- jointly subjected to any decision or  
3 order issued by the LUC so that LUC's decisions made  
4 shall apply solely to the Piihana Project District or  
5 Kehalani Project District under their respective  
6 docket numbers.

7 I think the testimony we heard today  
8 provides good cause for bifurcation. As we see,  
9 there's a variety of issues that came up today  
10 regarding the Kehalani Project District itself,  
11 applied to the Piihana Project District. And I think  
12 it would make it clearer when the LUC would be  
13 addressing matters within the respective Project  
14 Districts when issuing orders, making decisions,  
15 conducting hearings and so forth. They would be  
16 targeted towards one project district or the other.

17 We also believe we have established good  
18 cause for the bifurcation pursuant to HAR 15-15-71,  
19 Piihana Project District, the Kehalani are  
20 noncontiguous parcels. Both developments are at  
21 entirely different stages of developments.

22 We have different issues. Kehalani, as you  
23 are aware, is largely developed; the Piihana Project  
24 District is largely undeveloped.

25 The two project districts have entirely

1 different owners. RCFC LLC sold out their entire  
2 interest to Petitioner Wailuku Plantation LLC between  
3 2007 and 2019; RCFC no longer has any ownership  
4 interest in the Piihana District.

5 In the Piihana Project District, as it  
6 stands today, my client, Wailuku Plantation LLC,  
7 still owns 75 acres, and they have -- there have been  
8 parcels sold off to other owners of about  
9 approximately 3 to 4 acres.

10 Wailuku Plantation LLC is not affiliated  
11 with Kehalani LLC. We have no plans to work together  
12 on these projects in the future.

13 And I would just like to point out that all  
14 the Piihana Project District owners of these new lots  
15 that have been sold off have consented to my  
16 representation. I've provided attorney authorization  
17 with the LUC for all of the individual owners in the  
18 Piihana Project District, and I've made myself  
19 available to answer their questions.

20 And that's about all I really have for you  
21 guys today, LUC. I think in the stipulation we've  
22 addressed the concerns that were raised at previous  
23 hearings, and I'll open it up to any questions you  
24 guys might have at this time. Thank you.

25 CHAIRPERSON SCHEUER: Commissioners,

1 questions for Mr. McFarlin?

2 Commissioner Chang followed by Commissioner  
3 Okuda.

4 COMMISSIONER CHANG: Thank you, Mr. Chair.

5 Good morning Mr. McFarlin, thank you for  
6 your testimony.

7 I would like to ask you, are there other  
8 properties within the 75 acres that are for sale?

9 MR. McFARLIN: Yes, there are.

10 COMMISSIONER CHANG: So will this -- are  
11 you making disclosures of this proposed stipulation  
12 and the existing LUC D&O to those perspective buyers?

13 MR. McFARLIN: Yes, we are. As a matter of  
14 fact, the buyers often consult with the County of  
15 Maui, Department of Planning about the progress of  
16 the development, so they're aware of the status of  
17 the property, and we make disclosures as far as the  
18 conditions that need to be satisfied, remaining  
19 conditions.

20 COMMISSIONER CHANG: Thank you.

21 So any new owners who may purchase, you  
22 don't necessarily represent them; is that correct?

23 MR. McFARLIN: I don't represent them. I  
24 did submit documentation about realtors that list  
25 properties down there. That's a little beyond my



1 control, but there are primarily two different  
2 realtors who are marketing properties down there that  
3 work with Mr. Lindsey. He's the sole member of the  
4 Wailuku Plantation LLC.

5 COMMISSIONER CHANG: So you've done  
6 everything that you can to disclose the LUC existing  
7 conditions and the proposed stipulation, so that any  
8 buyer is aware of both the existing LUC conditions as  
9 well as proposed stipulation?

10 MR. McFARLIN: That's correct. I did make  
11 myself available to answer questions to current  
12 owners and perspective owners as I can. I've been  
13 contacted regularly.

14 COMMISSIONER CHANG: Thank you very much.  
15 I have no further questions.

16 MR. McFARLIN: You're welcome.

17 CHAIRPERSON SCHEUER: Commissioner Okuda.

18 COMMISSIONER OKUDA: Thank you very much,  
19 Mr. Chair. Thank you, Mr. McFarlin, for your  
20 presentation.

21 When your client purchased its interest in  
22 the property, it was aware that the property is  
23 subject to the Decision and Order which the original  
24 Petitioner and landowner C. Brewer & Company  
25 obtained; correct?

1 MR. McFARLIN: That's correct, fully aware.

2 COMMISSIONER OKUDA: And, you know, in  
3 hindsight, given what's taken place, you know,  
4 reasonable people might question whether C. Brewer &  
5 Company should have had these two different project  
6 districts presented in a single docket, but C. Brewer  
7 presented the boundary request the way they did, and  
8 the order was issued based on what C. Brewer &  
9 Company submitted to the Land Use Commission.

10 Do you agree that's a fair statement?

11 MR. McFARLIN: Yes, that's correct. That's  
12 my understanding.

13 COMMISSIONER OKUDA: And I'm not saying  
14 that a court, or even the Hawaii Supreme Court, would  
15 ultimately rule a certain way, but you do agree that  
16 there is an argument that because your clients are  
17 successors in interest to the original order that C.  
18 Brewer & Company obtained, and Mr. Sakumoto's clients  
19 are successors in interest to the original order that  
20 C. Brewer & Company obtained, that your respective  
21 clients might have an obligation with respect to each  
22 other's development?

23 I mean there is at least that argument,  
24 correct?

25 MR. McFARLIN: Yes. Yes, there is that

1 argument, I believe.

2 COMMISSIONER OKUDA: And, in fact, that's  
3 one of the reasons why, at least your client is  
4 asking for this bifurcation, so that going forward  
5 there's not going to be any responsibility for what  
6 happens at the other project, correct?

7 MR. McFARLIN: Yes. Yes, that's correct.  
8 My client isn't working with the Kehalani  
9 representatives, and doesn't have any plans to work  
10 with them on either development. They have proceeded  
11 independently.

12 COMMISSIONER OKUDA: But in any event, and  
13 we see this sometimes when people buy into companies  
14 or buy interest in property, that when you have  
15 additional buyers, sometimes there are more people  
16 that become responsible for an obligation which runs  
17 with the land.

18 Would you agree that's a fair statement,  
19 just an as a general principle?

20 MR. McFARLIN: Yes. We are the aware that  
21 the conditions do run with the land.

22 COMMISSIONER OKUDA: So in other words, if  
23 the LUC grants this bifurcation, what the LUC really  
24 is doing is limiting potential remedies that the  
25 citizens or residents of Maui who buy into either of

1 the projects have?

2 In other words, the Commission, by granting  
3 this bifurcation, may be limiting the potential  
4 people that homeowners can hold responsible. Would  
5 that be a fair statement?

6 MR. McFARLIN: Yeah. I'm following you --  
7 could you rephrase that, or make it a little more  
8 concise? But I think I do agree with you.

9 COMMISSIONER OKUDA: Yeah, let me put it in  
10 plain English.

11 If this bifurcation is approved, the  
12 Kehalani developer can claim that they're not  
13 responsible for any claims or arguments your  
14 purchasers may have, and also vice versa.

15 In other words, right now, you might be  
16 held responsible, or your clients might be held  
17 responsible for what takes place or doesn't take  
18 place in Kehalani, and basically could be sued by  
19 homeowners there.

20 But what the LUC will be doing is taking  
21 away some of the remedies that homeowners may have.  
22 Would that be a fair statement?

23 MR. McFARLIN: Yeah, that's correct.

24 COMMISSIONER OKUDA: Okay, then let me ask  
25 you this.

1           If the decision to bifurcate these cases  
2 will be taking away potential rights and remedies  
3 that homeowners who buy into this project or who have  
4 bought into this project have, what is the community  
5 getting in return for us granting this bifurcation?

6           What's the benefit of the bifurcation to  
7 the community? I'm not asking about the bifurcation  
8 to the developers, I'm asking about what's the  
9 benefit of the bifurcation to the community?

10           MR. McFARLIN: Well, I think it's kind of a  
11 hindrance to Kehalani to be tied to the Piihana  
12 Project District to proceed because of liabilities  
13 attached to that project district, and the same would  
14 be true vice versa for my client to be tied to the  
15 conditions and responsibilities at Kehalani.

16           My client is aware that the conditions do  
17 run with the land or the Piihana Project District,  
18 but I don't think there was any intention on his part  
19 to take on the obligation of the Kehalani Project  
20 District.

21           So benefit to the community, I hadn't --  
22 the respective individual owners of each parcel can  
23 address matters with the LUC and the Maui Planning  
24 Department specifically pertaining to their project  
25 district as opposed to when an issue comes up, it

1 jointly applies to Piihana and Kehalani. That's one  
2 benefit I can think of.

3 COMMISSIONER OKUDA: Okay. Can you think  
4 of any other benefit the community gets in exchange  
5 for the rights that it may be giving up if this  
6 bifurcation is granted? Any other benefits that the  
7 community gets?

8 I'm not talking about the developer's  
9 benefits, or the benefits the developer gets, can you  
10 think -- or tell me of any other benefits that you  
11 can point to that the community gets from this  
12 bifurcation?

13 MR. McFARLIN: I don't have any answer for  
14 you that at this time, Mr. Okuda.

15 COMMISSIONER OKUDA: Thank you very much  
16 for your answers to my questions.

17 Thank you very much, Mr. Chair. No further  
18 questions.

19 CHAIRPERSON SCHEUER: Thank you very much,  
20 Commissioner Okuda.

21 Commissioner Ohigashi.

22 COMMISSIONER OHIGASHI: My question is  
23 basically, this last hearing I went back -- I drive  
24 past that area that the property is on. I went down  
25 there to the Wailuku Industrial area, and I think

1 once or twice I've seen cars burning, burning cars on  
2 your property.

3 Are you still maintaining -- or is your  
4 client maintaining some kind of car disposable area  
5 there? Just curious because I live here.

6 MR. McFARLIN: No. That particular plot,  
7 piece of land is makai to the Piihana Project  
8 District. That's a different parcel of land where  
9 the burning is taking place. There is a homeless  
10 community that's been down there for decades. And  
11 that homeless community is increasing during the  
12 pandemic. And, yes, there has been fires down there.

13 That's on the outside of the Piihana  
14 Project District, it's makai.

15 COMMISSIONER OHIGASHI: And I have another  
16 question.

17 How many more parcels are up for sale at  
18 this point?

19 MR. McFARLIN: To my knowledge, there are  
20 approximately half a dozen properties for sale at  
21 this time. Some of the owners who initially bought  
22 are trying to resell their parcels too.

23 So, yeah, there's parcels that are marketed  
24 in an on-going fashion by realtors down there.

25 COMMISSIONER OHIGASHI: I understand that.

1 But in addition to the already sold parcels, how many  
2 other parcels are?

3 MR. McFARLIN: As far as new parcels, to my  
4 knowledge, one more. Mr. Lindsey will get a tax map  
5 key from the County and sell the parcels one by one  
6 is how things are going down, occurring.

7 COMMISSIONER OHIGASHI: Mr. Lindsey  
8 acquired this property by foreclosure, through  
9 foreclosure sale?

10 MR. McFARLIN: I don't believe so. He  
11 bought it from RCFC. I don't think there was  
12 foreclosure involved when he purchased the property.

13 COMMISSIONER OHIGASHI: So he was  
14 transferred all rights and responsibilities under the  
15 terms?

16 MR. McFARLIN: That's correct.

17 COMMISSIONER OHIGASHI: No further  
18 questions.

19 CHAIRPERSON SCHEUER: Thank you,  
20 Commissioner Ohigashi.

21 Are there any further questions at this  
22 time for Mr. McFarlin?

23 Commissioner Cabral.

24 VICE CHAIR CABRAL: Yes, thank you, Chair,  
25 for moving forward.



1           Mr. McFarlin, you reference there may be a  
2 dozen properties for sale. Now, there's the two  
3 different properties, two different entities that  
4 we're discussing.

5           How many are those that's in total on both  
6 sides, or just on the Pi'ilani (sic) property side,  
7 which is it?

8           MR. McFARLIN: I'm just speaking about the  
9 Piihana Project District. Actually, to clarify, it's  
10 my estimate that there's six properties for sale down  
11 there right now, and some of those are being resells,  
12 like they were already sold once, and now they're  
13 being marketed again.

14          VICE CHAIR CABRAL: There's about six  
15 properties down there for sale, but none on the  
16 Lindsey side of the property then?

17          MR. McFARLIN: I'm not sure what you mean.  
18 I'm speaking within the Piihana Project District as a  
19 whole. I don't know what you mean by the Lindsey  
20 side.

21          VICE CHAIR CABRAL: It can get a little  
22 confusing. It's bifurcating and which half has what  
23 going on.

24          MR. McFARLIN: Yeah.

25          VICE CHAIR CABRAL: So six on Pi'ilani

1 (sic) side. Thank you very much.

2 CHAIRPERSON SCHEUER: Commissioner  
3 Giovanni.

4 COMMISSIONER GIOVANNI: Thank you, Chair.

5 I'm testing my memory on this docket, but I  
6 recall one of the conditions was building of a bridge  
7 that was responsibility of the Pi'ilani (sic)  
8 District, and there was no clarification in our last  
9 hearing whether Mr. Lindsey had the financial  
10 wherewithal to actually build that bridge without  
11 selling property off.

12 Now, we are seeing, by terms of the  
13 stipulated an agreement, we will not have  
14 verification that he has a plan or any funds to  
15 actually complete that important condition until six  
16 months after we would approve the stipulation.

17 Am I understanding that correctly?

18 MR. McFARLIN: Yes, I believe that is  
19 correct. Right now, as it's set forth, Piihana  
20 Project District is to provide financials to the LUC  
21 within six months.

22 You know, my client has actually been  
23 fairly transparent. One of the issues that came up  
24 at the last hearing too was the suggestion that this  
25 property would be reverted to Agricultural zoning.

1           And my client has taken the initiative, and  
2 he has approached the County of Maui Department of  
3 Planning about this, and at this time that's my  
4 understanding where this Project District will be  
5 going. Just to be up-front with all of you guys.

6           So he has been diligently trying to pursue  
7 financing, trying to pursue contractors. We've done  
8 a lot of work on that end. This project district  
9 requires hundreds of millions of dollars and, hey,  
10 Mr. Lindsey doesn't have hundreds of millions of  
11 dollars, I'm going to tell you that right now.  
12 That's just a fact. We all know that. No need to  
13 beat around the bush.

14           So that my understanding is he is  
15 voluntarily going to revert the zoning to  
16 Agriculture. And he has -- it's just more money than  
17 he anticipated this whole thing costing is what it  
18 is. That's just a fact.

19           COMMISSIONER GIOVANNI: Thank you. No  
20 further questions.

21           CHAIRPERSON SCHEUER: Commissioners, are  
22 there further questions for counsel for Mr. Lindsey  
23 at this time?

24           Commissioner Chang.

25           COMMISSIONER CHANG: Thank you, Mr. Chair.

1           Mr. McFarlin, you just said something that  
2 I wanted some clarification.

3           So is it your statement that Mr. Lindsey  
4 intends to revert, after the bifurcation, intends to  
5 revert this Wailuku Plantation's property back to Ag?

6           MR. McFARLIN: Yes, he's already approached  
7 the County of Maui, Department of Planning about this  
8 matter. That's --

9           COMMISSIONER CHANG: And has that  
10 disclosure been made to all the realtors as well as  
11 perspective buyers that this land, the intention is  
12 to revert everything back to Ag?

13          MR. McFARLIN: As far as I know. That's  
14 what has been told to me, that they're making proper  
15 disclosures.

16          COMMISSIONER CHANG: And is it clear that  
17 there will be different restrictions if the property  
18 is Ag zone versus what it currently is zoned for any  
19 current owners as well as new buyers? Does Mr.  
20 Lindsey understand that?

21          MR. McFARLIN: Yeah, I believe he does  
22 understand that.

23          COMMISSIONER CHANG: Can you explain to me  
24 what do you think he understands?

25          MR. McFARLIN: I can't speak to that. But

1 I would suggest that if you guys want to have a  
2 hearing with Mr. Lindsey, then we can set that up.  
3 But he does own Agricultural land around Hawaii.

4 So he is well aware of the ramifications of  
5 Agricultural zoning.

6 COMMISSIONER CHANG: Just to be clear, you  
7 represent several of the owners that have bought  
8 land, as well as you represent Mr. Lindsey who owns  
9 Wailuku Plantation LLC?

10 MR. McFARLIN: Yes.

11 COMMISSIONER CHANG: Have you spoken to Mr.  
12 Lindsey prior to this hearing?

13 MR. McFARLIN: Yes. That's when he made me  
14 aware that he had made this proposal to the  
15 Department of Planning.

16 COMMISSIONER CHANG: Let me just ask you  
17 one final question.

18 Currently the landowners that you  
19 represent, have there been any improvements on the  
20 land? Are they building anything? Is there any  
21 structures? Is there anything on the land by either  
22 Wailuku Plantation or by the individual owners that  
23 you represent?

24 MR. McFARLIN: Yes, there is.

25 COMMISSIONER CHANG: And what is on the

1 land? What is on the land? What has been done on  
2 the land?

3 MR. McFARLIN: There is one freestanding  
4 house, and there are two mobile dwellings, like tiny  
5 house structures that can be moved. That's what's  
6 down there at the moment.

7 COMMISSIONER CHANG: Are they legal  
8 structures? Were they built with County permits?

9 MR. McFARLIN: Not to my knowledge. I  
10 don't believe so.

11 COMMISSIONER CHANG: Are they aware that if  
12 an enforcement action is taken by the County to  
13 require them to remove them, that they may be  
14 required to remove them?

15 MR. McFARLIN: Yes. Yes, they are aware.  
16 That's a significant concern.

17 COMMISSIONER CHANG: Mr. Chair, I have no  
18 further questions. Thank you, Mr. McFarlin.

19 CHAIRPERSON SCHEUER: Thank you,  
20 Commissioner Chang.

21 Commissioner Ohigashi.

22 COMMISSIONER OHIGASHI: Are you intending  
23 to file a Petition to revert that portion, your  
24 project to Agricultural District under Land Use  
25 Commission?

1           MR. McFARLIN: That's what Mr. Lindsey  
2 represented to me. That's the direction he wants to  
3 take the Piihana Project District. It was previously  
4 Ag.

5           COMMISSIONER OHIGASHI: So if we decide to  
6 bifurcate and add a condition that your client will  
7 be filing, with the understanding that your client  
8 will be filing Petition to Revert to Agricultural  
9 District, would that be objectionable to you?

10          MR. McFARLIN: I would prefer we had a  
11 hearing about that. Mr. Lindsey does change his mind  
12 from time to time, as we saw in other hearings. So I  
13 would like to have him here to speak for that.

14          COMMISSIONER OHIGASHI: Well, this is a  
15 hearing where we are going to decide -- isn't it your  
16 duty to have Mr. Lindsey there to respond?

17          MR. McFARLIN: Yes.

18          COMMISSIONER OHIGASHI: You're the one  
19 bringing --

20          MR. McFARLIN: I understand, yeah. No, I  
21 did make him aware of this hearing, I can tell you  
22 that. And I'm here representing him as best I can.

23          COMMISSIONER OHIGASHI: I don't know what  
24 to. So I don't know what to ask. I will stop here.

25          MR. McFARLIN: Yeah, I'm trying to answer

1 these questions as best I can. That's all I can do.

2 CHAIRPERSON SCHEUER: Commissioners?

3 I guess, Mr. McFarlin, I'm just going to  
4 observe two things and give you a chance to respond  
5 to my reaction.

6 First of all, I'm a bit perplexed by your  
7 statement Mr. Lindsey has been very transparent with  
8 us, and then comment, by the way, he's thinking of  
9 reverting the property.

10 This is the first time I've heard it, so it  
11 doesn't lend to me evidence that he is being  
12 transparent with this Commission.

13 MR. McFARLIN: Also want to note --

14 CHAIRPERSON SCHEUER: Let me finish, Mr.  
15 McFarlin, because I don't think you've actually fully  
16 comprehended the Commission before you this entire  
17 time.

18 The second thing I would like to note is  
19 that every time a parcel is sold, those parcels are  
20 still currently under the full obligations of the  
21 entire Decision and Order; and every time a parcel is  
22 sold, the landowner is deliberately limiting his  
23 ability to fulfill those conditions, deliberately and  
24 knowingly.

