

LAND USE COMMISSION  
STATE OF HAWAII'I  
Hearing held on May 13, 2021  
Commencing at 9:00 a.m

Held via ZOOM by Interactive Conference Technology

VI. Call to Order

VII. CONTINUED HEARING AND ACTION

All-791 HG Kaua'i Joint Venture LLC-HoKua Place  
(Kaua'i)

Petition to Amend the Land Use District  
Boundary of Certain Lands Situated at Kapa'a,  
Island of Kaua'i, State of Hawai'i, Consisting  
of 97 Acres from the Agriculture District, to  
the Urban District, Tax Map Key No.  
(4)4-3-003:POR 001

VIII. LUC LEGISLATIVE UPDATE

Report by Staff on bills passed in the  
Legislature that impact the Land Use Commission

VI. ADJOURNMENT

Before: Jean Marie McManus, Hawaii CSR #156

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APPEARANCES:

JONATHAN LIKEKE SCHEUER, Chair (Oahu)  
NANCY CABRAL, Vice Chair (Big Island - present Oahu)  
EDMUND ACZON, Vice Chair (Oahu)  
GARY OKUDA (Oahu)  
LEE OHIGASHI (Maui)  
ARNOLD WONG (Oahu)  
DAWN CHANG (Oahu)  
DAN GIOVANNI (Kauai)

STAFF:

LINDA CHOW, ESQ.  
Deputy Attorneys General

DANIEL ORODENKER, Executive Officer  
RILEY K. HAKODA, Chief Clerk  
SCOTT DERRICKSON, Chief Planner  
NATASHA A. QUINONES, Program Specialist

BRYAN YEE, ESQ.  
ALISON KATO, ESQ.  
Deputy Attorney General  
RODNEY FUNAKOSHI, Planning Program Administrator  
State Office of Planning  
State of Hawaii

CHRIS DONOHOE, ESQ.  
Kaua'i Corporation Counsel  
JODI HIGUCHI SAYEGUSA, Kaua'i Planning Dept.  
County of Kaua'i

WILLIAM YUEN, ESQ.  
JANNA AHU, ESQ.  
For Petitioner A11-791  
HG Kaua'i Joint Venture LLC

BIANCA ISAKI, ESQ.  
LANCE COLLINS, ESQ.  
For Intervenor

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1                   CHAIRPERSON SCHEUER: Aloha mai kakou and  
2 good morning.

3                   This is the May 13th, 2021 Land Use  
4 Commission meeting which is being held using  
5 interactive conference technology linking video  
6 conference participants and other individuals of the  
7 public via the ZOOM internet conferencing program to  
8 comply with State and County official operational  
9 directives during the COVID-19 pandemic. Members of  
10 the public are able to view the meeting via the ZOOM  
11 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 your microphone.  
15 Before speaking, please state your name and identify  
16 yourself for the record. Please also be aware that  
17 for all meeting participants that this meeting is  
18 being recorded on the digital record of the ZOOM  
19 meeting. Your continued participation is your  
20 implied consent to be part of the public record of  
21 the event. If you do not wish to be part of the  
22 public record, you should exit the meeting now.

23                   This ZOOM conferencing technology allows  
24 the Parties and each participating Commissioner  
25 individual remote access to the meeting proceedings

1 via our own personal digital devices.

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

9           There's one agenda item on today's agenda  
10 where public testimony will be allowed regarding  
11 legislative updates. If you are calling into the  
12 meeting via telephone function rather than via  
13 software, and you wish to testify at that time, you  
14 would use the key sequence \*9 to raise your hand and  
15 \*6 to ask to be unmuted. I will repeat those  
16 directions when the time comes.

17           I will note for everyone at this time that  
18 we will attempt to take breaks about ten minutes  
19 every hour.

20           My name is Jonathan Likeke Scheuer and I  
21 currently have the pleasure and honor as serving as  
22 the Land Use Commission Chair. Along with me  
23 Commissioners Edmund Aczon, who despite his zoom  
24 background is on Oahu rather than in Lahaina;  
25 Commissioner Dawn Chang, who appears to be on either

1 Haleakala or Mauna Kea, is also on the Island of  
2 Oahu, Gary Okuda, Arnold Wong, our Hawaii Island  
3 Commissioner Nancy Cabral and our Executive Officer  
4 Dan Orodener, Chief Planner, Scott Derrickson, Chief  
5 Clerk Riley Hakoda, our Deputy Attorney General Linda  
6 Chow, our Program Specialist Natasha Quinones, and  
7 our Court Reporter, Jean McManus are all on the  
8 Island of Oahu. Commissioner Lee Ohigashi is on Maui  
9 and Commissioner Dan Giovanni is holding it up on  
10 Kauai. We currently have eight seated Commissioners  
11 of a possible nine.

12 I want to address a little bit of  
13 scheduling for today. Commissioner Lee Ohigashi, you  
14 have a court appearance that you have to make today?

15 COMMISSIONER OHIGASHI: Yes, I'll be gone  
16 from 9:30, I think, thereabouts, until probably 10:15  
17 at the latest.

18 CHAIRPERSON SCHEUER: Okay. So what I  
19 would like to ask for -- also Commissioner Giovanni,  
20 you need to leave the meeting at what time today?

21 COMMISSIONER GIOVANNI: 12 noon until  
22 approximately 2:00 P.M., maybe less.

23 CHAIRPERSON SCHEUER: What I would like to  
24 ask for the Commissioners to consider is that for the  
25 purposes of the efficiency of our proceedings, I

1 would like to have somebody consider making a motion  
2 that we move our agenda item VIII LUC Legislative  
3 Update to 9:30, to the point of which Commissioner  
4 Ohigashi has to leave, so that we can conduct that  
5 business and then he will not have to go back and  
6 review any record.

7 COMMISSIONER GIOVANNI: I so move.

8 CHAIRPERSON SCHEUER: Moved by Commissioner  
9 Giovanni and seconded by Commissioner Arnold Wong.  
10 Any discussion on the motion? Seeing none, Mr.  
11 Orodenker, would you roll call the Commission?

12 EXECUTIVE OFFICER: Thank you, Mr. Chair.

13 CHAIRPERSON SCHEUER: Commissioner Giovanni  
14 made the motion, Commissioner Wong seconded it.

15 EXECUTIVE OFFICER: To address the agenda.

16 Commissioner Giovanni?

17 COMMISSIONER GIOVANNI: Aye.

18 EXECUTIVE OFFICER: Commissioner Wong?

19 COMMISSIONER WONG: Aye.

20 EXECUTIVE OFFICER: Commissioner Aczon?

21 VICE CHAIR ACZON: Aye.

22 EXECUTIVE OFFICER: Commissioner Cabral.

23 COMMISSIONER CABRAL: Yes.

24 EXECUTIVE OFFICER: Commissioner Chang?

25 COMMISSIONER CHANG: Aye.

1 EXECUTIVE OFFICER: Commissioner Ohigashi?

2 COMMISSIONER OHIGASHI: Aye.

3 EXECUTIVE OFFICER: Commissioner Okuda?

4 COMMISSIONER OKUDA: Yes.

5 EXECUTIVE OFFICER: And Chair Wong -- Chair  
6 Scheuer?

7 CHAIRPERSON SCHEUER: Aye.

8 EXECUTIVE OFFICER: Thank you, Chair. The  
9 motion passes unanimously.

10 COMMISSIONER OHIGASHI: Mr. Chair, I do  
11 have a disclosure that I have reviewed the last, I  
12 believe it was 15 minutes of the hearing that I  
13 missed yesterday, I reviewed it.

14 CHAIRPERSON SCHEUER: Thank you,  
15 Commissioner Ohigashi.

16 Are there other Commissioners with other  
17 similar statements? Commissioner Wong and  
18 Commissioner Chang.

19 COMMISSIONER WONG: I reviewed the portions  
20 that I missed, especially Commissioner Chang's  
21 discussion with the witnesses yesterday. It was very  
22 informative. Thank you, Commissioner Chang.

23 CHAIRPERSON SCHEUER: Commissioner Chang?

24 COMMISSIONER CHANG: Yes, I too reviewed  
25 the recordings of the portion of the meeting that I



1 missed. Thank you very much.

2 CHAIRPERSON SCHEUER: Anyone else?

3 With that we are on continued hearing on  
4 Agenda item related to Docket A11-791 HG Kaua'i Joint  
5 Venture, LLC-HoKua Place (Kaua'i) Petition to Amend  
6 the Land Use District Boundary of Certain Lands  
7 Situated at Kapa'a, Island of Kaua'i, State of  
8 Hawai'i, consisting of 97 Acres from the Agriculture  
9 District to the Urban District, Tax Map Key No. (4)  
10 4-3-003: a portion of Lot 1.

11 Will the parties please identify yourselves  
12 for the record?

13 MR. YUEN: Good morning, Mr. Chairman and  
14 Commissioners, William Yuen and Janna Ahu on behalf  
15 of HG Kauai Joint Venture, LLC.

16 CHAIRPERSON SCHEUER: Thank you, Mr. Yuen.

17 MR. DONOHOE: Good morning, Chair,  
18 Commissioners, Deputy County Attorney Chris Donohoe  
19 on behalf of the County of Kaua'i. Also present as  
20 representative is Deputy Director of Planning Jodi  
21 Higuchi Sayegusa.

22 MS. KATO: Good morning, Deputy Attorney  
23 General, Alison Kato. Also here is Rodney Funakoshi  
24 from the Office of Planning. Thank you.

25 CHAIRPERSON SCHEUER: Thank you, Ms. Kato.

1 MS. ISAKI: Good morning, Bianca Isaki with  
2 Lance Collins here for Intervenor Liko-O-Kalani  
3 Martin who is also here. Thank you.

4 CHAIRPERSON SCHEUER: Thank you very much.

5 So where we left off was we are hopefully  
6 concluding the evidentiary presentations by the  
7 Petitioner, two witnesses left.

8 Mr. Tom Nance and Mr. Ron Agor; is that  
9 correct, Mr. Yuen?

10 MR. YUEN: Yes. Mr. Nance is here.

11 CHAIRPERSON SCHEUER: Commissioner  
12 Giovanni.

13 COMMISSIONER GIOVANNI: I'm trying to  
14 recall exactly -- I can look it up -- but my  
15 understanding was that the first witness, Mr.  
16 Bruckner (sic) was going to come back as well for  
17 followup examination. Is that the case?

18 CHAIRPERSON SCHEUER: I believe we reserved  
19 the right to recall the witness if we needed him.

20 Is that the same understanding the rest of  
21 the parties have, Petitioner?

22 MR. YUEN: Yes.

23 MR. DONOHOE: Yes, Chair.

24 COMMISSIONER GIOVANNI: SO in term of  
25 logistics, would the timing of that be at the

1 conclusion of the two witnesses that are coming  
2 before us today? Do we have to make the call at that  
3 point in time?

4 CHAIRPERSON SCHEUER: We can certainly  
5 assess the proceedings at that time to see if we want  
6 to recall the witness, as was offered by the  
7 Petitioner.

8 COMMISSIONER GIOVANNI: Very good.

9 CHAIRPERSON SCHEUER: Just to check, Ms.  
10 Kato, do you share that understanding?

11 MS. KATO: Yes.

12 CHAIRPERSON SCHEUER: Intervenor?

13 MR. COLLINS: Our understanding was that  
14 there are certain exhibits that will only be  
15 considered if those individuals are available for  
16 further examination.

17 CHAIRPERSON SCHEUER: Can you expand on  
18 that?

19 MR. COLLINS: Let me see if I can pull up  
20 the exhibit numbers. There were a couple of exhibits  
21 that were submitted after the individual finished  
22 testifying, and my understanding was that we were in  
23 agreement that those could come in subject to the  
24 witness' being available for further examination as  
25 to those exhibits.

1 CHAIRPERSON SCHEUER: Commissioner Okuda?

2 COMMISSIONER OKUDA: Thank you, Mr. Chair.

3 Speaking for myself only, and I request  
4 that the Petitioner be sure that at the close of his  
5 case he has put on all evidence that he intends to  
6 put on regarding the case; or to put it differently,  
7 I make a request that at the end of the Petitioner's  
8 case, the Petitioner is sure that the Petitioner is  
9 not going to come back later and say, oh, by the way,  
10 I've got something else I'm going to raise.

11 My statement is not to indicate any  
12 prejudgment of anything, but I just want to be sure  
13 that when the Petitioner finishes his case, and he  
14 calls all his witnesses, those are all his witnesses  
15 with respect to his case in chief.

16 Thank you, Mr. Chair.

17 CHAIRPERSON SCHEUER: Commissioner  
18 Giovanni.

19 COMMISSIONER GIOVANNI: Yeah, it's in the  
20 testimony that Mr. Bruckner (sic) had been in the  
21 process of preparing a financial pro forma for the  
22 project, subsequent to his testimony, and that, at  
23 least my understanding was that that would be  
24 presented, that would be completed and made available  
25 to the Commission before the evidentiary case from

1 the Petitioner is concluded.

2 That's my understanding. I don't know if  
3 we have an update from Mr. Yuen on that.

4 CHAIRPERSON SCHEUER: Mr. Yuen, ask you to  
5 respond to Commissioner Giovanni's question first.

6 MR. YUEN: Mr. Chairman, we have  
7 prepared -- and there's a stipulation to submit  
8 Exhibits 44 and 46. Exhibit 46 is the contract  
9 between the Petitioner that the Commission requested.  
10 We are prepared to move that into evidence.

11 Exhibit 44 is the financial pro forma for  
12 the project. We are prepared to have Ron Agor  
13 testify to the pro forma.

14 COMMISSIONER GIOVANNI: Thank you.

15 CHAIRPERSON SCHEUER: Mr. Donohoe.

16 MR. DONOHOE: From a logistical standpoint,  
17 I had thought I heard yesterday it was the intent for  
18 the hearing this morning to go to 2:30. Just working  
19 out logistics with my witnesses. Is that still the  
20 timeline?

21 CHAIRPERSON SCHEUER: That is still the  
22 timeline.

23 MR. DONOHOE: Okay, thank you, Chair.

24 CHAIRPERSON SCHEUER: To go back to the  
25 main questions raised by Commissioners Okuda and

1 Ohigashi -- excuse me -- and Commissioner Giovanni.

2 So my understanding was this, and I will  
3 ask the Petitioner to respond first.

4 Unless the Commission chose to ask  
5 affirmatively for the recall of Mr. Bruckner (sic),  
6 you were going to be done presenting witnesses today,  
7 and done presenting any additional evidence today.

8 Is that correct?

9 MR. YUEN: It appears that it's going to be  
10 necessary to recall Mr. Bracken. I could do it maybe  
11 today or the next time we appear.

12 CHAIRPERSON SCHEUER: And you want to  
13 recall Mr. Bracken for what reason?

14 MR. YUEN: Well, it appears that there are  
15 questions, certainly from Mr. Okuda's remarks, and I  
16 think that it's going to be necessary to have Mr.  
17 Bracken answer questions that the Commissioners have.

18 CHAIRPERSON SCHEUER: Okay. I'm sorry,  
19 when I said Bruckner earlier, I meant Bracken.

20 Commissioner Giovanni?

21 COMMISSIONER GIOVANNI: I also said  
22 Bruckner when I meant Bracken. Let the record  
23 correct that.

24 I believe that the request we made when Mr.  
25 Bracken was about to conclude his testimony in the

1 midst of cross-examination by the Commissioners, we  
2 said we might like to recall him for further  
3 cross-examination after we heard the other parties'  
4 presentations.

5           Is that still possible? So that wouldn't  
6 be today, that would be after we heard from the  
7 County, the State and the Intervenor?

8           CHAIRPERSON SCHEUER: So this is my  
9 inclination as the Chair. Sorry, let me --  
10 Commissioner Okuda first.

