

LAND USE COMMISSION
STATE OF HAWAI'I

Hearing held on September 9, 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. ACTION

A89-642 C. BREWER PROPERTIES, INC. (Maui)
Consider PETITIONERS WAILUKU PLANTATION 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

VI. RECESS

BEFORE: Jean Marie McManus, CSR #156

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1 APPEARANCES:

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

6
7 STAFF:

8 WILLIAM WYNHOFF, ESQ.
Deputy Attorney General

9 DAN ORODENKER, Executive Officer
RILEY K. HAKODA, Chief Clerk
10 SCOTT DERRICKSON, Chief Planner
BERT SARUWATARI, Planner

11 DAWN T. APUNA, ESQ.
12 RODNEY FUNAKOSHI, Planning Program Administrator
LORENE MAKI, Planner
13 State of Hawaii, Office of Planning

14 MICHAEL HOPPER, ESQ.
Deputy Corporation Counsel

15

16 RANDALL SAKUMOTO, ESQ.
RCFC Kealani, LLC

17 JASON McFARLIN, ESQ.
18 Wailuku Plantation, LLC

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1 ACTING CHAIR ACZON: Aloha. Good morning
2 everyone.

3 This is the September 9, 2020, Land Use
4 Commission meeting, and it is being held using
5 interactive conference technology linking
6 videoconference participants and other interested
7 individuals of the public via ZOOM internet
8 conferencing program to comply with the State and
9 County official operational directives during the
10 COVID-19 pandemic. Members of the public are viewing
11 the meeting via the ZOOM webinar platform.

12 For all meeting participants, I would like
13 to stress to everyone the importance of speaking
14 slowly, clearly and directly into the microphone.
15 Before speaking, please state your name and identify
16 yourself for the record. Also, please be aware that
17 all meeting participants are being recorded on the
18 digital record of this ZOOM meeting. Your continued
19 participation is your implied consent to be part of
20 the public record of this event. If you do not wish
21 to be part of the public record, please exit this
22 meeting now.

23 The ZOOM conference technology allows the
24 parties and each participating Commissioner
25 individual remote access to the meeting proceedings

1 via their personal digital devices. Also, please
2 note that due to matters entirely outside of our
3 control, occasional disruptions to connectivity may
4 occur for one or more members of the meeting at any
5 given time. If such disruptions occur, please let us
6 know, and be patient as we try to restore the
7 audio/visual signals to effectively conduct business
8 during this pandemic.

9 My name is Edmund Aczon, and I currently
10 serve as the LUC Vice Chair. Along with me,
11 Commissioners Chang, Okuda and Wong, the LUC
12 Executive Officer Daniel Orodener, LUC Chief Planner
13 Scott Derrickson, Chief Clerk Riley Hakoda, the LUC's
14 Deputy Attorney General Bill Wynhoff -- good morning,
15 Bill -- and the Court Reporter Jean McManus are on
16 Oahu. Commissioner Cabral is on the Big Island.
17 Commissioner Ohigashi is on Maui, and Commissioner
18 Giovanni is on Kauai. Our Chair Jonathan Scheuer
19 will join us after the impending recess that we will
20 take after we conclude our administrative portion of
21 today's proceedings. There are currently eight
22 seated Commissioners of a possible nine.

23 Our first order of business is the adoption
24 of the August 12-13, 2020 minutes.

25 Mr. Hakoda or Mr. Derrickson, has there

1 been any written testimony submitted on this matter?

2 CHIEF CLERK: Mr. Chair, this is Riley
3 Hakoda. There has been no public testimony on the
4 minutes.

5 ACTING CHAIR ACZON: Thank you, Mr. Hakoda.

6 Are there any members of the public who
7 wish to testify on this matter? If so, please use
8 the raise-hand function of the ZOOM software, and you
9 will be promoted to the meeting and given two minutes
10 to testify. Anyone?

11 CHIEF PLANNER DERRICKSON: No one, Mr.
12 Chair.

13 ACTING CHAIR ACZON: Thank you.

14 Commissioners, are there any corrections or
15 comments on them? If not, is there a motion to adopt
16 the minutes for August 12th and 13th, 2020?

17 COMMISSIONER OHIGASHI: I move to adopt.

18 VICE CHAIR CABRAL: Second.

19 ACTING CHAIR ACZON: Commissioner Ohigashi
20 has moved to adopt the minutes, and was seconded by
21 Commissioner Cabral to adopt the August 12-13, 2020
22 minutes.

23 Mr. Orodenker, please poll the
24 Commissioners.

25 EXECUTIVE OFFICER: Thank you, Mr. Chair.

1 The motion is to adopt the minutes.

2 Commissioner Ohigashi?

3 COMMISSIONER OHIGASHI: Aye.

4 EXECUTIVE OFFICER: Commissioner Cabral?

5 VICE CHAIR CABRAL: Aye.

6 EXECUTIVE OFFICER: Commissioner Wong?

7 COMMISSIONER WONG: Aye.

8 EXECUTIVE OFFICER: Commissioner Giovanni?

9 COMMISSIONER GIOVANNI: Aye.

10 EXECUTIVE OFFICER: Commissioner Chang?

11 COMMISSIONER CHANG: Aye.

12 EXECUTIVE OFFICER: Commissioner Aczon?

13 ACTING CHAIR ACZON: Aye.

14 EXECUTIVE OFFICER: I'm sorry, Mr. Chair.

15 I took you out of order.

16 Commissioner Okuda?

17 COMMISSIONER OKUDA: Yes.

18 EXECUTIVE OFFICER: Chair Scheuer is

19 absent. The motion passes unanimously.

20 ACTING CHAIR ACZON: Thank you, Mr.

21 Orodenker. The next agenda item is the tentative
22 meeting schedule.

23 Mr. Orodenker?

24 EXECUTIVE OFFICER: Thank you, Mr. Chair.

25 Tomorrow we will once again be meeting by

1 ZOOM for the Kihei High School motion to amend. On
2 September 23rd, we will once again be meeting by ZOOM
3 for the Hawaiian Memorial Park closing arguments and
4 conclusion of the district boundary amendment
5 proceedings.

6 On September 24th, we will be hearing
7 possibly motion by the Office of Planning with regard
8 to Central Maui landfill. That will be -- also be
9 done by ZOOM.

10 On October 7th, going forward from end of
11 September, we will be monitoring whether or not we
12 can continue to hold ZOOM meetings. But the matters
13 before the Commission are on October 7th Halekua
14 Development motion to amend and Hanohano motion to
15 release.

16 On October 8th, we will be adopting the
17 order for Hawaiian Memorial Park and possible Kihei
18 High School matters that are outstanding.

19 On October 21st, we have an open day of --
20 if there are no loose ends, we may utilize that day
21 for -- to finish up.

22 On October 22nd, we have the Newton Family
23 matter -- Trust matter and Hawaii Islands Land Trust
24 matter, a motion to amend in Hilo. That's also the
25 day for the Hawaii Office of Planning

1 (indecipherable).

2 November 4th, Halekua Development.

3 November 5th, Hawaiian Islands Land Trust.

4 November 18th, we have Pulama Lanai matter,
5 and the 19th is also set aside for that.

6 December 2nd, we have the Windward Hotel
7 matter on Maui, and December 3rd conclusion of Barry
8 Trust matter.

9 December 16th, we have the Church matter,
10 and December 17th the adoption of the order for the
11 Barry Trust matter. That takes us to the end of the
12 year, Mr. Chair.

13 ACTING CHAIR ACZON: Thank you, Mr.
14 Orodanker.

15 Commissioners, do you have any questions?
16 Thank you, everyone.

17 This concludes the administration portion
18 of our meeting. We will now go into recess till
19 10:30 A.M. till we add to our quorum for the next
20 agenda item. Thank you, everyone. We are in recess.

21 (Recess taken.)

22 CHAIRPERSON SCHEUER: Gary Okuda?

23 CHAIRPERSON OKUDA: I'm present.

24 CHAIRPERSON SCHEUER: Commissioner Aczon?

25 VICE CHAIR ACZON: Here.

1 CHAIRPERSON SCHEUER: Commissioner Cabral
2 is present. Commissioner Ohigashi, Commissioner
3 Chang, Commissioner Giovanni.

4 COMMISSIONER GIOVANNI: Aloha.

5 CHAIRPERSON SCHEUER: Aloha. Thank you to
6 everyone for your extreme patience this morning and,
7 Jean, are you ready?

8 COURT REPORTER: Yes, I am. Thank you.

9 CHAIRPERSON SCHEUER: Okay. Thank you very
10 much for everyone's patience during the recess. My
11 name is Jonathan Likeke Scheuer. I'm currently the
12 Chair of State Land Use Commission.

13 COMMISSIONER WONG: Chair?

14 CHAIRPERSON SCHEUER: Commission Wong?

15 COMMISSIONER WONG: The county.

16 CHAIRPERSON SCHEUER: I will call for
17 parties -- oh, you think the Maui County is not there
18 yet?

19 COMMISSIONER WONG: And Bill Wynhoff got to
20 say something, I think.

21 CHAIRPERSON SCHEUER: Mr. Wynhoff?

22 MR. WYNHOFF: Just so the record reflects
23 the AG and Deputy AG is here. Thank you, Chair.

24 CHAIRPERSON SCHEUER: Okay. And I see Mr.
25 Hopper. Okay. And we have OP. Okay.

1 So we have Commissioners available for the
2 proceedings on our next agenda item which is an
3 action meeting on Docket No. A89-640 to C. Brewer
4 Properties, Inc., Maui, to consider the Petitioner's
5 Wailuku Plantation LLC, Edgar Somera, Fay Somera,
6 Larry Sky, Dayong Zhao, Xiu Xiang Fang, Bong Hwa Shi
7 Jordan, Wenxiao Liu and Elise Travis's motion for an
8 order bifurcating Docket No. A89-642.

9 Will the parties please identify themselves
10 for the record. You might need to unmute yourself.

11 MR. McFARLIN: Jason McFarlin for the
12 petitioners you just named off.

13 COURT REPORTER: Excuse me, can you speak
14 up?

15 CHAIRPERSON SCHEUER: Mr. McFarlin, could
16 you please speak up?

17 MR. McFARLIN: Sure. Can you hear me now?

18 CHAIRPERSON SCHEUER: Not particularly
19 well. I will note that the earbuds for me have not
20 worked particularly well on ZOOM.

21 MR. McFARLIN: Okay. I'll shut that off
22 then.

23 CHAIRPERSON SCHEUER: So could you
24 please --

25 MR. McFARLIN: Yeah, I removed the earbuds.

1 Can you hear me now?

2 CHAIRPERSON SCHEUER: A little better.

3 MR. McFARLIN: Okay. I'll speak louder.

4 CHAIRPERSON SCHEUER: Great.

5 MR. McFARLIN: Jason McFarlin for Wailuku
6 Plantation LLC, Edgar Somera, Fay Somera, Larry S.
7 Sky, Dayong Zhao, Xiu Xiang Fang, Bong Hwa Shi
8 Jordan, Wenxiao Liu, Elise Travis and we filed a
9 joinder for Ronald Vilorio, and I'm also representing
10 him in this motion.

11 CHAIRPERSON SCHEUER: Thank you very much.

12 MR. McFARLIN: Thank you.

13 MR. SAKUMOTO: Good morning, Commissioners,
14 good morning. Randall Sakumoto representing
15 co-petitioner, RCFC Kehalani, LLC. We're not the
16 movants in this case, but we are Co-Petitioner on the
17 docket.

18 CHAIRPERSON SCHEUER: Thank you, Mr.
19 Sakumoto.

20 County?

21 MR. HOPPER: Michael Hopper, Deputy
22 Corporation Counsel representing the Maui County
23 Department of Planning. With me is Deputy Director
24 Jordan Hart and zoning inspector Adam Parness. Thank
25 you.

1 CHAIRPERSON SCHEUER: Okay. And Ms. Apuna?

2 MS. APUNA: Good morning, Chair, members of
3 the Commission. Deputy Attorney General Dawn Apuna
4 on behalf of the Office of Planning. Here with me is
5 Rodney Funakoshi.

6 CHAIRPERSON SCHEUER: Thank you very much.
7 Let me update the record. On December 5th, 2019, the
8 Commission heard a status report on this docket at
9 the Maui Arts and Cultural Center, and we received
10 Notices from various Petition Area property owners
11 appointing Mr. McFarlin as their legal
12 representative.

13 The Commission also received notice from
14 Mr. McFarlin that the various property owners had
15 received a copy of Wailuku Plantation, LLC's Motion
16 For Order Bifurcating the Docket.

17 On December 13, 2019, the Commission
18 received correspondence from the representative for
19 the RCFC entity in this matter supplementing their
20 status report provided to the Commission earlier on
21 December 5th.

22 On Christmas Eve, 2019, the Commission
23 received the Piihana Project 2019 annual report. We
24 received the County of Maui's comments about this
25 report on March 19th, 2020.

1 On June 6th, 2020, the Commission received
2 Wailuku Plantation, LLC, et al's Motion for Order
3 Bifurcating the docket.

4 On August 28th, the Commission mailed and
5 emailed the September 9th and 10th agenda notice to
6 our statewide and Maui mailing lists.

7 From August 17th through yesterday, the
8 Commission received:

9 Correspondence from the Kehalani Community
10 Association-Hawaiiana Management.

11 The RCFC Kehalani LLC's Joinder to the
12 Wailuku Plantation, LLC et al's Motion as well as
13 corrections to their Exhibit 2.

14 A Notice of Sale of property within the
15 Petition Area from Wailuku Plantation LLC.

16 Public testimony from Gary Elster.

17 The County of Maui Planning Department's
18 Statement on Wailuku Plantation LLC's Motion and OP's
19 Response to the Motion.

20 Petitioner Wailuku Plantation LLC's
21 Supplemental Certification of Service as well as
22 their Notice of Representation and Joinder for Ronald
23 Viloria.

24 Let me review our procedure for today.
25 First, I will recognize the written public testimony

1 that has been submitted in this matter, identifying
2 the person or organization who has submitted the
3 testimony which to this point has included Gary
4 Elster.

5 Next, I will call for any individuals who
6 have preregistered to provide public testimony in
7 this docket. I will call you in from being an
8 attendee into being a panelist. I will swear you in,
9 and you will have two minutes to testify in this
10 matter. You will remain available for questioning by
11 the parties as well as the Commissioners, and after
12 that I will move you back to being an attendee in
13 this meeting.

14 After all registered testifiers have
15 completed the testimony, I will provide the same
16 opportunity for people who have not preregistered.
17 After the completion of public testimony for the
18 proceedings, I will give an opportunity for the
19 parties to admit exhibits. And following the
20 admission of any exhibits, the Petitioner will
21 present their case. When Petitioner has completed
22 their presentation, it will be followed by the County
23 of Maui and the Office of Planning.

24 From time to time, we will take short
25 breaks in this proceeding.

1 Are there any questions with our procedures
2 today starting with Mr. McFarlin?

3 MR. McFARLIN: No questions.

4 MR. SAKUMOTO: No questions, Chair.

5 CHAIRPERSON SCHEUER: Thank you.

6 MR. HOPPER: No questions, Chair.

7 CHAIRPERSON SCHEUER: Thank you, Mr.

8 Hopper.

9 MS. APUNA: No questions.

10 CHAIRPERSON SCHEUER: Thank you. Okay.

11 Other than Mr. Elster, has there been any
12 written testimony, Mr. Hakoda, on this docket?

13 CHIEF CLERK: No, Chair.

14 CHAIRPERSON SCHEUER: Okay. I'm going to
15 look in the attendee meeting room. Mr. Elster does
16 not appear to be attending. If you are attending,
17 please raise your hand using the raise your hand
18 function. I'm not seeing him.

19 Is there anybody who is attending this
20 meeting who wishes to provide oral testimony at this
21 time who's an attendee to this meeting, please, again
22 use the raise your hand function in ZOOM. Okay.

23 Mr. James Buika, I'm going to admit you in
24 as a panelist, swear you in, and then you will have
25 two minutes to testify. At the end of that, you'll

1 be available for questions.

2 Please turn on your microphone and your
3 video. Good morning, Mr. Buika. Please unmute
4 yourself as well.

5 THE WITNESS: Good morning. Can you hear
6 me?

7 CHAIRPERSON SCHEUER: I can hear you now.
8 I'm going to swear you in first. Do you swear or
9 affirm the testimony you're about to give is the
10 truth?

11 THE WITNESS: Yes.

12 CHAIRPERSON SCHEUER: Thank you. You have
13 two minutes, please proceed stating your name and
14 address on the record.

15 JAMES BUIKA

16 Was called as a witness by and on behalf of the
17 public, was sworn to tell the truth, was examined and
18 testified as follows:

19 DIRECT EXAMINATION

20 THE WITNESS: Thank you. My name is James
21 Buika. My address in Kehalani is 514 Komo Ohia
22 Street. I've owned since 2006. On A89-642, for some
23 reason I had spent a lot of time crafting a two-page
24 testimony that I submitted to Riley Hakoda two days
25 ago but doesn't appear it got registered.

1 CHAIRPERSON SCHEUER: The Commission has
2 received your written testimony.

3 THE WITNESS: Oh, you have. Okay, great.
4 Thanks. Okay. My time is almost up.

5 I took the time to actually craft a
6 condition for your consideration today, so please, in
7 my written testimony, there is a condition.

8 The problem here -- there's a problem and I
9 proposed a solution in the condition in that Kehalani
10 as a master planned community -- this is a unique
11 opportunity since the 1990 Decision and Order has
12 come up again to make Kehalani Master Planned
13 Community whole and make it right.

14 What happened as background in 19 -- in
15 2009, the master developer was gung-ho building
16 homes, making money, and then the recession hit
17 his -- and he declared bankruptcy and left the
18 Kehalani Community Association with no use of dollars
19 of dedications and the County of Maui i.e., our
20 taxpayers.