25 You may respond.



1                   MR. McFARLIN:  What was the question,  
2  Chair?

3                   CHAIRPERSON SCHEUER:  It was a statement,  
4  Mr. McFarlin.

5                   MR. McFARLIN:  I don't have -- you know,  
6  Mr. Lindsey let me know about the reversion to Ag  
7  status about three weeks ago when I made him aware of  
8  this hearing.  And he's met with the County of Maui,  
9  Department of Planning about it.  That's what I can  
10 tell you.

11                   CHAIRPERSON SCHEUER:  Is there anything  
12 further?

13                   Commissioner Okuda.

14                   COMMISSIONER OKUDA:  Thank you very much,  
15 Mr. Chair.

16                   You know, following up on this sudden  
17 disclosure, Mr. McFarlin, about Mr. Lindsey's  
18 intentions, may I ask you this question?

19                   Did you communicate to the other parties,  
20 Mr. Sakumoto, the County, Corporation Counsel, State  
21 Office of Planning, did you tell them that this was  
22 now Mr. Lindsey's most current intentions?

23                   MR. McFARLIN:  I haven't fully discussed it  
24 with Mr. Lindsey.  I don't represent him on that  
25 matter, but he has made me aware that that is

1 something he's pursuing on his own.

2 COMMISSIONER OKUDA: Do you believe that  
3 the intention to revert part, or to revert his part  
4 of the property back to Agriculture is a material  
5 fact which the other parties should have been made  
6 aware of because it may or may not affect now the  
7 substance of the stipulation, which appears to be  
8 entered into based on an understanding, or without an  
9 understanding, that there would be a reversion?

10 I mean, isn't that something material to  
11 the stipulation?

12 MR. McFARLIN: Yes. Basically Mr. Lindsey  
13 has told me he doesn't have the financial ability to  
14 do this project. So that's where --

15 COMMISSIONER OKUDA: I know. My question  
16 is simply whether or not the intention to revert the  
17 property of the people that you represent back to Ag,  
18 that intention is a material fact that the other  
19 parties to the stipulation should have known about,  
20 because it might affect their willingness to even go  
21 forward with the stipulation, or maybe affect  
22 whatever conditions they would have been willing to  
23 stipulate to?

24 MR. McFARLIN: That's correct.

25 COMMISSIONER OKUDA: Maybe for once in my

1 life I'm a little bit speechless.

2 Okay, Chair, I'm sorry, I've got no further  
3 questions.

4 CHAIRPERSON SCHEUER: Commissioner  
5 Ohigashi.

6 COMMISSIONER OHIGASHI: I just want to get  
7 this on the record.

8 So when you signed the stipulation  
9 indicating that you'll provide to the Land Use  
10 Commission within six months financials to show how  
11 you are going to complete this project, you knew that  
12 Mr. Lindsey did have money to complete it, and you  
13 probably would not be filing that six-month --

14 MR. McFARLIN: He brought this up to me  
15 after the stipulation came about.

16 COMMISSIONER OHIGASHI: I'm -- no --

17 MR. McFARLIN: I didn't know about --

18 COMMISSIONER OHIGASHI: You learned about  
19 this after the 14th when the filing of the  
20 stipulation took place?

21 MR. McFARLIN: Yeah, after I signed the  
22 stipulation, he contemplated these requirements,  
23 these three requirements, and he told me, you know  
24 what? I've done everything I can. I've investigated  
25 this, I've tried to get the financing. I'm just not

1 going to be able to do it. So I've approached County  
2 of Maui, Department of Planning about reverting to  
3 Ag.

4 COMMISSIONER OHIGASHI: As of this point in  
5 time, you have no intention of -- Mr. Lindsey has no  
6 intention of actual fulfilling the requirements under  
7 the stipulation that he provide financing by --

8 MR. McFARLIN: He said he would provide his  
9 financials within six months.

10 COMMISSIONER OHIGASHI: It calls for a  
11 financial plan showing how he can complete the  
12 project.

13 MR. McFARLIN: Yeah, you know, it's not  
14 going to be what -- you know, just to be honest, it's  
15 not going to be everything you guys want it to be,  
16 but he wants to provide the financials within six  
17 months.

18 CHAIRPERSON SCHEUER: Commissioner Wong.

19 COMMISSIONER WONG: Can I -- I would like  
20 to move to executive session to discuss with our  
21 attorney about the legal issues and limits to our  
22 discussion on this issue, please.

23 CHAIRPERSON SCHEUER: There is a motion to  
24 go into executive session to consult with the  
25 Commission's attorney regarding our powers and

1 duties, and it has been seconded by Commissioner  
2 Cabral.

3 Is there discussion on the motion?

4 COMMISSIONER WONG: Chair, this discussion  
5 is more on regarding the limits of attorneys'  
6 discussions and viewpoints that was presented to us,  
7 and I wanted to talk to our attorneys about his  
8 viewpoint to see if the matter that was brought in  
9 front of us is okay or not okay.

10 CHAIRPERSON SCHEUER: Can I ask you to  
11 further clarify, Commissioner Wong?

12 COMMISSIONER WONG: I just wanted to ask  
13 our Attorney General his opinion, because I have some  
14 concerns over Mr. McFarlin's statements and his prior  
15 statements to the Commission if he is trying to -- if  
16 he's lying to us or not, and if he knowingly knew  
17 about the lying. So I wanted to talk our attorney  
18 first.

19 CHAIRPERSON SCHEUER: Thank you very much  
20 for that clarified motion.

21 Do you still second the motion,  
22 Commissioner Cabral?

23 Okay, Commissioner Cabral still seconds the  
24 motion. Mr. Orodener -- is there discussion on the  
25 motion, Commissioners?

1           Mr. Orodener, if not, please roll call the  
2 Commission on the motion to go into executive  
3 session.

4           EXECUTIVE OFFICER: The motion is to go  
5 into executive session.

6           Commissioner Wong?

7           COMMISSIONER WONG: Yep.

8           EXECUTIVE OFFICER: Commissioner Cabral?

9           VICE CHAIR CABRAL: Yes.

10          EXECUTIVE OFFICER: Commissioner Giovanni?

11          COMMISSIONER GIOVANNI: Aye.

12          EXECUTIVE OFFICER: Commissioner Okuda?

13          COMMISSIONER OKUDA: Yes.

14          EXECUTIVE OFFICER: Commissioner Ohigashi?

15          COMMISSIONER OHIGASHI: Yes.

16          EXECUTIVE OFFICER: Commissioner Chang?

17          COMMISSIONER CHANG: Yes.

18          EXECUTIVE OFFICER: Commissioner Aczon is  
19 absent.

20          Chair Scheuer?

21          CHAIRPERSON SCHEUER: Aye.

22          EXECUTIVE OFFICER: Mr. Chair, the motion  
23 passes unanimously.

24          CHAIRPERSON SCHEUER: So, Commissioners,  
25 you will be sent a separate meeting invitation from

1 Mr. Orodenger to attend another ZOOM meeting.

2 This meeting will remain open for all  
3 panelists and attendees. There will be notice on the  
4 screen that we are going into executive session, and  
5 I cannot tell you how long that will last, and we  
6 will come back from executive session.

7 We're in executive session.

8 (Executive session. )

9 CHAIRPERSON SCHEUER: It is 11:25. We are  
10 back in regular session. Thank you everyone for your  
11 patience as we went into executive session.

12 We were still on -- or finishing with  
13 questions for Mr. McFarlin. Mr. McFarlin.

14 MR. McFARLIN: Yes, I would just like too  
15 say, I'm trying to be up-front about absolutely  
16 everything here. I think those who attended the LUC  
17 hearing previously with Mr. Lindsey and observed how  
18 he changed his mind and changed his intentions during  
19 the middle of the meeting surprisingly to all of us.

20 So I just want you guys to keep in mind I'm  
21 dealing with a very indecisive and difficult client  
22 here, and I am trying to provide you with the best  
23 information I can.

24 I'm answering your questions forthright. I  
25 really take great offense that I would be alleged to

1 be a liar because I've -- you know, there aren't any  
2 good answers to these questions, there just aren't.  
3 And I'm doing the best I can with them, and I hope  
4 you realize Mr. Lindsey doesn't have copious amounts  
5 of money. He doesn't have the greatest plan. And  
6 I'm here doing the best I can.

7 So any way, thank you.

8 CHAIRPERSON SCHEUER: Thank you for your  
9 statement, Mr. McFarlin. Commissioner Wong.

10 You're muted, Commissioner Wong. You're  
11 still muted, Commissioner Wong.

12 One moment while we try to address this.

13 COMMISSIONER WONG: There.

14 I want to apologize to Mr. McFarlin, if I  
15 called him a liar. It's just I was taken aback. It  
16 seemed like a misrepresentation by some statements  
17 that I just heard. I was just thrown off my chair  
18 pretty much by what I just heard. I apologize to Mr.  
19 McFarlin if I said he's lying.

20 MR. McFARLIN: Okay. Well, I'm not a liar.  
21 I'm going to answer forthright. You know, this  
22 letter and these appointments with the County of Maui  
23 Department of Planning, those are on the record with  
24 the Maui County Department of Planning. If I was a  
25 liar, I wouldn't tell you about it at all. I figured



1 I should bring it up now to be up-front rather than  
2 down the line in this meeting somebody else brings it  
3 up, and goes: "Hey, Mr. McFarlin, what about this?  
4 Why didn't you tell us that?"

5 So I'm bringing it up now, and I'm going to  
6 answer to the best of my ability, and that's all I  
7 can do, and that's got to be good enough. I can only  
8 do my very best and that's it.

9 CHAIRPERSON SCHEUER: Any more questions at  
10 this time for Mr. McFarlin, Commissioners? If not,  
11 let's hear from Mr. Sakumoto, and for his client.

12 MR. SAKUMOTO: Thank you, Chair. I think I  
13 want to start out by perhaps responding to a question  
14 that Commissioner Okuda raised during the public  
15 witness testimony, which was what community benefit  
16 is there if the Commission were to approve the  
17 bifurcation.

18 So if I could, I would just like to say in  
19 response to that, the Wailuku Project District  
20 referred to as Kehalani subdivision, it consists of  
21 many owners at this point, as we've explained  
22 previously. There are roughly 2000 homeowners. Lots  
23 have been sold to Carpenters' Union, Foodland and  
24 dedicated property to the County of Maui for these  
25 parks. They've dedicated land to the State of Hawaii

1 Department of Education for school.

2           And so, you know, one of the benefits that  
3 would come out of this bifurcation is that the title  
4 to all of these properties right now is, as you know,  
5 is encumbered by the Decision and Order conditions.  
6 But because the D&O applies to separate unrelated  
7 project districts, the question that arises that  
8 essentially clouds the title to all these properties  
9 is what is the impact of one Co-Petitioner's  
10 nonperformance of a condition on an unrelated  
11 Co-Petitioner on an unrelated project who is  
12 performing the conditions.

13           And so this question to me can be addressed  
14 by the bifurcation, because essentially that question  
15 would no longer exist if the Commission would  
16 bifurcate the docket.

17           We stated very clearly in the stipulation  
18 that it's a procedural matter only. It would support  
19 the just and efficient operation and proceedings of  
20 this Commission, and it is not intended to affect any  
21 of the existing substantive rights or obligations of  
22 any of the parties.

23           If a party has an obligation prior to the  
24 bifurcation, they would have that obligation after  
25 the bifurcation. There's no intention to try to

1 escape something or be released from something by  
2 virtue of the bifurcation. We're simply trying to  
3 create a means that is more efficient going forward,  
4 because these projects are unrelated.

5           And as has been stated repeatedly over the  
6 record, there's no coordination or connection between  
7 the two properties. And honestly, in fact, if things  
8 do proceed the way it was just discussed where the  
9 Piihana project does move toward a reversion of some  
10 type, I think it would only help to clarify for the  
11 record that there was no connection to that process  
12 with the Wailuku Project District.

13           That's the first thing I wanted to say and  
14 make sure that that was very clear.

15           The other thing I wanted to point out was  
16 that in terms of whether the Kehalani Community  
17 Association is actually supportive of this  
18 bifurcation, I think it was suggested earlier that  
19 maybe that wasn't the case. But we have filed things  
20 previously early on in this process to establish the  
21 fact that the Kehalani Community Association Board  
22 was informed and did pass a motion to support the  
23 bifurcation process.

24           So that association is supportive of this  
25 objective.

1           And I think I'll stop there. I just wanted  
2 to be sure that that was very clear for the  
3 Commissioners.

4           CHAIRPERSON SCHEUER: Mahalo, Mr. Sakumoto.  
5 Commissioners, questions?

6           Commissioner Okuda followed by Commissioner  
7 Chang.

8           COMMISSIONER OKUDA: Thank you very much,  
9 Mr. Chair.

10           Mr. Sakumoto, is today the first time you  
11 heard of the possible intention of the other project  
12 district to revert themselves back to Agriculture?

13           MR. SAKUMOTO: It was the first time I  
14 heard it stated definitively like that. I have seen  
15 an email that Mr. Lindsey sent to the County of Maui  
16 awhile ago, and it was just an inquiry asking the  
17 County for comments. It wasn't a declaration that  
18 this was a fait accompli. It wasn't a declaration  
19 that he had made up his mind to do it.

20           I think he emailed the County saying that  
21 he's considering it, and he wanted to know what their  
22 comments were. Beyond that I don't know anything  
23 else.

24           COMMISSIONER OKUDA: My other question is,  
25 you heard the public witness' testimonies about why

1 they oppose the bifurcation in a way that they  
2 described it. You know, there's allegations that  
3 certain improvements promised weren't made.

4 Do you have any response to that, the  
5 public testimony?

6 MR. SAKUMOTO: I don't have any specific  
7 point by point, Commissioner Okuda, except to say  
8 that my client has been very diligent about filing  
9 annual reports with this Commission, copying the  
10 County of Maui every single year since they acquired  
11 this property in 2012 or 2013.

12 It's very clear about the status on what  
13 has been done and what is yet to be done. And I  
14 think that, you know, as far as I know -- and the  
15 County, I guess, secondly, I guess, with respect to  
16 some of the specific issues that the County feels may  
17 not yet have been done, we had a very, I think,  
18 detailed discussion with the County between the last  
19 hearing and this hearing.

20 Our response, in fact, is attached as an  
21 exhibit to the County's filing, because we responded  
22 to their questions in writing as far as where we  
23 stood on these issues.

24 Lastly, as it relates to the community  
25 center or the site for the community center. I heard

1 several of the public testifiers bring that issue up.

2 I think the best I can say now is -- and I  
3 don't mean to be elusive about this -- it's being  
4 handled by another attorney, not myself, but there  
5 have been discussions directly with the County which  
6 involves the community center, and a proposal was  
7 presented to the County I think in October. To my  
8 knowledge, we don't have a formal response to that  
9 proposal. So that's the best I can tell you at this  
10 juncture.

11 COMMISSIONER OKUDA: Okay, let's just focus  
12 in on the community center.

13 And by the way, we take into account all  
14 public testimony, but I do recognize the fact -- and  
15 we all know this from all the trial work you and I  
16 have done over the years -- that sometimes a snapshot  
17 of witness testimony may not give you the whole  
18 picture.

19 But given the fact that there's been  
20 testimony about the community center, let me ask you  
21 this.

22 In the history of the project, your section  
23 of the D&O, was there representations of a community  
24 center as an amenity that was being presented to  
25 potential owners, along the lines of, hey, by the

1 way, if you buy a piece of property, or buy a lot  
2 here or buy an interest in a condominium unit, you'll  
3 have the benefit of this community center?

4 MR. SAKUMOTO: You're asking me if during  
5 my involvement with this whether my client made that  
6 representation to potential buyers that there would  
7 be a community center?

8 COMMISSIONER OKUDA: Let me ask it more  
9 precisely.

10 At least one of the witnesses seemed to  
11 testify that the representation or the promise of a  
12 community center was a material fact that was taken  
13 into account by that person to buy into the project.

14 Was that accurate testimony as far as what  
15 the facts were, as you know them to be, even if your  
16 knowledge might be second or third-hand?

17 MR. SAKUMOTO: I guess I can say this. It  
18 is true that there is a reference to a community  
19 center in the Findings of Fact, the 1990 D&O Findings  
20 of Fact. That much is clear. It is not a condition  
21 of the D&O to provide a community center.

22 So essentially what I think, as I  
23 understand the argument being made, is that because  
24 there was a reference to a community center in the  
25 Findings of Fact, that although it is not stated as

1 an expressed condition of the D&O, they're relying  
2 upon a condition in the D&O.

3 It's the standard LUC condition that says  
4 the property shall be developed in substantial  
5 compliance with the representations made to the  
6 Commission.

7 So weaving those two things together, I  
8 think the argument is that it has thereby become a  
9 requirement. I don't want to put words in people's  
10 mouth, but that is my understanding of how this issue  
11 has come up.

12 COMMISSIONER OKUDA: My final question is  
13 basically this. If for some reason the Commission  
14 were to decide either to deny this bifurcation at  
15 this point in time, or defer action on the  
16 stipulation because of what has suddenly transpired  
17 during this hearing, is there any real prejudice to  
18 your client if you took that period of time of a  
19 deferral or, you know, whatever break there is, in  
20 getting this kind of stipulation approved by the  
21 Commission, if you took that time to talk to these  
22 community people, to see if you could get their input  
23 and maybe see if something can be worked out?

24 Is there any prejudice to doing that to  
25 your client right now?



1           MR. SAKUMOTO: I don't know that I could  
2 point to a specific prejudice other than the fact,  
3 like I said, that this problem with the clouding of  
4 the title will not be resolved, it will remain as we  
5 go forward.

6           I think the other thing is that the way the  
7 D&O conditions read is -- and I'm paraphrasing  
8 here -- but the Petitioners were basically obliged to  
9 work with the County Department of Parks on  
10 satisfying park dedication requirements. And that is  
11 what I think has been going on over the years.

12           And, in other words, we need to be sure  
13 that the County has accepted the park dedication, and  
14 that we satisfied that condition as far as the County  
15 is concerned.

16           You know, there isn't a condition that says  
17 go out and canvas the homeowners and see what they  
18 want. So I guess, you know, it's a long way of  
19 saying I don't want to create confusion about what  
20 can be done, what should be done, who has the final  
21 say, you know, on an issue like this.

22           COMMISSIONER OKUDA: But as far as specific  
23 prejudice that can be pointed to either by a deferral  
24 of this matter or by a denial with leave that you can  
25 go and refile another stipulation, or refile an

1 appropriate motion, would it be a fair statement to  
2 say that right now any way, you can't really point to  
3 a specific piece of prejudice except for possibly the  
4 ongoing prejudice by what you call the clouding of  
5 title; would that be a fair statement?

6 MR. SAKUMOTO: Yes. But, if you would  
7 allow me to just be sure it's clear. You know, the  
8 refiling of a motion is not as simple as it would  
9 sometimes otherwise be, because -- well, first of  
10 all, the project, Wailuku Project District really  
11 does not have any feasible way to break a motion.

12 As I understand it from working with LUC  
13 staff, we would have had to obtained 2000 signatures  
14 to authorize us to bring the motion for bifurcation,  
15 because that's how many people have already purchased  
16 lots, which is not a practicable means of proceeding.

17 On the other hand, the Piihana Project  
18 District, which at the time we started this had, I  
19 believe, six owners or seven, did have the practical  
20 ability to get everybody that had an interest in the  
21 Piihana District to authorize a motion.

22 And essentially what we were obliged to do  
23 is to make sure the 2000 owners on our side were  
24 served with that motion, so they were given proper  
25 notice. That is, in fact, what happened.

1           Now, if there's a deferral, and this  
2 process goes on for some indefinite period of time,  
3 especially if the Piihana District continues to sell  
4 lots, and this group of six keeps changing, the  
5 refiling and the reauthorization of Mr. McFarlin as  
6 the attorney for the various owners, it becomes  
7 logistically more complicated and difficult.

8           So to bring it back to this point where we  
9 are now is not going to be that easy. It may be --  
10 frankly, it may be impossible, because if some of the  
11 owners decide they don't want to join in at Piihana,  
12 I don't know what happens at that point.

13           COMMISSIONER OKUDA: Okay, but right now,  
14 anyway, if, for example, there was just a deferral,  
15 not just a denial of the stipulation and the motion,  
16 but if there was a deferral, your client would not  
17 suffer that procedural prejudice which you describe,  
18 or at least not to the extent where you got to get  
19 authorization from 1000, possibly 1000 owners,  
20 correct?