11           COMMISSIONER OKUDA: Yes, my suggestion,  
12 and it's only suggestion, is that the Petitioner put  
13 on all his evidence, or all its evidence, all its  
14 evidence before Petitioner closes their case.

15           And let me state the reason why, so that no  
16 one thinks there's a hide the ball here.

17           I believe that there may -- and I'm just  
18 saying may -- I make no pre-judgements about this,  
19 but there may be a motion that is brought about the  
20 sufficiency of the evidence and sufficiency of the  
21 record. So at least for me personally, I'm giving  
22 notice to all parties that if a party has evidence  
23 that it intends to present, it's got to present all  
24 the evidence before such time that type of issue, for  
25 example, some type of dispositive motion is made, and

1 it is going to be too late to say, oh, wow, let me  
2 have more time, I'll go fix it.

3 Now is the time for parties who are  
4 presenting their case to present their evidence, and  
5 when the evidence is closed, that's it.

6 And that's my suggestion and position.

7 Thank you, Mr. Chair

8 CHAIRPERSON SCHEUER: Thank you,  
9 Commissioner Okuda. I might have a followup. I'll  
10 recognize Mr. Collins first.

11 MR. COLLINS: Thank you, Mr. Chair.

12 Our position under HRS 91-105, the  
13 Petitioner who has initiated these proceedings has  
14 the burden of proof and the burden of persuasion, and  
15 so before any other parties are required to put on  
16 any evidence, they have to meet their initial burden.

17 So we would strongly agree with the  
18 position that the Petitioner must put on all evidence  
19 that it wishes the Commission to consider before any  
20 other party is required to produce any evidence.

21 Thank you.

22 CHAIRPERSON SCHEUER: Mr. Collins, while  
23 you deal with citations, you took the point that I  
24 was going to raise out of my mouth in questioning of  
25 Mr. Okuda. Just because -- well, Commissioner Okuda



1 directed this to all parties.

2 I want to highlight that there is a  
3 particular burden for Petitioner in this kind of  
4 proceeding, is that not correct, Commissioner Okuda?

5 COMMISSIONER OKUDA: Mr. Chair, that is  
6 correct, that the Petitioner bears not only the  
7 burden of proof pursuant to the statute, but also the  
8 burden of coming forward with the evidence, and the  
9 burden of persuasion. And if anyone disagrees with  
10 that, I'm willing to be educated.

11 But, yes, that is the burden that the  
12 Petitioner faces. And, again, I don't believe any of  
13 us are prejudging the outcome, but just to make the  
14 process clear, if any Petitioner fails to meet that  
15 burden, then it very well may be that the decision  
16 can be made at that point in time.

17 But, again, I'm not prejudging anything;  
18 I'm not prejudging anything.

19 Thank you, Mr. Chair.

20 CHAIRPERSON SCHEUER: Thank you,  
21 Commissioner Okuda.

22 So there are two issues I want to take up.  
23 First issue, and actually sort of clarify my response  
24 to Mr. Donohoe regarding 2:30.

25 If the way our proceedings go today is that

1 the Petitioner concludes their evidentiary portion  
2 with or without the Commission choosing to recall Mr.  
3 Bracken, I had said that we would conclude by 2:30 to  
4 allow an hour of discussion on our legislative  
5 matter. So we actually would end at 3:30 today, not  
6 2:30.

7 Does that clarify my response to you  
8 earlier, Mr. Donohoe?

9 MR. DONOHOE: Yes, Chair, it does. Thank  
10 you.

11 COMMISSIONER GIOVANNI: I thought that was  
12 to allow time for the agenda item that we have now  
13 moved to 9:30.

14 CHAIRPERSON SCHEUER: That's correct. We  
15 were going to end at 2:30 to allow 2:30 to 3:30 that  
16 we are now moving to 9:30. So that clarification of  
17 my earlier confusing response out of the way.

18 Now, to the main subject of discussion that  
19 we are doing.

20 It is my intention, and I'm directing the  
21 Petitioner right now, that after these two witnesses,  
22 if the Commission does not choose to recall Mr.  
23 Bracken at that time, we're going to consider that  
24 you have concluded the evidentiary presentation, your  
25 presentation at that time. Mr. Yuen?

1 MR. YUEN: I may need to recall Mr. Bracken  
2 if the Commission chooses not to recall him.

3 CHAIRPERSON SCHEUER: Is he available  
4 today? Can you ensure that he is available today?

5 MR. YUEN: I have to double check.

6 CHAIRPERSON SCHEUER: Okay, sometime this  
7 morning, hopefully in the next hour while we are  
8 hearing from Mr. Nance, I expect to have an answer  
9 from you on that, please.

10 MR. YUEN: Yes.

11 CHAIRPERSON SCHEUER: Thank you.

12 Commissioner Okuda, your hand is still up,  
13 but that might be leftover.

14 COMMISSIONER OKUDA: Yes, Mr. Chair, I'm  
15 sorry. I will lower the hand.

16 CHAIRPERSON SCHEUER: With that, Mr. Nance,  
17 thank you for your patience.

18 Good morning. Can you say something so I  
19 can ensure that I can hear you?

20 THE WITNESS: Good morning. Can you hear  
21 me?

22 CHAIRPERSON SCHEUER: I can hear you, Tom.

23 Do you swear or affirm that the testimony  
24 you're about to give is the truth?

25 THE WITNESS: I do.

1 CHAIRPERSON SCHEUER: Please proceed with  
2 your direct, Mr. Yuen.

3 MS. AHU: Mr. Chair, may I share my screen?

4 CHAIRPERSON SCHEUER: Yes, you may. Thank  
5 you, Ms. Ahu.

6 TOM NANCE

7 Was called as a witness by and on behalf of the  
8 Petitioner, was sworn to tell the truth, was examined  
9 and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. YUEN:

12 Q Please state your name and address for the  
13 record.

14 A My name is Tom Nance. My business address  
15 is 560 North Nimitz Highway, Suite 213 in Honolulu.

16 CHAIRPERSON SCHEUER: One moment. Two  
17 issues. We now have the presentation correct. We're  
18 picking up some echo. You need to mute all but one  
19 microphone in the office that you're in. Try say  
20 something else.

21 MR. YUEN: Yes, I'm having -- we are on the  
22 same --

23 CHAIRPERSON SCHEUER: I'm still picking up  
24 some echo.

25 MR. YUEN: That's about as well as I can do

1 it.

2 CHAIRPERSON SCHEUER: Tom, can you say  
3 something?

4 THE WITNESS: Something.

5 CHAIRPERSON SCHEUER: Ms. McManus, is this  
6 acceptable?

7 COURT REPORTER: Now it is, thank you.

8 CHAIRPERSON SCHEUER: Please proceed.

9 Q (By Mr, Yuen): Mr. Nance, what is your  
10 profession and your business affiliation?

11 A I'm a civil engineer with specialty in  
12 hydrology. I'm president of a company doing business  
13 as Tom Nance Water Resource Engineering.

14 Q Can you please describe your background in  
15 hydrology?

16 A Well, I have a master's in civil  
17 engineering with a specialty in hydrology, and I've  
18 been working in that field since 1972.

19 And over that period of time, if you  
20 include wells that I've done internationally as well  
21 as here in Hawaii, that probably covers somewhere  
22 between 450 and 500 wells developed under my  
23 supervision.

24 MR. YUEN: I introduced into evidence  
25 Exhibit No. 21, which is Mr. Nance's resume.

1           Q       Mr. Nance, did you prepare an assessment of  
2 on-site well to provide potable water for HoKua  
3 Place?

4           A       Yes, it's in a memo I prepared earlier this  
5 year in February.

6           Q       Please describe the testing process used to  
7 evaluate the well site proposed at the water source  
8 for HoKua Place?

9           A       In 2006 a well was drilled in the southwest  
10 corner of the project site, at about a ground  
11 elevation of 25 feet. I don't believe it was ever  
12 surveyed more accurately than that.

13                   That well passed through overlying overly  
14 permeable alluvial formation, then through a series  
15 of clay layers, and essentially impermeable volcanics  
16 and at a depth of about 210 feet below the ground.  
17 It entered into permeable Koloa volcanic formation.  
18 The well was configured to draw exclusively from this  
19 lower formation.

20                   We tested it for 12 hours. The last  
21 ten-and-a-half hours of which at a rate of about  
22 530 gallons a minute to demonstrate that if the well  
23 were properly developed, properly designed and  
24 developed, it could be a viable source of supply for  
25 this project.

1           Also earlier this year I had a drilling  
2 contractor on Kauai, Barry Simmons of Oasis, he  
3 grabbed a sample. We sent it off to the mainland lab  
4 qualified to do testing for all regulated drinking  
5 water contaminants, and that testing also  
6 demonstrated that the well can produce potable water  
7 quality.

8           This well has a small eight-inch casing.  
9 Its alignment is relatively poor. There's other  
10 construction issues with it.

11           Might want to say for my own benefit that  
12 it was not my design or construction. I got involved  
13 during the pump testing. But it needs to be sealed  
14 with cement, according to the regulations of the  
15 State Water Commission, and a new well with proper  
16 diameter and proper construction should be installed  
17 in place to provide that source of supply.

18           The Bow Engineering has projected the  
19 maximum base requirement for the project at about  
20 610,000 gallons per day.

21           The Kaua'i Department of Water sizes wells  
22 to provide the maximum day supply in a 24-hour  
23 pumping day, that would translate to a little more  
24 than 400 gallons a minute.

25           The testing that we have done in the poorly

1 constructed well without proper development suggest  
2 that at least 500-gallons per minute is possible. So  
3 it's my opinion that, again, if the well were  
4 properly designed, properly constructed, developed by  
5 surging with a line shaft pump that it would be able  
6 to provide that supply.

7 I didn't mention in my earlier memo on the  
8 well, the finding of this moderate permeability,  
9 Koloa volcanic formation at substantial depth below  
10 sea level is not a unique one.

11 There are actually three other wells that  
12 have been developed with similar depth and similar  
13 configuration, two of which are about 4,000 feet to  
14 the northeast of the well that was drilled on the  
15 site.

16 And one of them is the Kaua'i Department of  
17 Water Wells, called the Kapa'a Homestead Well 3. I  
18 was involved in it's pump test, and it is established  
19 that this aquifer that's existing in this formation  
20 can be viably pumped.

21 Q Please summarize the test well results.

22 A Well, as I said, we pumped it at 530 -- I  
23 think I went over that part.

24 Q Please summarize your conclusions.

25 A Okay, there are several.



1           One is what I just stated, is that if the  
2 well is properly designed, properly constructed,  
3 properly developed by surging with a line shaft  
4 turbine pump, it will be able to provide the required  
5 supply for this project.

6           Because of the well's depth, it is going to  
7 be deeper than the current way that the State Water  
8 Commission regulates how far you can drill a well  
9 into the aquifer. Because of that, we will have to  
10 get a variance to go beyond their current limitations  
11 to drill only to one quarter of the depth of the  
12 basal lens, and we would be drilling to at least half  
13 of that basal lens.

14           So we would need to get a permit for that  
15 and that would have to be issued by State Commission  
16 on Water Resource Management.

17           The other thing is that the well is  
18 actually located on the makai side of what is called  
19 the UIC line. The UIC line establishes that  
20 injection wells can be installed on the makai of this  
21 UIC line, but not on mauka side.

22           Typically, most drinking water wells are  
23 located on the mauka side of the UIC line.

24           CHAIRPERSON SCHEUER: Mr. Nance, one  
25 moment. Commissioner Ohigashi is recognized. Do

1 you have to leave right now?

2 COMMISSIONER OHIGASHI: I was going to say  
3 I can stay to 9:40 if -- so I'm just curious.

4 CHAIRPERSON SCHEUER: So, Tom, if we can  
5 finish the response to this question, then we'll  
6 break from this agenda item and move to legislative  
7 agenda item and come back to you.

8 THE WITNESS: The final point I needed to  
9 make was describing on the UIC line. This well is  
10 located on the makai side of the UIC line.

11 When we had started to develop drinking  
12 wells on Kahului on Maui, we were putting wells on  
13 the makai side of UIC line, and up to that period of  
14 time, the Department of Health had not developed  
15 guidelines for what would be needed to certify a well  
16 for drinking water use that was on the makai side of  
17 that line.

18 They have that process in place. It's  
19 relatively recent, and it's for the drinking water  
20 wells that actually I was involved in developing on  
21 the makai side of the UIC line in Kahului aquifer on  
22 Maui.

23 So we would also, in order to get  
24 Department of Health certification of the well for  
25 drinking water use, we would have to go through that

1 process as well. It's a matter of informing other  
2 landowners around what the restrictions would be on  
3 their installation of individual wastewater treatment  
4 plants or injection wells due to the presence of a  
5 drinking water well.

6 So that concludes my testimony.

7 MR. YUEN: I just had one follow-up  
8 question if I could.

9 Q Do you expect that there would be any issue  
10 in getting a variance from the Commission on Water  
11 Resources?

12 A I don't. But what we would lay out is the  
13 process of how we would do it. Essentially, when we  
14 drill to that depth, I think we've got sufficient  
15 yield. We do what's called a CTD profile, which  
16 would be essentially a running profile of salinity  
17 and temperature with the depth through the water  
18 column.

19 That would be one piece of information that  
20 we would provide to the Water Commission to support  
21 the variance to go to this depth.

22 The other thing is that in the pilot bore  
23 hole, we would run an open pilot or pump test with an  
24 inflatable packer so that the pump test would only  
25 draw water below the packer in the freshwater zone,

1 and present that information.

2           Basically, they would be looking at, is  
3 there going to be a salinity issue if we drill to the  
4 depth that we need to get the yield?

5           So basically a satisfactory result of both  
6 CTD profile and the open bore hole pump test would be  
7 our way of demonstrating to the Water Commission that  
8 it would be viable at that depth.

9           And the reality is, there's a working  
10 history of the Kaua'i Department of Water's well at  
11 similar depth that has proved to be a viable source  
12 of water.

13           I hope that answers your question.

14           MR. YUEN: I have no further questions.

15           CHAIRPERSON SCHEUER: Thank you. We will  
16 take a break right now. We're going to move onto  
17 Agenda item regarding Legislative Updates from 9:30  
18 until 10:15.

19           Thank you, Commissioner Ohigashi, for  
20 sticking around a little past, then we will return  
21 back to our Agenda item and for the cross-examination  
22 of Mr. Nance.

23           MR. YUEN: What time do you anticipate  
24 returning?

25           CHAIRPERSON SCHEUER: Well, it depends in

1 part on how long it takes us to go through our  
2 legislative discussion.

3 Mr. Orodenker, do you know how long your  
4 direct presentation is going to take?

5 EXECUTIVE OFFICER: It's only going to take  
6 about 15, 20 minutes, and then questions by the  
7 Commissioners.

8 CHAIRPERSON SCHEUER: So what I think might  
9 happen, Mr. Yuen -- thank you for your question -- is  
10 that we might spend about a half hour to 35 minutes  
11 on this right now, take a ten-minute break and  
12 reconvene at 10:15. That's my anticipation at this  
13 time.

14 MR. YUEN: Thank you very much.

15 LUC Legislative Update

16 CHAIRPERSON SCHEUER: With that, we're  
17 going to take up Agenda item VIII, LUC Legislative  
18 Update, a report by Staff on bills passed in the  
19 legislature that impact the Land Use Commission.

20 Before we move to that Agenda item, let me  
21 confirm with Mr. Hakoda and Mr. Derrickson if there  
22 has been any written public testimony on this matter?

23 CHIEF CLERK: Mr. Chair, this is Riley. No  
24 public testimony on Agenda item VIII.

25 CHAIRPERSON SCHEUER: Are there any

1 attendees in the audience who wish to testify on our  
2 Agenda item VIII, LUC Legislative Update? If so, if  
3 you are accessing this meeting via ZOOM software, use  
4 the raise-your-hand function; or if accessing by  
5 telephone, press \*9 to raise your hand.