21 So the idea behind my condition is to
22 guarantee that the Kehalani master developer, which
23 is almost done completing all the homes, and has many
24 millions improvements not done and not dedicated,
25 that my fear is they will declare bankruptcy and

1 leave the dedications to the homeowners and the
2 County of Maui.

3 So my condition crafts something prior to
4 the execution of this bifurcation to put in place
5 that all of the necessary improvements and
6 dedications be completed prior to approval of this
7 bifurcation. It may seem a distant connection;
8 however, since the 1990 Decision and Order has come
9 up again, I think we really need a condition of
10 approval to avoid the situation that occurred in
11 2009.

12 Declaring bankruptcy in a pandemic, it's
13 very easy for them to do and who gets -- who foots
14 the bill after 30 years of promises to the LUC are
15 the taxpayers and the County of Maui, and I don't
16 believe that is correct. So it is incumbent upon
17 you, I'm trusting all of you that you will place a
18 very good condition. You can modify my words, but
19 place a condition on this bifurcation, please, to
20 guarantee that the master planned community becomes
21 whole as envisioned originally in 1990 by the LUC.

22 CHAIRPERSON SCHEUER: Please summarize your
23 testimony.

24 THE WITNESS: Yes, otherwise we are left
25 with massive urban sprawl. Thank you, and I can

1 answer any questions.

2 CHAIRPERSON SCHEUER: Thank you very much.

3 Mr. McFarlin, questions for the witness?

4 MR. McFARLIN: No questions, Chair.

5 CHAIRPERSON SCHEUER: Okay. Mr. Sakumoto?

6 MR. SAKUMOTO: No questions, Chair.

7 CHAIRPERSON SCHEUER: Maui?

8 MR. HOPPER: No questions, Chair.

9 CHAIRPERSON SCHEUER: Ms. Apuna?

10 MS. APUNA: No questions.

11 CHAIRPERSON SCHEUER: Commissioners? Thank
12 you very much for your testimony on this matter.

13 THE WITNESS: Thank you very much. I
14 appreciate your time.

15 CHAIRPERSON SCHEUER: We appreciate your
16 testifying. I'm going to move you back into being an
17 attendee.

18 THE WITNESS: Thank you.

19 CHAIRPERSON SCHEUER: Is there anyone else
20 who is an attendee who wishes to testify on this
21 matter? If so, please use the raise your hand
22 function on ZOOM. Seeing none, we are done with
23 public testimony on this matter, and we can begin
24 with the presentation by Mr. McFarlin.

25 MR. McFARLIN: Thank you, Chair. Good

1 morning.

2 CHAIRPERSON SCHEUER: You are very soft.

3 It is hard to hear you.

4 MR. McFARLIN: Okay.

5 CHAIRPERSON SCHEUER: Please come closer to
6 your microphone.

7 MR. McFARLIN: Thank you, Chair. Good
8 morning, Commissioners. Good morning, parties.

9 CHAIRPERSON SCHEUER: You're going to have
10 to project or do something, because it is still very
11 hard to hear you, Mr. McFarlin.

12 MR. DERRICKSON: Mr. McFarlin, this is
13 Scott Derrickson, planner at LUC. I would suggest on
14 your keyboard there should be a function that would
15 allow you to increase the volume or decrease volume.
16 You might want to increase your volume up as high as
17 it will go.

18 MR. McFARLIN: Okay. I think I've done
19 that. Can you hear now? Is that better?

20 MR. DERRICKSON: It's a little better.

21 CHAIRPERSON SCHEUER: Slightly.

22 MR. DERRICKSON: Yeah, I think you're going
23 to have to just really work hard at projecting your
24 voice more.

25 MR. McFARLIN: That's as loud as I can get,

1 but I can speak louder.

2 Good morning, Chair. Good morning,
3 Commissioners. Good morning, parties. My name is
4 Jason McFarlin. I'm representing the parties I just
5 mentioned.

6 Today we're filing a motion to bifurcate
7 the Pi'ihana Project District from the Kehalani.
8 There's a few reasons for this. What we're asking is
9 to bifurcate the current docket number and issue a
10 new docket number for Pi'ihana Project District.
11 Kehalani will remain as the Petitioner for the
12 current docket number.

13 For the Piihana Project District's new
14 docket number, we are asking to incorporate by
15 reference all pleadings, papers, legal memoranda,
16 exhibits and filings of Docket A89-642 into the new
17 docket number assigned to Pi'ihana Project District.

18 After this new -- after the bifurcation and
19 the new docket number is issued for the Pi'ihana
20 Project District, we would ask that future LUC
21 decisions shall apply solely to either the Pi'ihana
22 Project District or Kehalani under their respective
23 docket numbers.

24 And the 15 conditions outlined in the 1990
25 Findings of Fact or the 1990 -- otherwise known as

1 the 1990 D&O will still apply to both Piihana and
2 Kehalani. In other words, we're not looking to
3 change any conditions whatsoever. We're simply
4 intending to bifurcate these two dockets, so the LUC
5 can more efficiently make decisions about both
6 project districts and that the respective owners in
7 both project districts may move forward.

8 We believe there are several reasons that
9 establish good cause for bifurcation. Good cause is
10 established because Kehalani and the Pi'ihana Project
11 District are noncontiguous parcels. They're
12 separate; they're in different parts of Wailuku.
13 They're not connected.

14 Both of these project districts are in
15 entirely different stages of development, whereas the
16 Kehalani has almost been entirely developed and has
17 infrastructure in place, and they are nearing the
18 selling out of all the homes in that district.

19 The Pi'ihana Project District is largely
20 undeveloped, and both project districts have
21 different issues, entirely different owners, and we
22 believe it'd be more efficient for the LUC to make
23 decisions about these two project districts if they
24 were bifurcated, and it would also allow the
25 respective owners within each project district to

1 move forward according to their own interest and
2 conditions within the respective project districts.

3 Right now, Kehalani has approximately 2000
4 owners of different homes, and currently the Pi'ihana
5 Project District has nine owners.

6 RCFC Kehalani sold the Pi'ihana Project
7 District to Wailuku, LLC between 2017 and 2019, and
8 RCFC Kehalani no longer has any ownership interest in
9 the Pi'ihana Project District.

10 So Wailuku Plantation, LLC and the Pi'ihana
11 Project District are no longer affiliated with
12 Kehalani in any way, and there are no plans
13 established together, and there are no future plans
14 to working together.

15 Again, I would emphasize we're not asking
16 to change any of the existing conditions, and the
17 existing conditions will remain in place as they are
18 in the 1990 Findings of Fact.

19 As I pointed out earlier, all of the
20 Pi'ihana Project District owners have consented to my
21 representation in the bifurcation, and I have
22 submitted attorney authorizations to each owner with
23 the LUC.

24 I would also add that in reviewing the
25 Office of Planning's response, it looks like they --

1 their views are consistent with the motion I filed.
2 Of course, they'll speak for themselves, but it seems
3 like they are advocating for this bifurcation or
4 approve -- approving of it as well.

5 Also Kehalani will speak for themselves,
6 but they filed a joinder in this matter, and it's my
7 impression they approve of this bifurcation as well.

8 We've also received a response from the
9 Maui County Planning Department, and we do
10 acknowledge their issues. We are aware of their
11 concerns, and I do agree with them that these issues
12 should be addressed at a future hearing so their
13 concerns can be addressed. They're welcome to set a
14 hearing for these issues.

15 But today we're here on a procedural
16 matter, the bifurcate of the Pi'ihana Project
17 District and Kehalani, so these peripheral issues
18 should be decided at a future hearing.

19 The issues they've raised of -- are solely
20 to do with the Pi'ihana Project District, so I think
21 that's a further reason to bifurcate so that LUC can
22 make more efficient decisions based on each of the
23 respective project districts here.

24 And that's all I have at this time, Chair.
25 I would -- thank you.

1 CHAIRPERSON SCHEUER: Commissioners, are
2 there questions for Mr. McFarlin?

3 Commissioner Okuda.

4 COMMISSIONER OKUDA: Thank you, Mr. Chair.

5 Mr. McFarlin, the -- is there any prejudice
6 to your client if the Land Use Commission goes along
7 with what I understand one of the County of Maui's
8 request is that we defer this Motion to Bifurcate
9 until there is -- their concerns laid out in their
10 pleading are addressed, or there's an agreement
11 reached between the parties including the County of
12 Maui? Is there any prejudice to your client if
13 there's such a deferral?

14 MR. McFARLIN: Well, one that comes to mind
15 right off -- right away is we would have to do -- go
16 through this process again, and we would have to
17 serve all of the respective landowners in both
18 project districts again. The mail out is quite
19 extensive, and that's in the neighborhood of \$40,000
20 for printing and postage and the labor involved.
21 That would be the one that would come to mind.

22 The other prejudice is we're now in a
23 situation where we're supposed to coordinate our
24 project district with Kehalani, and that's not
25 happening. They don't own anything in Piihana, and

1 these two project districts have entirely different
2 interests and they have no plans to work together, so
3 I think it's more efficient for the Land Use
4 Commission to move ahead with the bifurcation and
5 address the Maui County Planning Department's concern
6 with the Pi'ihana Project District and with the LUC
7 at a hearing that's specifically addresses those
8 issues they brought up.

9 COMMISSIONER OKUDA: Do you believe,
10 however, that there is a benefit, not only for the
11 Land Use Commission, but for the public in general
12 that there's a clear understanding between the
13 parties here, including the County of Maui, but also
14 your clients and anyone else who has an interest in
15 either project?

16 Is there a benefit that everyone have a
17 clear understanding about what each other's duties
18 and obligations are with respect to the various
19 conditions that are set forth in the original Land
20 Use Commission Decision and Order?

21 MR. McFARLIN: Well, we've complied with
22 all of the public notice requirements. We've made
23 ourselves available for calls and questions from the
24 public. I feel that a number of calls prior to this
25 hearing today just based on the mail out, and I've

1 been available to answer questions from the
2 respective homeowners that have been served. And
3 I've also advised them of -- they've been advised by
4 myself in the mail out of this meeting, so I think
5 the public has had ample opportunity to participate
6 and, you know --

7 COMMISSIONER OKUDA: Well, wouldn't it be a
8 benefit to the public if there was a clear statement
9 which included not only yourself, but maybe Mr.
10 Sakumoto's client and the County of Maui which
11 clearly allocated any allocations or clearly stated
12 any allocations of duties and responsibilities under
13 the original Land Use Commission Decision and Order,
14 or if there really is no agreement to the allegation,
15 that that be made clear to the public also?

16 Isn't that type of clarity either we have
17 an understanding or we don't have an understanding,
18 laying all those cards on the table actually has a
19 benefit to the community, including with respect to
20 almost like a consumer protection policy?

21 MR. McFARLIN: Again, I think we've fully
22 complied with the Land Use Commission's process and
23 all of the legalities of it. I would say that the
24 Pi'ihana Project District acknowledges that
25 they're -- they will be moving forward and will be

1 responsible for complying with the conditions in the
2 Pi'ihana Project District. And I'm not -- I can't
3 speak for Kehalani, but Kehalani would no longer be
4 responsible for the ongoing or the satisfying
5 conditions in the Pi'ihana Project District.

6 COMMISSIONER OKUDA: Mr. Chair, thank you,
7 I have no further questions.

8 CHAIRPERSON SCHEUER: Thank you very much
9 Mr. Okuda.

10 Commissioner Ohigashi.

11 COMMISSIONER OHIGASHI: Can you hear me?

12 CHAIRPERSON SCHEUER: Yes.

13 COMMISSIONER OHIGASHI: Okay. All right.
14 I'm changing my computer during the process that's
15 why so...

16 Mr. McFarlin --

17 MR. McFARLIN: Yes.

18 COMMISSIONER OHIGASHI: If we separate this
19 into a separate docket number, have you provided to
20 the Commission what conditions would specifically
21 apply to your client under the new docket number?

22 MR. McFARLIN: Yes. I think we've made
23 that very clear. We're not looking to change --

24 COMMISSIONER OHIGASHI: What docket numbers
25 have you provided?

1 MR. McFARLIN: The conditions that were
2 established, were established in Docket No. A89-642.

3 COMMISSIONER OHIGASHI: So...

4 MR. McFARLIN: The findings --

5 COMMISSIONER OHIGASHI: Mr. McFarlin, I'm
6 not asking you to recite. I'm not asking that
7 question. My question is: Specifically what
8 conditions apply to you, your new docket only? What
9 conditions have you identified?

10 MR. McFARLIN: Well, there's 15 conditions,
11 and we are still responsible for all 15 conditions.
12 We're not --

13 MR. OHIGASHI: So there is -- there are --
14 all of the conditions would apply to this new docket,
15 is that what you're saying?

16 MR. McFARLIN: Yes, yes. We're not looking
17 to change any conditions or ways --

18 COMMISSIONER OHIGASHI: Okay. Regarding
19 the Findings of Fact and Conclusions of Law in the
20 order -- in the order, would you -- have you been
21 able to divide up what Findings of Fact and
22 declaration -- Conclusions of Law would apply to your
23 statement, your docket only, your new docket only?

24 MR. McFARLIN: There's one condition, one
25 condition out of the 15 that applies solely to the

1 Pi'ihana Project District. That's Condition No. 9.

2 COMMISSIONER OHIGASHI: My question went
3 further. I just wanted to know if you had the
4 opportunity to take a look at the Findings of Fact,
5 Conclusions of Law and determine under those Findings
6 of Fact and Conclusions of Law as to what specific
7 findings would apply to your docket number, new
8 docket number?

9 MR. McFARLIN: Yes, as far as I know,
10 they -- my reading indicates everything in the
11 Findings of Fact and Conclusions of Law applies to
12 the Pi'ihana Project District. The only one
13 difference that I've noticed is Condition No. 9.
14 Condition No. 9 is not applicable to Kehalani, but
15 Condition No. 9 is applicable to Pi'ihana Project
16 District, and that Condition No. 9 has to do with the
17 historical preservation.

18 So other than that, Pi'ihana Project
19 District is going to accept the entire Findings of
20 Fact and all of the conditions therein.

21 COMMISSIONER OHIGASHI: It would appear
22 that the County of Maui Planning Department seems to
23 disagree with you and indicates that there has not
24 been a clear delineation between the parties as to
25 what requirements are applicable to each party. So

1 would you be able to comment upon that argument?

2 MR. McFARLIN: Kehalani can make their own
3 testimony here in a few minutes, but it's my
4 understanding that the entire Findings of Fact and
5 Conclusions of Law will remain in force for Kehalani
6 when the docket is bifurcated. And at the same time,
7 when the docket is bifurcation, it's my understanding
8 -- it's our intention -- Piihana Project District's
9 intention that the entire Findings of Fact and
10 Conclusions of Law will continue to apply to the
11 Pi'ihana Project District.

12 COMMISSIONER OHIGASHI: Different subject.
13 I notice that in December 19, 2019 hearing I think
14 that we had, your representation or the -- the
15 reputation -- representation was there didn't --
16 wasn't any new sales activity, I guess, from the time
17 the last sales activities were reported up until
18 December 19th. This December 19, 2019, it appears
19 that there was one sale activity which is
20 February 20th, 2020 and reported August 27, 2020, and
21 there appears to be several lots or so-called sales
22 listed on the MLS concerning this -- portions of this
23 property.

24 Are there sales activities still going on
25 on the property selling unsubdivided lots?

1 MR. McFARLIN: That's -- there's 45 lots in
2 the Pi'ihana Project District that can be offered for
3 sale and --

4 COMMISSIONER OHIGASHI: Are those
5 subdivided lots?

6 MR. McFARLIN: Not all of them have been
7 subdivided yet, they are from a -- what's that? I'm
8 trying to give you the right word here, the right
9 terminology.

10 COMMISSIONER OHIGASHI: Mr. McFarlin, my
11 question is: Are there still sales activity ongoing
12 in that project?

13 MR. McFARLIN: Yes, there are still sales
14 activities ongoing with the various realtors. We try
15 to be upfront about that.

16 COMMISSIONER OHIGASHI: And are you the
17 principal lawyer involved in those sales activities?

18 MR. McFARLIN: No, I'm not. It's various
19 realtors that are engaged.

20 COMMISSIONER OHIGASHI: Would your client
21 be able to provide us names of all realtors that have
22 been -- that are listing --

23 MR. McFARLIN: Oh, yes.

24 COMMISSIONER OHIGASHI: -- the property?

25 And when will we expect that?

1 MR. McFARLIN: We could provide that within
2 a few days of -- there's properties listed right now.

3 COMMISSIONER OHIGASHI: So would it be fair
4 to say you would provide it within one week from
5 today?

6 MR. McFARLIN: Yeah, actually I know the
7 realtor. There's two lots for sale right now.

8 COMMISSIONER OHIGASHI: I'm not asking for
9 a description. I'm just asking you if you're going
10 to provide that information to us within one week
11 from now?

12 MR. McFARLIN: Sure. I can provide it now.
13 His name is --

14 COMMISSIONER OHIGASHI: In writing?

15 THE WITNESS: Yeah, yeah, there's one
16 realtor. His name's Bruce Travis.

17 COMMISSIONER OHIGASHI: Mr. McFarlin,
18 you're not asking -- I'm not asking for those names.
19 I'm asking to please provide those in writing within
20 a week from now. And if you cannot, just say I won't
21 do that. Or if you can, then you say I will.

22 MR. McFARLIN: Yeah, I can.

23 COMMISSIONER OHIGASHI: Okay, thank you.

24 Within -- are you able to provide to us
25 copies of the deed, or have you provided to us copies

1 of the deed, because I really haven't been able to
2 find them. During this COVID time, I got a cold, so
3 I'm concerned about copies of the deed that would
4 have references to the original docket number in this
5 case.

6 Would the deeds that you have given to
7 these individuals have reference to the original
8 docket numbers, the docket -- the original docket
9 number? In other words, are there condition --
10 (speaking over each other).

11 MR. McFARLIN: The people have discussed --
12 I've met with. I've made them aware of the
13 conditions. I've asked -- answered their questions.