21           MR. SAKUMOTO: Yeah, as long as it's not an  
22 indefinite deferral. And I think that other than  
23 what I disclosed, that's what I would say would be  
24 the impact on us.

25           COMMISSIONER OKUDA: Okay, and my final

1 question deals with this prejudice of a cloud on  
2 title.

3 At the time that your client was making  
4 sales of the individual properties, it had a duty to  
5 disclose material facts with respect to the sale;  
6 correct?

7 MR. SAKUMOTO: I think that's a fair  
8 statement.

9 COMMISSIONER OKUDA: Yeah, because there is  
10 not only a statute that deals with required  
11 disclosures and real estate transactions or  
12 residential real estate transactions, but there are  
13 those cases -- the Schaefer versus Earl Thatcher  
14 disclosure cases.

15 Now, if in fact, as you described it, this  
16 cloud on title is such a problem, wouldn't that fact  
17 have been disclosed to the buyers so they would be  
18 aware that if they're buying into your client's  
19 project, that's what the purchase comes with, the  
20 underlying Land Use Commission order with all its  
21 benefits, but with all its responsibilities?

22 MR. SAKUMOTO: I've not been involved with  
23 any sales, so I can't tell you what they did or  
24 didn't do. I do know that the conditions of the D&O  
25 were put on record as required by the D&O. There is

1 a declaration of conditions that is recorded in the  
2 Bureau of Conveyances. So anybody who acquires title  
3 to a property in the Wailuku Project District does  
4 see that the title is encumbered by that declaration.

5 COMMISSIONER OKUDA: In other words, all  
6 buyers were on notice that part of the deal in  
7 purchasing their properties was the fact that it  
8 comes along with the Land Use Commission Decision and  
9 Order; correct?

10 MR. SAKUMOTO: I mean, I think that there  
11 was constructive notice to that effect.

12 COMMISSIONER OKUDA: Mr. Chair, thank you,  
13 very much. I have no further questions.

14 Thank you, Mr. Sakumoto.

15 CHAIRPERSON SCHEUER: Thank you very much,  
16 Commissioner Okuda. We will have Commissioner Chang  
17 followed by Ohigashi followed by Cabral.

18 COMMISSIONER CHANG: Thank you, Mr. Chair.

19 Good morning, Mr. Sakumoto. Thank you for  
20 being here this morning.

21 I just wanted to -- in light of Mr.  
22 McFarlin's disclosure regarding Mr. Lindsey's  
23 potential decision to seek the reversion, does that  
24 in any way change your client's position on the  
25 stipulation?

1           MR. SAKUMOTO: I don't think so. I mean, I  
2 think that the idea behind the stipulation was to  
3 allow both properties to proceed on independent  
4 paths, and that was basically why we started this  
5 process. And whatever the fate of the Piihana  
6 Project District is, it is.

7           And I think that as far as we are  
8 concerned, the stipulation, the objective of the  
9 stipulation is still something we would like to  
10 achieve.

11           COMMISSIONER CHANG: I appreciate that.

12           I'm trying to understand if there is a  
13 bifurcation -- let me back up.

14           Currently both parties, your client and Mr.  
15 McFarlin's clients are responsible to fulfill the  
16 obligations under the LUC's D&O.

17           Would you agree with that they are  
18 responsible for fulfilling those obligations?

19           MR. SAKUMOTO: I don't know that I agree  
20 with that, Commissioner Chang. I think that, you  
21 know, we have always been responsible for the Wailuku  
22 Project District, the conditions as they apply to  
23 Wailuku Project District.

24           There's never been any sense that we were  
25 also obliged to perform the conditions that apply to

1 an unrelated property.

2 I mean, there's no feasible means of doing  
3 that. There's really -- it's really hard to imagine  
4 a scenario where that could actually even be done.

5 COMMISSIONER CHANG: That was sort of my  
6 understanding at the last hearing that LUC wanted a  
7 clarification from the parties, who's responsible for  
8 what obligations. And I know you attempted to do  
9 that with the stipulation.

10 But in the absence of the stipulation, if  
11 there is a reversion, or a petition to revert the  
12 property, some of these infrastructure obligations,  
13 where it is not really clear which party is  
14 responsible, that there is an argument that both  
15 parties may be responsible for some of these  
16 infrastructure requirements under the D&O, that if  
17 there is a bifurcation or -- yeah -- or that, because  
18 there's sort of a lack of clarity, at least in my  
19 mind, on some of these infrastructure requirements,  
20 that currently both parties would be responsible for  
21 some of those obligations.

22 MR. SAKUMOTO: I'm sorry --

23 COMMISSIONER CHANG: It was more of a  
24 statement than a question.

25 But that in the absence of the bifurcation,

1 that there's an argument -- and you may disagree --  
2 an argument that both parties are responsible for the  
3 obligations under the D&O. Would you agree?

4 MR. SAKUMOTO: I suppose you could make an  
5 argument. I don't agree with that argument. I don't  
6 see how that is possible for, you know, one developer  
7 to go and fulfill obligations on someone else's  
8 property that they have no right to be on, or do  
9 anything.

10 So other than an argument, I don't know  
11 that I agree that there's anything more than that.

12 COMMISSIONER CHANG: But, okay, so just  
13 kind of humor me.

14 In the absence -- if we bifurcated the  
15 docket, and we clearly separated, would you agree  
16 that the Land Use Commission and the public would not  
17 have the ability to hold both parties responsible to  
18 fulfill all of the obligations under the D&O?

19 If we bifurcated, and there is an argument  
20 that both parties are responsible, but once we  
21 bifurcated, we are essentially separating the  
22 obligations of both parties?

23 MR. SAKUMOTO: That's the objective of the  
24 bifurcation. And we think it's important to be  
25 clear. I mean, this goes to the very point about the



1 clouding of title, which is -- there is a question,  
2 there is an ambiguity which we would like to resolve,  
3 and it is for the benefit, from our standpoint, of  
4 all the people who have bought property. We want to  
5 remove that ambiguity from their title, and we don't  
6 think that there really is, as a practical matter,  
7 any real change.

8 I mean, my client would have no ability to  
9 go and do anything as it relates to the Piihana  
10 property. They don't have an interest in it. They  
11 don't have a right to even enter the property. They  
12 don't have any business with respect to that  
13 property.

14 So I don't know how, not having that right  
15 later, is any different from the status as it  
16 currently exists. We don't have the right to even do  
17 that now.

18 COMMISSIONER CHANG: But would you agree  
19 that the benefit is really to your client? At this  
20 point in time the clearing of the cloud is to the  
21 benefit of your clients --

22 MR. SAKUMOTO: It is clearly -- I'm sorry.

23 COMMISSIONER CHANG: So that if we don't  
24 bifurcate this case, and that there is an argument --  
25 because I would agree that with respect to those

1 conditions that apply strictly to activities on the  
2 Piihana Project, that's the Piihana, that's those are  
3 petitioner's obligations.

4           But I am more concerned about the  
5 infrastructure requirements, the roadways, and  
6 perhaps Commissioner Giovanni will talk more about  
7 the bridge, but those kinds of major infrastructure  
8 requirements that were placed on the LUC conditions,  
9 where there is an argument that to a certain extent  
10 both parties are obligated to fulfill those  
11 conditions; that if we bifurcated this, that we would  
12 no longer be able to hold -- when you, pursuant to  
13 your stipulation, those things that you say are the  
14 sole obligation of Piihana would no longer be -- the  
15 Commission would not be able to go and ask your  
16 clients to fulfill those obligations.

17           I know I made that kind of confusing.

18           Let me go on. Let me ask you one final  
19 question.

20           There are outstanding dedications that  
21 Wailuku, your clients, have to fulfill; is that  
22 correct?

23           MR. SAKUMOTO: Yes, that is correct. There  
24 are still certain things which need to be done, and I  
25 think, as I mentioned earlier, we've had very clear

1 discussion with the County about what they are. And  
2 it's laid out in one of our letters to the County on  
3 what the status is of each of those things.

4 COMMISSIONER CHANG: Is there a cost  
5 estimate to those dedications, the value?

6 MR. SAKUMOTO: Yes. I think we provided  
7 that.

8 COMMISSIONER CHANG: Is that the one about  
9 \$5.6 million?

10 MR. SAKUMOTO: I don't have it in front of  
11 me right now, but I can find out what those numbers  
12 are.

13 COMMISSIONER CHANG: Is there an agreement  
14 with the County as to what those requirements are?

15 THE WITNESS: I don't know that we have  
16 reached an agreement with the County. I think we  
17 have had discussions with the County. I think that  
18 those discussions are ongoing and will continue, you  
19 know, even after the bifurcation.

20 But I think it's, you know, it's not  
21 something that we're hiding from or running from. I  
22 think we tried to lay it out on the table so that we  
23 have a meeting of the minds as to what is left and  
24 how much it will cost.

25 COMMISSIONER CHANG: I'm not too sure if we

1 have got authority to do this, but my question to you  
2 is, would your client be willing to post a bond for  
3 the value of those dedications to ensure that, as you  
4 say, that they will be fulfilled?

5 MR. SAKUMOTO: I can't answer that without  
6 conferring with my client. I can't make that  
7 commitment on their behalf.

8 I believe, Commissioner Chang, that if you  
9 look at the historical performance of what has been  
10 done to date, what they have completed versus the  
11 very, I think, relatively small amount that is yet to  
12 be done, I don't -- frankly, I don't believe a bond  
13 would be necessary, or I don't think the cost would  
14 be justifiable, because the bond will come with a  
15 cost.

16 But like I said, I can't make any  
17 commitment for my client without having a discussion  
18 with them on that point.

19 COMMISSIONER CHANG: And I appreciate your  
20 comment on that. I guess it's just that we, in a lot  
21 of -- not only this project -- but other projects the  
22 public will come forward to us and say that these  
23 conditions have not been met, and then there's a  
24 foreclosure or there is a bankruptcy, and they never  
25 get met.

1           So I know in the future I will want to  
2 perhaps include as a condition a placement of a bond  
3 to ensure that these kinds of conditions are met.  
4 Because in the absence of that, there's no guarantee  
5 that the public who will get the benefit of those  
6 conditions.

7           So I understand your point. Thank you very  
8 much. I have no further questions.

9           CHAIRPERSON SCHEUER: Thank you,  
10 Commissioner Chang.

11           We have Commissioner Ohigashi followed by  
12 Commissioner Cabral. I'm noting it is noon. All  
13 hopes for a quick meeting this morning has completely  
14 evaporated, I'm sure to everyone's dismay, every  
15 participant's.

16           What I'm going to suggest is we go with  
17 questions for Mr. Sakumoto from Commissioner Ohigashi  
18 and Commissioner Cabral, and then we go into  
19 lunchtime recess and resume after lunch.

20           Commissioner Ohigashi.

21           COMMISSIONER OHIGASHI: Mr. Sakumoto, one  
22 thing I miss about ZOOM is not having your name plate  
23 in front of me.

24           But what I wanted to know, I'm looking at  
25 County of Maui's filing, and look on page 4, and look

1 at your filing, the stipulation. It says Finding of  
2 Fact 85, that's going to come under you, under your  
3 client; is that right?

4 Petitioner proposes to develop and dedicate  
5 approximately 110 acres of park and open spaces, as  
6 well as a community center within the Wailuku Project  
7 District.

8 MR. SAKUMOTO: Yes.

9 COMMISSIONER OHIGASHI: And then  
10 condition -- or the conclusion, you refer to  
11 Petitioner shall develop the property in substantial  
12 compliance and representations made to the Land Use  
13 Commission and obtain the reclassification of  
14 property.

15 That is coming under both of you, those  
16 two.

17 And further down, it refers to a letter  
18 that was sent by your client indicating that the RCFC  
19 shall petition the State Land Use Commission to  
20 determine whether the requirements of Finding of Fact  
21 85 are required to construct a community center.

22 Is that part of the stipulation?

23 MR. SAKUMOTO: The stipulation that we  
24 submitted, is that your question?

25 COMMISSIONER OHIGASHI: Yes.

1 MR. SAKUMOTO: No.

2 COMMISSIONER OHIGASHI: In order for -- so  
3 we may or may not receive that motion, is that what  
4 you're telling me under the stipulation? Because I  
5 think the stipulation says six months for both  
6 parties to provide that.

7 I was wondering if that would be included  
8 in that six-month period?

9 MR. SAKUMOTO: No. I mean the stipulation  
10 that we signed says within six months of the date of  
11 the order RCFC shall file with the Commission a  
12 statement of current cost for the remaining Wailuku  
13 Project District development and outstanding  
14 improvements, as well as a detailed schedule for  
15 necessary approval of said development. And that's  
16 basically it.

17 COMMISSIONER OHIGASHI: So that does not  
18 include this Petition that you have indicated in  
19 the --

20 MR. SAKUMOTO: No, it does not if -- and I  
21 guess, Commissioner Ohigashi, the one thing I could  
22 say, I think you're looking at the County of Maui's  
23 statement. I don't want to speak for them, they're  
24 well represented here, which they filed on  
25 December 1st.

1           I would only ask that you consider the fact  
2 that the stipulation was actually filed with the  
3 Commission on December 8th, you know, after they made  
4 their position statement. They still signed the  
5 stipulation saying basically what they were expecting  
6 from my client are the matters that I just read off.

7           COMMISSIONER OHIGASHI: I'm just trying to  
8 figure out is, because this was placed here  
9 December 1st, was it contemplated to be one of the  
10 things that will be filed within six months in the  
11 stipulation as filed on December 8th?

12           MR. SAKUMOTO: I'm trying to -- I'm trying  
13 to find the best way of answering this.

14           There is a proposal that was made, as I  
15 mentioned earlier, to address this community center  
16 issue. And that proposal was submitted by another  
17 attorney on behave of RCFC to the County of Maui back  
18 in October. As far as I know from checking with him  
19 yesterday, we're still awaiting a response.

20           So I don't want to say that there will be  
21 something coming within six months on that matter, if  
22 in fact it's resolved separately with the County  
23 pursuant to that proposal.

24           COMMISSIONER OHIGASHI: Because I'm -- so  
25 will we know about this so-called agreement that you



1 have? Because it does involve -- it seems to me it  
2 does involve a condition that specifically outlines  
3 110 acres. And I think what the submittal said was  
4 27 acres were so far dedicated for park.

5 So I'm just wondering 110 acres and the  
6 community center, are those things brought to us by  
7 your client as issues in here? Because as far as I  
8 can tell, you're like 90-something acres short of  
9 110.

10 MR. SAKUMOTO: I guess after the  
11 bifurcation, you know, we will respond to any  
12 inquiries that the Commission has, I mean, on this or  
13 any other matter.

14 It's a complicated discussion, let me put  
15 it that way. And one of the reasons why I didn't  
16 file anything in response to the County's papers was  
17 that, first of all, we had the stipulation that was  
18 signed; but secondly, I don't think it's necessarily  
19 tied to the bifurcation.

20 You know, like I said, if it is an issue  
21 prior to the bifurcation, it's still going to be an  
22 issue after the bifurcation. The bifurcation doesn't  
23 make anything disappear.

24 COMMISSIONER OHIGASHI: I was just asking  
25 the context of the stipulation. There was a

1 statement made in there, in their filing, and the  
2 stipulation could have included -- it was broad  
3 enough to include that issue to be brought before the  
4 LUC, and I was wondering if that was; and if not, are  
5 we going to be involved in it?

6 And the last thing maybe you can answer for  
7 me.

8 When they say petition the Commission,  
9 don't you run into the same problems of getting all  
10 2000-somewhat signatures? I'm just asking.

11 MR. SAKUMOTO: I don't know how to answer  
12 that. I think that if we had to get every person's  
13 signature, every owner's signature for every document  
14 we file with the Commission, that would be  
15 impracticable. But when it comes to clarifying  
16 developer obligations, I think that's something we  
17 can do directly and without all of that backup.

18 I think the difference here is that what we  
19 are seeking to achieve with the bifurcation is not a  
20 developer obligation, per se, we're really trying to  
21 clear up the title for all the homeowners and various  
22 people that own these properties. That's why I think  
23 this thing about needing the signatures from  
24 everybody, because it affected so many people's  
25 title, was where the line was drawn.

1           COMMISSIONER OHIGASHI: I only ask the  
2 question because there was that requirement in there.  
3 I look forward to hearing about the 110 acres.

4           No further questions.

5           CHAIRPERSON SCHEUER: Thank you,  
6 commissioner Ohigashi.

7           Commissioner Cabral.

8           VICE CHAIR CABRAL: Thank you, Chair  
9 Scheuer.

10           Mr. Sakumoto, thank you for being here and  
11 trying to help us clarify this.

12           I'm clearly more confused than I was when  
13 we opened this meeting.

14           Did I hear you correct that you said that  
15 you understand your client and your part of that  
16 development does have that obligation to make sure  
17 that there is a 110 acres of open space dedicated, is  
18 that something you've indicated, of which you've  
19 dedicated 27 acres so far?

20           Did I hear that correctly?

21           MR. SAKUMOTO: I don't know if I said that.

22           I think we acknowledge that certain  
23 findings of fact attributable to certain projects,  
24 and 85, I think it says in the stipulation, is one  
25 that's attributable to the Wailuku Project District.

1           With respect to the satisfaction of park  
2 dedication, it's a much more complicated question,  
3 and I don't know that I'm prepared to discuss all of  
4 it right now. I'll do my best if you want to hear  
5 it, but I think that, you know, our position is that,  
6 as it relates to conditions and performance, we've  
7 been working very closely since my client acquired an  
8 interest in this property 2012 with the County, with  
9 the Parks Department and, you know, I think that  
10 we've been doing what we were expected to do.

11           I'm not saying that it's done, but I think  
12 that we have been performing in good faith up until  
13 now.

14           COMMISSIONER CABRAL: Well, okay. I know  
15 everyone's ready for the lunch break, and I thank my  
16 fellow Commissioners. I'm going in that same  
17 direction.

18           I want to figure out who's going to do what  
19 and in what kind of time frame, and make that  
20 commitment so that if there were to be a bifurcation  
21 in the future, you would clearly know your clients  
22 are obligated to do a certain number of things and we  
23 would want to know that they're going to get done in  
24 a timely manner.

25           We're already 30 years. I don't want to

1 leave it for somebody else in another 30 years,  
2 because I think the public in many ways has been  
3 suffering, and clearly that is your clients have  
4 been the ones suffering from this confusion.

5 I'll save my questions for the future, and  
6 hopefully we will have more light on this subject as  
7 we move forward. Thank you.

8 CHAIRPERSON SCHEUER: Can I get a sense  
9 from my fellow Commissioners how many more questions  
10 there might be from Mr. Sakumoto after we return from  
11 break.

12 I have intention to ask Mr. Sakumoto about  
13 Finding of Fact 23 and sequential regarding  
14 affordable housing allocation between the two  
15 districts, and what obligations might continue to  
16 apply to both parties equally.

17 It is 12:12. I'm going to recommend that  
18 we take -- how long do you folks want, half hour or  
19 45 minutes? Arnold?

20 COMMISSIONER WONG: 45, Chair. I have a  
21 late lunch.

22 CHAIRPERSON SCHEUER: This is why I asked  
23 you, Commissioner Wong.

24 We will reconvene at 1:00. I hope  
25 everybody has a good and peaceful lunch and we will

1 reconvene at 1:00 o'clock for continued questioning  
2 of Mr. Sakumoto. We're in recess.

3 (Noon recess taken.)

4 CHAIRPERSON SCHEUER: We are back on the  
5 record.

6 Aloha everyone. Commissioner Cabral, you  
7 wanted to state something on the record?

8 VICE CHAIR CABRAL: Yes, thank you, Chair.  
9 I wanted to let those, if they're still out there in  
10 the public area, know that we did receive earlier,  
11 after our meeting had started, we received two  
12 different letters from Livit and Karin, and I wanted  
13 to let those two ladies know that we did receive  
14 those and I read them during the break; and they are  
15 very well written and I really appreciate their  
16 willingness to submit those and put that time into  
17 it. Their comments were very much on point to our  
18 current conversation.

19 So thank them very much for that effort.

20 CHAIRPERSON SCHEUER: Noting for the record  
21 that Mr. Buika resubmitted testimony and was received  
22 by the Commissioners.

23 VICE CHAIR CABRAL: I didn't see that, but  
24 I'll get to it.

25 CHAIRPERSON SCHEUER: Questions for the

1 witness, Mr. Sakumoto. Were there further questions  
2 for Mr. Sakumoto at this time, Commissioners? If  
3 not, I have a few.