6 Anyone who wishes to testify on legislative  
7 matters? Seeing none. There's no testimony on this.  
8 Mr. Orodener.

9 EXECUTIVE OFFICER: Thank you, Mr. Chair.

10 What I would like to do very briefly is  
11 talk about a few matters that impact the Commission  
12 and one matter that is, what I recall, a somewhat  
13 significant change in structure, but not in  
14 operation.

15 There were several bills that passed that  
16 sort of memorialize what we have been doing, and  
17 that's Senate Bill 873 and Senate Bill 1034.

18 SB873, contested case hearings allows  
19 contested case hearings to be held using interactive  
20 technology. And it also can be done as audio only,  
21 if necessary.

22 This measure takes effect on October 1st,  
23 2021. You'll see the gap here which may raise some  
24 issues and may cause us to have to go back to the old  
25 way of doing things for a little bit before these

1 measures kick in.

2           Senate Bill 1034 relating to Sunshine law  
3 boards, allows boards and commissions the option to  
4 use interactive technology for meetings. We  
5 managed -- we submitted some testimony when this was  
6 going through, because originally they were going to  
7 require the location of each commissioner be noticed,  
8 would have been a little bit difficult if  
9 Commissioners were going to come during the meeting  
10 from their homes or whatever.

11           So in the end, they allowed interactive  
12 conference technology be used, and without having to  
13 notice where each one of the Commissioners are. In  
14 other words, you can continue to take the meetings  
15 from your home without worry of the public coming to  
16 your house and banging on the door.

17           The format has to be visible and audible to  
18 the public.

19           Basically it memorializes what we are  
20 already doing. Cutting to the chase, the only  
21 difference is that it provides that we will have to  
22 have at least one meeting location open to the public  
23 that has audio/visual connection.

24           This means from a practical standpoint that  
25 it will become more and more difficult to hold these

1 multi-island meetings, because my interpretation of  
2 this would be that if a petition is on Maui, for  
3 instance, there has to be a meeting room available  
4 there. If there is a petition on the Big Island,  
5 there has to be a room available there. So while --

6 CHAIRPERSON SCHEUER: You're referring to  
7 agenda's, Dan, where we take up matters that consider  
8 multiple islands?

9 EXECUTIVE OFFICER: Yes. It may be  
10 possible to take up, from a logistical standpoint, to  
11 take up a matter on Oahu, and one on one of the  
12 neighbor islands, but mixing various neighbor islands  
13 would require staff spread too thin because we can't  
14 operate without staff being present in case there is  
15 an audio/visual problem.

16 So that means that the staff, at least,  
17 will have to travel. This bill doesn't come into  
18 effect until January 1st, 2022.

19 So if the Governor's Executive Order  
20 expires, we will have to go back to holding meetings  
21 on the islands where they are located, until at a  
22 minimum, October 1st, 2021.

23 So it was helpful, and in the long run we  
24 will be able to do more interactive technology. But  
25 it may be, as I mentioned before, because of the



1 effective date of these bills, that we have to start  
2 holding hearings on neighbor islands, or our hearings  
3 in person. It depends on what the Governor decides  
4 to do.

5 A couple other measures that are -- one  
6 other measure that's kind of minor HB247 relating to  
7 agricultural lands. And what it does is it amends  
8 205-4.5(a)(4) to require farm dwellings to be  
9 accessory to a farm rather than used in connection  
10 with.

11 There was some efforts in the last  
12 legislative session to tighten up the definition of a  
13 farm dwelling, so we get these gentlemen farms, which  
14 are then turned into TVRs and all the rest of that  
15 stuff.

16 But that's a constant battle and that's  
17 really at the County level, that's not our issues.

18 The big change was with, HB1149, and what  
19 that bill did was that it extracted Land Use  
20 Commission from being its attachment to the  
21 Department of Business and Economic Development, and  
22 now attaches us to a renamed Office of Planning and  
23 Sustainability.

24 This is very technical in nature. It is a  
25 reconfiguration or restructuring of government that

1 is consistent with what the legislature has been  
2 doing in a lot of other areas. It wasn't just us  
3 that they picked on, although, we were kind of the  
4 flagship.

5 From an operational standpoint, it's not  
6 going to change much as far as the Commissioners are  
7 concerned. From Staff standpoint we are going to  
8 have to erect some safeguards to make sure that we  
9 don't violate any legal issue, legal requirements  
10 with regard to ex-party communication with OP.

11 I don't think that's going to be a big  
12 deal. The bigger problem is one that the  
13 Commissioners I don't think really need to concern  
14 themselves with at this time, and that is that one of  
15 the things that the legislature did is that it  
16 removed our budget line item, and put our budget into  
17 OP's budget, which is of concern from a fiscal  
18 firewall standpoint.

19 We've been in conversation with both Linda,  
20 our AG's and with the AG who was in charge of the  
21 budget, who used to work with the Land Use  
22 Commission, Randall Nishiyama, and we are going to  
23 have to enter into some kind of memorandum of  
24 understanding with regard to that to protect that  
25 fiscal firewall.

1           It's our hope in the next legislative  
2 session that we manage to reinstate our budget line  
3 item, so that we don't have to deal with that  
4 problem.

5           The legislators felt that in order to  
6 ensure that HB1149 passed that they needed to make  
7 that budget change. So even if it HB1149 didn't  
8 pass, we were in effect going to be in the Office of  
9 Planning.

10           That's pretty much what resulted from what  
11 I would call a very tumultuous legislative session.

12           One of the other things that happened was  
13 that -- one of the other things that happened was  
14 that the Office of Environmental Quality Control has  
15 also moved into the Office of Planning. And there is  
16 sort of an agreement between the Director of the  
17 Office of Planning and ourselves as to how that will  
18 operate as well, that we will have to memorialize.

19           There was one other measure related to  
20 training and native Hawaiian rights that requires all  
21 newly appointed or reappointed members who have not  
22 already done so, to take the training in native  
23 Hawaiian rights from OHA, the UH Law School.

24           You have one year to do that. If you  
25 don't, the Governor's office will be told, and you'll

1 be -- if you haven't taken the course within one  
2 year, you'll be prohibited from serving or voting,  
3 and may be removed from the board or commission at  
4 the end of the regular legislative session.

5 Sort of as a recognition that all the  
6 Commissioners are volunteers, and their schedules  
7 have not always been conducive to their attending the  
8 hearings. OHA will record and make available the  
9 digital course, and viewing the online version  
10 requirement.

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

12 CHAIRPERSON SCHEUER: Thank you, Dan, for  
13 the overview, as you said, the tumultuous sessions,  
14 the matters that came out that particularly affect  
15 the Land Use Commission.

16 Members, questions for Dan or comments?

17 Commissioner Okuda.

18 COMMISSIONER OKUDA: Thank you, Mr. Chair.

19 Just a suggestion. I think interactive  
20 video like ZOOM has been a real plus. It's allowed,  
21 as we have seen in some other dockets, people to  
22 testify while they're going fishing at the dock,  
23 pulled over to the side of the road, and people can  
24 follow along what's going on, even when they're  
25 fishing or doing other things or just being at home.

1           So I think this is really good for  
2 government transparency and involvement. However, at  
3 the same time, if it's at all possible, I think it's  
4 really important, as long as it's safe for the  
5 community, and safe for the participants, that where  
6 there are issues that are significant -- and maybe  
7 not that significant -- we go out into the community  
8 and hold meetings in the same fashion or similar  
9 fashion as we've done in the past, because sometimes  
10 you really get additional information from people by  
11 just being around them.

12           So if it's possible in the future to  
13 combine the best that we can from interactive  
14 technology, but also if we can try to get back out  
15 into the community. I know it's a burden waking up  
16 in the morning. That's the great thing about  
17 interactive technology.

18           But I've always learned things just by  
19 being in the community, having the interactions. I  
20 think one very educational thing that I learned, and  
21 it was the only way I could learn it, was actually  
22 being there, was the interaction we had with everyone  
23 at the Mauna Kea Petition that was held before us  
24 shortly before the pandemic.

25           That's just my comment. Little bit of food

1 for thought. Thank you.

2 EXECUTIVE OFFICER: Thank you, Commissioner  
3 Okuda.

4 We have been working very hard during the  
5 course of this pandemic to utilize funds saved as a  
6 result of not traveling to develop a portable system  
7 so that when we do go to neighbor islands -- and I  
8 agree with you with regard to the value of going into  
9 the communities -- that we will also be able to  
10 broadcast over ZOOM at the same time.

11 So we will have sort of a hybridized  
12 situation that will allow continued public  
13 participation from their boats and homes and their  
14 cars, while also being in the community.

15 CHAIRPERSON SCHEUER: Thank you,  
16 Commissioner Okuda and Dan.

17 Other comments or questions, Commissioners?  
18 Commissioner Giovanni.

19 COMMISSIONER GIOVANNI: I agree with  
20 Commissioner Okuda. I think there is great value,  
21 depending on the matter at hand, whether we have a  
22 ZOOM meeting or we have an in-person meeting or we  
23 have a hybrid meeting following both. Just a  
24 comment.

25 I hope that we can make those decisions of

1 how we'll conduct meetings in an optimal sense and  
2 not just try to do what costs the least.

3 Sometimes these process sessions are driven  
4 just to save money, and that doesn't give us an  
5 optimal result in my view.

6 And then the one quick question I had about  
7 the required course. When I took that course, I did  
8 not take it for credit, meaning college credits,  
9 which was an option. I just kind of participated in  
10 the course. Is that sufficient?

11 EXECUTIVE OFFICER: Yes, it is. That is  
12 sufficient. Your participation is all that's  
13 required.

14 I have to go back and look at the measure,  
15 I think that -- I don't know what Commissioners it  
16 would apply to. I think that the effective date may  
17 be after your appointment, so it may not apply.

18 I'll have to defer to the AG on that to a  
19 certain extent.

20 COMMISSIONER GIOVANNI: I took the course  
21 after I was approved by the senate for the prior term  
22 or the current term.

23 EXECUTIVE OFFICER: Yeah. So I'm not sure  
24 whether if you were reappointed and reconfirmed in  
25 this last legislative session, whether you would have

1 to take the course again. Scott says no.

2 CHAIRPERSON SCHEUER: Well, if Scott says  
3 no then.

4 Commissioners, are there further comments  
5 or questions on this matter?

6 Commissioner Cabral.

7 COMMISSIONER CABRAL: Aloha, I agree with  
8 both Gary and Dan, because we are on a casual  
9 situation here. But I would like to think that -- I  
10 absolutely see with all my -- even my professional  
11 meetings and condominium and subdivision management  
12 that we are going to be hybrids forever.

13 So I would think our staff should look at  
14 each of our islands and location, find a location  
15 that is going to be a meeting room or something fully  
16 equipped with ZOOM, and not just a wi-fi, but a solid  
17 connection to the internet, because when I do go,  
18 doing hybrid meetings already, and if I don't have a  
19 good internet connection, it can become very  
20 problematic.

21 So you've got to understand, it's based on  
22 how many people are coming in, and all kinds of  
23 problems.

24 So the better the staff can get at  
25 finding -- and I would assume, State buildings that



1 we go to would hopefully come up to -- this is a  
2 great room right here, because it's so solid. So  
3 whatever. We should be proactive in finding a  
4 location.

5           And then the next question would be, can  
6 those locations be something like -- okay, my office  
7 in downtown Hilo, I'm setting up a new conference  
8 room, can probably have, during non-social distancing  
9 time, probably 20 people can sit in it, close, but  
10 20. And I'm going to have like a good ZOOM system.

11           So are those things allowed or permitted or  
12 not, because I'm a Commissioner, it shouldn't be at  
13 my office, but I think we should find good locations.

14           And I also agree that there are beneficial  
15 times to us as Commissioners being together with the  
16 people that are coming to testify, both the  
17 petitioners and their witnesses, as well as the  
18 general public and their testimony.

19           I think that I have to agree there's been a  
20 lot of different occasions when hearing them, and it  
21 gives you a more full sense of what's going on than  
22 just distance with the screen.

23           And then I would assume too that -- I'm not  
24 too worried that between now and October, I don't see  
25 our State or Governor releasing us from COVID, before

1 October. But it might happen before January, so we  
2 need to kind of be prepared for whatever happens.

3 And then I think too -- I wouldn't mind --  
4 I took that cultural training class a long time ago.  
5 So when they do the new one, even in those five or  
6 six years, I would think that it would be -- I would  
7 like to see especially if I can do it on ZOOM, that  
8 way it would really update me.

9 That's all my things. Thank you.

10 CHAIRPERSON SCHEUER: Thank you,  
11 Commissioner Cabral.

12 Commissioners Chang, followed by  
13 Commissioner Aczon, followed by Commissioner  
14 Giovanni.

15 COMMISSIONER CHANG: Just two points.  
16 Thank you, Mr. Chair.

17 I really appreciate the fact that you and  
18 staff, one, your heroic job on getting us on ZOOM and  
19 actually I suspect that LUC, our hearings are  
20 probably one of the best with other agencies, but  
21 thank you for creating a hybrid opportunity, because  
22 I too agree it's really helpful to be where the  
23 properties are located.

24 But the ZOOM has provided us, you know --  
25 people have been able to participate that they

1 otherwise wouldn't have. So I appreciate this hybrid  
2 as I think it provides us the best of both world's.

3           Although I will tell you that I will miss  
4 this ZOOM, if I don't have to travel. This has been  
5 so convenient and permitted me to do so much other  
6 work, so I guess, you know, we all have to make  
7 adjustments.

8           The other question I have is in  
9 relationship to the ag legislation. I would like a  
10 little bit of further explanation as to, you know,  
11 who proposed on the legislation, what kind of  
12 testimony did you receive -- I'm sorry, I did not  
13 participate in monitoring the legislation, but if you  
14 could just provide a little bit more insight into  
15 that as clearly this Commission is taking some strong  
16 positions on the definition of farm dwelling on ag  
17 lots.

18           So I would like to have a better  
19 understanding of what occurred in this legislative  
20 session on that matter.

21           CHAIRPERSON SCHEUER: Mr. Orodener.

22           EXECUTIVE OFFICER: HB247 was initiated by  
23 the Farm Bureau. It was based on a study done by OP  
24 with regard to the issue. OP commented -- it  
25 originated with regard to concerns over CPR projects.

1 The problem originally was that no one was taking  
2 responsibility for CPRs.

3 In other words, if somebody wanted to CPR  
4 farm land, like we saw at Kuliouou Ridge or something  
5 like that. They would apply to the DCCA for  
6 condominium property regime, which the DCCA, their  
7 only analysis is are the documents correct, is there  
8 a homeowners association; does it legally meet the  
9 requirements for CPR, not looking at zoning or land  
10 use issues at all.

11 And then they would send it over to the  
12 County, and the County was taking the position  
13 that -- and I disagree with this -- but taking the  
14 position that, oh, well, the State approved it, so we  
15 have to accept it.

16 And there was nobody looking at these  
17 things from a land use planning perspective.

18 CHAIRPERSON SCHEUER: I'm going to ask you  
19 to you summarize the status of the legislation.

20 EXECUTIVE OFFICER: Okay. So that was  
21 basically where the legislative came from. Farm  
22 Bureau was actively involved, and we did not get  
23 involved in the discussion, primarily because we felt  
24 that we had input into the original OP study, and the  
25 original conversations with regard to CPRs, and that

1 this was pretty much of a policy call on the part of  
2 the legislature, and when it comes to things like  
3 this, we allow the legislature to tell us what to do  
4 rather than us tell them. And that's kind of the  
5 genesis of that bill.

6 CHAIRPERSON SCHEUER: Any followup,  
7 Commissioner Chang?

8 COMMISSIONER CHANG: No, thank you very  
9 much for the explanation.

10 CHAIRPERSON SCHEUER: Commissioner Aczon  
11 followed by Commissioner Giovanni.

12 VICE CHAIR ACZON: Thank you, Mr. Chair. I  
13 agree with my fellow Commissioners about this hybrid  
14 or whatever, and you know, technology is here and  
15 it's not going to go away. So it's going to be upon  
16 us to change with the times.