14 COMMISSIONER OHIGASHI: Did you prepare any
15 of the deeds in this case?

16 MR. McFARLIN: Yes. And I filed them with
17 the Bureau of Conveyances, so they're --

18 COMMISSIONER OHIGASHI: So you're familiar
19 whether or not the deeds contain any information
20 concerning the restrictions of this docket?

21 MR. McFARLIN: The ones I have filed, yes,
22 I can say that.

23 COMMISSIONER OHIGASHI: And would you be
24 able to provide us copies of those?

25 MR. McFARLIN: They're at the Bureau of

1 Conveyances. I mean, I can --

2 COMMISSIONER OHIGASHI: I'm not asking
3 where they are, sir. I'm asking if you're going to
4 provide us copies of it. That's all I'm asking.

5 MR. McFARLIN: I can --

6 COMMISSIONER OHIGASHI: If you can provide
7 us copies of it, we can say thank you.

8 MR. McFARLIN: I mean, I'll -- just in the
9 spirit of compromise, I'll provide them, but there on
10 the Bureau of Conveyances, so they're --

11 COMMISSIONER OHIGASHI: I'm not asking you
12 to compromise. I'm not asking you for compromise,
13 Mr. McFarlin. I just want to know you're going to
14 provide it to us.

15 MR. McFARLIN: Sure.

16 COMMISSIONER OHIGASHI: Yes. Would that be
17 fair to say you'll do it within a week at the same
18 time that you'll provide those other -- that other
19 information in writing?

20 MR. McFARLIN: Yes.

21 COMMISSIONER OHIGASHI: Okay. Now,
22 assuming that you get this docket number change,
23 okay, and you get a new docket number, would that
24 affect any of the disclosures that you made in any of
25 the deeds that you prepared that you'll be providing

1 to us?

2 MR. McFARLIN: No.

3 COMMISSIONER OHIGASHI: Why not?

4 MR. McFARLIN: Can you repeat that
5 question? I don't --

6 COMMISSIONER OHIGASHI: You prepared some
7 deeds. And in those deeds, you told me under oath, I
8 guess, over here, that essentially, or essentially
9 that you had indicated in those deeds about the
10 conditions related to this particular Docket No.
11 A89-642, and you said, oh, I'm going to provide it to
12 you.

13 So my question is: If we change the docket
14 number and provide a whole new docket for you, does
15 that change the disclosures that you made in the
16 deed?

17 So the question is: The deed refers to
18 this particular docket number. Would it refer to --
19 how would they refer to the new docket number? How
20 would they be combined or part of the new docket?

21 MR. McFARLIN: Yeah, that's part of a
22 motion where we've -- we're requesting the -- to
23 incorporate by reference all the pleadings, papers,
24 legal memoranda, exhibits and filings of docket
25 A89-642 into the new docket number for Pi'ihana

1 Project District.

2 COMMISSIONER OHIGASHI: You know, maybe I'm
3 too far away from law school to not get it because
4 what I'm just trying to get at is this. My
5 understanding is a deed is an agreement between two
6 parties, not between the State of Hawaii or anybody
7 else, but it's an agreement between two parties to
8 buy a piece of property and to sell that piece of
9 property, right?

10 And when you sell the piece of property,
11 the guy who sells it discloses all kinds of stuff to
12 it, so they're responsible if anything goes wrong or
13 anything that they should have disclosed, that the
14 guys will get it. They'll say, well, you know, we
15 understand all what we're getting into.

16 So my question to you is that by changing
17 this docket number, does that create a reason for you
18 not to be responsible to your client, not to be
19 responsible to the people you make sales to
20 concerning the promises that he has made to them in
21 those deeds?

22 MR. McFARLIN: I don't think it changes any
23 responsibility my client has to the owners in the
24 Pi'ihana Project District. I know people have asked
25 various questions, and we've been as transparent as

1 we can and answered their -- addressed their concerns
2 and questions as fully as we can.

3 COMMISSIONER OHIGASHI: The reason why I'm
4 bringing it up is that my concern has been the time
5 that we started this is that these people who had
6 purchased property, they should know what they're
7 getting into. They should know where we're headed
8 for. They should know what the rules are. And when
9 you first filed -- when you first broached this
10 project, or when it came to the initial meeting,
11 these guys weren't involved in all of this, and it
12 was only recently since the motion to bifurcate came
13 up that they started to become involved.

14 So my concern is this, is that we want this
15 to be fully vetted, want to make sure that they
16 understand they're responsible for any condition.
17 And we like to make sure -- I would like to make sure
18 that every party understands what condition they have
19 to meet in order for their -- them to go forward in
20 this case.

21 Mr. Sakumoto's clients obviously have a
22 position that they had almost completed that project
23 or the last of the completed project, and they may be
24 able to argue, or they're probably going to argue
25 that they should get credit for that.

1 So if we create a separate docket number,
2 we're going to have to create what conditions need to
3 be met yet, and you can't rely on Mr. Sakumoto's
4 clients to say that they're -- you met those
5 conditions in a new docket number, so that's where
6 I'm going with this.

7 So before we go forward, I'm looking at
8 whether or not there should be
9 something (indecipherable) -- so that we can make
10 clear what conditions specifically attached to yours.
11 And whether or not there is sufficient facts,
12 Findings of Fact and Conclusions of Law to support
13 those conditions with regard to your particular
14 parcel as well as Mr. Sakumoto's project. That's
15 what I'm thinking about.

16 No further questions.

17 CHAIRPERSON SCHEUER: Thank you,
18 Commissioner Ohigashi.

19 Commissioners, are there further questions
20 for Mr. McFarlin at this time?

21 COMMISSIONER WONG: Chair.

22 CHAIRPERSON SCHEUER: Commissioner Wong.

23 COMMISSIONER WONG: Thank you, Chair.

24 Mr. McFarlin, so, you know, not just -- not
25 a lot, per se, just trying to think this out through.

1 So if I remember correctly, the conditions go with
2 the land; is that correct?

3 MR. McFARLIN: Yes.

4 COMMISSIONER WONG: So all the conditions
5 you stated that your clients will follow; is that
6 correct? And have been following?

7 MR. McFARLIN: Yes.

8 COMMISSIONER WONG: So I think the County
9 stated that a couple of the conditions were not
10 followed such as, you know, having structures built
11 on-site without the proper permits, a violation of
12 Condition No. 10; is that correct?

13 MR. McFARLIN: One structure has been built
14 there.

15 COMMISSIONER WONG: Yeah, but did they
16 follow the County's permit laws and statutes?

17 MR. McFARLIN: That's an individual owner
18 that did that so that part's --

19 COMMISSIONER WONG: Yeah, so --

20 MR. McFARLIN: It doesn't look to me like
21 they have, but that's an individual.

22 COMMISSIONER WONG: So the question I have
23 is: If these guys don't follow the conditions, why
24 should we, as a land use, give our okay to bifurcate
25 if you're not going to follow it?

1 MR. McFARLIN: I think this point in the
2 process is going to continue to get more convoluted
3 and more difficult for the LUC to manage if it's not
4 bifurcated. You know, I have to acknowledge the
5 situation for what it is.

6 COMMISSIONER WONG: Yeah, I understand
7 that, but --

8 MR. McFARLIN: It's far beyond what I
9 can -- in some respects, what I can control, but
10 there are nine owners down there that --

11 COMMISSIONER WONG: If we bifurcate, then
12 your clients and you will be responsible for that
13 docket; isn't that correct?

14 MR. McFARLIN: Yes.

15 COMMISSIONER WONG: So then you're saying
16 then that those conditions that are not met would
17 never be met?

18 MR. McFARLIN: We are working to satisfy
19 these conditions. The buyers have been -- it's been
20 full disclosure of the conditions and the
21 requirements for infrastructure to the people that --
22 the perspective buyers and the owners that they're
23 now -- we're in the process of working through the
24 conditions and satisfying them. We've made a number
25 of steps towards doing that.

1 COMMISSIONER WONG: Okay.

2 COMMISSIONER CHANG: Mr. Chair, I'm sorry,
3 can you ask Mr. McFarlin to speak louder? This is
4 Commissioner Chang.

5 Mr. McFarlin, I'm having a very difficult
6 time hearing you.

7 CHAIRPERSON SCHEUER: Sorry. Thank you
8 very much, Commissioner Chang.

9 MR. McFARLIN: I can repeat that.

10 CHAIRPERSON SCHEUER: Mr. McFarlin, you
11 need to project.

12 MR. McFARLIN: Yeah, okay. To repeat that
13 last part, we've been working to satisfy the
14 conditions in the Pi'ihana Project District. We've
15 made a number of steps towards doing so. We are
16 aware of the conditions, and we're working through
17 that process.

18 The respective owners down there are aware
19 of the need for the infrastructure down there, such
20 as roads and, et cetera, so we're aware and we're
21 committed to satisfying the conditions.

22 COMMISSIONER WONG: Okay. So let me ask
23 you a question, Mr. McFarlin.

24 How many people live in the project that
25 you want to bifurcate or own? How many -- you know,

1 those that you have to mail out to?

2 MR. McFARLIN: There's nine owners.

3 COMMISSIONER WONG: Okay. So I understand
4 that. But you know that you made a statement that
5 saying you spent approximately \$40,000 on a mail out,
6 how many people is that or how many households?

7 MR. McFARLIN: And then there is an
8 additional 2,000 owners in Kehalani.

9 COMMISSIONER WONG: Okay. So let me tell
10 you a little history of myself. I did run for
11 office; I lost. I had approximately 10,000
12 households that I had to mail out to. That cost me
13 approximately six grand from mail out.

14 How can your statement of 40,000 for that
15 little bit of household compared to the households I
16 had to run for 6,000? And I don't think the cost of
17 mail went up in the past four years, so can you
18 explain that cost factor difference?

19 MR. McFARLIN: When I ran the number
20 through the Office Max online service with the number
21 of pages and postage and number of mail outs, it was
22 in the vicinity of 30 to 40,000. That's the number I
23 saw.

24 COMMISSIONER WONG: Let's go to the next
25 subject.

1 You know, I'm having -- I have -- my sister
2 and I gets into fights a lot when we were younger.
3 And when we get into a fight, my parents tells us if
4 we don't clear up these issues, we're not going to
5 get ice cream that night or something. So it appears
6 that you have some issues with the County of Maui
7 that is still outstanding.

8 Why should us, as the Land Use Commission,
9 give -- allow you to bifurcate when you still have
10 outstanding issues?

11 MR. McFARLIN: We do acknowledge those
12 issues and those concerns. We just feel that that
13 should be addressed individually with the Pi'ihana
14 Project District. There's no reason to have Kehalani
15 around to bring them into the hearing when we're
16 talking about these issues with dwellings being built
17 down in Piihana and the other issues they raise. I
18 think on that end it would be more efficient for you
19 guys to --

20 COMMISSIONER WONG: It may be more
21 efficient, but let's say -- I like to see Mr.
22 Sakumoto. He may not like to see me, but, you know,
23 there's issues that there -- you guys are neighbors.
24 And if your neighbor doesn't know what's happening --
25 and let's say you're going to build a nuclear reactor

1 in -- on your site -- I'm just being theoretical --
2 and your neighbor doesn't know, wouldn't that pose a
3 problem?

4 MR. McFARLIN: Let me -- I want to pull up
5 revised Exhibit 2 from the Kehalani Joinder, so we
6 can illustrate the location of these two project
7 districts. They're actually not neighbors, and
8 they're actually --

9 CHAIRPERSON SCHEUER: Mr. McFarlin, I think
10 the Commissioners are aware of the fact that they are
11 not geographically connected to each other.

12 MR. McFARLIN: Okay.

13 COMMISSIONER WONG: Yeah.

14 MR. McFARLIN: Okay.

15 COMMISSIONER WONG: Okay. I'm going to ask
16 a couple other things like -- so is there financing
17 secure for your site?

18 MR. McFARLIN: Those are things that we're
19 working through as -- and the sales in part are
20 finance -- are financing the development. So we have
21 applied for financing for the affordable housing
22 component. There is an application in the process of
23 being completed and approved.

24 COMMISSIONER WONG: So we had a public
25 witness that stated their concerns about the, you

1 know, the affordable housing, public financing, et
2 cetera. You know, and they don't want to just see it
3 lay fallow. They want to see something happening.
4 They want to make sure that the public will not be
5 paying for it.

6 How can we guarantee the public will not be
7 paying for it?

8 MR. McFARLIN: The issue I heard from the
9 person that testified had to do with Kehalani. I
10 know Kehalani and Piihana are connected right now,
11 but what I heard from the testifier their concern
12 that Kehalani owners are going to go bankrupt and
13 leave all of these expenses to Kehalani owners. I
14 think that's a question for Kehalani.

15 COMMISSIONER WONG: So the question I have
16 is, I know there's a split on the cost for the
17 bridge. So let's say the other party goes bankrupt,
18 will your clients be able to cover that cost?

19 MR. McFARLIN: Yes, that's what -- yeah,
20 that's our proposal. We're not -- we don't have any
21 plans with Kehalani for contributions to the bridge
22 or anything like that.

23 COMMISSIONER WONG: So everything is done,
24 or is in the process such as an architect for the HUD
25 financing and all that? You have an architect in --

1 MR. McFARLIN: Architect and road plans,
2 financing. Our intention to start with the
3 affordable housing component and that would -- income
4 there would provide the funds necessary for building
5 other parts of the infrastructure.

6 COMMISSIONER WONG: Okay. So I'm just
7 going to leave it at that. I'm going to ask the
8 County of Maui some questions. But right now, I have
9 some concerns. I'm just going to tell you the truth,
10 and that's it. Thank you, Mr. McFarlin.

11 Thank you, Chair.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner Wong.

14 Commissioner Chang.

15 COMMISSIONER CHANG: Thank you very much,
16 Mr. Chair, and thank you, Mr. McFarlin.

17 I just want to confirm a couple of things.
18 One, did you actually pay \$40,000 for the -- to mail
19 out the motion --

20 MR. McFARLIN: That was an agreement
21 Wailuku Plantation -- Wailuku Plantation made. So
22 Wailuku Plantation has arranged financing, and that
23 was paid via that through the financing they
24 obtained.

25 COMMISSIONER CHANG: You lost me there, so

1 Wailuku Plantation paid for the mail out for the
2 motion for bifurcation?

3 MR. McFARLIN: That was part of the
4 compensation. I mean, they didn't -- we didn't pay
5 for it directly but -- but in order --

6 COMMISSIONER CHANG: Okay. Also -- yeah,
7 Mr. McFarlin, besides having a really hard time
8 hearing you, I'm having a real hard time with some of
9 the responses.

10 Let me share with you what my concern is.
11 Quite frankly, I would rather not bifurcate this
12 matter because as far as a track record, Wailuku and
13 Kehalani -- they've actually got a much better track
14 record of complying with the conditions and
15 fulfilling the development versus your client. So
16 currently -- so long as we don't bifurcate, both
17 parties are going to be responsible for fulfilling
18 all of the requirements under the D&O.

19 By bifurcation it's -- I think it leaves
20 the LUC, the County of Maui, the people of Maui with
21 less security that these conditions will be met.

22 So that's my concern with the bifurcation
23 is your clients have not established, in my mind, a
24 very good track record of compliance with the
25 conditions given the County's -- their response to

1 the motion that there's been ongoing violations, that
2 their lack of clarity on who is going to be
3 responsible.

4 So for me, based upon the track record of
5 both of the parties and the projects, Mr. Sakumoto's
6 clients have a much better track record, that I would
7 rather keep both of you together to ensure that these
8 conditions will be met.

9 You haven't raised my level of comfort that
10 your clients are going to be able to meet these
11 conditions.

12 MR. McFARLIN: I understand, Commissioner.

13 COMMISSIONER CHANG: Okay.

14 MR. McFARLIN: I understand what you're
15 saying.

16 COMMISSIONER CHANG: All right. Thank you
17 very much.

18 That's all I have, Mr. Chair.

19 MR. McFARLIN: Thank you.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Chang.

22 Commissioners, is there anything further
23 for Mr. McFarlin at this time? Commissioners, any
24 hands?

25 Mr. McFarlin, can you help my memory a

1 little bit? On December 19th at the close of the
2 hearing, if I'm recalling correctly, Mr. Vernon
3 Lindsey indicated you were not speaking for him.

4 You stated something on the record, and he
5 stated he was disagreeing with you.

6 MR. McFARLIN: That's correct, Chair.

7 CHAIRPERSON SCHEUER: Okay. But presumably
8 you're still representing him now and you have full
9 authority to speak on his behalf?

10 MR. McFARLIN: Yes, Chair.

11 CHAIRPERSON SCHEUER: Okay. Because we
12 have -- they're on the record, right, and on the
13 record the last thing that we left off with was him
14 saying that you were not adequately representing him.

15 MR. McFARLIN: I understand, Chair. At the
16 last hearing, we did go into that hearing with an
17 understanding that we were going to bifurcate with
18 Kehalani. Some issues came up during the
19 December 19th hearing that some new issues were
20 brought up by the Land Use Commission at that
21 hearing. And at that point, that's where Mr. Lindsey
22 decided -- he wanted more time to consider
23 bifurcation and the merits of that, so that's where
24 the disagreement arose.

25 Since then, the concerns Mr. Lindsey had

1 has been negotiated with Kehalani, RCFC, and those
2 concerns have been taken care of.

3 CHAIRPERSON SCHEUER: Okay. Thank you. I
4 have nothing further at this time.

5 Did you have any final or additional
6 statement you want to make at this time before we
7 move onto hear from Mr. Sakumoto, or take our next
8 step in this hearing?

9 MR. McFARLIN: No, thank you, Chair.

10 CHAIRPERSON SCHEUER: Okay. Mr. Sakumoto,
11 about how long do you think need?

12 MR. SAKUMOTO: Five minutes.

13 CHAIRPERSON SCHEUER: Okay. So my
14 suggestion is that we hear from Mr. Sakumoto and
15 then, Commissioners, I realize that while we started
16 fairly late, the -- my inclination is to take at
17 least a brief period for lunch and then move on so we
18 hear from Mr. Sakumoto and then take a half hour or
19 so break. Is that acceptable folks? Okay.