4 And I indicated before the break, Mr.  
5 Sakumoto, that I want to ask you questions regarding  
6 affordable housing.

7 How many units at full build-out of your  
8 client's Petition Area have been built?

9 MR. SAKUMOTO: How many units at full  
10 build-out?

11 CHAIRPERSON SCHEUER: Yeah, because you  
12 have three more; right?

13 MR. SAKUMOTO: I don't have the answer off  
14 the top of my head, Chair, and I don't want to  
15 speculate, but it's something we can provide.

16 CHAIRPERSON SCHEUER: If I understand the  
17 original docket correctly, there were originally  
18 going to be 2400 units developed in the Pi'ilani  
19 (sic) project area, and 600 units in the Piihana  
20 project area; do I ou have that correct?

21 MR. SAKUMOTO: It sounds, yes, generally  
22 consistent as I recall reading.

23 CHAIRPERSON SCHEUER: Starting at Finding  
24 of Fact 23 of the original Decision and Order, it  
25 notes that the Petitioner proposes putting

1 100 percent of the units in the Piihana Project  
2 District would help fulfill the affordable housing  
3 requirements, and 37.5 percent of the affordable  
4 units required of the total units in the Wailuku  
5 Project Area.

6 And then it goes onto note that at least  
7 two agencies, the County and the Hawaii Housing  
8 Finance Development Corporation, I believe, indicated  
9 that they wanted a more even split in affordable  
10 housing between the two areas.

11 But the developer said, due to -- and I  
12 believe this is Finding of Fact 24, Petitioner  
13 explains that their proposed affordable housing  
14 allocation and distribution as a result of both the  
15 increase in State affordable housing requirements and  
16 the physiographic characteristics of the project  
17 districts.

18 Which I take to mean it was cheaper and  
19 easier to first develop the Pi'ilani (sic) Project  
20 Area, and that income from that was then going to be  
21 used to finance the development of the affordable  
22 housing in the Piihana Project Area.

23 Do you believe that statement is supported  
24 by the record, Mr. Sakumoto?

25 MR. SAKUMOTO: Let me clarify something.



1 When you say "Pi'ilani (sic)", are you referring to  
2 the Kehalani? You said Pi'ilani (sic) and Piihana,  
3 but I just want to make sure what you're asking me.

4 CHAIRPERSON SCHEUER: There is two project  
5 districts, correct?

6 MR. SAKUMOTO: Correct, Wailuku and  
7 Piihana.

8 CHAIRPERSON SCHEUER: Okay, excuse me. So  
9 the Wailuku rather than the Pi'ilani (sic).

10 Development of the Wailuku Project District  
11 was essentially going to fund the development of the  
12 affordable housing in the Piihana Project District  
13 due to the physiographic characteristics of the two  
14 districts?

15 MR. SAKUMOTO: I can only speculate. I'm  
16 not sure what the Commission intended when they  
17 entered this Finding of Fact.

18 CHAIRPERSON SCHEUER: There is a series of  
19 Findings of Facts, and Finding of Fact 27:

20 "Petitioner commits to continue working  
21 with the HFDC and the County of Maui to resolve the  
22 differences over the allocation and distribution of  
23 affordable housing units to be provided, to be  
24 mutually agreeable between the Petitioner, the HFDC,  
25 and the County of Maui. Have I stated that

1 correctly."

2 MR. SAKUMOTO: Yes.

3 CHAIRPERSON SCHEUER: Where does your  
4 proposed bifurcation leave this condition?

5 MR. SAKUMOTO: The proposed bifurcation --  
6 I guess, first of all, this is a finding of fact, not  
7 a condition.

8 CHAIRPERSON SCHEUER: Where does this leave  
9 -- it is a condition in the sense of Condition 10  
10 that the Petitioner agreed to abide by all of their  
11 representations, and this is obviously a key  
12 representation made by the Petitioner.

13 So where does your proposed bifurcation  
14 leave this, I believe, still pending, very  
15 significant allocation of affordable housing units to  
16 the Piihana Project District?

17 MR. SAKUMOTO: 27 was applicable to both.  
18 Finding of Fact 27, I guess we agreed would be  
19 applicable to both projects.

20 CHAIRPERSON SCHEUER: What I'm really  
21 looking for -- and I realize on the one hand you've  
22 sat in our seat before and you've dealt with these  
23 issues. On the other hand, you're representing a  
24 client. But we're sitting in these seats now, and my  
25 concern is the LUC approved a docket with two project

1 districts tied, knowingly, certain conditions to both  
2 of them, and I believe -- and I haven't delved into  
3 the actual transcripts -- but I believe it's because  
4 they recognized the second area was harder to  
5 develop, there was going to be some of the profits  
6 from the first area to develop the second area to  
7 fulfill their affordable housing requirements.

8           And it appears, based on the record, that  
9 there is no financial ability, nor intent of the  
10 current owner of the Piihana Project District who was  
11 sold the land, by your client, to fulfill any of  
12 these conditions.

13           So we, the people of Hawaii, people of  
14 Maui, are out 600 units of affordable housing. And I  
15 don't want to be out 600 units of affordable housing,  
16 especially because we are about to enter the four  
17 months of the year where the LUC is ritualistically  
18 beaten as being the cause of affordable housing  
19 crisis. I don't enjoy it.

20           So how, in this docket, do we move forward  
21 with all the stated things that both Mr. McFarlin's  
22 clients and your clients need, but also fulfill the  
23 original intent that allowed this former agricultural  
24 land to be moved into the Urban District, because in  
25 return we were getting affordable housing?

1           MR. SAKUMOTO: I don't think that there is  
2 any intention to not continue with the affordable  
3 housing performance. I guess the question is, what  
4 is the performance that is actually being required.  
5 And I just point out in the document I filed back in  
6 October, that after the property was -- after the  
7 boundary amendment was approved in 1990, then the  
8 County approved a rezoning of the Wailuku Project  
9 District 3. And in there, I pointed out that they  
10 were cognizant of this requirement to provide these  
11 basically 60 percent affordable units, which is a  
12 significantly high number, and they acknowledged  
13 that.

14           It says in the documents I filed -- I'm  
15 looking at Ordinance No. 2053, Bill 70, 1991. It  
16 instructs the applicant to comply with affordable  
17 housing requirements set forth in the LUC's Decision  
18 and Order dated January 30th, 1990. And then  
19 proceeds to specify a lower income range for units.

20           In other words, the range that was  
21 specified for by the Land Use Commission was for  
22 60 percent in the upper income ranges. But when the  
23 County took this condition, it applied them to even  
24 lower median income ranges, of which the total  
25 obligation, from the County's standpoint, became

1 50 percent of the total units developed.

2 So, you know, essentially, as I understand  
3 what happened at this point, the County was aware of  
4 what the LUC was requiring, the County made its own  
5 decision to adjust the requirements to apply to a  
6 lower income level, but the quid pro quo for that was  
7 the aggregate number of units went down from  
8 60 percent to 50 percent.

9 And so if you look at the ordinance that I  
10 attached to the document I filed, it provides the  
11 breakdown of a significantly lower median income  
12 level and how that's allocated to add up to  
13 50 percent as it applies solely to the Wailuku  
14 Project District.

15 CHAIRPERSON SCHEUER: But I guess what I'm  
16 trying to get to is that in the original docket they  
17 were tied together, these two project districts, and  
18 the affordable housing projects were not really  
19 divisible.

20 So if we are to have any hope of seeing the  
21 promised affordable housing units in the Piihana  
22 Project District developed, what's our path forward?

23 MR. SAKUMOTO: I don't know that I have an  
24 answer to that. I mean --

25 CHAIRPERSON SCHEUER: But your client paid

1 for the purchase of the Piihana land.

2 MR. SAKUMOTO: Let me just make sure that  
3 this is clear.

4 The client I'm representing in this docket  
5 is RCFC Kehalani, LLC. There was a separate entity  
6 who acquired an interest in the Piihana Project, RCFC  
7 Piihana, that basically acquired some interest  
8 through, I believe, a foreclosure process as well.

9 They're not the same company, although I  
10 think they've a related interest in it because they  
11 were acquired probably by a lender through a  
12 foreclosure.

13 So if you're asking was RCFC Kehalani paid  
14 for that, I mean, the answer is no. What was RCFC  
15 Piihana? I don't have any idea about what that  
16 transaction involved, to be honest with you. I was  
17 not involved in that.

18 CHAIRPERSON SCHEUER: It's not owned by the  
19 same parent company? They were not a resident parent  
20 company?

21 MR. SAKUMOTO: I can speculate that there  
22 was a commonality of interest. I don't know who the  
23 ultimate owners were. I think that they were  
24 acquired by a lender --

25 CHAIRPERSON SCHEUER: Back to my previous

1 question.

2 Right now, in the docket and the Decision  
3 and Order, the affordable housing requirement were  
4 tied together. What is our path forward? Is there a  
5 path forward?

6 MR. SAKUMOTO: I can only answer for the  
7 Wailuku Project District, Chair, and the path  
8 forward, in my mind, is we will continue to do what  
9 we can do as it relates to the Wailuku Project  
10 District. And I think we've been reporting the  
11 progress. You know we -- the history of this is  
12 before the lender foreclosed. You know, my client  
13 inquired with the County of Maui, Department of  
14 Housing and Human Concerns about what was the status  
15 of the satisfaction of these affordable housing  
16 requirements.

17 And they did receive a letter from the  
18 County which identified what the status was. And  
19 since that time, they have been reporting annually to  
20 the County and getting confirmation letters as to,  
21 you know, what their status is, are they compliant?  
22 Have they earned credits? And I guess there's no  
23 intention to stop doing that, and to satisfy the  
24 County's requirement of 50 percent in these income  
25 ranges, but I can't say anything more than that.

1           If you're asking me to say something about  
2 how the Piihana obligation will be satisfied somehow  
3 by Keha -- I can't say they will. I can't say that  
4 there's any way to do it.

5           CHAIRPERSON SCHEUER: I have nothing  
6 further.

7           Commissioner Okuda.

8           COMMISSIONER OKUDA: Thank you, Mr. Chair.

9           Mr. Sakumoto, I just have a question, just  
10 so that we're clear about the effects  
11 (indecipherable).

12           A foreclosure is where the bank basically  
13 sells the collateral, in this case, real property; is  
14 that correct?

15           MR. SAKUMOTO: You're asking me is that  
16 generally what a foreclosure is? Yes, it's a sale by  
17 the court of the banks's collateral.

18           COMMISSIONER OKUDA: Right. And I'm asking  
19 stuff, even though, you know, my law firm, my  
20 partners do a lot of foreclosures.

21           So it's either a sale by the court or it  
22 could be what we call a nonjudicial foreclosure sale.

23           But in any event, it's where the collateral  
24 is sold to somebody else essentially after an  
25 auction, correct?



1           MR. SAKUMOTO: Yeah. This was done as a  
2 deed in lieu, just so that --

3           COMMISSIONER OKUDA: And a deed in lieu is  
4 where the bank or the lender takes the property in  
5 exchange for satisfaction of the obligation, correct?

6           MR. SAKUMOTO: Right.

7           COMMISSIONER OKUDA: But whether it's a  
8 foreclosure where there's an auction, either a  
9 judicial auction or nonjudicial auction or a deed in  
10 lieu, the bottom line is the new owner of the  
11 property steps into the shoes, as we would say, of  
12 the prior owner; correct?

13          MR. SAKUMOTO: Correct.

14          COMMISSIONER OKUDA: So in other words,  
15 whatever obligation the prior owner had, for example,  
16 under a Land Use Commission order, including, you  
17 know, the affordable housing requirements, which the  
18 Chair had this colloquy with you, whatever those  
19 obligations are, the foreclosure doesn't cut off  
20 those obligations; correct?

21          MR. SAKUMOTO: Right.

22          COMMISSIONER OKUDA: And whomever takes a  
23 deed in lieu either knows or should know that fact,  
24 that you take a deed in lieu -- if you're a successor  
25 in title to somebody who took a deed in lieu of a

1 foreclosure, you will be subject to essentially  
2 assuming, assuming the underlying obligations of  
3 encumbrances and orders which run with the land, like  
4 the Land Use Commission order; correct?

5 MR. SAKUMOTO: Correct.

6 COMMISSIONER OKUDA: Just wanted to make  
7 sure we all understood that.

8 Thank you, Mr. Sakumoto. Thank you Chair.  
9 No further questions.

10 CHAIRPERSON SCHEUER: Thank you,  
11 Commissioner Okuda.

12 Commissioner Chang.

13 COMMISSIONER CHANG: Thank you, Mr. Chair.

14 Mr. Sakumoto, during the line of  
15 questioning with the Chair, you said you represented  
16 KCFC Kehalani; is that correct?

17 MR. SAKUMOTO: RCFC Kehalani.

18 COMMISSIONER CHANG: Oh, RCFC. And  
19 there -- and you do not represent -- there's another  
20 entity. What was the other entity? What was the  
21 other entity you mentioned?

22 MR. SAKUMOTO: The other entity is RCFC  
23 Piihana.

24 COMMISSIONER CHANG: So do we have all the  
25 parties to the original docket participating in this

1 stipulation?

2 MR. SAKUMOTO: You're saying as it relates  
3 to the Kehalani or Wailuku Project District?

4 COMMISSIONER CHANG: Yeah, as it relates to  
5 Docket No. A89-642. Are all of the relevant parties  
6 through to whatever subsequent transactions to this  
7 docket, are they part of this stipulation?

8 MR. SAKUMOTO: To my knowledge, yes.

9 COMMISSIONER CHANG: So RCFC Piihana,  
10 they're not associated with this docket? Because you  
11 say you don't represent them.

12 MR. SAKUMOTO: No. I guess if they were  
13 still owning an interest in the Piihana project, they  
14 might be part of the docket, but they do not have any  
15 interest in the Piihana Project District.

16 COMMISSIONER CHANG: Bear with my ignorance  
17 on this, I'm so confused.

18 So RCFC Piihana, they were part of the  
19 original docket?

20 MR. SAKUMOTO: The original -- I'm not  
21 following you.

22 COMMISSIONER CHANG: I'm trying to make  
23 sure, because we're trying to determine whether this  
24 bifurcation -- I'm trying to determine whether this  
25 matter before us has all of the relevant parties so

1 we can hold them responsible for those D&O  
2 obligations.

3 You represent RCFC Kehalani?

4 MR. SAKUMOTO: Yes.

5 COMMISSIONER CHANG: McFarlin represents  
6 the Wailuku Plantation.

7 Now, you also mentioned RCFC Piihana. They  
8 no longer have any interest in this, in this docket  
9 number?

10 MR. SAKUMOTO: No.

11 COMMISSIONER CHANG: Did they ever have an  
12 interest in this docket number?

13 MR. SAKUMOTO: I believe they owned some of  
14 the property at some point, but have sold it.

15 COMMISSIONER CHANG: And they sold it to  
16 who? Who represents the properties that they sold?

17 MR. SAKUMOTO: I don't know who all of them  
18 are, but at least some of it, I believe, was sold to  
19 Wailuku Plantation.

20 COMMISSIONER CHANG: So any obligation that  
21 RCFC Piihana may have had under this original docket,  
22 who assumes those obligations when they sold? Does  
23 that make sense? Am I making sense to you?

24 Originally responsible, they were  
25 originally part of the boundary amendment; correct?

1           MR. SAKUMOTO: The original party was C.  
2 Brewer. Then it went through -- I'm not sure how  
3 many changes of ownership during that time. Each  
4 party, as Commissioner Okuda pointed out, probably  
5 acquired title that was encumbered by these  
6 conditions. So I think the conditions ran with the  
7 land.

8           And then the parties that are part of this  
9 docket now that are in front of you that signed the  
10 stipulation are, to my knowledge, the parties who  
11 collectively represent all the owners.

12           COMMISSIONER CHANG: So as you indicate,  
13 obligations run with the land. So when RCFC Piihana  
14 sold their properties, they also included the  
15 obligations.

16           So is it your understanding that Wailuku  
17 Plantation assumes those responsibilities, those  
18 obligations?

19           MR. SAKUMOTO: Yes.

20           COMMISSIONER CHANG: And none of your --  
21 and you don't represent any properties that were  
22 originally owned under RCFC Piihana?

23           MR. SAKUMOTO: No.

24           COMMISSIONER CHANG: Sorry, I'm just  
25 confused. This docket has so many transactions.

1           Okay, thank you very much.

2           CHAIRPERSON SCHEUER: I guess, if I may,  
3 following up on Commissioner Chang.

4           RCFC Piihana and RCFC Kehalani, were they  
5 owned by the same parent company?

6           MR. SAKUMOTO: I don't know, honestly, who  
7 the owner of the parent company is. My contact on  
8 this matter is through my client in Maui. Who owns  
9 the company ultimately, I don't know.

10          CHAIRPERSON SCHEUER: So they may have been  
11 owned by -- (indecipherable).

12          MR. SAKUMOTO: There may have been some --  
13 I mean, RCFC is in both names, I would assume that  
14 there is a commonality.

15          CHAIRPERSON SCHEUER: That's my assumption.  
16 So it's possible that really if the same entity owned  
17 both, they really got a twofer on the transaction.  
18 First they got paid for the land, and then they got  
19 to foist a whole bunch of obligations onto the  
20 unsuspecting new owner?

21          MR. SAKUMOTO: I think, like any real  
22 estate transaction, you buy the benefit and the  
23 burden. And I think that's part of any real estate  
24 transaction, you know, that's reflected in the price.  
25 So I don't know that there was any foisting of

1 anything.

2 CHAIRPERSON SCHEUER: Fair enough.

3 Is there anything further for Mr. Sakumoto?  
4 If not, I think we will now hear from Maui County and  
5 Mr. Hopper.

6 MR. HOPPER: Thank you, Mr. Chair, can you  
7 hear me okay?

8 CHAIRPERSON SCHEUER: We can hear you.  
9 Thank you for checking.

10 MR. HOPPER: The County of Maui has signed  
11 the stipulation in support of the Motion for  
12 Bifurcation. As you may recall this docket itself  
13 has been going on for 30 years, but this particular  
14 proceeding regarding Piihana, the issues there and  
15 the issue of bifurcation has been going on for  
16 several years now.

17 The County initially --

18 COURT REPORTER: Excuse me, Mr. Hopper, I'm  
19 so sorry to interrupt you. This is Jean, the Court  
20 Reporter. Can you speak a little louder for me,  
21 please?

22 MR. HOPPER: As you may recall, the County  
23 did initially have concerns with the bifurcation.  
24 The original motion, and this motion in particular,  
25 originally did not have any conditions, stipulations

1 whatsoever that would involve clearly allocating the  
2 responsibilities of the Findings of Fact, Conclusions  
3 of Law and Decision and Order to the parties.

4 And also did not have any requirements  
5 dealing with the ongoing compliance issues in both  
6 Kehalani and the Piihana Project District.

7 However, the County, after reviewing the  
8 Decision and Order, the proposed Decision and Order,  
9 and the stipulation is amenable to the bifurcation  
10 provided that is a clear allocation of obligations  
11 among the parties, and that the parties within a  
12 certain period of time after the bifurcation are  
13 required to indicate compliance with the conditions  
14 and representations made, and to the extent there are  
15 outstanding obligations, provide timetables for those  
16 developments.

17 Now, the issue with not bifurcating in this  
18 case -- and the County has reviewed this -- is that  
19 you have discussed the issue of the owners of  
20 Kehalani being responsible for Piihana, and the owner  
21 of Piihana being responsible for Kehalani jointly and  
22 severally. I think Commissioner Chang had brought  
23 that up.

24 One issue that that may create is that the  
25 current homeowners in Kehalani would, by that logic,



1 be responsible for compliance with the Piihana  
2 Project District. And any breaches in the Piihana  
3 Project District, and until bifurcation, would be  
4 responsible for fulfilling those conditions  
5 technically.

6           The practical difficulty and potential  
7 legal difficulty with that is that obviously those  
8 homeowners and the successor of owners in Kehalani  
9 don't have any ownership interest in the Piihana  
10 Project District, and so therefore, if there was  
11 enforcement action against Kehalani, for example, to  
12 require them to build in the Piihana Project District  
13 or to otherwise come into compliance in Piihana, the  
14 County would be asking, as the enforcement officer,  
15 would have to ask the court to order the Kehalani  
16 Project District, including the homeowners there, to  
17 effectuate an action on land it doesn't own.