17 So my only question is, this technology  
18 comes with a price. You can get expensive,  
19 especially if you have to, you know, set up on each  
20 island.

21 So my question, with this legislation, is  
22 there a probation connected to this legislation? So  
23 if we cannot perform our duty because of budget  
24 constraints, so what happens?

25 EXECUTIVE OFFICER: Well, there were no

1 appropriations directly associated with the  
2 legislation. However, because of our cooperation  
3 with the legislators, we were one of the agencies who  
4 benefitted from having our full budget reinstated.

5 So we have all of the travel money that we  
6 need if we need to go back to the old system which  
7 was travel on a regular basis.

8 As I said, we managed to use money saved  
9 from this current fiscal year that we would have used  
10 in our travel, to create the systems and purchase the  
11 hardware and software that's necessary to make it  
12 happen.

13 CHAIRPERSON SCHEUER: So to summarize, Dan,  
14 I think you're saying we have dealt with it, and come  
15 out okay. But to go to Commissioner Aczon's point as  
16 it might -- there wasn't an appropriation made, and  
17 that issue remains unresolved?

18 EXECUTIVE OFFICER: What I was going to  
19 say -- I can't speak to that. I did not go into  
20 detail in the budget with regard to other boards and  
21 commissions.

22 CHAIRPERSON SCHEUER: Any followup, Ed?

23 VICE CHAIR ACZON: My question now is, if  
24 whether LUC or other board, because of budget  
25 constraints, that, you know, we cannot -- well, the

1 boards cannot afford or doesn't have the budget to  
2 follow this legislation, so what happens?

3 EXECUTIVE OFFICER: Well, as I said, I  
4 can't speak for other boards and commissions, because  
5 we manage to find our way to do it and we were  
6 actually ahead of the curve on this. We actually  
7 started into this process three or four years ago  
8 before the pandemic even hit. But I'm not sure if --  
9 we are somewhat unique in the fact that we are  
10 required by law to hold hearings on neighbor islands.

11 Not all boards and commissions have that  
12 mandate. Or not just neighbor islands, on the island  
13 where the land is located, not all boards and  
14 commissions have that mandate.

15 I don't know how they would react. I think  
16 in a situation like Board of Land and Natural  
17 Resources or Commission on Water Resource Management  
18 where they're dealing with property rights and things  
19 that impact on development and farming, in the case  
20 of the Commission on Water Resource Management, there  
21 may be some issues that they have to deal with. I  
22 don't know.

23 I mean, I don't know what their situation  
24 is. I do know that several years ago, going back  
25 before these came on, was calling on the commission,

1 looking at budgetary restraints and shortages. And  
2 the then director for Business and Economic  
3 Development assured us that they would find the money  
4 within the Department of Business and Economic  
5 Development to allow us to hold meetings if we got to  
6 that point. We never did, but it was an issue.

7 CHAIRPERSON SCHEUER: I do want to manage  
8 this discussion so we can take a break before 10:15.  
9 Commissioner Giovanni.

10 COMMISSIONER GIOVANNI: Thank you, Chair.

11 I too want to commend the Staff for the job  
12 they have done using ZOOM for our hearings. I point  
13 to it with -- I live on ZOOM these days, and nobody  
14 does it better, so congratulations.

15 But I do have kind of one nitpicky question  
16 that maybe could be looked at. There's a huge  
17 difference viewing my ZOOM screen when I can see any  
18 of the other Commissioners up close and personal  
19 versus the room that the six of you sit in, which is  
20 useless, it's just about as good as audio mic only.

21 CHAIRPERSON SCHEUER: Even Arnold is hard  
22 to see.

23 COMMISSIONER GIOVANNI: I can't tell who's  
24 speaking, I can't read anything into their emotion.  
25 It's just purely audio. So if there's anything that



1 can be done, take it a step further to ZOOM in on  
2 who's talking or whatever, that would be helpful.

3 Just a comment. Thank you.

4 EXECUTIVE OFFICER: Thank you.

5 Commissioners, we will take that into  
6 consideration.

7 That's really true, Commissioner Giovanni.  
8 And I think sometimes the Counties, which have been  
9 in group rooms, I think we've not gotten as much out  
10 of their presentations, because people are this big  
11 (indicating) when they're talking to us.

12 Nancy, you have something?

13 VICE CHAIR CABRAL: I do have that  
14 solution. Like in my hybrids I take my small  
15 computer with me, so I'm in the big room, like I am  
16 right now, but I can turn on here, and you would see  
17 me, as long as I totally moot, and we don't have that  
18 reverberation.

19 So if each person in this room had their  
20 own screen in front of them, they would be on that  
21 camera. That combination is very, very, very doable.

22 CHAIRPERSON SCHEUER: Commissioner Aczon.

23 VICE CHAIR ACZON: Just a comment on  
24 Commissioner Giovanni.

25 What I do really is there's a function,

1 "speaker view" that you can enlarge the person that's  
2 speaking. So that's what I use. That's a comment.

3 CHAIRPERSON SCHEUER: Thank you.

4 The one thing I would like to share on this  
5 is that -- and this goes to what the comments about  
6 being in person -- one thing you cannot do in ZOOM is  
7 really look into someone's eyes, which is a very  
8 particular kind of human emotional exchange whether  
9 it's a witness or whether it's a Petitioner. I have  
10 found sometimes in my six-plus years of service on  
11 LUC that somebody looking directly at me when  
12 testifying has a particular kind of impact that's not  
13 available in this virtual word.

14 So I do err on the side of what  
15 Commissioner Okuda has said that there are certain  
16 matters where we really should be in person, if at  
17 all possible. At least having that option available  
18 on the island on which an important matter is being  
19 discussed.

20 Is there anything more on this right now  
21 from the Commissioners or from Mr. Orodener? If  
22 not, let's go into recess until 10:15 when we will  
23 resume discussion of the HoKua Place matter.

24 (Recess taken.)

25 CHAIRPERSON SCHEUER: Mr. Yuen, were you

1 able to reach Mr. Bracken?

2 MR. YUEN: Yes, I did, and he would be  
3 available later this afternoon, if we finish with Mr.  
4 Nance and Mr. Agor.

5 CHAIRPERSON SCHEUER: It's 10:20. I'm  
6 going to suggest to the Commissioners that we start  
7 up, and we are also going to lose Commissioner Dan  
8 Giovanni at noon, from noon to 2:00, so it is 10:20.

9 Perhaps what we will try to do is go about  
10 an hour, ten minutes to 11:30, around 11:30, take a  
11 break for lunch from 11:30 to 12:15, resume after  
12 that if needed, and proceed on our day.

13 Does that sound acceptable to parties? I  
14 see nodding heads. Thank you.

15 Mr. Yuen, were you raising your hand? Just  
16 gesturing. Okay.

17 So you were done with your direct. We will  
18 now start with Mr. Donohoe's questioning of Mr.  
19 Nance.

20 MR. DONOHOE: Thank you, Chair, Deputy  
21 County Attorney, Chris Donohoe.

22 CROSS-EXAMINATION

23 BY MR. DONOHOE:

24 Q Good morning, Mr. Nance.

25 A Good morning.

1           Q       You raise a lot of scientific points in  
2 your presentation, so I wanted to ask you some  
3 nonscientific questions, break it down so that I can  
4 better understand some of the issues.

5                    So regarding water resource, does the  
6 County of Kauai have different issues with regard to  
7 water than say Oahu or other islands?

8           A       Well, to some extent Kaua'i is different  
9 hydrogeologically as being the oldest with two major  
10 volcanic series eruptions. So in that respect, it's  
11 different.

12                   And the reality is this second formation  
13 called the Koloa volcanics is very heterogenous,  
14 unpredictable, and so in comparison to example,  
15 Kaua'i versus any of the other islands, typically  
16 Kaua'i about 60 percent or so of the rainfall runs  
17 off as surface water, whereas other islands only  
18 20 percent, so hydrogeologically Kauai is different.

19                   CHAIRPERSON SCHEUER: One second. I want  
20 to note for the record, right as you were starting  
21 your questioning, Commissioner Ohigashi joined us.

22                   COMMISSIONER OHIGASHI: Did I miss  
23 anything?

24                   CHAIRPERSON SCHEUER: Nothing substantive  
25 other than our schedule.

1 MR. DONOHOE: May I continue, Chair?

2 CHAIRPERSON SCHEUER: Please.

3 Q (By Mr. Donohoe): Some of the concerns  
4 being raised with the Petitioner's proposed project  
5 are productivity, namely, the water supply and how  
6 much will be needed for the project and the  
7 availability of a new well source.

8 Is that fair to say?

9 A Yes.

10 Q And so the three main issues to consider  
11 when looking at water source, storage and  
12 transmission; correct?

13 A Yes.

14 Q So with regard to the proposed development,  
15 the analysis would be to see if the current water  
16 system on Kauai has enough source, storage and  
17 transmission capacity to be able to serve the  
18 additional water needs of this proposed development;  
19 correct?

20 A Well, first I don't believe that's the  
21 case, but that's not exactly what I've been prepared  
22 to testify on. I'm testifying on the viability of  
23 the on-site well to provide the adequate supply. So  
24 its potential connection to the Kaua'i Department Of  
25 Water system is not something that I've looked at for

1 the project.

2 Q So regarding the water supply, you  
3 testified that the project's maximum day supply  
4 requirement is estimated to be 610,383 gallons per  
5 day.

6 A Yeah, that's a calculation made by Bow  
7 Engineering.

8 Q And then -- so applying to Kaua'i DOW  
9 design requirements, the project supply requirements,  
10 that would translate to the well pumping capacity of  
11 424 gallons per minute?

12 A Yes.

13 Q And so in order to meet this demand, what  
14 you're recommending is that a 500-gallon per minute  
15 well pump capacity be installed; correct?

16 A That's one possibility, if it's -- my  
17 understanding is that both a private water system and  
18 a system dedicated to the Kaua'i Department of  
19 Water still -- I'm not sure that a decision has been  
20 made about that, but 500 gpm pump would certainly  
21 supply it if it were a private water system. If it's  
22 connected with the County Kaua'i Department of Water  
23 may want a certain amount of its capacity of the well  
24 reserved for themselves rather than the project.

25 Q But is it your position though that

1 properly designed and on-site well will be able to  
2 produce the necessary water supply for HoKua Place?

3 A Yes, that's my conclusion.

4 Q And then the proposed well, as you  
5 testified, would be 300 feet?

6 A Well, the actual depth would depend on  
7 conditions encountered. I don't imagine that would  
8 go beyond that, might go short of that if we got  
9 sufficient yield penetrating to a shallower depth  
10 than that, based on the information being provided as  
11 we're drilling.

12 Q And then have the Petitioners been  
13 attempting to locate the proper new well source to  
14 service the water needs?

15 A I don't understand the question. Could you  
16 try to repeat it?

17 Q Is it your understanding that there have  
18 been attempts made by the Petitioners, the developers  
19 to locate a proper new well source to service the  
20 water needs of the project?

21 A It would be in the very near vicinity of  
22 the well that was drilled on the site.

23 Q And then do you recall recently having  
24 conversation with Michael Hinazumi from the County  
25 regarding the status of the well source?

1           A        If you're referring to a phone conversation  
2 two days ago, yes.

3           Q        Perfect. Yes, that's what I'm referring  
4 to.

5                    My understanding is that originally a well  
6 source was located, like you just testified to;  
7 correct?

8           A        Well, an exploratory well was drilled, yes.

9           Q        So the drilling commenced on that well  
10 source?

11          A        That's well back in 2006.

12          Q        Is it true that the Commission on Water  
13 Resource Management or CWRM, did not approve of the  
14 well?

15          A        That's my understanding, yeah. They asked  
16 that it be backfilled according to their standards.

17          Q        But backfill, is that another way of saying  
18 that the well is required to be abandoned?

19          A        Sealed and abandoned, yes.

20          Q        What's the process for doing that?

21          A        You apply for a permit with the Water  
22 Commission to seal the well, and in this case, then  
23 you fill it with cement by a licensed drilling  
24 contractor, and then he files a well abandonment  
25 report and submits it to the Water Commission. You



1 have to have prior approval to do the sealing, and  
2 then an abandonment report after.

3 Q To date, are you aware that the Petitioners  
4 or the developer has not completed the original well  
5 abandonment?

6 A That has not been abandoned, correct.

7 Q And so it's my understanding, correct me if  
8 I am wrong, is it true that the abandonment of the  
9 original well is required to be completed prior to  
10 drilling another well?

11 A I'm not sure that that is the case. You  
12 know, I might recommend to the Commission that we  
13 leave it in place until we do the new one so we can  
14 actually monitor from the existing well as well as  
15 the new well.

16 But if the Commission says seal that one  
17 first, then we would do that.

18 Q And if CRWM required that, then that would  
19 have to be done first before the drilling of any  
20 additional wells?

21 A I'm not sure that's the case. It may be,  
22 but I'm not sure.

23 Q Fair enough.

24 And to date, has there been another  
25 proposed well source to service HoKua Place, has it

1       been located yet?

2               A       Well, not with exact precision.  But as I  
3       say, it would be very near to the well that had  
4       already been drilled.

5               Q       But no specific location?

6               A       Well, if you're talking about metes and  
7       bounds description, that's correct, it wouldn't have  
8       that.

9               Q       And then after completion of the  
10       abandonment of the other well, is it your  
11       understanding that it's the owner's responsibility  
12       then to locate, design and drill the new well source,  
13       so it's on the developer to do that?

14              A       That's correct, yes.

15              Q       And then since there hasn't been a new well  
16       source formally located, designed and approved for  
17       drilling, this could potentially extend the proposed  
18       timeline for completion of HoKua Place; correct, with  
19       respect to water?

20              A       If the well is not done, sure, absolutely.

21              Q       And did you access the cost for locating  
22       and constructing a new well source?

23              A       I have not done that, no.

24              Q       Are you -- in your experience, are you able  
25       to testify and talk about how much it may cost to

1 develop a new well?

2 A Not sure I understood that question. Could  
3 you try repeat it?

4 Q Can you talk about how much it may cost to  
5 develop a new well, if you know, if it's in your  
6 realm of expertise?

7 A It's on the order of a half million  
8 dollars.

9 Q And with that additional cost, could that  
10 increase in cost in coming up with the funding to do  
11 that, could that also increase the development  
12 timeline in overall cost of the project?

13 A I don't know about the timeline, because I  
14 don't know the project's timeline, but certainly it  
15 would be part of the cost.

16 Q And will you be involved in monitoring the  
17 well drilling to ensure that the State laws are  
18 complied with?

19 A If asked to, yes.

20 Q And then would you also be, if asked to, be  
21 responsible for the testing, the capacity, and  
22 quality of the well source to ensure compliance with  
23 the DOH standards?

24 A Again, if asked to, yes. I mean, typically  
25 I would design overseeing construction, direct the

1 pump testing, file all the results. That would be my  
2 typical involvement in developing a new well.

3 Q What are some available options if, for  
4 instance, the current new well source doesn't have  
5 the capacity, or other issues come up in permitting  
6 and development of it?

7 A Have to seek another source somewhere else.  
8 Whether we try that as a second well on the same  
9 property is one proposition.

10 County is currently involved in developing  
11 sources, such as Kapa'a Homestead Well 4, which I'm  
12 involved in.

13 It would be one or the other of those are  
14 ways to provide sufficient supply.

15 Q Are you aware if there is a plan to use the  
16 two County Department of Water Reservoirs?

17 A I have not been involved in that.

18 Q Is it your understanding that also, talking  
19 about transmission lines now, that the developer  
20 would be responsible for installing the transmission  
21 lines for service to the development?

22 A Typically, that is the case. But I want to  
23 emphasize, I have not been involved in that part of  
24 this project.