20 Mr. Sakumoto, please proceed.

21 MR. SAKUMOTO: Thank you, Chair.

22 What I understand the request is before the
23 Commission right now is a procedural non-substantive
24 change to the docket, so that going forward two
25 projects that are completely unrelated to one another

1 can be dealt with separately by the Commission.
2 There's no request to alter the substantive rights or
3 obligations of any of the parties. If a party has an
4 obligation to observe or perform a condition under
5 the existing D&O before the bifurcation, they will
6 continue to have that obligation after the
7 bifurcation.

8 Similarly, if a party is bound by a certain
9 representation that was made before the bifurcation,
10 they will continue to be bound by that representation
11 after the bifurcation.

12 So, you know, in -- I realize it's a very
13 simplistic way of kind of framing this up, but I do
14 think that the request does not to alter anybody's
15 rights or obligations. It's simply to streamline the
16 way the LUC deals with this docket going forward.

17 The number of questions that came up
18 earlier for the Piihana project, and the fact that
19 the Kehalani site really does not know anything about
20 what these issues are, or what the status of these
21 things are, I think it just illustrates the fact
22 that, you know, these are really two projects that
23 probably should be dealt with separately.

24 Obviously, a question was asked earlier
25 about, you know, what is the prejudice if this is not

1 granted, you know. For the Kehalani site, it's the
2 ongoing expense associated with participating in the
3 ongoing hearings which deal with Piihana only and
4 nothing -- not anything to do with Kehalani. And I
5 think that, you know, just as a matter of efficiency
6 and cost effectiveness, you know, we hope that that
7 can be avoided.

8 And for those reasons, we ask that the
9 bifurcation, the Motion to Bifurcate be approved.

10 That's all I have, Chair.

11 CHAIRPERSON SCHEUER: Thank you, Mr.
12 Sakumoto.

13 Commissioners?

14 Commissioner Okuda.

15 COMMISSIONER OKUDA: Thank you, Mr. Chair.

16 Mr. Sakumoto, did your client acquire its
17 interest in the property before or after the Land Use
18 Commission entered its Decision and Order which now
19 people want to see bifurcated?

20 MR. SAKUMOTO: My client acquired it after,
21 I think, specifically it was in or around 2012
22 through a foreclosure process.

23 COMMISSIONER OKUDA: Okay. And when you
24 purchased -- and I'm not saying you -- but when a
25 party purchases property at a foreclosure, that party

1 is basically stepping into the shoes of the entity
2 whose property is being foreclosed on. Is that a
3 fair statement of the law?

4 MR. SAKUMOTO: I think that's fair.

5 COMMISSIONER OKUDA: So in other words, if
6 a piece of property, which someone is bidding on to
7 acquire in a foreclosure is subject to certain
8 covenants or conditions or restrictions which exist
9 before, for example, the mortgage is being
10 foreclosed, the party that's bidding for that
11 property is going to take subject to those prior
12 restrictions, conditions, covenants or whatever warts
13 or ugliness the property has; is that a fair
14 statement?

15 MR. McFARLIN: Yes.

16 COMMISSIONER OKUDA: Okay. So your client
17 knew that it was taking subject to the Land Use
18 condition Decision and Order entered in this case,
19 correct?

20 MR. SAKUMOTO: I can't say what they knew
21 at the time, but you're correct. I mean, it was on
22 title to the property at the time of the foreclosure.

23 COMMISSIONER OKUDA: And the way Hawaii law
24 reads is that if something is on title to a piece of
25 property, the buyer is deemed to have what we call

1 record notice of it. Is that a fair statement of the
2 law?

3 MR. SAKUMOTO: Yes.

4 COMMISSIONER OKUDA: Meaning that the buyer
5 is basically stuck with what's on title even if the
6 buyer didn't know about it in most cases, correct?

7 MR. SAKUMOTO: Yeah, that's correct. I
8 mean, I don't think we're saying that we were not
9 aware of it or, you know, we're denying that we
10 should be responsible for it in some way. It is what
11 it is, yeah.

12 COMMISSIONER OKUDA: Okay. Okay. And I
13 recognize what various parties are saying or
14 testifiers are saying, that there are practical
15 issues here that, you know, the other parcel, not
16 your client's project, has their own issues and, you
17 know, that doesn't really deal with you folks, and
18 there's these practical issues of having basically
19 two separate projects going on.

20 But when your client bid for this property
21 at foreclosure, it knew that, or should have known
22 that this -- these are potential practical issues.
23 Would that be a fair statement?

24 MR. SAKUMOTO: Yeah, I think that's fair.

25 COMMISSIONER OKUDA: Okay. So, yeah,

1 unfortunately maybe these practical issues have
2 arisen, but it is something -- the practical issues,
3 it's something that your client purchased at a
4 foreclosure auction, correct?

5 MR. SAKUMOTO: Correct.

6 COMMISSIONER OKUDA: And not to get too
7 technical here, but in the words of the appellate
8 court, in the case IMC Mortgage versus Smith, at a
9 foreclosure auction, you really don't end up paying
10 top dollar for the property, because at a foreclosure
11 auction you really have an unwilling seller, so
12 usually in most instances a buyer at a foreclosure
13 auction purchases the property at somewhat of a
14 discount than what a voluntary fair market sale would
15 be. Is that a fair statement?

16 MR. SAKUMOTO: Yes. And, Commissioner
17 Okuda, I'm not disagreeing with anything you're
18 saying.

19 I don't know whether this was a purchase
20 like a third-party bidder or a deed in lieu where
21 this was just an exercise of the remedy of
22 foreclosure where the mortgagee ended up acquiring
23 the collateral.

24 COMMISSIONER OKUDA: Okay. Yeah, and I'm
25 sorry if I didn't make that clear. There's different

1 ways in a foreclosure process. A party may acquire
2 title. But in any event, it wasn't a process by
3 which -- there's evidence in the record -- there's no
4 evidence in the record at least what we've seen up
5 until now that anyone paid either market value or
6 higher than market value.

7 Is that a fair statement of what the record
8 reflects? The absence of any evidence that anyone
9 paid market value or higher than market value?

10 MR. SAKUMOTO: Yeah, I don't think that
11 there's anything that was put into the record of what
12 consideration was paid by RCFC Kehalani to acquire
13 its interest. I certainly did not introduce anything
14 to that effect.

15 COMMISSIONER OKUDA: Okay. But the bottom
16 line is, your client ended up stepping in the shoes
17 which are part of the Land Use Commission Decision
18 and Order that was entered in this matter, correct?

19 MR. SAKUMOTO: Correct.

20 COMMISSIONER OKUDA: Okay. Thank you, Mr.
21 Chair. No further questions.

22 CHAIRPERSON SCHEUER: Thank you very much,
23 Commissioner Okuda.

24 Commissioners, questions for Mr. Sakumoto?

25 Commissioner Chang? You're muted,

1 Commissioner Chang.

2 COMMISSIONER CHANG: Thank you, I'm sorry.

3 Mr. Sakumoto, thank you for your testimony,
4 and I appreciated your statement that this is really
5 a procedural matter. If non-substantive, if a party
6 has an obligation, they will continue that
7 obligation.

8 I guess my question to you, and I'm looking
9 back at the original order, the D&O, how do we know
10 which party has which obligation under the D&O?

11 MR. SAKUMOTO: The Joinder document I
12 filed, what I was hoping was clear from that, is
13 there are 15 conditions in the D&O. 1 through 15,
14 there's only one of them that is specific to Piihana,
15 which I think Mr. McFarlin mentioned, Condition No.
16 9, but all others apply to both equally.

17 So what I had suggested in my Joinder is
18 Piihana would be -- would remain, you know, bound by
19 conditions 1 through 15, and the Wailuku Project
20 District would be bound by one through -- Conditions
21 1 through 8 and 10 through 15.

22 So that's pretty much what they're bound by
23 now, and that is what they would be bound by after
24 the bifurcation.

25 COMMISSIONER CHANG: Okay. So as I

1 understand, who are -- who do you represent? Who are
2 the parties that -- who are your clients?

3 MR. SAKUMOTO: So my client is RCFC
4 Kehalani, LLC. They acquired the developer's
5 interest in the project in about 2012, and it was
6 part of a foreclosure process as I mentioned earlier.

7 COMMISSIONER CHANG: I guess, Mr. Sakumoto,
8 my question is: Are there -- because you sold most
9 of -- most of that project has been completed; is
10 that correct?

11 MR. SAKUMOTO: Yes. Yes. I have exhibits
12 that I could show you if you care to see exactly how
13 much, but roughly 1,850 units have been constructed
14 already. There about 200 plus that are under
15 construction at this point, so it's a large property.
16 There are some developments within it. I believe
17 there are about 25 different sub developments within
18 the Kehalani Project District.

19 These sub developments have been built by
20 different developers -- Development, Stanford Carr,
21 D.R. Horton, Spencer Homes, just to name a few. So
22 there are, you know, various sub communities within
23 this overall master community.

24 COMMISSIONER CHANG: So I guess the
25 question I have is so much of the questions that we

1 have been asking Mr. McFarlin.

2 Are your clients aware when they acquired
3 their interest, are they aware that these conditions
4 run with the land and that they are responsible to
5 fulfill these conditions?

6 MR. SAKUMOTO: I did not represent them
7 when they acquired it, so I can't say what they were
8 aware of. All I can say is I think the conditions
9 were on title and, you know, so that's what I do
10 know. They were on title from the time the
11 declaration of conditions was recorded.

12 I think that with respect to acknowledging
13 the responsibility for the conditions, we have filed
14 the annual reports with the LUC and have given very
15 detailed updates on where we are as to each of the
16 conditions that Kehalani is responsible for, and, you
17 know, that's -- that seems to have been satisfactory
18 to everybody thus far.

19 COMMISSIONER CHANG: And do you have any
20 response to the County's concerns in relationship to
21 the bifurcation that their recommendation or there
22 inclination is to defer it until there can be a
23 clearer delineation of the respective parties
24 responsibilities or obligations?

25 MR. SAKUMOTO: I guess -- I don't think

1 that it's necessary to defer at this point, only
2 because the delineation of the conditions, there
3 doesn't seem to be a disagreement on that, which is I
4 think the Pi'ihana Project District is willing to
5 continue to be bound by 1 through 15, Conditions 1
6 through 15, and the Wailuku Project District would be
7 bound by Conditions 1 through 8 and 10 through 15.
8 So I haven't heard any disagreements on that point.

9 I guess what I understood the other two
10 points -- and I don't want to speak for the County --
11 but the issues that I believe I read in their
12 position statement.

13 One was that they wanted a clearer
14 allocation of the representations that were made. My
15 response to that is the record -- I guess the record
16 is what it is if a party made a representation.

17 We're not asking, or I don't think the
18 motion seeks to try to change any of that. As I said
19 earlier, if a party is bound by a representation that
20 it made before the bifurcation, it should continue to
21 be bound by that after the bifurcation.

22 So I guess on those two grounds, I don't
23 really see the need to defer taking action.

24 Insofar as the other issues as they were
25 describing specific County-related matters, I don't

1 have enough knowledge to respond to that. I don't
2 know what those issues are.

3 COMMISSIONER CHANG: All right. All right.
4 Thank you, Mr. Sakumoto.

5 CHAIRPERSON SCHEUER: Anything further,
6 Commissioner Chang?

7 COMMISSIONER CHANG: I'm sorry, Chair. I
8 have no further questions at this time.

9 CHAIRPERSON SCHEUER: Thank you.
10 Commissioners? Commissioners, anything?

11 MR. SAKUMOTO: May I make one statement to
12 clarify something?

13 CHAIRPERSON SCHEUER: Please go ahead, Mr.
14 Sakumoto.

15 MR. SAKUMOTO: Thank you.

16 I just recalled something that I think it
17 was Commissioner Wong had asked about a bridge, and,
18 you know, the subject of the obligation to build a
19 bridge came up at one of the earlier LUC meetings,
20 and it was the subject of some amount of discussion,
21 and I wanted to clarify that, because I think it's
22 very important for everybody to understand.

23 The obligation as related to a bridge
24 arises out of not this docket. There's nothing in
25 the LUC Decision and Order that relates to the

1 bridge. There's nothing in the conditions that
2 relate to it. It is a condition that is stated, the
3 zone change issued by the County of Maui as it
4 related to the Piihana development. So, you know,
5 there were separate zone changes that apply to
6 Piihana and the Wailuku Project District. The
7 Wailuku Project District didn't have that condition.
8 It was something specific to Piihana.

9 So I just wanted to make that clear because
10 I think that there may have been some confusion in
11 the last meeting that that was some joint
12 responsibility of both projects, but that, in fact,
13 is not the case.

14 Thank you, Chair.

15 COMMISSIONER WONG: Chair?

16 CHAIRPERSON SCHEUER: Yes, Commissioner
17 Wong.

18 COMMISSIONER WONG: So following up on Mr.
19 Sakumoto's statement, I guess I wanted to check with
20 the County on that issue also, so I just wanted to
21 tell that I was going to follow up with the County
22 first on that.

23 CHAIRPERSON SCHEUER: Thank you.

24 COMMISSIONER WONG: Thank you.

25 CHAIRPERSON SCHEUER: Commissioners,

1 anything further for Mr. Sakumoto?

2 I guess the question I have for you, Mr.
3 Sakumoto, is that, you know, if this was appearing in
4 front of us for initial action on a dba, a core part
5 of what we ask for is proof that the developer is
6 financially capable of completing the development and
7 fulfilling all of the terms and conditions placed
8 upon it by the LUC.

9 In my mind, if you bifurcate the docket,
10 you have to make the assumption that both parties,
11 especially if you're not bifurcating the conditions,
12 that you're saying all conditions apply equally and
13 presumably even severally to the parties. You're
14 saying that all the parties are capable of fulfilling
15 those conditions, and, I mean, I don't think it's
16 much of a stretch to any impartial observer of these
17 proceedings that it strains credulity that Wailuku
18 Plantation, LLC has any financial capability of
19 complying with any of these conditions, but you're
20 asking us to bifurcate them as if we were believing
21 that both sides were somehow financially capable of
22 fulfilling them.

23 MR. SAKUMOTO: So let me just be very
24 clear, when I said they apply equally, what I meant
25 was the conditions that as they're stated in the D&O,

1 would apply to both projects. I did not intend to
2 say or imply that the parties are jointly and
3 severally responsible for those conditions. I mean,
4 that would be I think inconsistent with the way this
5 docket has been handled for the last, you know,
6 30-odd years or more.

7 I think that they have been basically
8 processed as separate and distinct projects owned and
9 controlled by completely different parties.

10 So I -- yeah, I don't agree that the -- I
11 guess the ability to perform the conditions on the
12 Piihana project are affected in any way or become
13 less likely a performance by virtue of the
14 bifurcation. We were not going to perform them. You
15 know, the Kehalani subdivision or the Wailuku project
16 district would not have performed them, would not
17 know how to perform them, would not be responsible
18 for them and certainly would object to --

19 CHAIRPERSON SCHEUER: Would not be
20 responsible for them?

21 MR. SAKUMOTO: For the performance of
22 Piihana's conditions.

23 CHAIRPERSON SCHEUER: But they're all the
24 same conditions.

25 MR. SAKUMOTO: Which we are responsible for

1 as they relate to the Kehalani project.

2 CHAIRPERSON SCHEUER: The Decision and
3 Order 15, the conditions don't stipulate which ones
4 except for one which pertain to each project; is that
5 correct?

6 MR. SAKUMOTO: That's correct.

7 CHAIRPERSON SCHEUER: So I'm confused by
8 your statement that you might not be responsible for
9 fulfilling some of the conditions.

10 MR. SAKUMOTO: Wailuku Project District is
11 responsible for fulfilling all of the conditions
12 applicable to the Wailuku Project District, which are
13 1 through 8 and 10 through 15.

14 CHAIRPERSON SCHEUER: And the Pi'ihana
15 Project District is responsible for what?

16 MR. SAKUMOTO: Fulfilling all the
17 project -- all the conditions 1 through 15 as they
18 relate to the Pi'ihana Project District.

19 CHAIRPERSON SCHEUER: So there's a number
20 of conditions that both districts have -- share?

21 MR. SAKUMOTO: They are worded in very
22 general terms, you know.

23 CHAIRPERSON SCHEUER: It's a simple
24 question.

25 MR. SAKUMOTO: Yeah.

1 CHAIRPERSON SCHEUER: Both entities are
2 responsible for a number of conditions, correct?

3 MR. SAKUMOTO: Correct.

4 CHAIRPERSON SCHEUER: And are they jointly
5 and severally responsible for those conditions?

6 MR. SAKUMOTO: No.

7 CHAIRPERSON SCHEUER: Why not?

8 MR. SAKUMOTO: Because that is not how they
9 have been performed, that is not how we have been
10 basically informing the Commission as well as the
11 County that in every year this is what we've been
12 doing, and it has only been as it relates to
13 Kehalani. Kehalani has done nothing as it relates to
14 performing the Piihana conditions.

15 CHAIRPERSON SCHEUER: So you don't think
16 that it would be possible for somebody to file an
17 order to show cause for your client's failure to help
18 fulfill some of the conditions?

19 MR. SAKUMOTO: I'm sure they could file it.
20 We would strongly object.

21 CHAIRPERSON SCHEUER: I don't have anything
22 further right now. Thank you very much, Mr.
23 Sakumoto. I appreciate it.

24 Is there anything further, Commissioners?

25 Commissioner Okuda.

1 COMMISSIONER OKUDA: Thank you, Mr. Chair.

2 You know, Mr. Sakumoto, can you point out
3 language in the Decision and Order which supports or
4 states the response that you just gave to the Chair?