18           And if there was a way to prevent the  
19 ownership of -- the sale of the property in cases  
20 like this, or in other cases where it could be even  
21 more complicated where the land is contiguous and is  
22 not sort of easily separated, that could potentially  
23 prevent that issue from happening, but as long as it  
24 has been under Hawaii law, we cannot prevent the sale  
25 of land to other parties.

1           We have this potential issue of a Decision  
2 and Order being recorded on both of the properties,  
3 and an owner not necessarily being able to effectuate  
4 compliance on another portion of the property.

5           And so that was one of the concerns we had  
6 with ongoing, without bifurcating some of the issues  
7 that we would potentially have. And I think why the  
8 County was okay with having the enforcement actions  
9 or the ongoing compliance discussions on both of  
10 these properties in separate dockets, with the  
11 understanding that there is not a reduction in the  
12 requirements to develop the project district by  
13 bifurcating.

14           I would note that in addition to the fact  
15 that there is a recorded notice to the parties that  
16 the D&O has been recorded, Condition 14 of the  
17 Decision and Order even states that the deeds still  
18 specifically contain reference to the Decision and  
19 Order.

20           So any sell of the property, the deeds  
21 themselves, have to reference the Decision and Order  
22 as an encumbrance on title.

23           A couple of other issues I think we wanted  
24 to address that have been brought up by  
25 Commissioners. One is in the Decision and Order, the

1 discussion of affordable housing. And to what extent  
2 there are conditions, if any, and representations, if  
3 any, that can't really be separated out into  
4 different project districts, meaning that you can't  
5 bifurcate because they are really joint obligations.

6 With respect to the affordable housing  
7 Findings of Fact, I think the Planning Department had  
8 reviewed that. There was a discussion of the  
9 original proposal, but then the County of Maui,  
10 HHFDC -- on the merits of that, but it resulted in  
11 Condition No. 1. Those findings and conclusions --  
12 the Findings of Fact resulted in a condition, and I  
13 think the Findings of Fact, to a large extent, do  
14 show the discussion.

15 But the conclusion reached by the LUC I  
16 think was to come up with Condition 1. And Condition  
17 1 states that Petitioner shall provide housing  
18 opportunities for low, low/moderate and income  
19 residents of the State by offering for sale or lease  
20 a number of units equal to at least 30 percent of the  
21 residential units in each of the project districts on  
22 the property, and then provide an income range, and  
23 then states, and a number of units equal to at least  
24 30 percent of the residential units in each of the  
25 project districts on the property. And then states

1 another income range.

2           There's other parts of that condition, and  
3 the County is looking into that condition and  
4 believes that that should be an on-going issue to  
5 look into after bifurcation. And, therefore, has  
6 required that as a condition to be provided within  
7 six months of the Decision and Order.

8           The way that the County has read that  
9 condition is that each project district has to  
10 provide 30 percent on those units in one income  
11 range, and 30 percent of those units in another  
12 range, but that the Kehalani district doesn't have to  
13 provide that the units in Piihana would not be used  
14 to fulfill that requirement for Kehalani and vice  
15 versa, that each has their own percentage  
16 requirements.

17           If the Commission disagrees with that  
18 reading and believes there is a joint requirement,  
19 then certainly we can look at that, and that would  
20 affect bifurcation.

21           But the way that the County has read those  
22 conditions is that each project district  
23 independently have a percentage requirement in each  
24 district that represent a percentage of its units.

25           And, yes, there are Findings of Fact on

1 this issue, but those were -- I think, those resulted  
2 in this Condition No. 1, which is the affordable  
3 housing requirement and what would apply. So that's  
4 how the County read that issue.

5 The other issue dealing with Piihana and  
6 their decision apparently to seek reversion of the  
7 property, the County was -- I did discuss with the  
8 department. It did receive an email from Mr.  
9 Lindsey, but it was, I think, as Mr. Sakumoto had  
10 represented, sort of a statement, well, we're not  
11 certain if we can comply.

12 Reversion could be an option. But it was  
13 not seen as, I think, a formal request to revert the  
14 property, and would not alleviate the obligation if  
15 that was going to be something that they were going  
16 to take a formal position on to file such a statement  
17 with the Commission.

18 We had planned at this hearing to give you  
19 the information that we had received that Piihana had  
20 stated that it was concerned with its ability to  
21 fulfill the conditions and may have to revert the  
22 property.

23 But from day one, since we've dealt with  
24 these compliance issues, the County of Maui has  
25 stated it does not believe that the Piihana owners

1 can develop this property in compliance with the  
2 Decision and Order. And have also raised issues such  
3 as the fact that there is at least one house with  
4 someone living in it on the property, which is a  
5 flagrant violation of the condition. And that that  
6 house is owned by a different party.

7 But there are, for sure, significant  
8 compliance issues of the Piihana Project District.  
9 And the County has, as a requirement of this,  
10 required that both a hearing on the outstanding  
11 obligations, and specifically the financial  
12 capability of the Piihana Project District owners to  
13 fulfill the project be provided.

14 The County believes, similar to the  
15 Kehalani obligations, that those can be addressed  
16 after bifurcation, because Piihana will be its own  
17 docket and will be responsible for its own condition.

18 However, today is the first time we have  
19 seen in a formal capacity, the counsel for Piihana  
20 Project District state that it is their intention to  
21 file a Petition to Revert the property. I do not  
22 believe that necessarily changes our position on the  
23 bifurcations because that reversion could potentially  
24 still happen after bifurcation.

25 And to be honest, if it's not bifurcated,

1 I'm unclear on whether that could be reverted,  
2 because if the project district shall consolidate and  
3 they're under the same docket, I think the issue of  
4 substantial commencement may come up.

5 Because if Kehalani is considered part of  
6 Piihana, well, is that an issue of substantial  
7 commencement there that you would have to deal with  
8 where otherwise, if there is a bifurcation, you  
9 wouldn't?

10 Certainly this is ultimately up to the  
11 Commission if it wants to grant bifurcation. At this  
12 stage the County still believes that bifurcating,  
13 based on the stipulated Decision and Order, is the  
14 proper way to proceed in this docket, particularly,  
15 because of the concerns of attempting to enforce the  
16 obligations of Piihana against Kehalani owners in the  
17 Kehalani Project District and vice versa.

18 And in addition, because if you read the  
19 Decision and Order, while he did need to specifically  
20 allocate the representations made, to make sure that  
21 they're applicable to the appropriate parties, I  
22 think the original Decision and Order did envision  
23 the properties being developed as separate projects.

24 In fact, there are a lot of -- the traffic  
25 conditions, for example, the traffic Findings of Fact

1 and Conclusions of Law are separated by Piihana  
2 Project District and Wailuku Project District. There  
3 is a statement of: Here are the obligations for the  
4 Piihana; here are the obligations for Wailuku Project  
5 District. And that's something that the department  
6 did review with whether or not there were joint  
7 obligations that each party would have to fulfill.  
8 And with the allocation in the proposed order, we do  
9 believe that that's been addressed.

10 Obviously, if the Commission still has  
11 concerns of bifurcation, as the County did  
12 originally, that's something that you should review  
13 and be comfortable with prior to bifurcation. But we  
14 wanted you to certainly understand the basis for the  
15 County's willingness to support bifurcation under  
16 these conditions versus the position before this was  
17 clarified that there was not sufficient clarity to  
18 support bifurcation.

19 But we do certainly acknowledge there are  
20 significant compliance issues with Piihana and with  
21 Kehalani. I think the question for the Commission  
22 is, can those still be addressed after bifurcation,  
23 and is that something it can still do.

24 And the County does believe that that's  
25 something that can still be done after bifurcation,



1 and is most appropriately done in each separate  
2 docket. You can have a status conference for each of  
3 the dockets separately, rather than continuing to  
4 have status conferences with both of the parties  
5 here, and have confusion as to who's responsible for  
6 which conditions.

7 I think this provides that clarity and is  
8 appropriate action to take at this stage.

9 CHAIRPERSON SCHEUER: Is that it, Mr.  
10 Hopper, for now? Is that the conclusion of your  
11 statement?

12 MR. HOPPER: Yes.

13 CHAIRPERSON SCHEUER: Thank you.

14 Commissioner Wong followed by Commissioner  
15 Okuda.

16 COMMISSIONER WONG: Thank you, Chair.

17 Good afternoon, Mr. Hopper. First off, I  
18 just want to reconfirm, because I heard all these  
19 things, and just want to make sure in my mind that  
20 the stipulation that is before you, is the County  
21 okay with it or not, yes or no?

22 MR. HOPPER: Yes.

23 COMMISSIONER WONG: So you heard Mr.  
24 McFarlin stated about them coming back to revert to  
25 Ag. Are you okay with that?

1           MR. HOPPER: We're not necessarily okay  
2 with them taking that action. We have, from the  
3 beginning, not believed that they would be able to  
4 successfully develop this project, but do believe  
5 that those compliance issues can be done through  
6 enforcement after bifurcation.

7           We think the bifurcation is separate from  
8 Piihana's ability to develop the project. If they  
9 can develop the project and it's not bifurcated, it's  
10 Kehalani then on the hook Piihana's failure to  
11 develop that project. And are they therefore subject  
12 to enforcement actions for Piihana's failure to  
13 comply with the conditions. That was part of our  
14 concern.

15           COMMISSIONER WONG: The other thing, as you  
16 know, in this hearing today I think someone stated  
17 that LUC sets the conditions, findings of fact and  
18 decision and orders. And that it's up to the County  
19 to assist in ensuring that the conditions are met.

20           Is that correct?

21           MR. HOPPER: Yes. Under HRS, enforcement  
22 of the condition is the County's responsibility.  
23 Yes, that's correct.

24           COMMISSIONER WONG: So the other question I  
25 have is, we heard from Mr. McFarlin or someone that

1 there are houses and some other buildings that's  
2 removable on that area.

3 Does the County know about this?

4 MR. HOPPER: Yes, the County is currently  
5 pursuing enforcement on those issues right now  
6 through various departments. There's significant  
7 issues, certainly.

8 COMMISSIONER WONG: I just wanted to make  
9 sure about these things.

10 Thank you, Chair; thank you, Mr. Hopper.

11 CHAIRPERSON SCHEUER: Commissioner Okuda --  
12 thank you, Commissioner Wong.

13 Commissioner Okuda followed by Commissioner  
14 Ohigashi.

15 COMMISSIONER OKUDA: Thank you very much  
16 for your testimony and for the information you  
17 provided.

18 Let me first follow up on what Commissioner  
19 Wong was asking, and your responses to his questions.  
20 This deals with enforcement.

21 The enforcement power, or power to enforce  
22 the Land Use Commission's conditions, again, rests  
23 with the County, not with the Land Use Commission  
24 once there's substantial commencement of use of the  
25 property. Is that correct?

1           MR. HOPPER: Yes, with the caveat that we  
2 would generally approach the Commission, and through  
3 declaratory ruling or other proceedings, get clarity,  
4 especially when we are talking about findings of fact  
5 on what was expected and what was required of the  
6 landowners.

7           But, yes, the enforcement through HRS is  
8 through the County.

9           COMMISSIONER OKUDA: And, you know, not to  
10 prejudge anything that might take place or might not  
11 take place in the future, but I'm not aware of any  
12 appellate case or statute or legal authority which  
13 gives the Land Use Commission authority to command or  
14 compel you or any other planning department or county  
15 enforcement officer to actually take an enforcement  
16 action.

17           Is that a fair statement of the state of  
18 the law as you understand it, that we at the Land Use  
19 Commission, we might make a lot of noise, but the  
20 bottom line is the discretion to enforce or not  
21 enforce, or to the extent of enforcement, that really  
22 rests with the County once there's substantial  
23 commencement of use of the property; is that a fair  
24 statement?

25           MR. HOPPER: I believe the Lanai Company

1 case addressed this by the Hawaii Supreme Court, and  
2 I think their statement was something to the effect  
3 of once the Land Use Commission has found violation,  
4 it is the responsibility of the County to enforce. I  
5 don't think that requires necessarily a finding by  
6 the Commission of a violation before the County can  
7 enforce.

8           And I would agree with you that the  
9 Commission cannot compel enforcement by County or by  
10 court order. I think that the Lanai Company has  
11 helped to establish that.

12           But the point I'm trying to make, is that  
13 because you've got 30 years of history, you've got a  
14 lengthy decision and order with findings of fact, is  
15 that we would rely on the Land Use Commission's view,  
16 and the decision was based on its own decisions and  
17 order in the enforcement process.

18           That happened in the Pi'ilani Promenade  
19 case where the County believed they were in  
20 compliance, and the Commission disagreed and said,  
21 no, County, we believe they are not in compliance.

22           So the future of the County has generally  
23 been of the view that we take things to the  
24 Commission for LUC docket, and be very sure that  
25 there's a violation, that there in fact is a

1 violation, or if there is not, that there's not. So  
2 that's where we're at with that.

3 COMMISSIONER OKUDA: And we -- at least I  
4 definitely appreciate how you bring things to the  
5 Commission, your clarity -- not only clarity of  
6 presentation, but clarity of purpose. And maybe  
7 that's why I'm a lot more comfortable with how you  
8 folks handle enforcement.

9 Let me ask a question along that line.

10 Would you agree that because this type of  
11 enforcement action by the County is essentially an  
12 exercise of the police power, there really is a fair  
13 amount of discretion that's suggested with the County  
14 on how it exercises its police power with respect to  
15 these types of issues?

16 MR. HOPPER: Yes, there would be. I would  
17 also add, if it would be okay, there are other laws,  
18 of course, other than the Land Use Commission  
19 decision and order that are at issue and that the  
20 County is involved in enforcing.

21 When I say, "enforcement", it's not just  
22 LUC issue, but as you probably can tell from the  
23 description of what's happening here, there are a  
24 variety of other legal enforcement issues ongoing.

25 COMMISSIONER OKUDA: Yeah, and I don't mean

1 to belabor these questions, but my point to these  
2 questions, taking into account your responses, is  
3 that when you get to the bottom line here, the County  
4 is not simply going to blindly follow a command which  
5 the County, based on, of course, adequate legal  
6 research and consideration of the facts, would  
7 consider to be somehow abusive to the citizens of  
8 Maui.

9 I know that's a fact specific question, but  
10 like if we at the Land Use Commission made, you know,  
11 made these statements, which frankly you believe  
12 exceeded reasonable exercise of the police power of  
13 the County, you're not going to just blindly follow  
14 what we say, right? You would take appropriate  
15 action, correct?

16 MR. HOPPER: I mean, if we got -- I'd like  
17 specifics. I mean, if we ask for a declaratory  
18 ruling and the LUC gave one that we disagreed with,  
19 we would have the option to appeal that to a court or  
20 just not follow it, but then that would sort of make  
21 it pointless to ask you in the first place.

22 So that's -- I mean, I think we would  
23 generally respect the Commission's view on an item.

24 The other concern we have is, if we're the  
25 enforcement officer, it would be the County personnel

1 and the court arguing these cases. We would go  
2 before a judge and say we want these Kehalani  
3 property owners to fix what's on the Piihana Project  
4 District, and ask a judge to say, order these guys to  
5 fix issues on another property.

6 That's part of our concern that I was  
7 getting at in our earlier statement.

8 COMMISSIONER OKUDA: And that's the reason  
9 for my questions, because I don't believe I heard any  
10 of the Commissioners, and I'm certainly not saying  
11 that the County should force an 85-year-old  
12 grandfather or grandmother to go and build a bridge  
13 which a developer had represented the bridge would be  
14 built, even if you can make a technical legal  
15 argument, which might be technically correct.

16 I mean, none of us are saying that, but I  
17 do agree with the Chair's line of questioning that if  
18 there are representations made for specific amounts  
19 of affordable housing, for example, where other  
20 improvements that are represented, and it really  
21 appears in the record that's the reason, or some of  
22 the reasons why the original applicant, C. Brewer,  
23 was able to get the boundary amendment, then would  
24 you agree it's not unreasonable to hold the developer  
25 entities, whoever those developer entities may be for



1 whatever obligations they may be either jointly or  
2 severally obligated to, I'm not asking you to  
3 prejudge who in this case would be responsible, but  
4 as a general matter, it's not unreasonable to say,  
5 okay, we might not go after the 85 year kupuna to  
6 build a bridge, but we will certainly hold a  
7 developer entities for the obligations that, you  
8 know, they definitely should have known with due  
9 diligence follow from a Land Use Commission order.

10 I mean, isn't that a reasonable position to  
11 take?

12 MR. HOPPER: Well, I would say as a general  
13 matter, yes. But if you're talking about sales of  
14 the property, I'm not sure how saying Piihana --  
15 Kehalani selling a portion of the property would have  
16 been different than, for example, then selling all  
17 the property.

18 If they sold the property with the Decision  
19 and Order on it that allows you to fulfill the  
20 conditions on that property that you own, do they  
21 have an impossibility of performance argument at that  
22 point?

23 Do they sue Piihana and say, you've got to  
24 build the housing here? Or how is it different if  
25 they had sold the whole property? I guess it's

1 because they still own property with the Decision and  
2 Order recorded on it that says you're responsible for  
3 it still, but to make them fulfill building  
4 affordable housing on a property that it doesn't own.

5 If the Commission does (indecipherable)--  
6 case law or things that would state, yes, you still  
7 have to make them build it, then we would be happy to  
8 look at that.

9 Our concern with not bifurcating in keeping  
10 with things out there was the nature of the project  
11 district as described in the D&O, and the current  
12 ownership structure of the property right now.

13 COMMISSIONER OKUDA: Yeah, and I don't mean  
14 to belabor this, and I will move on to another  
15 question after this, and that will be the last couple  
16 of questions.

17 The fact that a landowner, somebody who has  
18 an obligation gets rid of an asset, that doesn't  
19 necessarily absolve that person from obligations to  
20 perform on the obligations that they should have  
21 performed.

22 In other words, for example, isn't it true  
23 that under the Uniform Fraudulent Conveyance Act, if  
24 you own a corporation, you know the corporation has  
25 obligations, and you intentionally don't perform the

1 obligations, and you drain the corporation of its  
2 profits, there still might be, in fact, personal  
3 liability against corporate owners.

4 I'm just saying that's a possibility,  
5 right? So sometimes the obligation not only runs  
6 with the land, but it might even follow when you get  
7 rid of the land.

8 That's more a statement, Mr. Hopper,  
9 because the question is this.

10 I'm thinking if there is no bifurcation, at  
11 least right now, or if there is a deferral, this  
12 actually gives the County of Maui more tools in its  
13 tool box on whatever type of enforcement action the  
14 County wants to take.

15 I'm not proposing that people be held  
16 hostage here, but sometimes if there is no quid pro  
17 quo back to the community, a clear community benefit,  
18 you know, I've got this concern, and maybe you can  
19 address it.

20 You know, what is the community getting in  
21 return that people are going to be let off the hook  
22 for obligations which have been running on this land  
23 for decades?

24 MR. HOPPER: I would want to know what,  
25 because the County is very concerned about this, what

1 obligations, if bifurcation is granted, will the  
2 developer be left off of the hook from?

3 That is a grave concern of ours. We want  
4 to make sure that there are no obligations that  
5 someone is let off the hook from if this bifurcation  
6 happens. We could not find any that would still be  
7 enforceable against the appropriate parties after  
8 bifurcation. Kehalani, the community center issue,  
9 which we do have issues with. Their affordable  
10 housing allocation, their parks allocations. Those  
11 are things that appear to still be Kehalani's  
12 obligations after bifurcation.

13 I understand that technically, yeah, maybe  
14 the County could issue a notice of violation against  
15 Kehalani, the developer only, or the homeowners.  
16 You're talking about the developer only to fix the  
17 situation in Piihana. I guess that's technically  
18 something the County could try. I don't know if it  
19 would be successful.

20 But we did not see that concern as being a  
21 basis to justify continued opposition to bifurcation  
22 given the conditions that were put in place, and  
23 given the nature of the development of the property.

24 It appeared that the bifurcation is  
25 appropriate in this situation to make the obligations

1 of the parties clear and the obligations of the  
2 County clear with respect to who is responsible for  
3 what.

4 But obviously if the Commission thinks that  
5 there are obligations that landowners will be left  
6 off the hook from, as you said, by bifurcating, then  
7 let's address those, but we did not see those in the  
8 review.

9 COMMISSIONER OKUDA: My final question is  
10 this. If the LUC decided to defer this matter just  
11 for a reasonable period of time, we can argue what  
12 reasonable means, but let's use that term.