25 Q Are you familiar -- did you analyze the

1 cost at all for installing the transmission lines, or  
2 can you speak to that in any capacity?

3 A No, I cannot.

4 Q Do you know if the developer included --  
5 did you get a chance to review the overall cost  
6 prediction for the infrastructure budget in this  
7 case?

8 A I have not seen it, and have obviously not  
9 reviewed it.

10 Q Are you aware if there was any agreement,  
11 if you know, between the Petitioners in this case and  
12 County of Kaua'i DOW regarding water source, storage  
13 or transmission reached by the parties?

14 A I do not know that.

15 Q However the water is sourced, the proposed  
16 development, it's going to result in a new water use  
17 or an increase to existing water use in the area;  
18 correct?

19 A Correct.

20 Q How would you describe the end use of the  
21 water be it private, commercial or domestic?

22 A It's municipal. It's drinking water.  
23 There would be some landscape irrigation, but  
24 primarily for drinking water use.

25 Q And then -- and you understand that for

1 other uses of water are not protected as public trust  
2 purposes, correct?

3 A I'm not sure I understand the question.  
4 Could you try again?

5 Q I'll ask you another question.

6 Have you analyzed the various uses of water  
7 and how the uses may affect other public uses?

8 A In this particular case, no.

9 Q Have you done that in other cases?

10 A Probably other islands. I can't recall  
11 specifically at the moment.

12 Q When you analyzed in the other cases, what  
13 was the reason that you were asked to analyze various  
14 proposed uses of water and how they could affect  
15 other public uses?

16 A It was primarily whether, in drawing  
17 groundwater from a well, we were going to impact  
18 streamflow.

19 Q Is there a reason why, or if you know why  
20 you weren't asked to do that in this case?

21 A I have no knowledge; don't know; can't say.

22 Q And then have you analyzed the various  
23 proposed uses of water and how they could affect  
24 other private uses in this case?

25 A Not specifically. But I don't believe any

1 other private uses would actually be impacted.

2 Q And, again, you've analyzed how it would  
3 affect other private uses in other cases, though?

4 A In the manner that I just indicated.

5 Q Perfect, perfect.

6 Did you study the effects that any future  
7 well source may have to other water systems and  
8 sources on Kaua'i?

9 A Not sure I understand the question. Could  
10 you try again?

11 Q If there is a well source, it may or may  
12 not affect other water systems and other sources of  
13 water on Kaua'i; correct?

14 A Potentially.

15 Q Did you study the effects that that may  
16 have on those other water systems?

17 A Not specifically, no.

18 Q Do you feel it would have been important to  
19 have been asked if somebody asked you to study that?

20 A To be honest, because we're drawing water  
21 from the deep aquifer that's confined by overlying  
22 formations, the reality of pumping from this aquifer  
23 is not likely to impact even surface water, much less  
24 other groundwater uses.

25 Q Have you consulted or discussed any of

1 these potential water issues with the CWRM?

2 A I did have a conversation with Ray Hardy at  
3 Water Commission, specifically, on the status of the  
4 well that's makai of this property.

5 I think it's a four-inch case well that's  
6 relatively shallow, limited yield, just to find out  
7 if it was still being used and what the status was.  
8 And Roy told me that it wasn't in use, and they have  
9 asked the owner to seal it, similar to the request  
10 for the on-site well.

11 Q Did you study the effect of any of the  
12 possible well source locations and well sources may  
13 have on any downstream uses?

14 A Not specifically. But as I say, if we put  
15 a well in this project, it's relatively close to the  
16 shoreline. It's not likely to affect any downstream,  
17 based on the source that we are drawing the water  
18 from.

19 Q But to your knowledge, you weren't asked to  
20 study that, and it potentially could have an effect,  
21 you just don't know because no study was done?

22 A I was not asked to study it.

23 Q Are you familiar with Kaua'i's Water Use  
24 and Development Plan?

25 A To be honest, not really.



1 Q Fair enough.

2 In your opinion, is the proposed use of  
3 water, what's being proposed for the project,  
4 reasonable and beneficial in relation to other public  
5 uses?

6 A I believe it is.

7 Q Same question regarding private uses.

8 Is the proposed use of water for the  
9 project reasonable and beneficial in relation to  
10 other private uses?

11 A I believe it is.

12 Q Will the proposed uses harm any protected  
13 uses under the public trust?

14 For instance, will the proposed use harm  
15 the maintenance of waters in their natural state?

16 A I don't believe it will.

17 Q Will the proposed use harm the protection  
18 of domestic water use?

19 A I don't believe it will.

20 Q Will the proposed use harm the protection  
21 of water and exercise of native Hawaiian traditional  
22 and customary rights?

23 A I don't believe it will. But I have to  
24 sort of say that in a very cautionary manner. I'm  
25 not aware of any downstream traditional or cultural

1 practices using water.

2 But as I say, this is a very deep aquifer  
3 that discharges into the ocean at depth offshore, not  
4 likely to affect anything in the nearshore area.

5 Q But specifically with that, the exercise of  
6 native Hawaiian traditional and customary rights, you  
7 didn't particularly, specifically, study that?

8 A That's correct.

9 Q And would the proposed use harm the  
10 reservation of water set forth in the State Water  
11 Code?

12 A As far as I'm aware, it will not.

13 Q And then, what is the proposal to  
14 accommodate the public's use, access, enjoyment and  
15 resource protection?

16 A Not aware of any.

17 Q What actions are proposed to mitigate any  
18 cumulative impacts to public trust purposes that may  
19 occur if the proposed use is to be approved?

20 A I'm not aware of any.

21 Q You weren't asked to do an analysis or come  
22 up with potential mitigations if there's an issue?

23 A I was not.

24 Q So in addition to the State Land Use  
25 Commission, are you aware -- isn't it true that a

1 public trust analysis will also have to be conducted  
2 at the County level before there's approval?

3 A I'm not aware of that.

4 Q Are you aware that -- actually that's all  
5 the questions I have.

6 Thank you so much, Mr. Nance.

7 Thank you, Chair; thank you Commission.

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

10 Ms. Kato.

11 CROSS-EXAMINATION

12 BY MS. KATO:

13 Q Hello, Mr. Nance.

14 So for the existing well on the property,  
15 my understanding is that you came on to the project  
16 after that was already constructed; is that correct?

17 A That's correct, just to oversee and direct  
18 pump testing of it, correct.

19 Q Do you know if that -- was that well done  
20 solely for test purposes intending to be sealed?

21 A It was a contract by Greg Allen to the  
22 driller Marcus Frandsen, and I don't know any of  
23 those details. I can't really speak to that.

24 Q But you testified earlier that that  
25 existing well is unusable for this project; is that

1 correct?

2 A Yes, absolutely.

3 Q So my understanding is that there are two  
4 alternatives for the water supply being considered,  
5 and that both involve the construction of a new  
6 up-to-standards well constructed by the Petitioner;  
7 is that correct?

8 A Yes.

9 Q For my understanding, what triggers the  
10 need for construction of a new well versus using the  
11 existing public water system?

12 A My under -- well, I haven't had those  
13 discussions with the Department of Water, but I  
14 assume we're doing that because the Department of  
15 Water does not have a source to supply this project.

16 Q So your understanding is it's likely due to  
17 lack of capacity?

18 A In the Kaua'i Department of Water system,  
19 yes.

20 Q Are you aware of any planned water system  
21 improvements by the County?

22 A I'm working right now on Kapa'a Homestead  
23 well. I'm aware of that's going on.

24 Q Do you think those -- I guess any  
25 improvements, do you think the situation has changed

1 where the County may be able to provide water without  
2 the new well at all?

3 A I can't speak to that. I haven't had  
4 conversations with Department of Water.

5 Q So the pump test for the existing well,  
6 exploratory well, that was done in 2006; correct?

7 A Yes.

8 Q Was there any more recent test done since  
9 that time?

10 A Earlier this year I had the drilling  
11 contractor Barry Simmons from Oasis put a small  
12 submersible pump in the well, pumped it for a while  
13 so it was clean, took samples. We had those FedEx'd  
14 overnight to the mainland lab, and analyzed for all  
15 the regulated drinking water contaminants.

16 Q And the results of that test were that the  
17 water was sufficient, right?

18 A It will meet the water quality requirements  
19 to be certified for drinking water use.

20 Q Regarding the new well that you're  
21 recommending be constructed according to standards,  
22 that's going to be very close to the existing well;  
23 is that correct?

24 A It will be in the near proximity, yes.

25 Q Do you foresee -- are there any foreseeable

1 issues with the fact that it is in a different  
2 location?

3 A In a what location?

4 Q That it's going to be in a different  
5 location because it hasn't been started yet, that  
6 process. Are there any foreseeable issues with the  
7 fact that, you know, a new well is going to be  
8 drilled in a different location from the existing  
9 well, will there be any changes, do you think?

10 A Well, it is true that Koloa volcanics  
11 change from location to location, but we will be so  
12 close to the existing one that I'm pretty comfortable  
13 that what we see as the potential yield from the  
14 originally drilled well will be applicable to the new  
15 well.

16 Q So it's unlikely to be different from what  
17 you've seen with the existing well; is that correct?

18 A Right.

19 The other thing is that, as I indicated  
20 earlier, there are three other wells that were  
21 drilled previously, first in 1986, then 2004, 2005,  
22 they all hit the same source, same piezometric at  
23 water level, and all were, in terms of yield, were  
24 successful.

25 Q So you said that the test well was drilled

1 to 260-foot depth, and your recommendation for a new  
2 well is 300 feet; is that correct?

3 A We would -- when we apply for permit, we  
4 would indicate potential depth of 300.

5 If during the process of drilling, when you  
6 hit formations that are yielding water, you are  
7 actually airlifting pumping out of the hole.

8 So if we got to a point short of 300, where  
9 we thought we had the yield, we would stop at that  
10 point rather than continue on.

11 Q Are there any foreseeable issues with the  
12 fact that you may have to drill deeper?

13 In case if you drill down and you don't hit  
14 it for awhile, would you need to keep going down?

15 A I can't eliminate that possibility, but we  
16 would have to go back to the Water Commission to get  
17 permission to do that.

18 Q So I want to clarify about the requirements  
19 for the project. Are you going -- you mentioned that  
20 the requirements for the project, for the daily  
21 supply, is 610,000 approximately?

22 A It's what we refer to as the max day use.  
23 The average use is that number divided by 1.5, around  
24 407,000, that's a year-long average.

25 Q When you say the project, is that

1 specifically the requirement for HoKua Place, or was  
2 that intended -- is that well intended to supply  
3 HoKua Place plus the ag lots that are to the west of  
4 the property of the Petition Area?

5 A I wasn't involved in that calculation.  
6 It's a question for Bow Engineering rather than me.  
7 I assume it's for both, but I don't know that.

8 Q Is it your understanding that the well is  
9 intended to supply both locations?

10 A Again, I really haven't been involved in  
11 that part. I'm just sort of focusing on the  
12 viability of a drilling well in this location to  
13 provide that kind of supply.

14 Q So your opinion that the 500 gallons per  
15 minute pump will be sufficient for HoKua Place, that  
16 is specific to HoKua Place?

17 A If HoKua Place was supplied by a private  
18 water system, yes.

19 If it's connected to the County system, the  
20 capacity pump would be subject to negotiations  
21 between the parties.

22 Q In determining whether this -- whether a  
23 new well would be sufficient for HoKua Place, you do  
24 not consider whether that well would be required to  
25 supply the ag lots that are outside of the Petition



1 Area; is that correct?

2 A I'm just talking about the viability of the  
3 source to provide that quantity of supply. That's  
4 what I am here to discuss.

5 Q For HoKua Place?

6 A Yes.

7 Q So just to be clear then, so it's your  
8 opinion that a properly designed new well would  
9 produce enough water supply for HoKua Place at full  
10 build?

11 A Yes.

12 Q Okay. Thank you. I have no more  
13 questions. Thank you.

14 CHAIRPERSON SCHEUER: Thank you, Ms. Kato.  
15 When you lean forward, by the way, we lose about half  
16 of you.

17 MS. KATO: I tend to hunch.

18 CHAIRPERSON SCHEUER: Intervenor, give me a  
19 sense -- Ms. Isaki, will it be you? How long do  
20 you --

21 MS. ISAKI: My questions are all yes or no.  
22 I think I could probably do it in half hour, maybe a  
23 little less.

24 CHAIRPERSON SCHEUER: Let's give it a shot.  
25 Please go ahead.

## CROSS-EXAMINATION

1  
2 BY MS. ISAKI:

3 Q Thank you so much for being here, Mr.  
4 Nance.

5 So your testing was done recently, so it's  
6 not in the EIS, which was approved, I think, in 2019;  
7 is that correct?

8 A The water quality testing, that's correct,  
9 it was done earlier this year.

10 Q And you clarified, I think, that the  
11 500 gallons per minute might be enough for private  
12 system, but not County. Is it common practice for  
13 County to require a third of water reserved for  
14 credit so it can be used for other developments?

15 A I can't speak to the Kaua'i Department of  
16 Water criteria.

17 Other municipalities have different  
18 percentages. One of them being one-third, that's the  
19 Big Island. But I don't know what the Kaua'i  
20 Department of Water requirement would be.

21 Q And you mentioned that the County may lack  
22 a volume of water resources in response to OP's  
23 question about hooking up to the County system;  
24 correct?

25 A That's my understanding. But, as I say, I

1 haven't really been involved in that part of this  
2 project, so I can't really speak to it.

3 Q Was the test bore hole and the proposed  
4 well for HoKua Place in the Lihue Basin?

5 Did I lose you? Hello?

6 CHAIRPERSON SCHEUER: We're still hearing  
7 you.

8 MS. ISAKI: Okay, yeah, that was the end of  
9 my question.

10 CHAIRPERSON SCHEUER: Can the witness hear  
11 the questions? Mr. Yuen, can you hear us?

12 MR. YUEN: I think we did not hear the  
13 entire question.

14 CHAIRPERSON SCHEUER: If you could repeat  
15 the question.

16 Q (By Ms. Isaki): Is the test bore hole and  
17 the proposed well in the Lihue Basin, considered the  
18 Lihue Basin, if you're familiar with the term?

19 A It might be the northern part of Lihue  
20 Basin.

21 Q Are you aware of where all the wells in  
22 the --

23 A No, I'm not really specific to it.

24 Q Are you aware of wells in the Lihue Basin  
25 that have had reduced productivity in recent years?

1 A Yes.

2 Q Is Nonou Well B one of those wells?

3 A It may be.

4 Q Is Kilohana-Puhi Well one of those wells?

5 A I wouldn't be familiar with that.

6 Q Are you familiar with Kalepa Well's falling  
7 water level?

8 A Yes.

9 Q To clarify I was referring to Kalepa Well  
10 10. Is your answer still yes to that?

11 A Yeah. Both Kalepa and Nonou actually are  
12 drilled into a different formation. They're drilled  
13 into exposures of the Waimea volcanics. And the  
14 compartments that are drilled into are very small and  
15 essentially they have been overpumped relative to  
16 what can be supplied in that very small specific  
17 area.

18 Q Thank you.

19 Is it your understanding that there is a  
20 possibility that the HoKua Place well could be  
21 connected to the KDOW, the County water system?

22 A I assume that's one of the possibilities  
23 being considered.

24 Q And the County water system, if it's  
25 connected to other water sources, correct?

1           A       Yes.

2           Q       So if the HoKua Place, for some reason, ran  
3 dry, it would have access to the County water  
4 systems' other sources?

5           A       Be up to the County Department of Water.

6           Q       Thank you.

7                   And are you familiar with the Water  
8 Commission's 2004 well construction and pump  
9 installation standards?

10          A       Generally, yes.

11          Q       You would agree that those standards  
12 require 48 hours of testing for a 500-gallon per  
13 minute nonpublic supply well?