5 MR. SAKUMOTO: Which portion of the
6 response, Commissioner Okuda?

7 COMMISSIONER OKUDA: The fact that as a
8 successor in the interest you can bifurcate out
9 responsibility under this Land Use Commission
10 Decision and Order which, as far as I know, hasn't
11 been modified or amended.

12 I mean, where in the Decision and Order is
13 there a statement that -- that a successor in
14 interest can abide by only one part of the Decision
15 or Order and disclaim responsibilities for any part
16 or portion of the Decision and Order? Where does it
17 say that?

18 MR. SAKUMOTO: Well, I didn't say and I
19 didn't mean to imply that it's actually stated in
20 there. What I said was that the way these conditions
21 have been observed and performed from the time this
22 order been issued many years ago until now has been
23 separately, so that's all I'm saying is that that is
24 how we've been performing them. That is how the LUC
25 has accepted it. That is how the County has accepted

1 it. And I don't want to speak for the County, but I
2 think that annual reports on the status and the
3 progress of these conditions are submitted on a
4 regular basis, and they have been accepted as
5 reported.

6 It's nothing that's stated that way in the
7 D&O. Because when the original Petitioner, C.
8 Brewer, filed the Petition, it was one owner of both
9 parcels, and they processed two unrelated properties
10 under one docket. So there wouldn't be anything in
11 there under those circumstances because one party
12 was, in fact, at that time truly responsible for both
13 parcels.

14 COMMISSIONER OKUDA: Can you point to
15 anything in the record which indicates the Land Use
16 Commission or anyone acting on behalf of the Land Use
17 Commission ever represented or stated that the
18 responsibilities of any of the successors and
19 interest to the original Petitioner in this docket
20 would be so limited or -- or, yeah, limited only to
21 one project? Is there anything in the record that
22 shows that the Land Use Commission or anyone acting
23 on behalf of the Land Use Commission made such a
24 representation?

25 MR. SAKUMOTO: No, I don't think that I am

1 aware of a representation. As I said, this is how
2 it's been performed. This is how it has been
3 accepted to our knowledge, and this is how these
4 properties have progressed moving forward. I don't
5 think that any lender or investor or developer or
6 anybody would honestly buy into a property where
7 there was some contingent liability on another
8 unrelated property at some other location over which
9 they had no control. I think that would just be
10 commercially impracticable.

11 COMMISSIONER OKUDA: Well, I'm not
12 commenting on whether or not any lender or anyone
13 doing due diligence here did an adequate job at
14 underwriting or doing due diligence.

15 But my final question is basically this:
16 Can you point to any legal authority which indicates
17 that the conduct that you just described assuming --
18 and I will take what your description is as 100
19 percent correct that the conduct you described what
20 legal authority states that that amounts to or
21 requires essentially a modification or de facto
22 modification of the Land Use Commission's Decision
23 and Order? Is there any authority in Hawaii law that
24 so states?

25 MR. SAKUMOTO: I don't have anything off

1 the tip my fingers right now.

2 COMMISSIONER OKUDA: Okay. Thank you, Mr.
3 Chair. No further questions.

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner Okuda.

6 Commissioner Chang?

7 COMMISSIONER CHANG: Yeah, thank you.

8 Mr. Sakumoto, I'm just going to follow,
9 because this is essentially what my line of
10 questioning was to you, is that looking at the D&O,
11 based upon your responses, you are assuming that
12 LUC's acceptance of the annual reports is in someway
13 a modification of the D&O because the D&O does not
14 say anything about one project would be responsible
15 solely for the conditions just for their -- that
16 particular project.

17 There's nothing that I can see in the D&O
18 that separates the two. Quite frankly, I think both
19 are responsible. And based upon the representations
20 of Mr. McFarlin today, that is why I said, I would be
21 opposed to the bifurcation because your clients have
22 demonstrated a much better record at fulfilling the
23 conditions.

24 But as far as LUC is concerned, we've not
25 modified the order. There's nothing in the order

1 that says, you know, Wailuku is responsible only for
2 Wailuku. Piihana only -- it's -- and the fact that
3 C. Brewer was the only owner, I think both of the
4 parties, or anyone who has an interest, wouldn't you
5 agree that these -- and this is the question I asked
6 you that this D&O ran with the land. So your clients
7 Stanford Carr, all of your developers, these
8 conditions by LUC should have been included in their
9 deeds; wouldn't you agree?

10 MR. SAKUMOTO: There are a lot of questions
11 in there. The last statement I heard it should be in
12 the deed. It was in the record, so that part I do
13 agree.

14 COMMISSIONER CHANG: Okay.

15 MR. SAKUMOTO: The other question I recall
16 you saying is did I argue that there was a
17 modification of the D&O, and I don't think I said
18 that. I think what I said was that our annual
19 reports have been filed. They have been accepted,
20 and there's been no objection to the performance by
21 the Wailuku Project District.

22 I think on that grounds we believe that
23 what we were doing was what we were expected to do.

24 I think your recognition that the Wailuku
25 Project District has been diligent about performing

1 conditions and filing annual reports and trying to
2 develop in accordance with the way the project was
3 contemplated when it was first approved. To me what
4 it supports is the fact that, you know, we shouldn't
5 be punished by virtue of having done a good job. I
6 mean, that's effectively what would amount -- this
7 would amount to, is because we're doing a good job at
8 performing, we're being punished now by not being,
9 you know, basically allowed to move forward under a
10 separate docket.

11 That's effectively I think the way it's
12 going to be viewed, and I would hope that, you know,
13 part of the -- I don't want to call it a reward, but
14 recognition at least that we are continuing to
15 observe these obligations and not reject them or deny
16 them, would be recognized by virtue of, you know,
17 allowing us to have our own docket.

18 COMMISSIONER CHANG: And I am not in any
19 way suggesting that LUC is punishing your client.
20 What I am looking at is clearly what it -- what does
21 the D&O provide, and it doesn't say that each project
22 would only be responsible for their own project. It
23 does -- so I think, and the fact that we've accepted
24 the annual reports, quite frankly, it's only because
25 Wailuku has been the only active project that has

1 proceeded, so that's why we've accepted them. There
2 was no modification on any of those reports that
3 said, you know, this is only -- that these conditions
4 only apply that, you know, proportionately just to
5 Wailuku.

6 And quite frankly, I think that there's a
7 real disconnect between what the movant and your
8 clients are saying this motion for bifurcation and
9 how the County and LUC may be seeing it.

10 Because I think you -- the way -- my
11 impression, and I may be wrong, but my impression
12 from the arguments by both you and Mr. McFarlin, is
13 that the bifurcation would clearly delineate the --
14 these conditions, the D&O only runs to your project.
15 And I'm sorry, that's not how I read it. I read it
16 that it runs with the entire -- with all of the
17 properties that were the subject of this D&O that --
18 and as a bifurcation. So while I'm hearing that the
19 obligations would still remain, I think that there is
20 an underlying assumption that is very different
21 between the movant and your client and what LUC and
22 the County may be viewing this bifurcation as.

23 So I'm sorry, most of my comments were
24 statements not questions, but I think you know where
25 I'm coming from.

1 Thank you, Mr. Chair.

2 CHAIRPERSON SCHEUER: Thank you
3 Commissioner Chang. I very much appreciate it.

4 Commissioners, if there's nothing further
5 now, it's 12:22, and I'd like to recess until
6 1:00 P.M. when we will take up hearing from the
7 County of Maui and the Office of Planning.

8 Is that acceptable? Okay. We're in recess
9 till 12:20 or till 1:00 o'clock.

10 (Recess taken.)

11 CHAIRPERSON SCHEUER: Okay. It's 1:01; we
12 are back on the record, continuing with A89-642, and
13 we were going to hear from Mr. Hopper.

14 MR. HOPPER: Thank you, Mr. Chair and
15 members of the Commission. We also thank you for the
16 questions that you asked already. It's clear that
17 you have I think some of the same questions that we
18 had with this process.

19 There's not a very clear bifurcation
20 process that supports that there's not anything where
21 you can look at the rules and see what they -- an
22 approval of bifurcated motion would look like.

23 We do understand from time to time projects
24 get sold or portions of projects get sold which is
25 the real issue here. And the Commission and the

1 County is -- Commission's enforcement body are kind
2 of left to sort that out. And that was sort of the
3 crux of our request for deferral.

4 To be clear, the motion is not -- or our
5 response is not requesting that you necessarily deny
6 bifurcation on this docket, and there could be some
7 benefits to bifurcation in this docket.

8 We do note there's ongoing enforcement
9 issues. Those we do believe could be dealt with
10 after bifurcation possibly.

11 However, the issue the County had was
12 like -- and I think some of your questions brought
13 this out -- was what will result from the
14 bifurcation? From the party statements, it appears
15 that they believe that a bifurcation, meaning that
16 each project district will have its own docket, will
17 inherently mean that the -- each project district
18 will not be responsible for complying with
19 representations or conditions in the D&O that are
20 attributable to the other project district.

21 And while that does sound like a good idea
22 because it's hard for a property owner who doesn't
23 own another property to effectuate building a road or
24 something else on that property.

25 When we looked at the record, at the

1 filings, we didn't see a clear delineation of what
2 would result from the bifurcation. Meaning, we
3 didn't see any statement that would say these
4 representations or these conditions apply only to the
5 Piihana District or the Kehalani District, and others
6 would not.

7 Even if it's a relatively basic statement
8 set forth in a Commission order or through a
9 stipulation, particularly among the two owners prior
10 to the bifurcation being acted upon. I think that's
11 what the County was looking for, so that's what we
12 requested and suggested to you that you defer and
13 obtain that information from the parties.

14 When you look through the Decision and
15 Order, there are a lot of references to conditions or
16 representations -- I wouldn't say a lot -- but there
17 are a fair number of occasions where it's clear that
18 certain representations or improvements will apply
19 only to Piihana, and some will apply to the Wailuku
20 Project District.

21 The traffic improvements, for example, and
22 the Findings of Fact discusses the improvements for
23 each district. In cases like that, it may be
24 possible to tell which conditions apply to whom. But
25 our reading of this is that if you granted this

1 bifurcation, we didn't really see much of a
2 difference from how the conditions would be applied
3 to the parties prior to bifurcation.

4 It does appear that counsel for both of the
5 parties presume that they won't be severally
6 responsible for the conditions, but we didn't see a
7 real statement like that. We saw that there was a
8 statement to that effect in the Joinder filed by the
9 Kehalani property owners, but there wasn't real
10 guidance for the Commission as far as how it would
11 enter an order to effectuate that or any allocation
12 among the representations, for example, all the
13 traffic improvements and how those representations
14 would be allocated among the parties.

15 If the Commission's intention is to say
16 Kehalani and Piihana, after bifurcation, you're not
17 responsible for fulfilling conditions that apply to
18 the other project district. Well, why not say that
19 and make clear how that would apply. And I don't
20 know if it's a statement of saying in the D&O if it's
21 clear from the context that that condition only
22 applies to one property over the other, then let's
23 say that.

24 But the County wasn't comfortable at this
25 stage supporting bifurcation without something like

1 that in the record, and we presume the Commission
2 would also like something like that in the record to
3 be clear.

4 It also sounds like there may not be an
5 interest in some of the Commissioners of even
6 bifurcating long term which is potentially a separate
7 issue.

8 The County's main concern was that there
9 didn't appear to be enough information as of record
10 to be comfortable supporting bifurcation at this
11 time. There was some internal discussion among the
12 department of how much information to include about
13 the this ongoing situation with the Pi'ihana Project
14 District.

15 We did feel that it was important to
16 provide some information to the Commission such as
17 the fact that the property consists of multiple lots.
18 You're aware of the sales. You may not have been
19 aware that a structure has been constructed, someone
20 is living in, and that there have been other
21 structures constructed.

22 And so the County sees these as problems,
23 but they're also problems that may be dealt with
24 after bifurcation by perhaps a continuing status
25 conference from the original status conference that

1 you had on the Piihana -- well, at that time it was
2 on the entire project, but you've already had a
3 status conference going over sort of ongoing issues
4 with Piihana.

5 So the County again would want to have
6 additional clarification from the parties on who is
7 responsible for what conditions. Even if it's more
8 comprehensive saying that, you know, conditions that
9 are clearly applicable to Piihana will apply only to
10 Piihana, and if the Commission is okay with that
11 level of clarity, then the Commission could set that
12 forth in an order.

13 But we wanted to have that clearly
14 applicable, and frankly, we think that that's
15 probably in the best interest of parties, so there's
16 not confusion after the bifurcation if that's
17 granted. Particularly for Kehalani if they've got a
18 project that is -- has substantial commencement, and
19 the Piihana site has not had substantial
20 commencement, there could be interest in bifurcating
21 an order to deal with that issue.

22 Also, if there's different owners, as we
23 said before, it may be difficult for one owner to
24 effectuate conditions on property it doesn't own.

25 But, again, I think we read this the same

1 way as the Commission. The sale itself doesn't
2 create that separation, and there does need to be
3 some sort of recognition by the Commission that
4 there's a separation of responsibility for the
5 conditions. And I think without that, that issue is
6 a bit unclear to us.

7 We can remain to answer questions, and,
8 again, we do believe that the ongoing issues with the
9 Piihana project area is something that could be dealt
10 with at a status conference and not necessarily as
11 part of the Motion to Bifurcate.

12 We wanted to note that, and ensure that if
13 you do grant the bifurcation motion, that you
14 condition it to require those items. And in addition
15 to those -- the ongoing discussion relating to the
16 financial ability of the owner to effectuate the
17 project should be part of that.

18 And, you know, the County finally we note
19 our concern with the project, that if a project is
20 going to be sold to multiple smaller owners, frankly,
21 it becomes less likely that the project itself will
22 be able to comply with the comprehensive conditions
23 that are normally intended for a master developer.

24 The only other thing we wanted to mention;
25 there was a discussion about the extension of Imi

1 Kala Street to Piihana Road. I believe that that
2 involves the bridge. There's a condition on the
3 project that deals with traffic improvements and says
4 the parties shall provide their pro rata share of
5 traffic improvements.

6 There's also a Finding of Fact on page 31
7 of the Decision and Order. It talks about the
8 traffic consultant for the project. This is in the
9 1989 D&O. It talks about the recommended
10 improvements by the traffic consultant at the time,
11 and one of them states:

12 As an alternate path for district traffic,
13 Imi Kala Street be extended to Piihana Road.

14 Now, we do acknowledge there's a County
15 condition that's more specific to that requirement.
16 I wanted to note that that was something before the
17 Land Use Commission. Again, that's totally in
18 control of the Piihana District, let's make that
19 clear.

20 But we did believe that that was
21 represented as a proposed improvement by the
22 developer and perhaps the developer -- the landowners
23 have a different take on those issues, but, you know,
24 that along with a variety of other conditions would
25 we do believe -- it can be difficult to separate the

1 representations from the conditions, but we believe
2 the condition talking about the representations made
3 and substantial compliance with them as well as the
4 traffic condition would cover the representations in
5 the Findings of Fact that include some of these
6 traffic improvements.

7 So, again, the County reiterates that it
8 does not ultimately oppose the idea of bifurcation
9 due to the change in ownership and if that may be
10 appropriate, but at this time we do recommend to the
11 Commission that it obtain that additional information
12 before taking action. That's all we have.

13 CHAIRPERSON SCHEUER: Thank you, Mr.
14 Hopper.

15 Commissioners, starting with Commissioner
16 Ohigashi.

17 COMMISSIONER OHIGASHI: I just have some
18 questions.

19 Mr. Hopper, when -- would the County be
20 disagreeable to have the movant, and I guess Mr.
21 Sakumoto try -- attempt to submit some kind of a
22 stipulation into the record and approved by the Land
23 Use Commission that outlines the different -- their
24 different responsibility under a bifurcated -- if
25 allowed to be bifurcated?

1 MR. HOPPER: Yeah, we would like something
2 like that. Hopefully, it would also analyze which
3 representations apply to the appropriate parties, and
4 maybe that could be done in the form of a proposed
5 order that the Commission would adopt, just thinking.

6 Again, we don't have a clear process for
7 this, but we wouldn't object to that process I don't
8 think.

9 COMMISSIONER OHIGASHI: The other question
10 that I had was: There were several different
11 transactions or sales of property -- of property
12 interest within the property. Are these sales that
13 have been approved or have been -- are these proper
14 sales in the County's definition or the County's
15 purview in regard to establishing ownership in that,
16 instead, larger parcel?

17 MR. HOPPER: I wouldn't -- County sales,
18 but I would say there is a letter in -- attached as
19 Exhibit 2 to your -- to our Position Statement that
20 outlines that in 2018 the Public Works Department
21 recognized that there's actually 45 separate lots on
22 the property because of preexisting Land Commission
23 Awards that predated any sort of County subdivision
24 requirements or anything to that effect.

25 That is, I think, we believe one of the

1 problems here. Normally, you would go through a
2 subdivision process, and you know, the plans and the
3 conditions could be verified then. At this point,
4 because these lots existed prior to -- they were
5 obligated to be recognized because they were listed
6 prior to any subdivision requirements. If the
7 landowner has been selling off these lots, that, of
8 course, does not excuse the future owners from
9 compliance with the conditions, so you're not allowed
10 to build homes.

11 You're certainly not allowed to live in
12 those homes, and the County is taking enforcement
13 action against those owners, but that has been an
14 issue here that there's actually 45 separate Land
15 Commission Awards or other lots that existed prior to
16 any regulation of the subdivision.

17 COMMISSIONER OHIGASHI: So if the County is
18 taking the position that there are valid owners of
19 the lots within the sub -- within the property area.

20 MR. HOPPER: Yeah, I don't think the County
21 would have the basis to test that the lots exist and
22 can be sold.

23 COMMISSIONER OHIGASHI: I -- just for the
24 reason why I'm just trying to establish, see if
25 there's a record sufficient enough to allow them to

1 enter -- to become named parties in this case.
2 Because if they were sold properties that were not
3 subdivided or illegally done, then the question is
4 whether or not they should be even named parties in
5 this case.