13 Would the County suffer any actual  
14 prejudice by a reasonable deferral, just so that we  
15 can be sure, for example, we have a complete record  
16 including what certain person's intentions really  
17 are?

18 MR. HOPPER: I cannot think of prejudice to  
19 the County.

20 COMMISSIONER OKUDA: Thank you very much,  
21 Mr. Hopper. I appreciate the information you  
22 provided us.

23 Thank you, Mr. Chair. No further  
24 questions.

25 CHAIRPERSON SCHEUER: Thank you,

1 Commissioner Okuda.

2 Commissioner Ohigashi followed by  
3 Commissioner Giovanni.

4 COMMISSIONER OHIGASHI: Mr. Hopper, I found  
5 you.

6 I'm going to ask you the same questions  
7 that I was asking Randall Sakumoto about, and it  
8 refers to your filing on December 1st.

9 I'm assuming that since you -- that certain  
10 statements in there haven't changed. And I'm  
11 referring to page 4 on the bottom paragraph, if you  
12 have it. It talks about the Decision and Order which  
13 states under Finding of Fact 85, and this is what it  
14 says:

15 "Petitioner proposes to develop and  
16 dedicate approximately 110 acres of parks and open  
17 space as well as a community center within the  
18 Wailuku Project District."

19 And then the next page it talks about the  
20 binding obligation that represents, became a binding  
21 obligation to Condition No. 10, page 50, and that's  
22 the position of the County, I understand. That's the  
23 Condition No. 10, these representations made?

24 MR. HOPPER: Yes, the community center was  
25 required, yes. The County has taken the position

1 that a community center is required.

2 COMMISSIONER OHIGASHI: In addition --

3 COURT REPORTER: I'm sorry, Commissioner,  
4 let me break in here. I did not get the answer by  
5 Mr. Hopper. I cannot hear him.

6 MR. HOPPER: Yes, the community center -- I  
7 stated that the community center was a representation  
8 made, and we believe that that was an obligation.

9 COMMISSIONER OHIGASHI: Would that apply  
10 also to the 110 acres?

11 MR. HOPPER: That we have a -- there is a  
12 parks' condition about that that's a bit more  
13 specific, but the County has been in discussions with  
14 the parks department on this issue and believe that  
15 there are outstanding compliance issues there.

16 But that's something at this point we flag  
17 as an outstanding compliance issue that will need to  
18 be addressed, we believe, in the Kehalani docket,  
19 with Kehalani, but that's an outstanding compliance  
20 issue.

21 Whether it's specific to 110 acres, I what  
22 to confer with the parks department on that, but the  
23 community center is something that's been more  
24 specific in there, and we believe is required.

25 COMMISSIONER OHIGASHI: It seems to say

1 both, very specific, I understand, and on the 110  
2 acres and community center.

3 But going on further, you state that they  
4 will be -- RCFC shall petition the State Land Use  
5 Commission to determine whether the requirements of  
6 Finding of Fact 85 require it to construct a  
7 community center.

8 Is that that part of the stipulation that  
9 was signed by the County? It would include that?

10 MR. HOPPER: No. This is a reference to a  
11 letter that the developer had sent to the County at  
12 some point to discuss a potential resolution. And I  
13 think -- the reason -- the County filed two things,  
14 filed the stipulation, then filed this document which  
15 was in response to Kehalani's list of outstanding  
16 obligations.

17 Before acting on the stipulation, the  
18 County wanted the Commission to be aware that it did  
19 have outstanding disagreements with the Petitioner on  
20 what obligations still had to be fulfilled. We do  
21 believe that those could still be addressed after  
22 bifurcation in the Kehalani docket.

23 This item is not in the Decision and Order,  
24 but it's a proposal by, I believe, the developer to  
25 fix the issue. That's something they may do in the



1 future along with other things to address the ongoing  
2 compliance issue, but not part of the decision and  
3 order.

4 COMMISSIONER OHIGASHI: So if the logic is,  
5 Condition No. 10, the D&O incorporates the Findings  
6 of Fact and representations made, or incorporates the  
7 representations made and enumerated in the Findings  
8 of Fact of the original D&O, would you say then that  
9 the requirements that the Chairman has indicated  
10 regarding the amount of affordable housing is a  
11 condition of the D&O?

12 MR. HOPPER: No, because you've got a very  
13 specific condition, Condition No. 1, that specifies  
14 percentages in each project district. I don't  
15 believe there is a similar thing for parks that says  
16 you don't have to give the community center.

17 But for affordable housing, there is a  
18 condition and, Commission, please, if you disagree,  
19 then please let us know. But the way we read  
20 Condition No. 1, it says that 30 percent of each  
21 project district at one income range, and 30 percent  
22 of a different income range in each district.

23 If we're misreading that, and the Finding  
24 of Fact is supposed to supercede that, then please  
25 let us know, but we don't think that's a reasonable

1 FOF interruption of the affordable housing issue. I  
2 think it's 30 percent/30 percent in each district in  
3 one range and 30 percent at another.

4 There is a lot of other language too on  
5 ways to alter that. And the County has gone back in  
6 looking into this issue with the housing department,  
7 because this is 30-year history and trying to find  
8 that, but it does appear that this condition is what  
9 controls in the case of affordable housing, because  
10 it's a very specific condition with percentages.

11 It does not say, for example, Piihana has  
12 to be 100 percent affordable, it says 30 percent in  
13 one range, and 30 percent in another. So we went  
14 with the condition.

15 But if the Commission has a different  
16 reading of that, please let us discuss.

17 COMMISSIONER OHIGASHI: I think that I err  
18 in the side of consistency in the obligations of the  
19 conditions. And Condition No. 10 is very clear  
20 whether you apply it to Condition No. 85 or Condition  
21 No. 20, or Findings of Fact No. 85, or Condition No.  
22 20.

23 So my concern with the County is that  
24 knowing that they are trying to revert the property,  
25 if we bifurcate, we will lose, like the Chairman has

1 indicated, maybe 600 affordable housing units. And  
2 I'm not sure if that's the policy of the County of  
3 Maui to give up trying to enforce to get 600  
4 affordable units in addition to this matter.

5 So I'm just reading your logic and agreeing  
6 with it and applying it to the various other  
7 statements within the D&O.

8 Is the County going to file for a motion or  
9 file for a declaratory ruling on these two issues?

10 MR. HOPPER: That's what we had planned to  
11 do, not a declaratory ruling, but that's something  
12 that would have to be done after Kehalani provides  
13 its statement of outstanding obligations, and that  
14 should be done at either a status hearing, or if you  
15 want to do it as a declaratory order to deal with  
16 that issue.

17 If the Commission believes that Piihana has  
18 to be 100 affordable and that that is tied to  
19 Kehalani's existing obligation, then that's your  
20 decision and you can deny bifurcation, and say,  
21 County, you've got to enforce against Kehalani and  
22 make them build 100 percent of the units in Piihana.

23 But I don't think, saying Condition 1, I  
24 can't see that as a reasonable reading of Condition 1  
25 to say instead of 30 percent one range and 30 percent

1 at another, it's actually 100 percent affordable in  
2 Piihana.

3 I think, to be consistent, I think what was  
4 happening was that those Findings of Fact were  
5 discussions of what the parties had discussed. Right  
6 after the Findings of Fact, it says the County of  
7 Maui thought the land use should be different,  
8 because putting 100 percent affordable is too heavy  
9 of a distribution. And HHFDC stated its opinion, and  
10 that's also a Finding of Fact. So I think that's how  
11 those Findings of Fact are different with respect to  
12 affordable housing versus with parks which states it  
13 in more of a clearer way that says 110 acres as well  
14 as a community center.

15 But if the Commission has a different  
16 reading of that, then by all means, please provide  
17 that and so state.

18 COMMISSIONER OHIGASHI: Mr. Hopper, I find  
19 it kind of concerning, because the D&O just stands,  
20 and this is how we look at things. The D&O just  
21 stands. We're not, as Commissioner Okuda indicated,  
22 the ones to enforce it. (Indecipherable).

23 We are asking you is this a policy of the  
24 County of Maui, that knowing that it made this  
25 representation in here, which makes sense to me, is

1 the policy of the County of Maui to ignore that  
2 provision and say, well, we're not going to try and  
3 enforce; we're not going to file a motion for default  
4 judgement; we're not concerned about having  
5 additional 600 units?

6 And if you say that is policy, fine, I  
7 accept it because that's your job, not ours. Our job  
8 is to listen to the arguments, and try to make  
9 headway of it. The situation that you brought up, a  
10 declaratory ruling that the County has sought -- in  
11 fact, I remember with the Kihei School, the County  
12 sought declaratory ruling regarding the overpass and  
13 underpass, which is still apparently going on at this  
14 point in time.

15 So I'm asking if the County intends to  
16 bring that to light, or is it the County's position  
17 that we're going to let that 600 affordable units go?

18 MR. HOPPER: County of Maui has filed  
19 multiple documents stating that the Kehalani Project  
20 District is not in compliance. There is nowhere in  
21 the conditions or in the decision and order that  
22 states that there are 600 affordable housing units  
23 that the project district still owes, that is owed  
24 here. Condition No. 1 states that there should be 30  
25 percent --

1           COMMISSIONER OHIGASHI: Mr. Hopper, the  
2 answer is "yes" or "no". Is the County going to file  
3 declaratory ruling or not?

4           MR. HOPPER: Maybe. Potentially in this  
5 case we may.

6           CHAIRPERSON SCHEUER: I think it's a great  
7 time for a break if that's acceptable for all  
8 parties. We have been going an hour and six minutes.  
9 Recess to 2:16 and we can let Mr. Ohigashi continue,  
10 followed by Commissioners Giovanni and Chang. Recess  
11 until 2:16.

12           (Recess taken.)

13           CHAIRPERSON SCHEUER: Commissioner  
14 Ohigashi, did you have further --

15           COMMISSIONER OHIGASHI: No further  
16 questions. Thank you.

17           CHAIRPERSON SCHEUER: Commissioner Giovanni  
18 followed by Commissioner Chang.

19           COMMISSIONER GIOVANNI: Thank you, Chair.

20           Thank you, Mr. Hopper. I always appreciate  
21 listening to you. I always learn something. And let  
22 me acknowledge upfront that I think the County of  
23 Maui has had their hands full attempting to enforce  
24 the conditions of this 30-year old Decision and Order  
25 on this particular property over the years, so I'm

1 sensitive to the difficulties.

2           Having said that, I'm reading the  
3 proposed -- or the executed stipulated stipulation  
4 that's part of the current immediate Petition, and in  
5 particular, there are three requirements on the  
6 Piihana Project District which come due six months  
7 later and one condition on the Kehalani, also six  
8 months later.

9           My question is, in the context enforcement  
10 that the County of Maui currently has the authority  
11 to do, is there any reason it couldn't ask for or  
12 demand these same requirements today prior to a  
13 decision for bifurcation?

14           MR. HOPPER: You know, I believe though  
15 these came up in the context before any bifurcation  
16 motion we had a status conference for C. Brewer  
17 property for all these properties, and that's sort of  
18 the genesis of this whole thing. So what we had  
19 wanted to ensure is that if there is a bifurcation,  
20 that this issue doesn't go by the wayside.

21           And then -- I mean, we could request them,  
22 but in this case, it's the Commission actually  
23 ordering them to do it. And if they don't do it in  
24 this Commission's order, then there will be  
25 consequences potentially to the parties.

1           So, again, the original Motion for  
2 Bifurcation didn't have any of this attached to it.  
3 And Kehalani thought that this would be a good  
4 opportunity to require this, and then it wouldn't  
5 just be the County reviewing it, but also the  
6 Commission would deal with their --  
7 (indecipherable) -- consistent with this sort of  
8 starting at a status hearing before the Commission.

9           COMMISSIONER GIOVANNI: I appreciate that  
10 explanation of logic, whether or not I agree with it.  
11 I do see your logic in it.

12           In view of the representation that was made  
13 today by Mr. McFarlin on behalf of the Piihana  
14 project, in essence that the developer does not have  
15 the wherewithal to comply with these -- the financial  
16 wherewithal to comply with these requirements. And  
17 the expectation is that in six months we would get an  
18 answer that says, I'm sorry, I can't do it. I don't  
19 have the money.

20           Either that, or they would pursue some  
21 other strategy of noncompliance.

22           Do you still think it makes sense to  
23 include these requirements as part of this  
24 stipulation?

25           MR. HOPPER: I think so. The change in the



1 wording of the financial capability statement, given  
2 that today is a formal statement that they're looking  
3 to revert, I suppose we could look at that.

4           To be frank, the County did not believe  
5 that the Petitioner or landowner would be able to  
6 develop this project, which is why we wanted to  
7 proceed further with enforcement to -- because  
8 originally said, yeah, we are looking for financing,  
9 we're doing other things, but it appeared to us that  
10 the intention was to sell off as much of the property  
11 as possible, which normally you don't do without a  
12 subdivision.

13           But based on that concern, we believe that,  
14 yes, that could still be addressed after bifurcation  
15 as it relates to enforcement on the Piihana side.  
16 And with this, you would at least get an answer that  
17 we are unable -- something on the record other than  
18 the statement today by Mr. McFarlin, something on the  
19 record that states we cannot complete the project,  
20 which would provide a basis for further action.

21           Maybe we can change the phrasing of that.  
22 I understand what you're getting at is why bother  
23 with this if they're saying we are not going to go  
24 forward.

25           The thought was to bifurcate, pursue

1 enforcement on each side individually with respect to  
2 their obligations, and we could proceed with finding  
3 financial condition and appropriate enforcement after  
4 that.

5 Part of the concern maybe is that if they  
6 provide it now, make the statement now, and they  
7 state we cannot develop it, does that change your  
8 position with respect to bifurcation? And with  
9 respect to the County, I don't think it did.

10 But if it changes the Commission's  
11 position, then that's something we would need to  
12 discuss.

13 I understand your questions on that, and  
14 your concern with respect to leaving it in there.  
15 However, I think it would be a good opportunity to  
16 get a formal answer that says we cannot develop it,  
17 and have that on record.

18 There's probably -- I don't want our  
19 goal -- I don't want to try to argue with the  
20 Commission on things. I think our goal should  
21 hopefully be to find the best way forward with this  
22 docket that has become very problematic. So if  
23 there's a preference to either defer or to change the  
24 language, then I think we would pursue that.

25 But I think this is the County's best

1 attempt to finding a way to both approve bifurcation,  
2 which we think is appropriate, while not ignoring the  
3 ongoing enforcement issue.

4 COMMISSIONER GIOVANNI: Okay, thank you.

5 My final question relates to an exchange  
6 between Commissioner Chang and Mr. Sakumoto regarding  
7 whether or not it would be arguable if there were  
8 still joint responsibilities of both developers for  
9 conditions that apply solely on the property that is  
10 known as the Piihana.

11 Would you agree or disagree that there is  
12 an argument to be made, or would you take the  
13 position that if bifurcation goes forward, there is  
14 no recourse whatsoever for holding the developer of  
15 Kehalani responsible for any of the conditions that  
16 might be judged to the Piihana property?

17 MR. HOPPER: I would agree after  
18 bifurcation, based on the Decision and Order only,  
19 the conditions and representations that are stated in  
20 that order that apply to Kehalani will apply to them.

21 So to the extent that they would apply to  
22 Kehalani, the Kehalani developers and the homeowners  
23 in Kehalani would no longer be responsible for  
24 effectuating development in Piihana; that's correct.

25 COMMISSIONER GIOVANNI: And if we do not

1 bifurcate, the opposite would be true?

2 MR. HOPPER: I think, yes, technically the  
3 Decision and Order would apply with both, but we have  
4 raised concerns with attempting to enforce a D&O --  
5 it's something to require Kehalani, even if the D&O  
6 is still as it is now, requiring them to build  
7 housing on the land that it doesn't own anymore.

8 That was a legal concern that we had. Even  
9 though, I think, as you stated it correctly, until  
10 bifurcation, the Decision and Order is how it is  
11 right now.

12 COMMISSIONER GIOVANNI: That's what  
13 Commissioner Chang referred to as the so-called  
14 argument, I believe.

15 So, thank you, Mr. Hopper; and thank you,  
16 Commissioner Chang. That's all I have.

17 CHAIRPERSON SCHEUER: Thank you very much,  
18 Commissioner Giovanni.

19 Commissioner Chang. So patient, thank you.

20 COMMISSIONER CHANG: Thank you very much.

21 Mr. Hopper, you have always been extremely  
22 helpful in helping to clarify.

23 I'm going to share with you what my angst  
24 is with this case, as well as many others that come  
25 before, not only LUC, but other government agencies.

1           It is going back to the original intent of  
2 the D&O that was approved 30 years ago.

3           Because of failure to timely implement  
4 those conditions and the development when they were  
5 required to, we are now faced with these current  
6 situations. This is not only LUC, it's not only just  
7 County of Maui. But I'm really struggling with this  
8 as a member of the public as well.

9           When this DBA was made, there was no  
10 indication that these were going to be separate  
11 developments. This was treated as one development.  
12 All of these conditions ran with the one development.

13           Subsequently, the properties were sold, and  
14 the development structure changed.

15           So the arguments that the parties make  
16 today about the validity and the appropriateness of  
17 the bifurcation, it is the present situation. But  
18 what got us here 30 years ago was joint and several  
19 responsibility to do all of these conditions.

20           Now, we are being asked to take away the  
21 one leverage that we have, which is obviously  
22 Kehalani has got access to more resources than  
23 Piihana. And in all due respect to the Kehalani, you  
24 know, the landowners there, and the desire by those  
25 Petitioners to get some clarity, in my view, lack of

1 clarity is in the best interest of the public. If we  
2 can hold both parties responsible for some of these  
3 obligations that were required, why shouldn't we do  
4 that?

5           Why should we give up the original intent  
6 of this D&O? And we should not be rewarding parties  
7 who, you know, disregard these conditions, build when  
8 they're not supposed to, sell when they're not  
9 supposed to, make representations when they're not  
10 supposed to.

11           I apologize, you're asking, okay, so  
12 where's the question in all of this?

13           So I guess my question to the County is you  
14 say it is -- we need to take action against the  
15 appropriate parties. So the enforcement on Piihana,  
16 we should hold those people responsible. But at this  
17 point in time, in the absence of the bifurcation,  
18 don't we have greater leverage to ensure that these  
19 obligations get fulfilled if we keep all the parties  
20 into this action, into this particular docket?

21           MR. HOPPER: I brought this up a few times.  
22 I'm not certain if we can bring an enforcement action  
23 against the Kehalani owners and successfully require  
24 them to build housing on properties they don't own.

25           I guess, we could issue -- I don't want to

1 get into potential litigation scenarios against the  
2 Kehalani owners, but I understand that legally under  
3 the D&O, that all land that's owned is encumbered by  
4 the same D&O, and therefore, technically someone in  
5 Kehalani, whether they be homeowner or developer, is  
6 responsible for fulfilling the Piihana project  
7 conditions, like the drive extension which is the  
8 bridge and other things.

9 I am just concerned being before -- I don't  
10 want to get into specific litigation scenarios, but I  
11 think I did mention before to try to require an owner  
12 to build housing on property it doesn't own any more  
13 for development that it doesn't have an ownership  
14 interest in any more, I'm not sure how different than  
15 it is when somebody sells their property, it's  
16 different than someone just signing the property  
17 because the D&O is still recorded on the Kehalani  
18 lot.

19 By my concern is with the impossibility of  
20 performing if they don't own the land. I agree with  
21 you there that there are joint obligations currently  
22 under the D&O, but with how the property is owned --  
23 and I would note in the D&O how its described,  
24 because multiple areas refer to Piihana Project  
25 District requirements, and Wailuku Project District

1 requirements, how that will be read if we pursue  
2 enforcement against Kehalani owners for development  
3 of Piihana.

4           So I understand what you're saying as far  
5 as the leverage concept, but do I have legal concerns  
6 with that enforcement mechanism.

7           COMMISSIONER CHANG: But that legal fiction  
8 has been created as a result of the parties'  
9 independent action to treat these as two separate  
10 districts. Under the original D&O, they were one.  
11 That is not -- the Land Use Commission is not part of  
12 that. The Land Use Commission wants to ensure that  
13 the conditions we made are enforced. And aren't we  
14 rewarding parties where people who purchased  
15 properties knowing what the conditions are, aren't we  
16 rewarding them by saying we're not going to take any  
17 action, because you don't -- we can't enforce.