14          A       Yes.

15          Q       But there was not a 48-hour pump test done  
16 on the test bore hole, correct?

17          A       That's correct, because there was, from my  
18 perspective, anyway, no intention of actually using  
19 it. We just wanted to evaluate what the capacity  
20 would be, but there was no, from my perspective,  
21 given what I knew of how the well was constructed,  
22 there was, from my perspective, there was no way that  
23 that was going to actually be put into use.

24          Q       Okay. But did you recommend a 48-hour  
25 constant rate on test pump for that test bore hole?

1           A       For the purpose that I was seeking to  
2 establish the viability of the source, it was not  
3 needed.

4           Q       Did you recommend a 48-hour constant rate  
5 pump test?

6           A       No, we ran for 12 hours.

7           Q       Did you recommend 48 hours?

8           A       No.

9           CHAIRPERSON SCHEUER: I think you've asked  
10 him that three times, and he's answered no twice.

11           MS. ISAKI: Can I share my screen? I want  
12 to show Intervenors 97. Is that permitted?

13           CHAIRPERSON SCHEUER: Yes.

14           MS. ISAKI: I hope that we are all looking  
15 at Intervenor's Exhibit 97. This is from PDF No. 47  
16 or PDF page.

17           Q       Could you read, if you can see it, from  
18 12:00 o'clock on August 9th, Wednesday.

19           A       I can read part of it.

20           Q       Please do.

21           A       What's the question?

22           Q       Could you please read on August 9th the  
23 Wednesday from left-hand side of the page starting at  
24 12:00 o'clock: Tom wants to ream well -- just finish  
25 out what the rest of it says. I'm just asking you to

1 read the exhibit.

2 A To ream up to 12-inches, put 12-inch pipe,  
3 170, and test 48 hours. They didn't do that.

4 Q Oh, okay.

5 And there's also a note underneath says, TM  
6 recommendation. Is that correct?

7 A That's what it says. I didn't write that.  
8 That's Marcus Frandsen, I assume. They didn't do it.

9 Q Correct.

10 So you did not recommend it or did you  
11 recommend 48 hours?

12 A We are talking about 2006, so I can't  
13 really recall, but the realities are if they were to  
14 develop it as a viable source, the casing would need  
15 to be 12-inches, bore hole would need to be reamed to  
16 19 inches and a 48-hour test done.

17 That's not what they did.

18 Q Correct, and --

19 A (Indecipherable) -- inch facing. When I  
20 put my entrance down as crooked as a dog's hind lane,  
21 there was no way this thing was going to be a viable  
22 source of supply.

23 Q Okay. And you said that there is a  
24 possibility the well could become linked to the  
25 County's water system, right?

1 A Not this well.

2 Q Sorry, the new well?

3 A The new well, yes. That's my understanding  
4 anyway.

5 Q Do you know how many hours of constant rate  
6 pumping are required for a public supply well?

7 A If it's going to be conveyed to the  
8 Department of Water, you need to go 96 hours.

9 Q Thank you.

10 And, sorry, I do have one more that I want  
11 to share if it is okay. This is actually from --

12 CHAIRPERSON SCHEUER: What is it?

13 MS. ISAKI: Petitioner's Exhibit 23, the  
14 water PowerPoint that Nance just showed, would it be  
15 okay to show a page from that?

16 CHAIRPERSON SCHEUER: Please go ahead.

17 Q (By Ms. Isaki): This is from your  
18 presentation. And is it correct that you're  
19 proposing to put the well in the springs?

20 A In the -- I can't really -- I think I have  
21 a copy of that here.

22 Q Page five.

23 A That shows the location of the well that  
24 was drilled, and we would put the new well very close  
25 to that location.



1 Q Thank you.

2 And it does say that those are springs in  
3 this area, correct?

4 A Yes, USGS quad map says that.

5 Q Great. Okay. I'll stop my share.

6 And you -- and I know you told the County  
7 you were not asked to evaluate if there was  
8 interference with the stream or spring, correct?

9 A I haven't been asked to do that, but the  
10 realities are, it's likely to be a requirement of  
11 approval of a permit to drill a new well, I would  
12 assume.

13 Q Would it also be likely a requirement to  
14 test if there is interference with other wells in the  
15 area?

16 A Well, there is -- the closest well is about  
17 4,000 feet away. You're not likely to see much of  
18 anything.

19 Q Okay.

20 And is it correct that -- or did you know  
21 that the Water Commission noted that there was a lack  
22 of evaluation of potential interference with wells  
23 and streams in assessing the test bore hole?

24 A I'm not aware of that.

25 Q I want to move onto your aquiclude

1 conclusions.

2           Your presentation asserted that at 80 to  
3 210 feet of depth there's an impermeable volcanic  
4 rock and clay which functions as an aquiclude in  
5 regard to the 2006 well?

6           A       Yes.

7           Q       Were you aware that the Water Commission  
8 reviewed the well drilling laws for that well, and  
9 concluded there was not an aquiclude, at that depth  
10 at least?

11          A       I'm aware of that, and I absolutely  
12 disagree. And we just went through a similar  
13 analysis for Mililani.

14                 It's unfortunate that the Water Commission  
15 staff just hasn't had the experience of drilling  
16 through the Koloa volcanic, and you've got layers of  
17 poorly permeable lava, layers of mud, and the  
18 realities are that you get small little freshwater  
19 bodies on some of these impermeable layers, and the  
20 assumption that there's collective permeability  
21 vertically through it is absolutely incorrect.

22          Q       Are you aware that the Water Commission  
23 believed it's possible that recharge during your 10.5  
24 hour constant rate pump test may be from the strata  
25 between 86 to 210 feet?

1           A        I'm not aware of that, and I would call  
2 that assertion without value.

3           Q        And you're aware that the Petitioner, or  
4 one of the Petitioner's other consultants poured 212  
5 bags of cement into that bore hole?

6           A        I didn't quite get the question.  Could you  
7 try again?

8           Q        Were you -- are you aware that the  
9 Petitioner poured 212 bags of cement into this test  
10 bore hole?

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

12          Q        Are you aware of whether the integral  
13 between 180 and 210 feet below ground was encased to  
14 prevent mixing between deep and shallow waters?

15          A        It's only cased for a portion of that.

16          Q        Are you aware that the Water Commission was  
17 concerned that there is currently, because it's not  
18 properly constructed and not properly field, that may  
19 allow for wasting and mixing of deep and shallow  
20 waters?

21          A        They may be of that opinion, and -- I mean,  
22 the amount of possible leakage from up above is  
23 pretty insignificant if it occurs at all in that  
24 well.

25                    Certainly when we construct the new one, it

1 would be done properly. It's one of the reasons why  
2 this thing is absolutely not usable.

3 Q And although it's not usable and not used,  
4 the Water Commission -- are you aware that they  
5 thought it -- that it posed a significant potential  
6 for leakage to occur into commingling between  
7 groundwater of different formation?

8 A That could be their opinion. I would  
9 disagree.

10 Q And to your knowledge, the entire integral  
11 has not been cased, only a part of it, correct?

12 A That's correct, yes.

13 Q And you testified earlier that it had not  
14 been, the test bore hole had not been abandoned,  
15 correct?

16 A It has not been yet, that's correct.

17 Q And the test bore hole, was it plugged?  
18 You said it was not plugged.

19 Was there a UIC permit obtained for that  
20 test bore hole?

21 A A UIC permit, is that what you're asking,  
22 underground injection -- for that well?

23 Q Yes.

24 A No, that would be -- that's for disposal  
25 wells. That's not for supply wells.

1           Q       Okay. Thank you. I just wanted to get  
2 your opinion on that one.

3                    So you're not aware of Department of  
4 Health's requirement for UIC permits for any bore  
5 hole if they are not plugged?

6           A       I'm sort of (indecipherable)-- what you're  
7 asking. A UIC permit only applies to a disposal  
8 well. It does not apply to any supply well. The  
9 disposal wells are regulated by Department of Health.  
10 UIC program, supply wells are regulated by the State  
11 Water Commission.

12                   So applying, or having any relevance of an  
13 UIC permit in this case is nonexistent.

14           Q       Is the test bore hole a supply well?

15           A       It was intended to be a supply well, not a  
16 disposal well.

17           Q       Okay. Thank you.

18                   And you -- just clarifying, none of my  
19 questions about the water master plan can directed  
20 toward you. I should ask another consultant, perhaps  
21 Agor. You don't know anything about the water master  
22 plan?

23           A       Not the current plan. I mean back in 2012  
24 I did several versions of a master plan. But I don't  
25 think they're relevant for what's being proposed

1 currently.

2 Q Is it because that water master plan was  
3 for 50 farm dwelling units, and goat grazing  
4 operation and not HoKua Place?

5 A I can't speak to that. I don't know what  
6 the current master plan is, haven't been involved in  
7 it.

8 Q One more question.

9 Your water master plan that you said you  
10 worked on before, was that for the 50 farm dwelling  
11 units and a goat grazing operation?

12 A 2012, I can't recall exactly. There were  
13 several versions. One was just for an agriculture  
14 use. Another was for potable and agricultural use.  
15 So there was more than one version of a master plan  
16 at that point in time.

17 COMMISSIONER WONG: Can you hold on,  
18 please. I think we lost the Chair. Hold on, please.

19 CHAIRPERSON SCHEUER: Sorry, I got dropped  
20 off briefly during the question. I have no idea why.

21 MS. ISAKI: I asked my last question about  
22 the water master plan.

23 CHAIRPERSON SCHEUER: I heard that  
24 question.

25 MS. ISAKI: And I was asking, I asked about

1 goat grazing operation and that was actually my last  
2 question.

3 CHAIRPERSON SCHEUER: Okay. I believe I  
4 heard it. Thank you. Okay.

5 Commissioners, who would like to ask  
6 questions of Mr. Nance?

7 Commissioner Giovanni.

8 COMMISSIONER GIOVANNI: Thank you, Chair.

9 Mr. Nance, I only have one question, and it  
10 has to do with your testimony about this -- your  
11 expectation is to drill the new well makai of the UIC  
12 line?

13 THE WITNESS: Yes.

14 COMMISSIONER GIOVANNI: And that you would  
15 need to obtain a variance or an exemption to allow  
16 that to happen; is that correct?

17 THE WITNESS: Yeah. The well, whether it's  
18 for a private system or for a County Department of  
19 Water, needs to be certified for drinking water use  
20 by the State Department of Health.

21 Because it is makai of the UIC line, the  
22 underground injection control line, it has an added  
23 procedure to alert landowners in the near proximity  
24 of the well, that once the well is certified for  
25 drinking water use, there are prohibitions for

1 installing either an independent wastewater disposal  
2 system or an actual disposal well within certain  
3 radiuses around the well.

4 So you have to go through a public  
5 notification process alerting landowners that this is  
6 what's going to happen, and this is the implications  
7 of it becoming a drinking water well.

8 COMMISSIONER GIOVANNI: And I believe you  
9 also mentioned there were two tests that had to be a  
10 company and approved for that exemption; is that  
11 correct?

12 THE WITNESS: I don't know what you're  
13 referring to.

14 COMMISSIONER GIOVANNI: You said there were  
15 two tests that had to be submitted with the request  
16 for the variance.

17 THE WITNESS: Okay, that variance is for  
18 the depth of the well, not related to the UIC permit.  
19 Did you want me to go over that?

20 COMMISSIONER GIOVANNI: No. I'm  
21 particularly interested in it being on the wrong side  
22 of the UIC line.

23 THE WITNESS: The two tests I was referring  
24 to in getting a variance were for the depth of the  
25 well drilled, not for its location makai of the UIC.



1           COMMISSIONER GIOVANNI: Thank for  
2 clarifying that.

3           Do the neighboring landowners have the  
4 option to protest or to request a contested case or  
5 whatever if they disagree?

6           THE WITNESS: My understanding is that they  
7 do, yes. They need to be notified personally by  
8 letter contacting them as well as publications in the  
9 newspaper, and that kind of thing. And they are  
10 asked to raise an objection because this, that or the  
11 other thing makes an unreasonable imposition on  
12 whatever they had wanted to do with their property.

13           COMMISSIONER GIOVANNI: And I understand  
14 your opinion that that is very, very likely, if not  
15 almost assured, that that process well work out to  
16 the favor of the Petitioner, and they will be allowed  
17 to drill the new source well below the UIC line;  
18 that's your opinion.

19           THE WITNESS: I can't predict that. I  
20 think you're sort of confusing that with whether we  
21 get permission from the State Water Commission to  
22 drill deeper.

23           I don't know what neighboring landowners,  
24 how they would respond in this notification process.

25           COMMISSIONER GIOVANNI: Okay. That leads

1 me to my real question.

2 In the event, in the whatever event, that  
3 the Petitioner is not allowed to drill a well on the  
4 wrong side of the UIC line, meaning on the makai side  
5 of the UIC line, is there another option for a source  
6 well for this property on this side of the UIC line?

7 THE WITNESS: Let me check. It's pretty  
8 much the whole property is on the makai side of the  
9 UIC line, so they would have to -- if that were a  
10 problem, they would have to find an adjacent piece of  
11 property that they could drill a well on that would  
12 be on the mauka side of the UIC line.

13 COMMISSIONER GIOVANNI: How far away is  
14 that?

15 THE WITNESS: It's not too far. I mean,  
16 it's probably within a couple thousand feet at the  
17 most from the property.

18 COMMISSIONER GIOVANNI: Okay, thank you.  
19 That's all I have.

20 Thank you, Chair.

21 CHAIRPERSON SCHEUER: Thank you,  
22 Commissioner Giovanni.

23 Commissioner Okuda.

24 COMMISSIONER OKUDA: Thank you very much,  
25 Mr. Chair.

1           Just a couple questions, Mr. Nance, and the  
2 reason why I'm asking these questions is to determine  
3 whether or not we have a problem under what's  
4 commonly called the Kuilima case. That's Unite Here!  
5 exclamation mark, Local 5 versus City and County of  
6 Honolulu 123 Hawaii Reports at 150, that deals with  
7 the issue of the need of supplementation of  
8 environmental impact statements, and frankly, whether  
9 or not the initial environmental impact statement  
10 might be adequate enough to even allow an agency to  
11 move forward.

12           My first question is, were you involved in  
13 the preparation of the Final Environmental Impact  
14 Statement?

15           THE WITNESS: No, not at all.

16           COMMISSIONER OKUDA: Have you reviewed the  
17 Final Environmental Impact Statement?

18           THE WITNESS: I've looked briefly at some  
19 of the sections.

20           COMMISSIONER OKUDA: Were you looking at  
21 sections that dealt with water, water resources and  
22 impact of the development on water or water  
23 resources?

24           THE WITNESS: I think I briefly looked at  
25 that, yes.

1                   COMMISSIONER OKUDA: In your review,  
2                   however brief it was of the Final Environmental  
3                   Impact Statement, did you see anything in the Final  
4                   Environmental Impact Statement which you can  
5                   specifically point out to us so that the record is  
6                   clear which would included the matters that were  
7                   discussed in your questioning by County of Hawaii's  
8                   -- excuse me, the County of Kauai's attorney today,  
9                   the Office of Planning's attorney today, or the  
10                  Intervenor's attorney today, can you point to where  
11                  in the Final Environmental Impact Statement those  
12                  issues were discussed?

13                  THE WITNESS: I can't. I don't have the  
14                  EIS here, and my review was very brief. I was not  
15                  involved in its preparation.

16                  COMMISSIONER OKUDA: Can you recall, to the  
17                  best of your knowledge, any such discussion of those  
18                  water or water resource or water impact issues that  
19                  the three counsels questioned you about, can you  
20                  recall any such discussion in the Final Environmental  
21                  Impact Statement?

22                  THE WITNESS: I think a number of those  
23                  things that have been raised were not addressed in  
24                  the EIS.