6 So I take it from your response that you're
7 not objecting that they be named parties in this case
8 and that -- because you recognize that you can
9 contest their ownership?

10 MR. HOPPER: Naming them as --
11 (indecipherable) I think is appropriate. If there
12 was a method to prevent the sales from ongoing that
13 would be -- because this was sort of represented as a
14 comprehensive development, not as a development that
15 would be sold to 45 different owners and developed,
16 but we don't necessarily see that as a -- as
17 something that we could enforce at this stage because
18 there's not a restraint on the ability to sell the
19 property. But, of course, the development of the
20 property still has to be consistent with the
21 conditions, so nothing should be built on any of
22 these lots until the conditions are complied with
23 which includes a lot of infrastructure improvements.

24 So, yes, our position is that we wouldn't
25 object to the new owners, but they not be allowed to

1 do anything on that property until the conditions are
2 complied with.

3 COMMISSIONER OHIGASHI: It's my
4 understanding that the County has another layer of
5 enforcement, because there are two separate zoning
6 ordinances for -- ordinances that control the two
7 different properties, and that's the -- I guess the
8 movants' property at this point in time is controlled
9 by a different zoning ordinance than the -- then Mr.
10 Sakumoto's property.

11 MR. HOPPER: Yes, that's correct. There
12 are separate Project District Ordinances for the
13 different properties, and they have different
14 conditions on them. Those are a little easier on the
15 County side to sort out than the D&O which is
16 currently still recorded on the master approval which
17 includes all of the land.

18 COMMISSIONER OHIGASHI: Would a stipulation
19 in the bifurcation of these -- in relations to a
20 bifurcation of these two properties, would it include
21 the recognition that each of the properties are
22 governed by different zoning ordinances and shall
23 comply with the terms and conditions of those
24 ordinances?

25 MR. HOPPER: I think -- I don't think it's

1 required, because those are recorded on those
2 properties, so they would apply separately. But that
3 could be something that's stated in the documents.

4 COMMISSIONER OHIGASHI: Would that give you
5 more comfort in terms of determining who has
6 responsibility for what?

7 MR. HOPPER: Well, as for the zoning
8 conditions, I think we're pretty clear on who has
9 responsibility for what. It's just that these Land
10 Use Commission conditions, that's the issues that's
11 up in the air for us. As far as the zoning
12 conditions -- and I have the deputy director here. I
13 think that we're relatively comfortable with who is
14 responsible, meaning that the Kehalani owners,
15 because, you know, the Piihana conditions wouldn't be
16 recorded on land owned by the -- on the Kehalani
17 parcels, and the conditions on the Kehalani -- the
18 Wailuku Project District wouldn't be recorded on the
19 Pi'ihana Project District, therefore, I won't -- I
20 don't -- do not believe there's a problem with
21 confusion as to those conditions.

22 COMMISSIONER OHIGASHI: I'm just trying to
23 clear up the bridge issue. And if the zoning, or Mr.
24 McFarlin's clients are required them to prepare to
25 build the bridge, then by adopting that -- by them

1 agreeing to adopt those conditions would necessarily
2 clear that issue up, wouldn't it?

3 MR. HOPPER: Well, we would still
4 request -- I think we'd still request it in here in
5 whatever the Commission decides that it made clear to
6 the extent that's a representation they made, which
7 party that applies to. And that's true of all of the
8 representations and conditions. And, again, I think
9 that's for the protection of the Kehalani owners, so
10 they're clear that they don't have to comply with the
11 -- anything that applies to Piihana.

12 So some sort of statement to that effect
13 that the Commission adopts I think would be a comfort
14 to the parties that they're not on the hook for
15 the -- each other's conditions.

16 COMMISSIONER OHIGASHI: And I'm just trying
17 to figure out a way forward without having a hearing
18 to determine which conditions should apply to which
19 property. It would appear that we're kind of stuck
20 that if we are going to divvy up conditions and apply
21 it, that is not only -- it seems to me more
22 substantive than what Mr. Sakumoto has indicated and
23 would require us -- the hearing -- I'm just trying to
24 circumvent any issue of substance in having them
25 stipulate and agree to how it's going to work and we

1 adopt it in the bifurcation order, and they agree to
2 have it adopted.

3 MR. HOPPER: Point taken. Yeah, I do think
4 that that stipulation would be -- or something to be
5 done outside of the Commission and then proposed to
6 the Commission would be a good way of starting that
7 process, or something filed by the Kehalani owners
8 or, you know, that would go over who's asking what.

9 COMMISSIONER OHIGASHI: Is the County of
10 Maui a party in this matter?

11 MR. HOPPER: I think since we were a party
12 to the original docket we've been -- you know, this
13 is an on -- if this is a continuation of the same
14 docket, I imagine we would be continuing to be a
15 party.

16 COMMISSIONER OHIGASHI: So wouldn't it be a
17 good idea that any stipulation include the County of
18 Maui's input?

19 MR. HOPPER: I think that that would make
20 sense, and OP could be involved as well, but I do
21 think the starting point's got to be between the
22 owners who's okay with what, and to the extent
23 they're not -- have that approved.

24 We're not trying to necessarily make extra
25 work for everybody, but we've -- doing this now will

1 make more sense than trying to figure it out
2 afterwards.

3 COMMISSIONER OHIGASHI: I understand. I'm
4 just trying to make less work for me. Thank you.

5 CHAIRPERSON SCHEUER: Thank you,
6 Commissioner Ohigashi.

7 Commissioner Okuda.

8 COMMISSIONER OKUDA: Thank you, Mr. Chair,
9 and I totally agree with Commissioner Ohigashi that I
10 personally want less work.

11 So in line with my wanting to have less
12 work, Mr. Hopper, can I ask you two questions?

13 One is that if the Land Use Commission were
14 to agree with the County's request for deferral, how
15 much time would you want for the deferral?

16 And, number two, what do you anticipate or
17 what do you think would be the most productive things
18 to take place during this time of deferral?

19 So if I can ask those two questions, number
20 one, how much time if the Land Use Commission were to
21 grant your request for deferral; and, number two,
22 what do you want everybody to do during that period
23 of time to make the deferral period productive so
24 Commissioner Ohigashi and I can do less work or no
25 work?

1 MR. HOPPER: Thank you. I think that the
2 request -- specifically what would happen I think is
3 we would want the parties to propose something for
4 the Commission to adopt maybe the order, whatever
5 you'd be comfortable with, but something that sort of
6 clarifies as part of the Motion for Bifurcation what
7 the end result would be, and how it would be clear
8 that the Commission is allocating the conditions and
9 representations. I don't know how detailed they
10 would want to be.

11 We do think that it might be a worthy
12 exercise to go over the representations and -- I
13 mean, some of it is clear that -- it's clear that it
14 says this applies to Kehalani or this applies to
15 Wailuku Project District. This applies to Piihana.

16 And they could go over those and say that,
17 you know, the -- after the bifurcation, the docket
18 dealing with Piihana, the conditions will be --
19 Piihana project will comply with the following
20 conditions and the following representations, or
21 even -- I mean, maybe even a broader type of
22 statement that would be that the -- that they will
23 comply with all representations that are specific to
24 the Piihana Project Area only.

25 And so to have some sort of document,

1 probably I would imagine in the form of a proposed
2 order that the Commission would enter -- that I would
3 imagine the Commission would need to enter any way.
4 I suppose the parties were presuming the Commission
5 staff would draft the D&O, you know, if the
6 bifurcation was granted.

7 The County wasn't really clear on what that
8 D&O would say, because that would outline the party's
9 ongoing responsibilities, and I think, you know, make
10 it clear what the movants want. If it's to be clear
11 that they're not responsible for any conditions or
12 representations that apply only to land they don't
13 own, then say that, specify what those are.

14 Whether you have to do it on a list or more
15 a general statement and propose that to the
16 Commission, and I think the parties can be available
17 to look at that and see if that's acceptable.

18 Hopefully, the Commission will have that in
19 front of them and be able to move forward, you know,
20 based on that, and that's the best that I can think
21 of.

22 Again, this is something I would have
23 honestly hoped was done and thought of in advance of
24 asking for the bifurcation, because this will affect
25 the rights of the owners. And it does appear that

1 the owners thought something different than the
2 Commission thought, so having that clarified I think
3 is important.

4 COMMISSIONER OKUDA: Okay. And, you know,
5 my intention is not to pass the buck to you, Mr.
6 Hopper, or the very competent people at the County of
7 Maui, but would it be acceptable for you and the
8 County that whatever the two Petitioners agree upon
9 or stipulate that they also seek -- since I do agree
10 that the County of Maui is a party, and I believe OP
11 may also be -- that the parties or the Petitioners
12 also seek the approval of the County of Maui and the
13 Office of Planning.

14 In other words, that, you know, at least
15 you'll be given the opportunity to weigh in and
16 possibly either agree or disagree or give your input
17 as frankly the guardians of the County of Maui?

18 MR. HOPPER: I think we wouldn't have a
19 problem with reviewing. And if we, you know,
20 disagree with something, we could have a separate
21 filing, or if we've got guidance maybe we can help
22 us -- help with that. Yeah, I don't think we would
23 have -- this to me seems similar to when there's a
24 district boundary amendment and a proposed order
25 is (inaudible) -- I believe that's the process that

1 we would use. So I don't think we would object to
2 that with the opportunity to review, and then we'll
3 provide the Commission (indecipherable).

4 COMMISSIONER OKUDA: The County's filing
5 raised a number of issues which I won't go over, of
6 course, which in my view seem significant.

7 Do you think it would be helpful to the
8 resolution of this current situation if, for example,
9 the effected Petitioner would sit down and meet with
10 you or the appropriate representatives of the County
11 of Maui and try to address the concerns the County
12 has? Is that helpful, or did you think that's just
13 not going to be helpful in this case?

14 MR. HOPPER: I think -- we are going
15 through an enforcement process, not just with the LUC
16 conditions. That's one part of it. There was a
17 variety of other issues on the property. I think
18 that's an ongoing process. So as part of that we
19 would potentially be having discussions with the
20 owner.

21 But right now we've got -- I agree with you
22 there're significant issues. Frankly, the Land Use
23 Commission issues are only part of that, and so we're
24 going to continue the enforcement for the County.
25 The Department of Planning will continue the

1 enforcement process, and through that we are going to
2 look to (indecipherable) -- any compliance with the
3 conditions.

4 So we can have those discussions as part of
5 that ongoing process, but it's -- there's multiple
6 departments involved with this property, and at some
7 point, we brought to the Commission (inaudible) -- as
8 we think the Commission is going to need to be aware
9 of it, and deal with it down the line. But that's an
10 ongoing process for us.

11 So I think we'll continue to have those
12 discussions through the enforcement process, but it's
13 (Indecipherable) -- right now. We need -- yeah.

14 COMMISSIONER OKUDA: Yeah, and I think it's
15 very clear from the Bridge Aina Lea case that,
16 frankly speaking, in many instances enforcement of
17 LUC orders are really left to the counties in their
18 discretion on how to enforce these orders.

19 One final question I have.

20 In your filing, I think you raised an issue
21 about financial ability to complete improvements or
22 to satisfy, or do the representations that have been
23 made on the record.

24 Is that something that is a concern of the
25 County, financial ability and proof of financial

1 ability?

2 MR. HOPPER: I think, yes, it is. I wanted
3 to clarify one other thing.

4 The enforcement we believe for Piihana. If
5 the area is -- has been -- if there hasn't been
6 substantial commencement of the development with
7 respect to that area, I think there would be
8 potentially other enforcement areas if the
9 bifurcation could potentially assist with that to get
10 that noted.

11 But for the financial ability, yes, we did
12 raise that as an issue. We think that's not
13 necessarily something that should prevent the
14 bifurcation, because the sale has already happened,
15 so the Commission's not approving the sale
16 necessarily. The bifurcation, I think, would
17 recognize that this party's responsible for that, and
18 I don't know if you would necessarily be going after
19 Kehalani to fulfill the Piihana project requirements.
20 But I think we do believe that if inability to comply
21 with the conditions is a prerequisite to getting the
22 district boundary amendment, then it would be
23 relevant to check in with the development to see what
24 the status is of the financial capability of the
25 project -- of the new project owner to fulfill the

1 conditions. So that was a concern that we had.

2 You know, frankly the project hasn't --
3 there hasn't been much development of infrastructure
4 over the years in this particular areas, and frankly,
5 the development plan does not appear to be
6 comprehensively developed this area. It appears to
7 be to sell as many lots as possible and build --
8 build whatever can be built without really any cares
9 towards the conditions, which I think envisioned a
10 more comprehensive development.

11 COMMISSIONER OKUDA: Yes, thank you, Mr.
12 Hopper. And let me clarify one thing.

13 I do agree with your clarification, and I
14 should have made that clear, that perhaps bifurcation
15 would make it so that now the bifurcated section of
16 the original D&O has not been developed or there
17 hasn't been substantial commencement according to
18 representations made.

19 And so the Land Use Commission may have,
20 with respect to that portion, the power to revert
21 back to the original Land Use designation.

22 While if there wasn't bifurcation, because
23 there's substantial commencement at least on, you
24 know, portions of the property, there wouldn't be the
25 ability to revert.

1 So I do recognize the fact that for
2 enforcement perhaps bifurcation might allow greater
3 enforcement by the Land Use Commission.

4 But in any event, my question was just
5 dealing with the points you raised about deferral and
6 I appreciate your explanation, clarification.

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

8 CHAIRPERSON SCHEUER: Thank you very much,
9 Commissioner Okuda.

10 Commissioner Chang?

11 COMMISSIONER CHANG: Thank you, Mr. Chair.

12 Mr. Hopper, you did remind me of the issue
13 of substantial compliance. Because as I read through
14 the files, it did not appear as if the Piihana
15 project had substantially commenced, and they were
16 going through a lot of the planning.

17 And as counsel, as Mr. Sakumoto mentioned,
18 his client shouldn't be punished for the good work
19 that they've done, and they have actually completed a
20 substantial portion, if not all of their project.

21 So in your opinion, with the bifurcation,
22 would that enable the Land Use Commission to
23 separately review the Piihana parcel and revert since
24 there's not been substantial compliance?

25 MR. HOPPER: I don't want get too much into

1 the details of ongoing enforcement issue and the
2 action to be taken. I think that should be -- there
3 should be a hearing for that and an opportunity.

4 Generally speaking, I do think that that's
5 a potential action the Commission has on lands that
6 have not been substantially commenced, but where
7 development hasn't been substantially commenced. And
8 post bifurcation, I think that intent is to look at
9 the project separately.

10 And, you know, if one has not been
11 substantially commenced and the other has, you may be
12 able to have remedies with respect to one parcel that
13 you don't have with the other.

14 But we still, again, potential within that
15 bifurcation process, that there be some type of
16 decision by the Commission, hopefully if the parties
17 are agreeable to, that sets forth their respective
18 responsibilities.

19 Apparently I don't think there's a
20 disagreement between the parties of who's going to be
21 responsible for what in theory. I don't know if
22 they've sat down and thought of, okay, here's the
23 things that we have to do, here's the things we don't
24 have to do, and set that forth in a document.

25 COMMISSIONER CHANG: No, I appreciate that.

1 And I'm not -- and I had intended to ask Mr. McFarlin
2 this question, and I'm hoping I still do have an
3 opportunity.

4 I don't know if Mr. McFarlin, when he filed
5 this motion, considered the potential that the Land
6 Use Commission under the bifurcation could revert
7 that portion of the property, so I will ask him that
8 question later.

9 The question I have for the County, Mr.
10 Hopper, is when I look at the D&O, there's specific
11 provisions about drainage and erosion control.
12 That's No. 3. No. 4 being water.

13 In your -- based upon the County ordinances
14 and regulations, are -- can those be separated? Can
15 those conditions be separated so that both Piihana
16 and Wailuku could clearly differentiate what would be
17 applicable to each of them, keeping that condition?

18 MR. HOPPER: Yes. We think similar to
19 traffic improvements that they can be independently
20 assessed. Again, there's two project districts. So
21 from the County zoning level, they're separated out
22 pretty well here.

23 The conditions are general in the
24 conditions themselves, but the Findings of Fact get
25 more specific, in some cases even separating by

1 project district. And, I mean, the County has
2 already gone through the approval process with a lot
3 of the Kehalani parcels, so it has separately looked
4 at those approvals, you know, separately.

5 I think it's similar to maybe a project
6 being done in phases, where it says, okay, we want to
7 subdivide and build this portion of this project
8 district.

9 You have to be in compliance with
10 everything including drainage, and so the drainage is
11 going to look at that, and the LUC condition will
12 apply to the extent that that project is seeking
13 approval.

14 So that would be maybe an example of a
15 condition that would -- you know, you would change
16 that to -- not necessarily change it, but to clarify
17 that, you know, this decision shall apply to -- for
18 the Wailuku Project District for all development in
19 that project district, and with respect to Piihana,
20 you know, the improvements required that are
21 considered necessary to -- for the project being
22 built on that site, that project would be complied
23 with.

24 The only potential issue would be is if
25 there's some area where there -- there's a joint

1 responsibility contemplated in the original D&O, and
2 I don't think we can immediately identify anything
3 like that. I mean, we would hope that everything
4 could be separated out by project district, you know,
5 to make clear that this condition applies to the
6 extent the development is being done in Kehalani and
7 does not apply -- doesn't make Kehalani responsible
8 for the other project district.

9 But, yes, generally, these are looked at
10 similar to maybe phases that where when the
11 development is proposed, the County would look at the
12 drainage plan for that particular area. The
13 conditions themselves don't say that so that can
14 be -- that's why it's not obvious to start with.

15 COMMISSIONER CHANG: I have no further
16 questions. I really appreciate the County's
17 analysis, and their planning papers as it really
18 helped to address, I think, many of the issues I had,
19 so thank you very much for the County's
20 (indecipherable).