18           Government has -- we made promises to this  
19 community. Certain conditions were probably  
20 negotiated in order to get this DBA. We are totally  
21 disregarding that original intent by going with the  
22 current circumstances. And it does -- at some point  
23 in time one has to say enough is enough.

24           We need to stick to what the original  
25 intention is. If that means we need to litigate



1 that, and someone tells us we're wrong, but in the  
2 absence of that, we are constantly being asked to  
3 compromise because the conditions have changed.

4           However, we have heard from enough people  
5 in the community that they're going back to the  
6 original conditions. And isn't that our obligation,  
7 not only as the LUC, but as the County as well?

8           MR. HOPPER: Again, several points.

9           One, if we could prevent somebody from  
10 selling off a portion of a project, yes, that would  
11 be great, it would be make it a lot easier. There  
12 are, again, the resort, I think as an example, that's  
13 been sold to a different owner and is in fact  
14 contiguous, so that's an even bigger issue than here.  
15 But we cannot do that at this point.

16           Parties or landowners are allowed to sell  
17 their property to whomever they would like, and we  
18 don't have a legal recourse there.

19           The Decision and Order, when we read  
20 through it, clearly does contemplate two different  
21 project districts. And, in fact -- (indecipherable)  
22 in fact, describes them as two separate noncontiguous  
23 parcels, which I believe is unusual for a LUC docket.  
24 It's described as the Piihana Project District and  
25 Wailuku Project District.

1           In many cases there are separate, for  
2 example, traffic described in the separate project  
3 districts.

4           The other issue is what obligations are  
5 being lost by the bifurcation? And that's a big  
6 question the County had asked. Whether there are  
7 other obligations that don't have to be fulfilled if  
8 the property is bifurcated. And with the allocation  
9 of conditions, that was -- the intention was to the  
10 parties to be responsible for the same obligations  
11 that they were under.

12           If, by having conditions not fulfilled,  
13 you're talking about the current Kehalani owners not  
14 building out the Piihana Project District, I suppose  
15 that is something they don't have to do any more, but  
16 currently after selling it, just like if a landowner  
17 sells their entire interest in the project, can we  
18 sue that landowner who has already sold and doesn't  
19 own the property any more, to perform on the project  
20 they already sold? I think the future property owner  
21 may be able to sue them, but I don't think the  
22 government has recourse there because it's the new  
23 owner that has that responsibility.

24           So I don't think we saw that as a reduction  
25 in the infrastructure and other conditions that were

1 required by bifurcating. So I think that was the  
2 County's perspective there as far as the project  
3 district.

4 This was certainly a unique DBA because it  
5 involves a noncontiguous parcel that was a fair  
6 distance apart from each other and that are described  
7 in the D&O as separate project districts.

8 And in hindsight, yes, I think it probably  
9 would have been more appropriate to do a DBA for each  
10 separate property with their own separate conditions,  
11 because I don't think there was a lot in here.

12 It wasn't like a situation where you're  
13 supposed to jointly develop traffic improvements.  
14 The traffic improvements were separated out by  
15 project district in there.

16 So I don't think the intention was to say  
17 that the master developer is going to build out a  
18 certain highway that's going to service both projects  
19 necessarily. I think they were separated.

20 So it's an unusual docket in that sense,  
21 and when we reviewed it, we saw that. That's, I  
22 think, our response to the question that you had.

23 COMMISSIONER CHANG: And I appreciate that.  
24 I guess when I look at this, I think, well, what was  
25 the same was the landowner. The fact that they're

1 not contiguous, I believe that C. Brewer owned both  
2 of the parcels and wanted to develop both the parcels  
3 probably for different purposes.

4 But, again -- and I'm not going to belabor  
5 this -- but my concern is, again, is that we are  
6 being asked to rewrite the original conditions based  
7 upon current circumstances, when the current  
8 circumstances are the result of the parties' own  
9 doing, not anything with the community or with the  
10 LUC.

11 So it does really trouble me that we are  
12 not fulfilling the original obligations that we made  
13 when this DBA was made.

14 So I understand your position, the County's  
15 position, but -- I won't say anything more. So thank  
16 you very much.

17 CHAIRPERSON SCHEUER: Thank you,  
18 Commissioner Chang. Commissioner Giovanni.

19 COMMISSIONER GIOVANNI: Mr. Hopper, we  
20 heard testimony from Mr. Sakumoto that there are two  
21 RCFC, there's RCFC Kehalani LLC, and RCFC Piihana  
22 LLC, both of which acquired land through some form of  
23 foreclosure mechanism, they acquired ownership.

24 Mr. Sakumoto could only speculate as to the  
25 owners of interest in each of those LLCs and he said

1 there's probably some common owners.

2 Does the County know who the parties of  
3 interest are in those two LLCs?

4 MR. HOPPER: We don't know the detailed  
5 corporate breakdown for the ownership structure --  
6 (indecipherable) -- or I don't know offhand.

7 COMMISSIONER GIOVANNI: Thank you. Nothing  
8 further.

9 CHAIRPERSON SCHEUER: Commissioner Cabral,  
10 had you raised your hand earlier, your physical hand?

11 VICE CHAIR CABRAL: No, but I think I would  
12 like to hear what OP says, because we've heard so  
13 many things I would like to hear what they have to  
14 say, then I have some action.

15 CHAIRPERSON SCHEUER: We are still on  
16 questioning of the County. I have a couple questions  
17 for Mr. Hopper, if no other Commissioners have  
18 questions.

19 Mr. Hopper, I join in my colleagues, as  
20 always, it's a pleasure to hear from you, and I  
21 listened keenly to your responses.

22 Tell me if I've heard you correctly.

23 At the core of the County's interpretation  
24 of Conditions 1 and 10 is a belief that it would be  
25 impractical, if not possibly undoable, to have -- to

1 require one landowner to build affordable housing on  
2 another landowner's property.

3 Have I heard you correctly?

4 MR. HOPPER: I'm saying as a legal matter,  
5 if I was in a court arguing that, that would be  
6 potentially a difficult position to try to take.

7 CHAIRPERSON SCHEUER: So let me ask you.  
8 Does Condition 1 specify that the physical building  
9 of units on those properties is the only way to  
10 fulfill those conditions?

11 MR. HOPPER: No, there are other ways.

12 CHAIRPERSON SCHEUER: So that's why I'm  
13 confused at your stance. That's one of the two  
14 reasons I'm confused at your stance.

15 I'm following up on Commissioner Ohigashi's  
16 questioning of you. I am concerned that we interpret  
17 dockets and decision and orders consistently  
18 throughout. It's not that we haven't come across  
19 dockets from 20 or 30 years ago that have some  
20 inconsistencies in them, but we try at least to apply  
21 these conditions -- the same logic to reading all  
22 these conditions. And when I read Condition 1, I  
23 guess -- I want you to walk me through the County's  
24 understanding of Condition 1, because it says in  
25 terms of tallying up -- in my reading -- the number

1 of units required, the number of units required for  
2 the entire docket is 30 percent of the units  
3 allocated to the Wailuku Project District and 30  
4 percent of the units allocated to the Piihana Project  
5 District.

6 But it goes onto say, but you can build  
7 these in any distribution between the two areas that  
8 you want, or in any other part of the community  
9 planned area, or there is frankly a part of the  
10 condition I don't understand about producing units at  
11 a higher affordability rate and getting certain  
12 credits.

13 So I'm not understanding how that is  
14 necessarily inconsistent with the other  
15 representations, when it says at least 30 percent of  
16 the units in that area will be affordable,  
17 100 percent is at least 30, it's consistent. I'm not  
18 understanding the County's interpretation.

19 MR. HOPPER: So if you would go back to the  
20 Findings of Fact, this is what we read for them to  
21 state -- gosh, I don't want to keep the Chair longer  
22 than we have to.

23 CHAIRPERSON SCHEUER: Nor do I, Counselor.

24 MR. HOPPER: Finding of Fact 23 talks about  
25 100 percent affordable in Piihana and 37 percent, and

1 then it goes onto state the basis for that. And then  
2 it does the same 25:

3 "Based upon socio-economic concerns, Maui  
4 County proposes that Petitioner's housing allocation  
5 be distributed to provide sixty (60) more affordable  
6 housing units in the Wailuku Project District and  
7 sixty (60) less affordable housing units in the  
8 Piihana Project District."

9 And then it says:

10 "The HHFDC also expressed concern regarding  
11 the Petitioner's proposed high concentration of  
12 affordable housing in the Piihana Project District  
13 and proposed that the affordable housing units be  
14 equally distributed between the project districts",  
15 and then goes on.

16 And then, as you said, they will continue  
17 working to resolve the differences.

18 And then you have after that, which I  
19 believe was a statement of what went on at the  
20 hearing, and what was on the record at the hearing,  
21 Condition No. 1. And Condition No. 1, I believe,  
22 states that the requirements are -- and I think it  
23 amounts to 60 percent in each district, 30 percent at  
24 one rate and 30 percent at the other. And then it  
25 also states that credits can be provided to fulfill



1 this requirement from housing.

2 And that the condition may be fulfilled  
3 through construction and distribution of units in the  
4 property with other projects within the same  
5 community planned district and have the property  
6 under such terms as may be agreeable.

7 But it does appear that the minimum can  
8 only be 60 percent in each of the districts at  
9 certain rates.

10 Now, I believe that the Commission had  
11 intended to say, Piihana, at minimum, had to be 100  
12 percent affordable -- as part of that condition it  
13 would say, Piihana has to be 100 percent affordable  
14 rather than 60 percent. So I think that was our  
15 reading of the condition.

16 And after hearing from all the parties'  
17 arguments which was set forth in the Findings of  
18 Fact, the Commission settled on this condition.

19 So I think that's how the County read that  
20 condition.

21 CHAIRPERSON SCHEUER: It's a complex set of  
22 issues. I guess what I'm getting at is I don't think  
23 there is any reasonable way to read this Decision and  
24 Order to think that there were no affordable housing  
25 units expected in the Piihana Project District. Is

1 that correct?

2 MR. HOPPER: Yes, it does state though,  
3 insofar as possible, the Petitioner shall implement  
4 this affordable housing requirement and currently  
5 with the completion of market priced units for the  
6 residential project.

7 And so I think that the percentage means it  
8 kicks in when you build the housing. So if you built  
9 market rate housing in Piihana, then you have to  
10 build the affordable.

11 CHAIRPERSON SCHEUER: No, that -- I don't  
12 think that condition supports that interpretation,  
13 because rather in the Findings of Fact about one of  
14 the ones that we referred to earlier, it talked about  
15 the developer seeking the allocation of affordability  
16 to 100 percent of Piihana later because of the  
17 basically increased infrastructure cost for  
18 developing Piihana versus the Wailuku Project  
19 District.

20 But that didn't actually respond to my  
21 question, which was there's affordable housing that's  
22 going to be required in Piihana. And that it was  
23 really part of the overall allocation of affordable  
24 housing in the entire project. Is that not County's  
25 interpretation?

1           MR. HOPPER: I think it says 60 percent of  
2 what is built in Piihana has to be affordable. I  
3 don't believe --

4           CHAIRPERSON SCHEUER: It says 30 percent --  
5 a number of units equal to in each district. It  
6 doesn't saying physically built there. And, in fact,  
7 it goes on to say -- I'm sorry to berate this and  
8 draw this long day out further -- but it goes on to  
9 say you can develop these in either area.

10          MR. HOPPER: Yeah, it's 30 percent of  
11 what's built. If you are saying that -- I think  
12 we're not seeing this as the same way if you are  
13 saying, for example, Kehalani couldn't build any  
14 market rate units until it built units in Piihana.  
15 So that Kehalani --

16          CHAIRPERSON SCHEUER: I'm not talking about  
17 sequencing.

18          MR. HOPPER: At this point I think the  
19 County's position would be that 60 percent of the  
20 units in Piihana already built are required to meet  
21 these affordable income ranges, the 30 percent at one  
22 and 30 percent at the other.

23                 If they are never built, though, then  
24 you've got issues of substantial commencement  
25 certainly, but until --

1           CHAIRPERSON SCHEUER: But substantial  
2 commencement applies to us, not to you.

3           MR. HOPPER: Yeah, certainly. But I mean,  
4 if there is no percentage upon which to base anything  
5 if the district doesn't have any units built yet,  
6 would be the issue we would be looking at, 60 percent  
7 of what would be the question.

8           CHAIRPERSON SCHEUER: I don't have anything  
9 further at this point.

10           Anything more for Mr. Hopper,  
11 Commissioners? I'll just -- my final response.

12           I hear what you're saying, but I don't  
13 think you can look at the entirety of the docket and  
14 come to that conclusion is my reading of it, but I  
15 expect you have read it differently.

16           Office of Planning, Ms. Apuna.

17           MS. APUNA: Thank you, Chair. The Office  
18 of Planning did sign the stipulation and was  
19 supportive of the bifurcation, but with the new  
20 information provided by Mr. McFarlin today, we can't  
21 in good conscious continue to support the  
22 stipulation.

23           I think we would like some time -- not a  
24 lot of time -- to review it in light of that  
25 information to understand how that works. And I

1 think that's basically our position today.

2 CHAIRPERSON SCHEUER: Questions for Ms.  
3 Apuna from the Commissioners?

4 VICE CHAIR CABRAL: I would like to defer  
5 to Commissioner Arnold Wong, please.

6 CHAIRPERSON SCHEUER: We're not yet in  
7 deliberation. I know you're trying to move us to  
8 deliberation, Commissioner Cabral. I just want to  
9 make sure that there is an opportunity for anybody  
10 else to ask questions of Ms. Apuna, or if there's any  
11 final bite of the apple of any of the parties.

12 VICE CHAIR CABRAL: I'll wait a little bit.  
13 Thank you.

14 CHAIRPERSON SCHEUER: Commissioner Okuda.

15 COMMISSIONER OKUDA: Sorry, using different  
16 computer today.

17 Ms. Apuna, since you represent the Office  
18 of Planning, which is also the keeper of public  
19 policy, maybe I can ask you to comment on the  
20 observation Commissioner Chang was making. And I  
21 don't mean to put words into her mouth, so let me  
22 take the words out of my mouth, that it really seems  
23 like where we come across these dockets where the  
24 easy money is made by the developer, and the stuff  
25 that's not easy money, oftentimes the affordable

1 housing, it's just left undone and what's left undone  
2 are other infrastructure promises.

3           And then when 25, 30 years pass, people  
4 come and petition us and say, well, changed  
5 circumstance. A lot of time has gone past. Relieve  
6 us of these obligations.

7           I mean, isn't there a public policy reason  
8 why the LUC really should start taking a harder line  
9 in these cases, and really make the point that, yeah,  
10 I guess somebody is going to suffer at this point,  
11 the successor in interest maybe to the original  
12 Petitioner.

13           But you know what? Promises made to the  
14 community have to be kept. That's one of the reasons  
15 why people don't trust us in government any more  
16 because we say things when we're in government  
17 positions, and either deliberately, or just by the  
18 passage of time, we don't live up to what we say.

19           So you really can't blame the community for  
20 saying why should we listen to you. Why should we  
21 trust you folks in government, because what you say  
22 in the end is just worse than just a shibai.

23           Any comment to that, since Office of  
24 Planning really is a custodian of the public trust?

25           MS. APUNA: Thank you, Commissioner.

1           I think OP understands the frustration that  
2 the Commission feels on behalf of the community, and  
3 just on behalf of whatever conditions are made in the  
4 original Decision and Order.

5           I think we also understand, like Mr. Hopper  
6 is saying, as far as the legal ability to force or  
7 require these developers at this point to hold these  
8 conditions, you know, make sure that they build the  
9 affordable housing.

10           I would offer maybe what the Commission can  
11 do is with any new DBAs, that there are more  
12 stringent timelines and requirements of the  
13 developers to make sure that they are doing these  
14 things timely within ten years.

15           Or I think Commissioner Chang mentioned  
16 bond requirements, that there might be other ways to  
17 really require the original developer to perform as  
18 represented.

19           But, yeah, it's a difficult position at  
20 this point, because if Mr. McFarlin says that his  
21 client can't do it, I don't know how we can force him  
22 to do what he is required to do at this point.

23           COMMISSIONER OKUDA: Thank you very much,  
24 Ms. Apuna. Thank you.

25           CHAIRPERSON SCHEUER: Commissioners, is

1 there anything further for Ms. Apuna? If nothing  
2 further from Ms. Apuna, is there any further  
3 questions of any of the parties? It is 2:53 P.M. I  
4 will note that we have gone on obviously very long.  
5 So if the questioning might be brief, any followups.

6 Any questions, Commissioners, of Mr.  
7 McFarlin, Mr. Sakumoto, Mr. Hopper or Ms. Apuna?

8 I'm going to allow a brief period for any  
9 of the parties to add anything that they might wish  
10 to add, starting with Mr. McFarlin.

11 MR. McFARLIN: I don't have anything to  
12 add. I appreciate all your input. I do respect your  
13 input. I think you guys are trying to arrive at a  
14 right decision in a complicated situation. I'll just  
15 leave it at that. And have a Happy New Year. Thank  
16 you very much.

17 CHAIRPERSON SCHEUER: Thank you, Mr.  
18 McFarlin.

19 Mr. Sakumoto.

20 MR. SAKUMOTO: Nothing to add, Mr. Chair.  
21 Thank you.

22 CHAIRPERSON SCHEUER: Mr. Hopper?

23 MR. HOPPER: Just to be clear, the County  
24 is not taking the position that the conditions are  
25 unenforceable against the parties to whom the



1 obligation is owed at this point. We have, in fact,  
2 filed a document stating the instances where we  
3 believe there are compliance issues with some of the  
4 Kehalani conditions, and still believe that needs to  
5 be pursued. Kehalani is not fully built out yet, so  
6 there are still obligations that need to be fulfilled  
7 and we believe they can done in this docket.

8 We didn't want to create the impression  
9 that we believe all the conditions are not  
10 enforceable, let everybody go. That's not the  
11 County's position.

12 It's after bifurcation we believe the  
13 conditions will still have to be enforceable against  
14 the parties that own the land that they own right  
15 now. I just wanted to have that clarified.

16 CHAIRPERSON SCHEUER: Thank you, Mr.  
17 Hopper, for your further clarification.

18 Ms. Apuna, you just spoke. Anything  
19 further?

20 MS. APUNA: Nothing further, Chair.

21 CHAIRPERSON SCHEUER: We are now in  
22 deliberation and we have before us a motion from  
23 Wailuku Plantation LLC's Motion for an Order to  
24 Bifurcate Docket No. A89-642. You can either  
25 approve, deny, defer.

1           COMMISSIONER WONG: Chair, this is  
2 Commissioner Wong.

3           CHAIRPERSON SCHEUER: Commissioner Wong.

4           COMMISSIONER WONG: Chair, you know, in  
5 light of today's discussions and very lengthy  
6 discussions, and then information that was presented  
7 to us, it is my opinion that this matter is not ripe  
8 for a determination. I would therefore move that we  
9 reject the proposed decision and order and  
10 stipulation, and direct the parties to continue  
11 discussions on this matter and not to return to the  
12 Commission until evidence of the following:

13                   One, financial capability is filed with the  
14 Commission;

15                   Two, the responsibility for various  
16 conditions and requirements, as a result, and given  
17 the information received at this hearing. That's it.

18           COMMISSIONER OHIGASHI: Second.

19           CHAIRPERSON SCHEUER: Too slow, Nancy, you  
20 can third the motion.

21           VICE CHAIR CABRAL: Third, okay.

22           CHAIRPERSON SCHEUER: A motion has been  
23 made. Just to clarify, restating to reject the  
24 motion and to direct the parties to not come back to  
25 us with another stipulated motion until there's been

1 the verification of financial ability which was, I  
2 believe -- Commissioner Wong, you're referring to the  
3 language that was the existing stipulation, but was  
4 postponed for six months, you want to see that done?

5 COMMISSIONER WONG: Before they come back  
6 to us.

7 CHAIRPERSON SCHEUER: Then the second part  
8 of your motion was clarification on the assignment of  
9 responsibilities of all conditions?

10 COMMISSIONER WONG: Right, and the  
11 requirement, given the information received at  
12 today's hearing for the affordable housing and  
13 everything else that's involved, community center.

14 CHAIRPERSON SCHEUER: Okay. Folks we have  
15 a motion before us. I'll allow the movant, the  
16 secondary and then the third to speak to it.

17 COMMISSIONER WONG: The reason I made this  
18 motion, because there's still a lot of questions I  
19 have.

20 One, the information about the affordable  
21 housing, those conditions. The public brought up  
22 about the community center, who's going to build  
23 that.