25                  COMMISSIONER OKUDA: You have been involved

1 previously in your professional career, which is  
2 amply documented in the resume made part of the  
3 record, you have been involved in the preparation of  
4 Draft EISS and Final EISS; correct?

5 THE WITNESS: Yes.

6 COMMISSIONER OKUDA: Given your experience,  
7 are you troubled in any way, no matter how manini or  
8 small you might be troubled, but are you troubled in  
9 any way that these water issues were not discussed in  
10 the Final Environmental Impact Statement?

11 THE WITNESS: Troubled is a kind of a  
12 strange word, because I haven't been involved in that  
13 part of the progress but, you know, had I been the  
14 author of this section, I would have written it in a  
15 different and far more detailed way.

16 COMMISSIONER OKUDA: My last question deals  
17 with the process of decision-making and the duties  
18 which the law imposes on us as Commissioners of the  
19 Land Use Commission.

20 You do agree we're not like the  
21 legislature? We can't just make decisions based on  
22 our personal preferences. We're required to follow  
23 the law strictly as the legislature has passed the  
24 law; do you agree with that?

25 THE WITNESS: I really can't speak to that,

1 I'm a hydrologist. I deal with water and wells and  
2 so forth.

3 COMMISSIONER OKUDA: If we were to just  
4 look at the Final Environmental Impact Statement, do  
5 you believe there is sufficient information in the  
6 Final Environmental Impact Statement for us on the  
7 Land Use Commission to make a reasoned decision with  
8 respect to the impact and effect and availability of  
9 water for this project, or is there not sufficient  
10 information?

11 THE WITNESS: I didn't review the EIS for  
12 that purpose. I was really just reviewing it to see  
13 if they had in some way or other misrepresented both  
14 the existing well that was drilled, and the proposal  
15 to drill a new one.

16 But I didn't review it to see if it was  
17 complete or whatever. So I really sort of don't feel  
18 comfortable responding to that.

19 COMMISSIONER OKUDA: This actually will be  
20 my final question.

21 Whether you feel comfortable or not, based  
22 on your experience as documented in your resume,  
23 which is part of the record, can you point to  
24 anything in the Final Environmental Impact Statement  
25 which, for example, I, or we as Commissioners can

1 believe that there is sufficient discussion in the  
2 Final Environmental Impact Statement with respect to  
3 the topics that you testified on today?

4 THE WITNESS: As I said, I didn't review  
5 the EIS from that perspective. I think what I  
6 presented in the testimony today represents my  
7 opinion about the viability of the well being  
8 successful onsite.

9 COMMISSIONER OKUDA: And your opinion, as  
10 you testified today, is not stated in writing in the  
11 Final Environmental Impact Statement, correct?

12 THE WITNESS: I think that is correct, yes.

13 COMMISSIONER OKUDA: Thank you, Mr. Chair;  
14 and thank you very much, Mr. Nance.

15 No further questions.

16 CHAIRPERSON SCHEUER: Thank you,  
17 Commissioner Okuda.

18 Commissioners? I, of course, have  
19 questions for Mr. Nance, but don't want to jump in  
20 line. Commissioners?

21 Hi, Tom, and forgive me if some of my  
22 questions are a little bit repetitive of some of the  
23 questions -- oh, Commissioner Aczon.

24 VICE CHAIR ACZON: Sorry about that. I  
25 wasn't going ask. I just have a simple question to

1 Mr. Nance.

2           You know, I value everybody's expert's  
3 recommendations. My question is as you have said  
4 there's not going to be enough supply of water just  
5 through the County, and it will need a well to  
6 accommodate this project.

7           So is it your testimony that, given the  
8 County or -- whether the County or private well,  
9 there will be sufficient amount of water to supply  
10 this project?

11           And, in addition, would there be any  
12 adverse affect to the environment if the Petitioner  
13 proceeded without -- (indecipherable).

14           Also -- let me let you answer that question  
15 first, then I'll ask the next question.

16           THE WITNESS: Are you asking if it's my  
17 opinion that the well will be able to provide  
18 sufficient supply for the project; is that your  
19 question?

20           VICE CHAIR ACZON: Yeah, I want to kind of  
21 confirm that your testimony is -- you are testifying  
22 that there would be sufficient amount of water to  
23 supply the project, whether it's County or in  
24 addition to the private well?

25           THE WITNESS: Yeah. My testimony is that,



1 you know, by developing a new well on this site  
2 properly, there will be sufficient supply.

3 VICE CHAIR ACZON: In doing the additional  
4 well, or drilling another well, would there be an  
5 adverse affect to the environment?

6 THE WITNESS: I don't believe so. Drawing  
7 water from more than 200 feet below sea level, and  
8 that water is hydrologically connected to the ocean  
9 at depth offshore, so it's not going to affect  
10 anything in the nearshore area or anything that is  
11 above this aquifer. So I think it can be developed  
12 without adverse impacts.

13 VICE CHAIR ACZON: That's what your  
14 testimony is. I just wanted to confirm.

15 The second one, the next question is, would  
16 there be any problem or issue that would prevent the  
17 drilling of this well?

18 Do you think any problem issue come out to  
19 prevent drilling this well, and in return not enough  
20 water for this project?

21 I'm just trying to figure out, what would  
22 stop the supply of this water to the project?

23 THE WITNESS: I'm pretty sure that when  
24 we -- which stopped the case when the original  
25 application went in in 2005 or 2006, but times have

1 changed.

2 I would expect, given its location, that  
3 during the pump testing, we would, as a condition of  
4 approving the permit, have to prove that we are not  
5 impacting the spring and the surface water nearby.

6 So I'm pretty sure, or would be confident  
7 that in approving the permit to drill the well, the  
8 conditions apply that would include that kind of  
9 monitoring to demonstrate that the impact to the  
10 surface water, and even the shallow groundwater is  
11 negligible.

12 We could do that in the well design because  
13 in the annular space we can put something that can  
14 measure impact in the strata above the zone that we  
15 are pumping from, and we put water level recorders in  
16 there to demonstrate that when we get a drawdown in  
17 this lower formation, the upper water levels have no  
18 impact, no affect. So we do that, plus any kind of  
19 surface water monitoring to demonstrate that --

20 VICE CHAIR ACZON: You don't really see  
21 it --

22 CHAIRPERSON SCHEUER: Hold on, hold on.

23 THE WITNESS: -- pump from depth without  
24 impacting the groundwater and the surface water  
25 above.

1           VICE CHAIR ACZON: I just want to make sure  
2 that you don't see any really problem later on,  
3 whether its government regulation or environmental  
4 thing that would be a problem in the supply into the  
5 water.

6           You don't have to answer that. I just want  
7 to kind of confirm your testimony, because I just  
8 want to kind of make sure you catch everything.

9           You mentioned that drilling a well might  
10 cost maybe half million dollars?

11          THE WITNESS: To drill case and do the  
12 final pump testing and including all of the required  
13 monitoring, so forth, it's a very round number  
14 because I haven't made any specific estimate, but  
15 it's in that range.

16          VICE CHAIR ACZON: Do you think that cost  
17 would be kind of cost prohibitive for the project to  
18 move on?

19          THE WITNESS: I can't answer that. I have  
20 no idea about the finances of the project itself.

21          VICE CHAIR ACZON: Thank you, Mr. Nance.

22          Thank you, Mr. Chair. That's all I wanted.

23          CHAIRPERSON SCHEUER: Commissioner

24 Ohigashi, then we might be running up against a need  
25 to take a break.

1           COMMISSIONER OHIGASHI: Just had a couple  
2 questions.

3           Referring you back to Exhibit 97 that was  
4 placed -- Ms. Isaki, Intervenor's exhibit. Is that  
5 your notes?

6           THE WITNESS: No.

7           COMMISSIONER OHIGASHI: Do you know whose  
8 notes they are?

9           THE WITNESS: I'm pretty sure, can't say  
10 for sure, but Marcus Frandsen, who was the well  
11 driller.

12           COMMISSIONER OHIGASHI: So I just wanted to  
13 know, because I didn't know whose notes those were.

14           The other question that I had is, regarding  
15 impacts to other wells or impacts downstream, is it  
16 your position is that that really cannot be measured  
17 until the well is drilled and the tests are  
18 conducted?

19           THE WITNESS: Yes, yeah.

20           COMMISSIONER OHIGASHI: And is that -- is  
21 there any test that can be done prior to the drilling  
22 that would indicate any of these impacts that may  
23 occur or may not occur, rule out?

24           THE WITNESS: There wouldn't be any that  
25 I'm aware of. You would have to get the perturbation

1 of pump testing to create any impacts that might  
2 occur to see if you can monitor to pick up any  
3 impacts.

4 COMMISSIONER OHIGASHI: That's all I wanted  
5 to know. Thank you.

6 CHAIRPERSON SCHEUER: It's 11:28. We have  
7 been going an hour and 13 minutes, which is longer  
8 than I typically like to go. I had suggested we take  
9 a break for lunch right now until 12:15. This is  
10 going to disadvantage Commissioner Giovanni who needs  
11 to take leave of our meeting between 12:00 and  
12 approximately 2:00 o'clock, so we could do one of two  
13 things, take a brief break right now, and continue  
14 until noon; take a break from noon to 1:00; or we  
15 could do as planned.

16 Is there a preference among the  
17 Commissioners? Commissioner Aczon.

18 VICE CHAIR ACZON: Go up to noon, then  
19 break.

20 CHAIRPERSON SCHEUER: I do need to give  
21 people at least a chance to go to the restroom. So  
22 we'll break, it's 11:29, we'll break for six minutes  
23 until 11:35, come back, go take a break from noon to  
24 1:00.

25 COMMISSIONER GIOVANNI: Thank you, Chair.

1                   CHAIRPERSON SCHEUER: Commissioners,  
2 continue cross-examination by Commissioners of Mr.  
3 Nance. Further questions from the Commissioners? If  
4 not --

5                   MS. AHU: Mr. Chair, I don't believe Mr.  
6 Yuen is back.

7                   MR. YUEN: He's here.

8                   CHAIRPERSON SCHEUER: Thank you, Ms. Ahu.  
9 Any questions for Mr. Nance from the other  
10 Commissioners?

11                   If not, I started to say before  
12 Commissioner Aczon asked his questions, forgive me if  
13 some of these questions appear to be repetitive, but  
14 similar questions have been asked in slightly  
15 different ways by various parties and Commissioners.

16                   I want to make sure I understand the  
17 responses.

18                   Can I start out with the UIC line  
19 discussion. UIC stands for underground injection  
20 control line. Can you help us understand what the  
21 purpose of that line is by the Department of Health?

22                   THE WITNESS: The purpose of that is to --  
23 there is, on the makai side of the line, we are  
24 considered at the point in time the line was drawn to  
25 be not potential sources for drinking water. And so

1 disposal wells were allowed makai of the line in the  
2 assumption that it wasn't going to be impacting a  
3 potential potable water source.

4 On the mauka side of the line, the  
5 presumption was, groundwater there was potential  
6 source of drinking water supply into which disposal  
7 wells were not allowed to be drilled.

8 CHAIRPERSON SCHEUER: Can you tell me how  
9 large an area the Department of Health requires for  
10 neighboring property owners to be notified of a  
11 potential drinking water source if there is a  
12 proposed drinking water source makai of the UIC line?

13 THE WITNESS: I would have to look that up.  
14 I'm not sure. It's either -- I think it's a quarter  
15 mile radius, but I'm not positive about that.

16 CHAIRPERSON SCHEUER: And is this -- would  
17 you know if this is the way the -- is it a Department  
18 of Health rule, or is there a procedure that allows  
19 for this certification?

20 THE WITNESS: It's not a rule. It's a  
21 procedure that they created. I actually had drilled  
22 and got certified maybe four or five wells in the  
23 Kahului aquifer makai of the UIC line that I hadn't  
24 picked up, and that the Department of Health had not  
25 picked up.

1           When I went to get two more wells certified  
2 for drinking water, it's makai of the line, and I've  
3 got all these other wells certified makai, so I  
4 talked to the Safe Drinking Water Branch, and they  
5 created these guidelines for potential drinking water  
6 wells on the makai side of the line.

7           CHAIRPERSON SCHEUER: So we're trying to  
8 protect drinking water sources from contamination, is  
9 that the basis of it?

10          THE WITNESS: That's the basis.

11          CHAIRPERSON SCHEUER: And it ultimately  
12 relates to the Safe Drinking Water Act on federal  
13 law; is that correct?

14          THE WITNESS: Could you try repeating that?

15          CHAIRPERSON SCHEUER: The purpose of  
16 drawing the UIC line is part of the State's  
17 compliance with the Federal State Water Drinking Act?

18          THE WITNESS: I assume, but I'm not  
19 positive about that.

20          CHAIRPERSON SCHEUER: Is the -- if you are  
21 locating a potential drinking water source makai of  
22 the UIC line, do landowners -- does it only restrict  
23 their activities going forward, or would they also be  
24 required to remove any potential sources of  
25 contamination to the drinking water source for that



1 water source to be allowed as a drinking water  
2 source?

3 THE WITNESS: The pre-existing, either  
4 disposal wells or individual wastewater disposal  
5 systems, they would be grandfathered in. They  
6 wouldn't have to be removed. And it would be up to  
7 us to prove to the Department of Health that those  
8 pre-existing potential sources of contamination will  
9 not be an issue for the drinking water well.

10 CHAIRPERSON SCHEUER: Thank you.

11 Is there anything in your work in the  
12 record that indicates how many potential existing  
13 contamination sources there were in the area that the  
14 Department of Health would require notification on?

15 THE WITNESS: I think there's little or  
16 none at the moment.

17 CHAIRPERSON SCHEUER: In the record there  
18 is little or none, just to clarify?

19 THE WITNESS: A quarter mile radius within  
20 where the new well would go. Not in terms of manmade  
21 things. I'm not aware of any potential source of  
22 contamination.

23 CHAIRPERSON SCHEUER: Just to be really --  
24 I want your answer to my question to be clearly  
25 responsive to my question.

1           In the record, or in your research, was  
2 there work done to identify any of these potential  
3 sources? Do we have documentation in the record that  
4 a survey was done to see whether there is potential  
5 contaminating sources existing within this area?

6           THE WITNESS: No such survey was conducted.

7           CHAIRPERSON SCHEUER: Thank you.

8           Now, I want to go to the other permit, or  
9 the variance that you mentioned regarding the  
10 constructing the well below a recommended depth and  
11 seeking a variance to the well construction and pump  
12 installation permit standards from the Water  
13 Commission.

14           Can you explain for those of us who don't  
15 know why there is an existing limit that you would  
16 have to exceed, why the well construction pump  
17 installation standards have those limits in them?

18           THE WITNESS: Let's say what the limit is.  
19 The limit is that without prior approval from the  
20 Commission with a variance, that you can't drill more  
21 than one quarter of the thickness of what is assumed  
22 to be a basal groundwater condition. And if it's  
23 actually basal groundwater with saline groundwater  
24 beneath it, if you drill too deep, and pump at a rate  
25 that creates up-coning of a saltwater into the

1 freshwater zone, you have a problem with increasing  
2 salinity going forward, not only a problem for the  
3 well, but a problem for the aquifer.

4           And a very large percentage of all the  
5 wells in the State are basal groundwater in which  
6 that's an applicable kind of limit to apply.

7           But in areas where you've got lava layers  
8 at and below sea level that are essentially  
9 impermeable on West Hawaii, for example, we have in  
10 Kapolei area, we have to exceed the quarter lens  
11 thickness to get any yield at all.

12           And in that case, we have to demonstrate to  
13 the Water Commission that we cannot have this  
14 salinity issue drilling to that depth.

15           On Kaua'i it's a very different situation  
16 for the Koloa volcanics, or even the Waimea volcanics  
17 overlaying by the Koloa volcanics, because we can put  
18 wells far closer to the shoreline on Kaua'i because  
19 of the Koloa, than basically anywhere else in the  
20 State without running into a salinity problem.