21 Thank you, Mr. Chair.

22 CHAIRPERSON SCHEUER: Thank you very much,
23 Commissioner Chang.

24 Commissioner Ohigashi.

25 COMMISSIONER OHIGASHI: Mr. Hopper, I just

1 wanted to say that I think that the County is the
2 only -- was the only party asking for a deferral in
3 the filing papers, and that's why I hope that the
4 County would take leadership in determining what
5 actual conditions that they would like to see with
6 regard to how the division should take place, so give
7 Mr. Sakumoto and Mr. McFarlin great opportunity to
8 look in -- to satisfy your concern, and the concerns
9 that you've written in your Position Statement.

10 And frankly, I -- this is only an issue of
11 bifurcation and not an issue of enforcement or
12 anything like that that you need to speak with them
13 with. All it would seem to me that the issues that
14 you have brought up about which conditions that each
15 one would adopt and why, can be handled by -- and one
16 of my good friends always used to say, I'd rather be
17 in the room than out of the negotiating, so I urge
18 you to take leadership in this matter and try to see
19 if there is something -- if we grant the deferral,
20 that some kind of agreement can be reached. That's
21 all.

22 CHAIRPERSON SCHEUER: Thank you,
23 Commissioner Ohigashi.

24 Commissioners, are there further questions
25 for the County?

1 If not, I have three questions for the
2 County.

3 And let me just preface my comments by
4 saying that while this is styled as just a procedural
5 matter, for me the eyes on the prize thing is that
6 according to one of the exhibits from the original
7 Petitioner, we're supposed to have 600 units of
8 housing in the Piihana District. And I don't think
9 anybody is standing up and saying, oh, yeah, we don't
10 need more housing including affordable housing on
11 Maui, so we're here in part to ensure that these key
12 representations and conditions are followed through
13 with.

14 Mr. Hopper, do you know off the top of your
15 head whether all the affordable housing conditions
16 for the Kehalani portion of this project have been
17 satisfied?

18 MR. HOPPER: Yeah, we knew -- we did have
19 some discussion with the Department of Housing and
20 Human Concerns. We would want to verify with them
21 where they're at. I don't think they're necessarily
22 in noncompliance with anything, but I don't want to
23 say they've built everything.

24 I do believe housing credits were involved
25 as well, but we would want to get that clarified from

1 the department that oversees those -- that and before
2 we give you a definitive answer.

3 CHAIRPERSON SCHEUER: My second question is
4 is that I understand that the County took up these
5 two districts in two separate zoning actions, but are
6 you aware, or can you represent that there was no
7 time during these zoning actions that the Planning
8 Commission, and ultimately the Council did not
9 understand that these were at that time both being
10 proposed by the same developer, same landowner and
11 that that same landowner was going to be fulfilling
12 all these conditions?

13 MR. HOPPER: We would -- I'd want to go
14 back into the record to look at those zoning
15 ordinances, but because those are separately recorded
16 on separate parcels, it does appear that it was
17 presumed that those conditions would be applied
18 separately to two separate project districts.

19 CHAIRPERSON SCHEUER: But if I was a
20 Council member and I had just voted for approving
21 zoning conditions for Kehalani, and then I was
22 bringing up the Piihana parcels, but I knew it was
23 both C. Brewer, and I knew they were going to be
24 making a lot of money, would I feel more comfortable
25 with the planning a bridge on the other parcel,

1 knowing it was all the same entity, or was there
2 really clear in the record a statement that says,
3 now, these are absolutely separate, and we're not
4 expecting any of the revenue or any of the support
5 from Kehalani to go towards fulfilling the
6 conditions?

7 MR. HOPPER: I think I understand what
8 you're getting at. Again, I can't -- you could go
9 back in the minutes and look at what was discussed at
10 the County zoning level. That may be something, you
11 know, to look at.

12 We can't speak to what the filings are and
13 what's recorded on those properties. And your point,
14 I think, may be more applicable to -- I think the
15 cases where projects have been -- have had different
16 portions of them of the same project that's
17 contiguous sold off to different owners that have
18 unified conditions.

19 That's a little bit more iffy than in this
20 case where there are two separate parcels of land,
21 but I don't want to represent that there was not a --

22 CHAIRPERSON SCHEUER: I would seek that
23 representation, because in my mind, part of the
24 original representations in this docket were that to
25 follow through you're going to get zoning after the

1 LUC entitlement. And so it's in that degree the
2 zoning conditions, while they are applying to
3 different parcels, if they were at all approved in
4 the way or in manner that they were connected by
5 representation at the County level, I want to know
6 it.

7 The last question I have, and this goes to
8 the representations from Mr. Sakumoto.

9 Condition 15 of the LUC conditions, and
10 I'll just -- I'll read it for everybody's benefit.
11 It says:

12 The Commission may fully or partially
13 release these conditions as to all or any portion of
14 the property upon timely motion and upon the
15 provision of adequate assurances and the satisfaction
16 of these conditions by the Petitioner.

17 Mr. Hopper, you represented that you
18 thoroughly reviewed the record in these matters. Are
19 you aware of any party coming forward to this point
20 under Condition 15 to try and release some of the
21 conditions in relationship to some of the property?

22 MR. HOPPER: I'm not.

23 CHAIRPERSON SCHEUER: Thank you very much.
24 I'm not either.

25 Is there anything further, Commissioners?

1 Okay.

2 Office of Planning, it's your floor.

3 MS. APUNA: Thank you, Chair.

4 So in its filed response to Petitioner's
5 motion, OP recommended approval of the proposed
6 bifurcation of Docket No. A89-642, however, having
7 reviewed and heard the County's Position Statement
8 and the concerns of the Commissioners, which brings
9 to light concerns that there are a variety of ongoing
10 violations on the property and violations of D&O
11 representations and conditions, and potential
12 complications from multiple owners, OP agrees that
13 the Commission should defer granting bifurcation or
14 bifurcate and require Petitioner to provide
15 sufficient information on the development costs of
16 the project, financial capability, a detailed
17 schedule, how substantial compliance with conditions
18 will be achieved uniformly or comprehensively among
19 the proposed new landowners, and how conditions
20 should be appropriately be separated and applied
21 between Petitioner and Kehalani.

22 CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.

23 MS. APUNA: Thank you.

24 CHAIRPERSON SCHEUER: Commissioners,
25 questions for the Office of Planning?

1 Commissioner Cabral.

2 VICE CHAIR CABRAL: Yes, thank you.

3 Ms. Apuna, in your change in position, are
4 you, with what we've learned, what was presented at
5 first and what we've learned in this discussion I
6 think more so today, do you see that obviously we've
7 already -- are pretty clear that Mr. Hopper and the
8 County of Maui's Planning Department should be
9 involved.

10 Do you think also that in this deferment
11 and clarification on responsibilities and duties, is
12 your office also -- should your office also be
13 involved with all of that, and are you willing to do
14 so?

15 MS. APUNA: Yes, I think Office of Planning
16 is willing and would like to review as well.

17 VICE CHAIR CABRAL: Okay. Thank you very
18 much.

19 MS. APUNA: Thank you.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Cabral.

22 Commissioner Chang?

23 COMMISSIONER CHANG: Thank you, Mr. Chair.

24 Ms. Apuna, I'm going to ask you the same
25 question that I asked Mr. Hopper regarding

1 substantial compliance.

2 If there is a bifurcation, in your opinion,
3 can LUC -- if there's not-- and I'm not saying that
4 there hasn't. I don't know enough.

5 But if there's not been substantial
6 compliance on the Piihana parcel after the
7 bifurcation, are you of the opinion that LUC could
8 revert that property back to its original zoning?

9 MS. APUNA: Yes, I do think that that's
10 possible following bifurcation.

11 COMMISSIONER CHANG: Okay. And do you
12 agree with Mr. Hopper's, the County's interpretation
13 that the D&O -- that under the bifurcation, the
14 parties could stipulate to what provisions under the
15 D&O, or how they would, you know, the allocation of
16 -- or what would be required for each party under the
17 D&O? Do you agree that the parties could stipulate
18 to that with the review by both the County and OP?

19 MS. APUNA: Yes.

20 COMMISSIONER CHANG: I've got no further
21 questions, Mr. Chair. Thank you.

22 CHAIRPERSON SCHEUER: Thank you,
23 Commissioner Chang.

24 Commissioner Giovanni?

25 COMMISSIONER GIOVANNI: Thank you, Chair.

1 Ms. Apuna, I'm going to ask you to
2 elaborate so that I fully understand your current
3 position. So in your testimony today, you said
4 that -- I think I heard you say that if a deferment
5 was granted in addition to coming away with a better
6 understanding of the distribution of responsibilities
7 of the parties, you're also asking for a
8 demonstration that the parties have the financial or
9 capacity or wherewithal to perform on the conditions.
10 Could I ask you to elaborate on that?

11 MS. APUNA: Yes. I think that's consistent
12 with the County's request as well that the
13 Petitioner's show that they are capable of moving
14 forward with the development. Whether it's, you
15 know, financial capability or what timeline they have
16 moving forward, all the different elements that would
17 help this Commission see that the Petitioner is able
18 to move forward and accomplish the project.

19 COMMISSIONER GIOVANNI: So then is it your
20 position that, if in that period of deferment, those
21 items were all clarified, that this could then be
22 brought back for consideration for bifurcation by the
23 Commission?

24 MS. APUNA: Yes.

25 COMMISSIONER GIOVANNI: Thank you, no

1 further questions.

2 CHAIRPERSON SCHEUER: Thank you.

3 Mr. Hopper, did you have a point of
4 clarification to raise? You're muted.

5 MR. HOPPER: Yes, just to clarify, I think
6 our position wasn't necessarily that the financial
7 information has to be provided prior to bifurcation.
8 The concern was that if that's shown, and it's not
9 satisfactory, preventing bifurcation, I'm not sure
10 where that gets us. Because the subsequent -- the
11 property can't be unsold. Our suggestion was to --
12 if you decide to bifurcate, to hold hearings to
13 determine the financial capability, and if it's not
14 there, then you could take enforcement action against
15 the owner. But doing it before bifurcation and then
16 you saying -- and then denying the bifurcation
17 because of the -- their inability to develop the
18 project doesn't unsell the property. They still own
19 the property, and Kehalani doesn't -- is still linked
20 to that same docket, and I'm not sure where that gets
21 Commission.

22 Again, this is up to the Commission, and if
23 they think it's a good idea to have -- to require
24 beforehand then that's fine, but our motion -- or
25 our -- I think our document stated that that should

1 be provided within six months of the bifurcation, or
2 a sooner time if you think that should be done,
3 should be provided, could be provided after
4 bifurcation just because a lack of financial ability
5 for the Piihana project. We don't think that should
6 necessarily prohibit the bifurcation if it's
7 otherwise clear.

8 CHAIRPERSON SCHEUER: Thank you, Mr.
9 Hopper.

10 Commissioners, questions for the Office of
11 Planning?

12 Okay. So I'm going to give each of the
13 parties up to three minutes to add any additional
14 points they might want to raise starting with Mr.
15 McFarlin.

16 MR. McFARLIN: I apologize. The speaker --
17 not working. I've done my trial runs, and it's
18 worked every time including this morning, but any way
19 I'll speak up.

20 Yeah, we're happy to work with the Kehalani
21 and Maui County and whoever else to clearly set forth
22 which conditions will apply to the respective owners.
23 I would -- I'd also note for people that are actually
24 familiar with this area on Maui.

25 This is -- this area has had a lot of

1 problems for a long time, and it's actually been
2 significantly improved under Wailuku Plantation, LLC.
3 I know there are still problems, and it may not
4 appear that way, but there were far greater problems
5 with chronic homelessness, dumping, et cetera.

6 It hasn't been a desirable area, so I would
7 encourage the Land Use Commission to consider that
8 positive steps have been made and to help us find a
9 way forward so we can bring this area up.

10 I think that's all -- what we all want, and
11 this is a particularly challenging part of the
12 island. If you're familiar with this part of the
13 island, you will know that. So that's about all I
14 have to say.

15 You know, we're willing to work with
16 whoever, whatever interested parties are involved to
17 allocate the conditions in a way that is very clear
18 to everyone. Thank you.

19 CHAIRPERSON SCHEUER: Thank you, Mr.
20 McFarlin.

21 Mr. Sakumoto.

22 MR. SAKUMOTO: Thank you, Mr. Chair.

23 The only thing I have to add is, you know,
24 we're happy to work with the other parties as well on
25 some kind of stipulation. I like Commissioner

1 Ohigashi's suggestion that we could even propose an
2 order for the Commission to consider, if that would
3 streamline things, but, you know, we're happy to do
4 that.

5 CHAIRPERSON SCHEUER: Thank you, Mr.
6 Sakumoto.

7 COMMISSIONER OHIGASHI: That was Okuda said
8 that.

9 MR. SAKUMOTO: My apologies, Commissioner
10 Okuda.

11 CHAIRPERSON SCHEUER: Let the record show.
12 Mr. Hopper, can you keep your video on,
13 please?

14 MR. HOPPER: Yes, video is on. Sorry, I
15 didn't want to not take up room on the panel while
16 they're receiving but...

17 CHAIRPERSON SCHEUER: You have three
18 minutes if you want to add anything.

19 MR. HOPPER: I think we've made our
20 position clear, and it sounds like there's not
21 necessarily an objection from the parties, so
22 hopefully we can make some progress. Thank you very
23 much.

24 CHAIRPERSON SCHEUER: Okay.
25 Ms. Apuna.

1 MS. APUNA: OP has nothing further to add.

2 CHAIRPERSON SCHEUER: Okay. Commissioners,
3 any final questions?

4 Commissioner Cabral.

5 VICE CHAIR CABRAL: Mr. Hopper, I think
6 this question could go to you. Mr. Hopper, Mr. Mask
7 man, could County of Maui give -- question, how much
8 time do you folks think you would need to work out
9 the -- organize and work out the plan to be able to
10 determine which property is going to take what
11 action? How much time of a deferment would you need?

12 MR. HOPPER: I think we would request that
13 the landowners draft that, so I think that timetable
14 would depend on when we would have that.

15 Maybe the County would like a couple of
16 weeks to look at it? Longer? So I don't know when a
17 reasonable timetable is for that, but it's going to
18 depend on the -- when we get the documents, the
19 proposal drafted from the landowners.

20 But we think that's the appropriate
21 starting point because that's -- you know, the
22 developers should hopefully have an idea of what they
23 are required to do and what they're not required to
24 do and share that with everybody, and we can review
25 that. But, again, a lot of this was for the

1 Commission, so the Commission could be clear on
2 what's going to happen, and we would help enforce
3 that if the Commission was okay with how those were
4 allocated.

5 So as far as specific timing, I'm not sure.
6 It depends on when we would get the proposals from
7 the developers.

8 VICE CHAIR CABRAL: Okay. Thank you.

9 CHAIRPERSON SCHEUER: Anything further,
10 Commissioners, questions?

11 COMMISSIONER WONG: Mr. Chair.

12 CHAIRPERSON SCHEUER: Commissioner Wong.

13 COMMISSIONER WONG: Did we want to work
14 with the Executive Officer or the Staff on a timeline
15 for this with the parties?

16 CHAIRPERSON SCHEUER: Well, so -- okay. So
17 procedurally we have a motion -- well, we have a
18 motion from Wailuku Plantation, LLC before us. We
19 don't have a motion made by one of the parties. If
20 there are inclination, or at least your individual
21 inclination is to go where this discussion is going
22 and saying what kind of time might be needed, you
23 could direct a question to Mr. Orodenker.

24 COMMISSIONER WONG: If you don't mind, Mr.
25 Orodenker. I'm not sure if I can.

1 CHAIRPERSON SCHEUER: Yeah, please.

2 COMMISSIONER WONG: Mr. Orodener, can you,
3 yeah, give us some sort of timeline, because I know
4 we have certain vacant dates in the future, so we --
5 because I figure -- well, that's where we're moving
6 to, but I'm unsure, because, you know, we want to try
7 and get this over with and make sure that everyone
8 has enough time during this pandemic.

9 EXECUTIVE OFFICER: Commissioner Wong,
10 the -- I would prefer that the parties tell us what
11 kind of a timeline they anticipate, and I think part
12 of that is what we're going to request them to do.

13 The reason that I say I prefer that the
14 parties set the timeline is that, as you say, with
15 this pandemic on, it's going to take some discussion
16 between all four of the parties to work out what a
17 proposal would be, and then we would have to have
18 time to post a hearing notice and schedule the
19 hearing.

20 So, I mean, we've got several -- a couple
21 of open dates, completely open dates, two, in fact,
22 between now and the end of the year. But we also
23 have some other dates assuming that we can continue
24 to do ZOOM meetings that we could utilize between now
25 and the end of the year.

1 Some of the matters that we have in front
2 of us on some of the dates that I mentioned are minor
3 matters that could be handled in a few hours, and
4 then we could take this matter up afterwards. I
5 don't think that the staff should drive this in terms
6 of timelines. I think that should be up to the
7 parties.

8 COMMISSIONER WONG: Okay. So, Mr. Chair,
9 do you want to ask the other parties, or do you want
10 me to?

11 CHAIRPERSON SCHEUER: You could go ahead
12 and ask the other parties, Commissioner Wong.

13 COMMISSIONER WONG: Okay. Thank you,
14 Chair.

15 Mr. McFarlin, how long would you need to
16 take to work on this item, like a month, two -- one
17 day? You know, give us some timelines that is
18 reasonable that you have to work with other parties
19 on.

20 MR. McFARLIN: I would estimate 60 to
21 90 days. That's my guesstimate, but I'm available to
22 start this afternoon or tomorrow, you know. I'm
23 willing to work on it anytime.

24 COMMISSIONER WONG: Thank you.

25 Mr. Sakumoto?

1 MR. SAKUMOTO: Thank you, Commissioner
2 Wong.

3 I think that, you know, if we had 30 days
4 to come up with a draft and then circulate it to the
5 parties and give them an opportunity to review and
6 comment on it, that should probably be adequate.
7 That's my view.