24 Chair Giovanni -- Commissioner Giovanni.  
25 Sorry, Chair.

1 CHAIRPERSON SCHEUER: Are you trying to  
2 tell me something?

3 COMMISSIONER WONG: Talking about the  
4 bridge, who's going to pay for that? What is the  
5 breakdown? Who has the money to pay for these things  
6 for the community?

7 So those are some of the conditions that  
8 I'm really --

9 CHAIRPERSON SCHEUER: Hold on. You were  
10 muted by your Executive Officer.

11 COMMISSIONER WONG: No problem. No one  
12 wants to hear me again, not even my wife.

13 CHAIRPERSON SCHEUER: Court Reporter, where  
14 did you leave off?

15 COURT REPORTER: Give me a second to try to  
16 find it, Chair.

17 "Talking about the bridge, who's going to  
18 pay for that? What is the breakdown? Who has the  
19 money to pay for these things for the community?

20 So those are some of the concerns that I'm  
21 really -- "

22 That's where it ended.

23 COMMISSIONER WONG: I'm concerned about all  
24 these issues that was in the original D&O.

25 So that's why I made that motion, Chair.

1 That's it.

2 CHAIRPERSON SCHEUER: Commissioner  
3 Ohigashi.

4 COMMISSIONER OHIGASHI: Happy New Year.  
5 The reason why I'm supporting this motion is  
6 essentially because it appears that Office of  
7 Planning has requested that they are not going  
8 forward with the stipulation. Absent a complete  
9 stipulation, there is nothing that we can do before  
10 the Commission.

11 The second thing I want to say is this, is  
12 that the Land Use Commission, when all its  
13 decision-making powers is limited, we're not out  
14 there, but our limited staff, no access to any kind  
15 of enforcement officers, no policemen running around,  
16 that we are able to enforce conditions in our D&O,  
17 especially when we do not have the -- there's  
18 substantial completion or compliance with the D&O.

19 That being said, statute limits that  
20 authority and discretion to the counties. In this  
21 case, I'm hoping that the County would take a look at  
22 its policy, and keep -- I think what Mayor Victorino  
23 indicated at the start of his administration, that  
24 housing -- affordable housing would be the number one  
25 policy for the County.

1           And rather than explain to us why they  
2 cannot do it, perhaps they should take a look at how  
3 it can -- famous former mayor when I was a deputy  
4 corporation counsel, Hannibal Tavares, and I kept  
5 telling him, "oh, you can't do this; you can't do  
6 that". He once told me, "Lee, tell me not that you  
7 can't do it, tell me how I can do it".

8           So I think that that message is important  
9 to our lawyers. Tell us how we can make sure that  
10 these things are -- how we can get additional housing  
11 for our people, rather than telling me how I cannot  
12 do anything. Thank you.

13           CHAIRPERSON SCHEUER: Thank you,  
14 Commissioner Ohigashi.

15           VICE CHAIR CABRAL: Thank you for letting  
16 me be number three. Absolutely, Happy New Year.

17           CHAIRPERSON SCHEUER: I remind the  
18 Commissioners, we have one further agenda item after  
19 this.

20           VICE CHAIR CABRAL: I do want to comment on  
21 this, that I am wanting to defer because I think we  
22 clearly have more unanswered questions and we have so  
23 much unclarity among even those testifying and  
24 presenting their opinions to us, that we really need  
25 to get more clarification as to what is what. This

1 is such a complicated issue, because of the fact that  
2 30 years ago I would say that it was done wrong. And  
3 we now have 30/30 hindsight or something.

4 So I wanted to comment on hopefully us as  
5 the Commissioners now today really make certain we  
6 are very clear in our current and future decisions  
7 that we don't provide confusion in the future to some  
8 future commissioners, because I think that that's --  
9 you know, in a perfect world this would have already  
10 been developed, built out, all affordable housing,  
11 bridge and everything done, and no big problem.

12 But I think we all need to do a better job  
13 doing our job.

14 And then I would make a comment, because I  
15 do housing and I do administer affordable housing on  
16 the Big Island, that there is a vote for the  
17 attorneys, McFarlin and Sakumoto, tell your clients  
18 they need to figure this housing out, because there  
19 is a lot of affordable housing money coming down from  
20 federal areas as well as different agencies who have  
21 got a lot of money floating around, and if you  
22 provide the land, and maybe at least the stub out for  
23 the sewerline, somebody else will build it.

24 So they need to be a little bit more hard  
25 working in trying to make that happen, because I do

1 know the money is there.

2 Thank you very much.

3 CHAIRPERSON SCHEUER: Commissioners, we are  
4 in deliberations. Anybody else wish to speak to the  
5 motion? Commissioner Giovanni.

6 COMMISSIONER GIOVANNI: Thank you, Chair.

7 I'm in favor of the motion that's been  
8 seconded and thirded.

9 I share Commissioner Chang's angst about  
10 30-year old decision and orders that are not  
11 implemented as originally represented to the Land Use  
12 Commission. This particular docket is not unique. I  
13 can count back within the last six months two other  
14 similar situations where, as Commissioner Okuda  
15 represented, you go for the easy money first, the  
16 developer does, and too often they come back with a  
17 request or petition to relieve them of conditions  
18 that are not profitable to them due to changing  
19 circumstances 20 and 30 years later.

20 This is not what the community expects;  
21 it's not what the Land Use Commission should expect.

22 And I'm also sensitive and in agreement  
23 with Ms. Apuna's suggestion that on a going forward  
24 basis, and I think this is consistent with what  
25 Commissioner Cabral is talking about, when we do put



1 conditions for that infrastructure or for roads or  
2 affordable housing, put them on timelines that make  
3 it very clear that they can be enforced relative to  
4 the timeline and make it easier on the counties to do  
5 that.

6 So in this particular docket, I am in favor  
7 of the motion, and I will vote in support of it.

8 CHAIRPERSON SCHEUER: Commissioner Chang.

9 COMMISSIONER CHANG: Thank you, Mr. Chair.

10 I apologize if I have -- you know, I'm not  
11 riding any of kind of a soap box. But I think I am  
12 at the point where enough is enough. Where we really  
13 need to hold people, developers to their commitments,  
14 because those are the basis upon which these  
15 approvals have been made.

16 I think moving forward, I agree, we do need  
17 to be much more specific. I am going to look into  
18 how do we -- whether we can require a bond to be held  
19 in escrow to ensure that infrastructure is developed  
20 or affordable housing, but I think we need -- there  
21 needs to be a disincentive to buy and sell, go into  
22 foreclosure, and then our communities are held --  
23 holding the bag with a park that has a gate that they  
24 cannot even enter. Or we've got conditions about  
25 foregoing the affordable housing, and now coming in

1 they want to build more market homes. I think we  
2 need to look out for the public interest.

3 So, again, that's all I have to say. I  
4 have greatly appreciated all of the parties' openness  
5 in bringing this to our attention.

6 So thank you very much. That's it.

7 CHAIRPERSON SCHEUER: Commissioner Okuda.

8 COMMISSIONER OKUDA: Thank you, Mr. Chair.  
9 I will also be voting in favor of this motion. I  
10 agree with everything that has been said up to now by  
11 the other Commissioners, and indulge me to repeat  
12 myself.

13 I think it is very important that  
14 government lives up to what government represents and  
15 states is going to be what is going to take place.  
16 And if things are going to change, and I think I said  
17 this at the Waimanalo Gulch Landfill case, another  
18 case where the record indicates representations to a  
19 community were not kept, but if things are going to  
20 change, then it's incumbent on the people who want  
21 the change to go out to the community, demonstrate  
22 with admissible evidence the reasonableness and the  
23 need for the change, and get the community to support  
24 what the change is.

25 I mean, we on the Commission, as you can

1 tell, we will listen to all the evidence. We'll  
2 listen to all the evidence. We'll give people the  
3 time to present the evidence.

4 But when requests for changes are being  
5 made on representations which are embodied in what  
6 amounts to an enforceable order, and the community  
7 testimony is one that indicates serious questions of  
8 trust by the community, I mean, a reasonable  
9 petitioner or applicant would see that's going to be  
10 a problem.

11 So going forward, I would really urge the  
12 parties to talk to the members of the community, get  
13 them on board, or at least make it very clear so that  
14 they might have disagreements, if they do, but it's  
15 not going to be like somebody is trying to basically  
16 change the ground rules after the fact.

17 And, again, because if anything, we all got  
18 to seek and try to restore trust in our government,  
19 and we can only do that if we all live up to the  
20 representations we make.

21 Thank you, Chair.

22 CHAIRPERSON SCHEUER: Thank you,  
23 Commissioner Okuda.

24 Anything further, Commissioners?

25 All I will do is echo the eloquent

1 statements of my fellow Commissioners. I join in  
2 them.

3 Mr. Orodenker, please poll the Commission  
4 today.

5 EXECUTIVE OFFICER: Sorry, Mr. Chair, I'm  
6 still laughing over Commissioner Wong's response to  
7 your statement of "eloquent".

8 The motion is to reject the proposed motion  
9 and stipulation and direct the parties to continue  
10 discussions and not return until they have  
11 verification of financial capability and clarify  
12 responsibilities on all conditions and the  
13 requirements contained in those conditions.

14 Commissioner Wong?

15 COMMISSIONER WONG: Aye.

16 EXECUTIVE OFFICER: Commissioner Ohigashi?

17 COMMISSIONER OHIGASHI: Aye.

18 EXECUTIVE OFFICER: Commissioner Cabral?

19 VICE CHAIR CABRAL: Yes.

20 EXECUTIVE OFFICER: Commissioner Okuda?

21 COMMISSIONER OKUDA: Yes.

22 EXECUTIVE OFFICER: Commissioner Giovanni?

23 COMMISSIONER GIOVANNI: Aye.

24 EXECUTIVE OFFICER: Commissioner Chang?

25 COMMISSIONER CHANG: Aye.

1 EXECUTIVE OFFICER: Commissioner Aczon is  
2 absent.

3 Chair Scheuer?

4 CHAIRPERSON SCHEUER: Aye.

5 EXECUTIVE OFFICER: Thank you, Mr. Chair.  
6 The motion passes unanimously with seven votes.

7 CHAIRPERSON SCHEUER: Thank you, sincerely,  
8 to all the parties. Grateful for your endurance on  
9 this matter.

10 LEGISLATIVE MATTERS IMPACTING THE LUC

11 Commissioners, I think this next matter  
12 could be brief, and we could perhaps not take a break  
13 but just go through it. I would like to move to the  
14 next agenda item, which is legislature matters  
15 impacting the LUC.

16 Mr. Hakoda, Mr. Derrickson has anybody  
17 signed up to testify?

18 CHIEF CLERK: This is Riley. No  
19 testifiers.

20 CHAIRPERSON SCHEUER: Is there anybody who  
21 is listening in the audience who wishes to testify on  
22 this particular agenda item, legislative matters  
23 impacting the LUC? Seeing none.

24 Mr. Orodener, can you please brief the  
25 Commission.

1 EXECUTIVE OFFICER: Thank you, Mr. Chair.

2 There are a number of matters that the  
3 Commissioners have expressed concern about that  
4 revolve around the legislature this year.

5 One of them was, of course, the proposed  
6 furloughs that are now postponed until July.  
7 Furloughs would have had a significant impact on LUC  
8 operations, and a decrease -- as everyone knows,  
9 we're so small that any decrease percentage, decrease  
10 in time spent in the office and time working has an  
11 exponential impact on our ability to move matters to  
12 hearing and to complete the work and preparation  
13 necessary for hearing as well as decisions and orders  
14 subsequent.

15 More concern, immediate concern is various  
16 restrictions. We were gifted in being able to hire  
17 Natasha, however, we have two vacant positions we are  
18 not going to be allowed to fill because of both the  
19 Governor and legislature's restrictions on personnel  
20 hiring and firing, hiring of personnel.

21 Legislatively, the Governor's budget has  
22 been submitted and it was -- I would caution that it  
23 was done prior to the latest relief package, so there  
24 may be some changes. However, the Governor's budget  
25 has a 50 percent reduction in our travel expenses

1 next year, and 100 percent reduction in the  
2 subsequent year. Why it's not the other way around,  
3 I don't know. I can't answer that question, but  
4 that's what's been submitted.

5 I'm not sure how that is going to play out  
6 and what changes will be made as the legislature  
7 continues.

8 We have not seen any specific legislation  
9 as yet with regard to changes to the LUC, eliminating  
10 the LUC, or any other measures impacting the LUC  
11 other than the officer information practices proposal  
12 that would allow amendments to Chapter 91 and 92, so  
13 we could continue to do ZOOM meetings.

14 However, we have been informed, and we are  
15 still in discussion with various committee chairs  
16 regarding what is being termed a streamlining of  
17 government, and the combining of various  
18 organizations with synergistic programs.

19 At the moment we don't know how that is  
20 going to play out, but it is not inconceivable that  
21 there is a proposal put forward that somehow combines  
22 the LUC with various other land use activities in the  
23 state system.

24 But once again, I would caution that we're  
25 still in discussion with regard to those, and we

1 don't know exactly what that is going to look like.

2 I can answer any questions if the  
3 Commissioners have any.

4 CHAIRPERSON SCHEUER: Commissioners,  
5 discussion.

6 Commissioner Ohigashi.

7 COMMISSIONER OHIGASHI: I just have a  
8 question. Are we contemplating trying to expand some  
9 of these deadlines that we have on the various  
10 dockets that we need to resolve because of the  
11 pandemic and the limited time we have on ZOOM  
12 webinar?

13 EXECUTIVE OFFICER: We're not looking at  
14 that right now. The Governor's Emergency  
15 Proclamation waives all those deadlines.

16 COMMISSIONER OHIGASHI: Does the fact that  
17 we are not able to hire additional people, does that  
18 affect these timelines?

19 EXECUTIVE OFFICER: It may. I don't know  
20 how to answer that question until we're actually  
21 confronted with it.

22 COMMISSIONER OHIGASHI: Just have to  
23 rescind Bert's retirement.

24 EXECUTIVE OFFICER: I tried. I was  
25 rejected soundly, but I tried.



1           We're balancing on the razor's edge on  
2 that, because if we ask for additional time to  
3 complete work, and our proposed legislation to do  
4 that, the backlash may be that we are now moving too  
5 slowly for the crisis, and the need for the  
6 development community.

7           My feeling is that we're better off leaving  
8 that alone for now and attempting to manage it  
9 through creative calendaring.

10           CHAIRPERSON SCHEUER: Commissioner  
11 Giovanni.

12           COMMISSIONER GIOVANNI: Thank you, Chair.

13           Dan, any updates on confirmation or  
14 reconfirmation of Commissioner's appointments to the  
15 Commission?

16           EXECUTIVE OFFICER: I received an email  
17 during the course of this hearing saying that there  
18 are three Commissioners who need to reapply for their  
19 positions, and I sent e-mails to those three  
20 commissioners which I believe you're one of.

21           All you have to do is redo the application.

22           COMMISSIONER GIOVANNI: Do I have standing  
23 between January 1st and whenever it gets officially  
24 approved?

25           EXECUTIVE OFFICER: Yes. Yes, the law

1 states that after your term expires, you can holdover  
2 for two years, up to two years. So there is no  
3 concern with that.

4 COMMISSIONER GIOVANNI: Okay. That was my  
5 issue. Thank you.

6 CHAIRPERSON SCHEUER: Commissioners? If  
7 not.

8 Mr. Orodenker, I understand on the next  
9 agenda you'll put another legislative update?

10 EXECUTIVE OFFICER: I don't suggest doing  
11 that at the next meeting, only a week or so away. I  
12 was doing that at the meeting at the end of January.

13 CHAIRPERSON SCHEUER: Okay. Commissioner  
14 Cabral.

15 VICE CHAIR CABRAL: I do want to say as  
16 somebody from the outer islands, while I love not  
17 living on an airplane, I absolutely really -- and I  
18 think these ZOOM meetings have been incredibly well  
19 done by staff, and we've worked through a lot of the  
20 glitches that I've experienced on other ZOOM  
21 meetings, but I think there is a whole lot to be said  
22 for meetings in person.

23 So I can see that the travel budget is  
24 limited to disappearing, obviously, but I think it  
25 would be something -- I would appreciate it. I mean,

1 I might be willing to spend my own money to travel.  
2 I have a place in Honolulu I can stay in. But any  
3 way, because there are sometimes some topics, some  
4 hearings that I really would prefer I was in person  
5 with at least my fellow Commissioners or something,  
6 because I think I would get a lot more out of it, and  
7 maybe it's partly because I'm such a visual person.

8 I can remember these hearings when we had  
9 them in person with someone like Mr. Lindsey when we  
10 were together with him in Maui a year-plus or so or  
11 something. The one on September 9th, I can vaguely  
12 remember.

13 So there's a lot to be said for in person  
14 the old fashion way. I can understand the financial  
15 difficulties here. So it might be something that we  
16 can try and work up to being optional. Obviously  
17 Arnold is there. And I guess I'll join him on the  
18 table and I'll bring the coffee or something.

19 I just want to kind of make sure we have  
20 that ability to come in person, especially if the  
21 staff felt like the complications on a new topic or  
22 repeating topic would allow us to do a better job.

23 EXECUTIVE OFFICER: Thank you, Commissioner  
24 Cabral.

25 It's our belief that in-person hearings

1 have advantages. We've been working with ZOOM, but I  
2 think that there is a real benefit to appearing on  
3 neighbor islands, especially to let the community  
4 know that we're there and we're concerned, this is  
5 their island and we don't want to make a decision  
6 from Honolulu and dictate it down on top of you.

7           So I would agree with you. The trick is  
8 going to be preserving some kind of budget. My  
9 understanding is that almost all of the boards and  
10 commissions had their budgets cut in a similar  
11 manner.

12           CHAIRPERSON SCHEUER: Anything else?  
13 Commissioner Giovanni.

14           COMMISSIONER GIOVANNI: I want to echo what  
15 Commissioner Cabral just said. I think that the LUC  
16 administrative executive team has done an incredible  
17 job and set a very high bar for ZOOM meetings. I've  
18 tried to emulate that in other ZOOM meetings and it's  
19 not possible. So kudos to the team for that, and we  
20 have gotten some important work done as a result of  
21 that.

22           Having said that, I miss seeing you guys,  
23 and I would love to have you here on island for the  
24 Hokuia Place matter that is coming before us. There's  
25 a lot of local interest in that. Seeing everybody by

1 ZOOM, the community misses that.

2 And finally, just hope everybody has a  
3 Happy New Year and see you in 2021.

4 EXECUTIVE OFFICER: Thank you once again  
5 for everything you've done for the last past year.

6 CHAIRPERSON SCHEUER: Congratulations for  
7 surviving today's meeting and 2020.

8 COMMISSIONER OHIGASHI: Happy New Year from  
9 a neighbor island.

10 CHAIRPERSON SCHEUER: Is there any further  
11 business?

12 COMMISSIONER WONG: Chair, just wanted to  
13 say again, I know everyone echoed me. Thank you to  
14 Bert. Happy New Year to everyone too.

15 CHAIRPERSON SCHEUER: Bert, just because  
16 you're retired doesn't mean you can't volunteer and  
17 help out.

18 VICE CHAIR CABRAL: Just do it for free,  
19 because there is no money to pay him now.

20 CHAIRPERSON SCHEUER: And welcome, Natasha.

21 VICE CHAIR CABRAL: And welcome, Natasha.  
22 We're really a good nice group, aren't we?

23 CHAIRPERSON SCHEUER: There being no  
24 further business, I declare this meeting adjourned.

25 (The proceedings adjourned at 3:25 p.m.)

## CERTIFICATE

1 STATE OF HAWAII )  
2 ) SS.  
3 COUNTY OF HONOLULU )

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on December 30, 2020, at 9:00 a.m.,  
6 the proceedings contained herein was taken down by me  
7 in machine shorthand and was thereafter reduced to  
8 typewriting under my supervision; that the foregoing  
9 represents, to the best of my ability, a true and  
10 correct copy of the proceedings had in the foregoing  
11 matter.

12 I further certify that I am not of counsel for  
13 any of the parties hereto, nor in any way interested  
14 in the outcome of the cause named in this caption.

15 Dated this 30th day of December, 2020, in  
16 Honolulu, Hawaii.

17  
18  
19 /s/ Jean Marie McManus  
20 JEAN MARIE McMANUS, CSR #156  
21  
22  
23  
24  
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