8 COMMISSIONER WONG: Thank you.
9 County of Maui?

10 CHAIRPERSON SCHEUER: Maui always asks for
11 more time.

12 COMMISSIONER WONG: So 20 -- just joking.
13 Mr. Hopper?

14 MR. HOPPER: Thirty days would be -- I
15 think would be adequate with the understanding that
16 if the parties -- if the parties have a recent
17 agreement, they could separately file something with
18 the Commission explaining their concerns, and then if
19 the -- I don't know if the Commission can say, okay,
20 30 days hasn't happened, and we can defer additional
21 time by the Chair's authority. I think 30 should be
22 adequate, though.

23 COMMISSIONER WONG: And Ms. Apuna, OP?

24 MS. APUNA: Yeah, I think 30 days is
25 reasonable.

1 CHAIRPERSON SCHEUER: I want to recognize
2 Commissioners Ohigashi, then Giovanni.

3 COMMISSIONER OHIGASHI: Mr. Chair, my
4 recommendation is that we continue this matter for
5 two months, 60 days, and -- for hearing for
6 determination on two months and give them -- because
7 they are trying to work it out without any kind of
8 structure, give them the opportunity to try to work
9 it out. And if they cannot work it out, then they
10 should file one week before the hearing their
11 position.

12 CHAIRPERSON SCHEUER: You said 60 days
13 before --

14 COMMISSIONER OHIGASHI: Right. 60 days
15 just because they all mentioned 30 days, and I'm a
16 lawyer and I know there will be things.

17 CHAIRPERSON SCHEUER: Commissioner
18 Giovanni.

19 COMMISSIONER GIOVANNI: Thank you, Chair.

20 I just wanted to get a clarification from
21 the parties that they're -- they have the same vision
22 of a scope when they're talking about a timeline.

23 So, for example, if they're just talking
24 about what is going to be done and who is going to
25 have responsibility, that's a lot simpler than what

1 OP's suggestion and what the County's suggestion
2 which is that they would also work out a plan for
3 implementation in terms of timeline and some
4 demonstration of capacity to execute.

5 So my question goes back to the parties,
6 what is the scope that you expect to deliver within
7 30 to 60 days?

8 MR. McFARLIN: Commissioner Giovanni, the
9 scope of what I was thinking of is to address the
10 conditions and which parties would be responsible for
11 that. That's the limit of my scope for that time
12 period. Thank you.

13 CHAIRPERSON SCHEUER: Mr. Sakumoto?

14 MR. SAKUMOTO: I think one of the things
15 that it sounds like both the County and OP are
16 expecting if we do a stipulation is, in addition to
17 the conditions, some allocation of the
18 representations, namely, you know, going through the
19 100 or so Findings of Fact and making sure it's
20 clear, you know, which Findings of Fact are
21 attributable to which project.

22 So, you know, my thought would be in
23 addition to some agreement on allocating the
24 condition, it would be on the Findings of Fact as
25 well. So I don't know if that answers your question,

1 Commissioner Giovanni, but I think that that would be
2 the initial effort, and then putting that in a
3 document, you know, a stipulation between the parties
4 attached to which would be a proposed order so that
5 if the Commission were willing to follow the
6 agreement of the parties, an order would be already
7 provided for them to consider.

8 COMMISSIONER GIOVANNI: That's helpful.

9 CHAIRPERSON SCHEUER: Okay. Maui County,
10 did you have anything to add in response to Mr. -- to
11 Commissioner Giovanni's question?

12 MR. HOPPER: I think we would agree with
13 Mr. Sakumoto that the proposed order for the
14 conditions and representations, and at this time
15 wouldn't include the ongoing enforcement issues, the
16 development plan, or the financial capability issues
17 which could be handled after the bifurcation if it's
18 granted.

19 CHAIRPERSON SCHEUER: Ms. Apuna?

20 MS. APUNA: I think we agree with Mr.
21 Sakumoto and the County. Although I don't know if --
22 if it -- I haven't thought about this enough maybe,
23 but the ability of the Petitioner to move forward
24 after bifurcation, if bifurcation is granted, that
25 they do have that ability. If they provide the

1 information as far as financial capability and
2 schedule and things of that sort, everything, that
3 would be in their best interest to address those
4 things in this particular process rather than wait
5 for the Commission to require it at a later date in a
6 different procedure potentially an OSC.

7 So I would think that it would be in
8 Petitioner's best interest to put that information
9 forward as part of -- or in addition to the decision
10 of the conditions and the Findings of Fact.

11 CHAIRPERSON SCHEUER: Commissioner
12 Giovanni?

13 COMMISSIONER GIOVANNI: Yeah, just as I
14 suspected, all four of the parties has a little bit
15 different vision what was to be delivered in terms of
16 the scope. I in particular agree with Ms. Apuna that
17 I'd rather grant a little more time and get a little
18 more definition in the work.

19 I agree with Mr. Sakumoto in terms of the
20 basics, but I'd also like to see some representation
21 by the parties in their ability to execute, so I'd
22 grant a little more time and deferment to address
23 that up-front rather than after a consideration for
24 bifurcation, and then having to deal with it then.
25 That's just my opinion.

1 CHAIRPERSON SCHEUER: Thank you,
2 Commissioner Giovanni.

3 At this point in our proceedings, what I'd
4 like to do is to ask for somebody to offer a motion
5 for the Commission's consideration.

6 Now, we have before us a motion seeking a
7 bifurcation, so we can actually deny or accept, or we
8 could move to defer as well.

9 COMMISSIONER WONG: Chair?

10 CHAIRPERSON SCHEUER: Commissioner Wong.

11 COMMISSIONER WONG: Yeah, I want to move to
12 defer the bifurcation motion for 60 days with a
13 hearing on November 21st with all the parties
14 involved, should submit all written documents or
15 position statements by November 5th to everyone
16 that's involved, and then we'll go from there.

17 CHAIRPERSON SCHEUER: Would you be willing
18 to add to authorize the Chair to sign the order
19 affecting this motion?

20 COMMISSIONER WONG: Of course.

21 CHAIRPERSON SCHEUER: Commissioner Cabral?

22 VICE CHAIR CABRAL: I'd like to second that
23 but give it a friendly amendment that if all parties
24 involved request additional time, that that can be
25 granted up to an additional 60 days if all parties

1 involved with the matter agree.

2 CHAIRPERSON SCHEUER: The movant. Mr.
3 Wong?

4 COMMISSIONER WONG: Yeah, sure, Nancy, no
5 problem.

6 COMMISSIONER OHIGASHI: You mean at the
7 discretion of the Chair?

8 COMMISSIONER WONG: Discretion of -- yes.

9 CHAIRPERSON SCHEUER: Okay. Would you
10 restate the motion just so our record is really
11 clear, Mr. Wong?

12 COMMISSIONER WONG: Okay, so I would like
13 to move to defer this for 60 days with a hearing on
14 November 21st where all parties should submit all
15 written documents or position statements by
16 November 5th for the -- and then the Chair can sign
17 the document order, and with -- also the Chair has
18 the discretion to extend this for 60 days.

19 CHAIRPERSON SCHEUER: If all parties agree
20 to such an extension.

21 COMMISSIONER WONG: Yes.

22 CHAIRPERSON SCHEUER: And that's the motion
23 you're willing to second, Ms. Cabral?

24 VICE CHAIR CABRAL: Yes.

25 CHAIRPERSON SCHEUER: Okay. There is a

1 motion before us, folks. We are in discussion.

2 COMMISSIONER WONG: Chair.

3 CHAIRPERSON SCHEUER: Commissioner Wong.

4 COMMISSIONER WONG: Talk about my motion.
5 It's just that it appears that most of the parties
6 after we talk to them are in agreement that they want
7 to work out something. Now, what is that something.
8 And as Commissioner Ohigashi says, since he is a
9 lawyer, he knows sometimes they need more time than
10 less time, so that's why I did the motion.

11 CHAIRPERSON SCHEUER: Thank you.

12 Did you want to speak to it, Commissioner
13 Cabral?

14 VICE CHAIR CABRAL: Exactly, I'm happy that
15 all parties are in agreement that they should be able
16 to work it out, and I agree. But when you've got
17 four different parties and they all actually have
18 a -- it's a box. They all have a different
19 perspective to what's inside that box, so I think we
20 need to have potentially the ability to have more
21 time in the event between getting more complicated,
22 or the fact with COVID going on, it may not be so
23 easy to get together one afternoon to deal, you know,
24 yours is mine, both, A or B or both, you know. So I
25 wanted to have that extra time, but I think it's

1 excellent that all the -- everybody's willing to work
2 together. Thank you.

3 CHAIRPERSON SCHEUER: Thank you,
4 Commissioner Cabral.

5 Commissioner Chang followed by Commissioner
6 Okuda.

7 COMMISSIONER CHANG: Thank you, Mr. Chair.
8 Just a point of clarification on the
9 amended motion, that the Chair may sign the extension
10 for an additional 30 days, but it's not to sign the
11 stipulated order. It's just the extension, correct?

12 CHAIRPERSON SCHEUER: That is correct. I'm
13 being authorized to do -- well, there's an order that
14 has to effectuate this motion, so I'm being delegated
15 the authority to sign that so that the parties can
16 get a written order expressing what the Commission
17 has done today if it -- if the motion prevails.

18 And then second of all, the ability, if the
19 parties all agree for an extension, but not the
20 stipulated order.

21 COMMISSIONER CHANG: Very good, thank you.

22 CHAIRPERSON SCHEUER: Thank you very much,
23 Commissioner Chang, for the clarification.

24 COMMISSIONER CHANG: Sure.

25 EXECUTIVE OFFICER: If I may --

1 CHAIRPERSON SCHEUER: Mr. Okuda.

2 EXECUTIVE OFFICER: I'm sorry --

3 CHAIRPERSON SCHEUER: Mr. Orodanker.

4 EXECUTIVE OFFICER: Yeah, 11/21 is actually
5 a Saturday. I think you meant 11/19.

6 CHAIRPERSON SCHEUER: If there is no
7 objections from Mr. Wong or Ms. Cabral, the motion
8 will reflect that erroneous date.

9 VICE CHAIR CABRAL: No objection.

10 CHAIRPERSON SCHEUER: We won't require you
11 to come in or Riley to come in on a Saturday during
12 the pandemic.

13 Commissioner Okuda.

14 COMMISSIONER OKUDA: Thank you, Mr. Chair.

15 Although it's not part of the main motion,
16 I would urge the appropriate parties to provide the
17 financial information, the timeline and the other
18 items suggested by Commissioner Giovanni. I
19 personally have concerns on those issues, and it's --
20 it probably would be in the interest of everyone if
21 those issues are addressed earlier than later. Yeah,
22 it's true we can issue an order to show cause
23 possibly after bifurcation, but we might as well get
24 to the points which seem to be of some concern, so I
25 would urge everyone that even though it's not part of

1 the main motion, that the information which
2 Commissioner Giovanni suggested and listed also be
3 provided ahead of the next meeting, because I believe
4 that information is relevant and material in deciding
5 how to proceed going forward in this matter.

6 Thank you, Mr. Chair.

7 CHAIRPERSON SCHEUER: Thank you.

8 Commissioners, are there further -- did you
9 raise your hand, again, Commissioner Chang?

10 COMMISSIONER CHANG: Yeah, I did. And
11 thank you, Mr. Chair.

12 My only concern about having as a
13 precondition to the bifurcation the information
14 regarding the movant's financial capabilities, if
15 that's a condition, then my fear is that we're going
16 to have a situation where we're going -- that it will
17 not be -- it won't -- in my mind, it won't be clean.
18 Clean in the sense of if -- if Mr. Sakumoto's
19 clients, it's very clear that they have complied
20 with -- substantially complied with most of the
21 conditions of the D&O. And if we wait for the
22 bifurcation -- or if we have the bifurcation done
23 after we're satisfied that Mr. McFarlin's clients
24 have the ability, we may not be able to grant that
25 motion. I mean the bifurcation may hold up the

1 ability to potentially revert the Piihana property.

2 So in my view, it is -- I think it is a
3 procedural matter, the bifurcation. The issues about
4 financial abilities, to me that's a substantive issue
5 about whether they're able to proceed. So I'm not as
6 wedded to having all of that information.

7 But I think the parties will work it out
8 and they will come forward with what necessarily has
9 to be done, but I fear that it will become too
10 confusing if we condition the bifurcation to having
11 all of this information showing the ability of Mr.
12 McFarlin's clients to proceed, because to date we
13 haven't gotten it.

14 And I think an additional 30 -- 60 days, we
15 may not get it either, so that's my only comment.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Chang.

18 Commissioner Okuda followed by Commissioner
19 Giovanni.

20 COMMISSIONER OKUDA: Yes, thank you.

21 And to answer Commissioner Chang, my
22 intention was not to have this information be a part
23 of a precondition. I just viewed it as relevant
24 information in helping me make a decision. And the
25 amount of relevance, I'm not saying it's going to be

1 of high relevance, low relevance. I think it's of
2 some relevance, and I'm not -- so I wasn't intending
3 to imply that this information, whether it shows
4 financial ability or lack of financial ability really
5 is going to be ultimately determinative of the final
6 decision.

7 It's just because the County of Maui
8 raised -- or certain parties raised certain questions
9 or issues, so I thought for a complete record I would
10 ask that, you know, the appropriate parties submit
11 the information.

12 If they choose not to submit the
13 information, I don't view it as a lack of a condition
14 precedent which would prevent granting or denying a
15 bifurcation, so it's not intended to be determinative
16 of anything. Thank you.

17 CHAIRPERSON SCHEUER: Thank you.

18 Commissioner Giovanni?

19 COMMISSIONER GIOVANNI: So I concur with
20 Commissioner Okuda. I don't think it -- my interest
21 in having access and visibility to that information
22 rises to making it a condition of the motion before
23 the Commission at this time, but I do think it's
24 relevant information.

25 You know, I go back to an earlier comment.

1 It was made in testimony today by Mr. McFarlin, which
2 he said that they'd have to build and sell some of
3 the affordable housing to generate revenues of
4 profit, so they could follow through on the execution
5 of other conditions. That concerns me. I want to
6 understand that better, and the sooner I understand
7 it, the better.

8 So I concur with Mr. Okuda, I think it's
9 relevant information. I would urge the parties to
10 make that effort to clarify the capabilities of the
11 parties, but it's not a condition of the motion and I
12 recognize that.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Giovanni.

15 Other Commissioners who wish to speak to
16 the motion before us? Is there anything further?

17 I will vote in favor of the motion because
18 I view it as, in this convoluted and screwed up
19 docket, the possible pathway forward to getting --
20 just to remind you all, 600 affordable units,
21 100 percent affordable in this Piihana section, 600
22 units that were supposed to be delivered.

23 And I don't know if this is what opens up
24 the pathway to the County enforcing against the
25 current landowner and attaching all of his assets and

1 selling the properties to an affordable housing
2 developer, I don't know how we're going get there
3 eventually, but at least this is part of the pathway
4 there to fulfill our commitment.

5 Because clearly representations were made
6 by C. Brewer which has gone poof, that they would
7 provide these units, and now all these other parties
8 are holding that bag. It's our job to try and hold
9 them to those representations.

10 Anything further? If not, Mr. Orodener,
11 will you please poll the Commission.

12 EXECUTIVE OFFICER: Thank you, Mr. Chair.

13 The motion is to defer this matter for
14 60 days with a hearing to be held on 11/19. The
15 parties should submit all written documents or
16 position statements by 11/5. The Chair is authorized
17 to sign an order with regard to this deferral and to
18 add another 60 days to the time period if all parties
19 agree and at the discretion of the Chair.

20 CHAIRPERSON SCHEUER: Mr. Orodener, let me
21 clarify, I heard both 30 and 60 during the discussion
22 of the additional --

23 EXECUTIVE OFFICER: Oh, 60 days. 30 was
24 from past memory. It's all 60 days.

25 CHAIRPERSON SCHEUER: 60 and 60.

1 EXECUTIVE OFFICER: Defer this matter for
2 60 days with an option for the Chair at his
3 discretion to defer for another 60 days.

4 CHAIRPERSON SCHEUER: Thank you. Okay.

5 EXECUTIVE OFFICER: Commissioner Wong?

6 COMMISSIONER WONG: Aye.

7 EXECUTIVE OFFICER: Commissioner Cabral?

8 VICE CHAIR CABRAL: Aye.

9 EXECUTIVE OFFICER: Commissioner Giovanni?

10 COMMISSIONER GIOVANNI: Aye.

11 EXECUTIVE OFFICER: Commissioner Chang?

12 COMMISSIONER CHANG: Aye.

13 EXECUTIVE OFFICER: Commissioner Aczon?

14 VICE CHAIR ACZON: Yes.

15 EXECUTIVE OFFICER: Commissioner Ohigashi?

16 COMMISSIONER OHIGASHI: Yes.

17 EXECUTIVE OFFICER: Commissioner Okuda?

18 COMMISSIONER OKUDA: Yes.

19 EXECUTIVE OFFICER: Chair Scheuer?

20 CHAIRPERSON SCHEUER: Aye.

21 EXECUTIVE OFFICER: Thank you, Mr. Chair.

22 The motion passes unanimously with eight
23 affirmative votes.

24 CHAIRPERSON SCHEUER: Okay. Thank you very
25 much. We have no further business for today. A

1 written order will be forthcoming on the motion that
2 we just took. I thank everybody for their patience
3 this morning with our delays, and I declare that
4 we're in recess and we reconvene tomorrow morning via
5 ZOOM at 9:00 A.M.

6 (The proceedings were recessed at
7 22:01 P.M.)

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CERTIFICATE

1 STATE OF HAWAII)
2) SS.
3 COUNTY OF HONOLULU)

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on September 9, 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 9th day of September, 2020, in
16 Honolulu, Hawaii.

17
18
19 /s/ Jean Marie McManus
20 JEAN MARIE McMANUS, CSR #156
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