21           So a very large percentage of the wells  
22 drilled into the Koloa volcanics, because of its  
23 permeability layering, has to exceed what is assumed  
24 to be a basal groundwater condition.

25           But it's very questionable that that

1 actually is an accurate description of the  
2 groundwater that's existing in that formation.

3           So we are basically required to stick to a  
4 depth based on the assumption of a free basal  
5 groundwater with saltwater beneath it, even though in  
6 this particular case, and in numerous others that we  
7 have done on Kaua'i, which, you know, if we stuck to  
8 the quarter lens thickness, we would have no yield at  
9 all.

10           CHAIRPERSON SCHEUER: Thank you. That's a  
11 very good description of why those standards are  
12 there, and how you believe they might not apply here.

13           I want to go from that to something that  
14 was mentioned by the Intervenor's counsel in  
15 questioning.

16           There appears to be a disagreement between  
17 you and Water Commission staff over the presence of  
18 an aquiclude in this area.

19           Could you explain that difference of  
20 opinion from your perspective?

21           THE WITNESS: Well, as I say, we just went  
22 through this virtually identical argument with the  
23 Water Commission on a well that was recently  
24 completed little north of the area we are talking  
25 about now. And they look at what the driller

1 presents, and it's a layering that has layers of  
2 poorly permeable volcanics and clay and so forth, and  
3 so the driller's report says, oh, found this water at  
4 depth, and this water at this depth, and they're  
5 assuming that this basically has, in the vertical  
6 thing, a hydraulic connection.

7           We went through the exercise on the Molowa  
8 (phonetic), this is within the last year, to  
9 demonstrate that that wasn't the case. And its  
10 pretty similar argument that if we go through that  
11 same thing with the new well, we would have to  
12 establish that with them.

13           The realities are that what you're dealing  
14 with in Koloa volcanics is very heterogenous, very  
15 difficult to predict, varies from one location, but  
16 generally speaking, when you get a series of poorly  
17 permeable volcanics clay layers, which is the case,  
18 basically in total it functions as an aquiclude.

19           CHAIRPERSON SCHEUER: So why did the Water  
20 Commission staff disagree with you?

21           THE WITNESS: You would have to ask them.  
22 But the realities are they're not privy to -- they're  
23 limited by what the well completion report says,  
24 versus my experience in the field of drilling wells  
25 and running into these small little perch water

1 bodies separated. And they just didn't have that.

2 So that's kind of why we went through this  
3 long argument on the Molowa within the last year, and  
4 they finally agreed with us.

5 CHAIRPERSON SCHEUER: Is it the staff or  
6 Water Commission that needs to approve the variances?

7 THE WITNESS: It's the staff. In the case  
8 of the Molowa 1 Well, Roy Hardy, Patrick Case, Bob  
9 Schmidt (phonetic), those guys on staff.

10 CHAIRPERSON SCHEUER: Again, since we are  
11 limited to the record, what we have right now based  
12 on the oral testimony and the written record is that  
13 the Water Commission staff believes there is not an  
14 aquiclude, you believe there is. And that its the  
15 Water Commission staff that has to be convinced that  
16 there is an aquiclude in order to grant the variance  
17 that's needed?

18 THE WITNESS: Well, the aquiclude isn't  
19 needed, because its basically the variance is to  
20 drill deeper. But, you know, let's say that they  
21 refer back to the original assumption of not an  
22 aquiclude, we can easily demonstrate to them that it  
23 is, because we can install solid casing to a depth,  
24 louver casing below that, but in the annular space we  
25 can put multiple sounding tubes to various depths in

1 what I'm referring to as an aquiclude, pump the well,  
2 and demonstrate that the small little perch water  
3 bodies in the aquiclude have no response to pumping  
4 the well.

5 I can prove that at that point in time with  
6 the annular space sounding tubes at varying depths.  
7 So the overlying --

8 CHAIRPERSON SCHEUER: Sorry to interrupt  
9 you, Tom. Please continue.

10 THE WITNESS: Is there a question? I  
11 didn't hear you.

12 CHAIRPERSON SCHEUER: I think I interrupted  
13 the conclusion of your statement.

14 THE WITNESS: I think I said it all. If  
15 the Water Commission makes it an issue in approving  
16 the permit, we would be prepared to say, here's how  
17 I'm going to prove to you with these annular space  
18 sounding tubes that it is in fact functioning as an  
19 aquiclude.

20 CHAIRPERSON SCHEUER: My third set, and  
21 hopefully this won't take too long, just summarize  
22 some of the testimony that you've given.

23 If the well is dedicated to the Department  
24 of Water Supply, they require an unknown percentage  
25 of the well to be dedicated to their use?

1 THE WITNESS: I would assume so.

2 CHAIRPERSON SCHEUER: Is that standard  
3 practice in Hawaii?

4 THE WITNESS: Generally speaking for  
5 municipal departments of water supply, yes.

6 CHAIRPERSON SCHEUER: So if the well with  
7 its proposed 500-gallon per minute capacity is  
8 dedicated to the County, there may not be sufficient  
9 production from the well to satisfy this development;  
10 is that correct?

11 THE WITNESS: That would be correct, if we  
12 install the 500 gpm pump. That's not necessarily the  
13 limit of the capacity of the well. The test rate of  
14 532 feet for the existing well, that was the capacity  
15 of the contractor's pump, so we couldn't pump more in  
16 that instance.

17 But I would have to know before we even  
18 apply for the permit if it's going to be for ultimate  
19 dedication to the Kaua'i Department of Water what  
20 percentage do they need, therefore, what capacity are  
21 we shooting for the well. And we would have to go  
22 out and prove that in fact we can produce that  
23 capacity.

24 CHAIRPERSON SCHEUER: But I've been relying  
25 on the statements from Mr. Bow that attribute to you



1 the statement that you believe the 500-gallon per  
2 minute pump was -- could be used with that and  
3 produce water.

4 THE WITNESS: 500 gpm would work for  
5 private water system. I'm assuming based on  
6 negotiations between the parties, some portion of the  
7 well's capacity would be for Department of Water's  
8 use, and we would need to know what that was, so we  
9 would have to know what capacity we need to be  
10 shooting for in the well.

11 CHAIRPERSON SCHEUER: We have no evidence  
12 in the record right now that a larger pump capacity  
13 well would necessarily be -- that the aquifer that  
14 you're targeting would necessarily be capable of  
15 producing water for a larger pump.

16 THE WITNESS: We don't have any physical  
17 evidence on the record. It's my belief that we can  
18 do that. But we -- (indecipherable).

19 CHAIRPERSON SCHEUER: It's on the record  
20 that (indecipherable).

21 And the brief pump test that you did, you  
22 didn't assess that, correct?

23 THE WITNESS: Yeah, we pumped it up to  
24 530 gallons a minute, ten-and-a-half hours at that  
25 rate.

1 CHAIRPERSON SCHEUER: Thank you.

2 Last question. I'm sorry, I know I should  
3 know this from the record, but I can't find it  
4 immediately.

5 When was the well that will be abandoned  
6 drilled?

7 THE WITNESS: I didn't get the last part.

8 CHAIRPERSON SCHEUER: The well that you  
9 tested but that needs to be abandoned, when was that  
10 drilled?

11 THE WITNESS: I still couldn't hear the  
12 last part of your question.

13 CHAIRPERSON SCHEUER: The well which you  
14 tested which needs to be abandoned, when was that  
15 drilled?

16 THE WITNESS: In 2006.

17 CHAIRPERSON SCHEUER: But the landowner --  
18 I understood from the testimony, it is not a well  
19 that was ever authorized by the Water Commission.

20 THE WITNESS: I think they did get a well  
21 construction permit, and then they filed a well  
22 completion report, I believe, and that's where the  
23 response from the Water Commission emanated from.

24 CHAIRPERSON SCHEUER: That indicated that  
25 the well needed to be plugged and abandoned?

1 THE WITNESS: Yeah. It's the right call on  
2 their part for sure.

3 CHAIRPERSON SCHEUER: Is there a timeline  
4 that's required on that plugging and abandonment,  
5 under the law, do you know?

6 THE WITNESS: I don't know. I'm sure that  
7 15 years is longer than would be, because it hasn't  
8 been plugged yet.

9 CHAIRPERSON SCHEUER: So did this  
10 notification, to your knowledge, occur during the  
11 time in which Mr. Peter Young was consultant for the  
12 early version of the proposed project?

13 THE WITNESS: I don't know. I was aware  
14 that Peter Young got involved in some point after I  
15 stopped, but I don't -- I can't recall.

16 CHAIRPERSON SCHEUER: But it is true that  
17 this is the same Peter Young who was once the Chair  
18 of the Water Commission, correct?

19 THE WITNESS: Yes.

20 CHAIRPERSON SCHEUER: Okay, that's it for  
21 me. That's all I had.

22 Is there anything further, Commissioners?  
23 Otherwise, it's any redirect by Mr. Yuen.

24 Commissioner Wong.

25 COMMISSIONER WONG: Just one question. Can

1 you define what aquiclude is?

2 THE WITNESS: Okay. An aquiclude is a  
3 layer or formation that hydrologically separates  
4 groundwater above it from the groundwater below it,  
5 so that you get two distinct and separate groundwater  
6 bodies above and below the aquiclude.

7 COMMISSIONER WONG: That's all I needed to  
8 know, because I didn't know what aquiclude means.  
9 Thank you.

10 COMMISSIONER GIOVANNI: Mr. Nance, what is  
11 the ballpark cost to plug this well that should be  
12 plugged by now?

13 THE WITNESS: It's probably between 15 and  
14 20,000.

15 COMMISSIONER GIOVANNI: Thank you.

16 CHAIRPERSON SCHEUER: Anything further,  
17 Commissioners?

18 If not, any redirect, Mr. Yuen?

19 MR. YUEN: Yes.

20 REDIRECT EXAMINATION

21 BY MR. YUEN:

22 Q Mr. Nance, you were asked whether your  
23 report that was part of the Environmental Impact  
24 Statement was complete or not. And I wanted to  
25 direct your attention to a portion of Petitioner's

1 Exhibit 4, Volume 2A, there is an Exhibit E in the  
2 report, I believe. And I'm referring to a memo that  
3 is included in the EIS that you drafted dated  
4 September 10th, 2012.

5 A Yes.

6 Q Can you take a look at that, please. In  
7 that report -- and you subsequently prepared a report  
8 that we have marked as Exhibit Number 22, which is  
9 your analysis prepared earlier this year; correct?

10 A Yes.

11 Q Did your basic conclusion that the water  
12 source would be sufficient for this development, did  
13 you make that conclusion in your 2012 report?

14 A Yes.

15 Q And you made essentially the same  
16 conclusion this year, correct?

17 A Yes.

18 Q And what is the difference? Can you refer  
19 the work (indecipherable).

20 A Not really. The memo that you're referring  
21 to, the 2012, was sizing criteria for what was going  
22 to be a private water system, with this new well to  
23 be developed properly as a source of supply, and  
24 that's the same conclusion I've come to in my  
25 February 2021 memo.

1           MR. YUEN: Thank you. No further  
2 questions.

3           CHAIRPERSON SCHEUER: Any recross?

4           MR. DONOHOE: No, thank you.

5           MS. KATO: No, thank you.

6           CHAIRPERSON SCHEUER: Intervenor?

7           MS. ISAKI: Just a clarifying question.

8                           RE CROSS-EXAMINATION

9 BY MS. ISAKI:

10           Q        So that -- when you say your conclusion  
11 hasn't changed, you're speaking about this project,  
12 your conclusion that there's enough supply for  
13 759 units, plus the commercial and everything, that  
14 still applies; is that what you're saying?

15           A        Yes.

16           Q        Thank you.

17           CHAIRPERSON SCHEUER: With that, we have  
18 made it through yet another witness in this  
19 proceeding.

20                    Thank you, Mr. Nance. I think you got off  
21 easiest actually of anybody who's appeared so far.

22                    It is 11:57. We will reconvene at  
23 1:00 p.m.

24                    (Noon recess taken.)

25           CHAIRPERSON SCHEUER: It's 1:00, we're back

1 on the record.

2 And Petitioner's final listed witness, Ron  
3 Agor.

4 Do you swear or affirm that the testimony  
5 you're about to give is the truth?

6 THE WITNESS: I do.

7 CHAIRPERSON SCHEUER: Please proceed, Mr.  
8 Yuen or Ms. Ahu.

9 MR. YUEN: I think Ms. Ahu would like to  
10 share her screen.

11 CHAIRPERSON SCHEUER: Please go ahead.

12 MS. AHU: My PowerPoint is pulling up, but  
13 a little slow. I think it's good right now.

14 RON AGOR

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

18 DIRECT EXAMINATION

19 BY MR. YUEN:

20 Q Will you please state your name and address  
21 for the record?

22 A Good afternoon, Commissioners. For the  
23 record, my name is Ron Agor, and I reside in Lihue,  
24 Kaua'i, 3728 Nawiliwili Road. I was raised in  
25 Kekaha, in a plantation environment since I was an

1 infant.

2 Q What is your business affiliation?

3 A I first started my career in Cal Poly --  
4 not San Luis -- but in San Luis Obispo County.

5 In 1982, after leaving University of Cal  
6 Poly San Luis Obispo where I studied architecture and  
7 some planning.

8 And my first encounter in development  
9 planning was to work with a civil engineer who was  
10 commissioned to do four senior housing projects in  
11 the San Joaquin Valley. And my primary function was  
12 to do the site planning, and drive out two-and-a-half  
13 hours and meet with government agencies and  
14 continually keep in contact with them to make sure we  
15 were on the right track.

16 I then worked with the Corps of Engineers,  
17 toured the projects that were near wetland areas. I  
18 practiced there for four years.

19 In 1986 I decided to return home to my home  
20 island, Kaua'i. And since 1986, I've been practicing  
21 architecture, engineering, development, planning,  
22 land use and environmental assessment work for  
23 projects in Kaua'i. And so my total years is about  
24 35, 40 years of experience.

25 One of my first encounters in development



1 planning on Kaua'i was working with Fox of Fox Hawaii  
2 in master planning the Waimea Plantation Cottages on  
3 the west side.

4           And throughout the 35 years I have done a  
5 lot of pro bono work for most of the major non-profit  
6 organizations in helping them plan and get use  
7 permits and some attachments on a pro pono basis for  
8 the projects.

9           And I mention that because working with  
10 this non-profit organization have helped me immensely  
11 in my development planning work. I've learned so  
12 much from them in terms of the problems of the  
13 community. The problems that develop, and then  
14 miraculously always come up with solutions to help  
15 people.

16           In all of my projects and planning and in  
17 architecture I try to do everything I can to  
18 implement what I learned from this non-profit  
19 organizations.

20           So to bring me up to current situations, I  
21 have just completed the draft master plan 455-acre  
22 parcel for Kikiaola Land Company in Waimea, Kaua'i.  
23 And the master plan was focused on the best use of  
24 the property according to the needs of the community  
25 and according to the newly developed General Plan.

1           Also recently we completed the development  
2 planning and designs for a 100-unit cottage-style  
3 housing project in Koloa, called Koloa South Town.

4           Across the street from Koloa South Town we  
5 completed the planning and design use permit work for  
6 Koloa Estates, which involved some single-family  
7 dwellings, and a 72-unit condominium project.

8           So that really sums up my background as a  
9 developer, planner and architect.

10          Q       Mr. Agor, is the HoKua Place property  
11 appropriate for this development?

12          A       I certainly -- I certainly believe so.  
13 HoKua Place is a large undeveloped parcel close to  
14 Kapa'a Town. HoKua Place is reasonably close to  
15 government services. The project will provide  
16 housing close to where people work, and should  
17 eliminate traffic coming from the north.

18                As part of being classified as agriculture  
19 land, HoKua property is subject to trade winds, lack  
20 of irrigation water, and inappropriate for intensive  
21 cultivation here in the proximity of Kapa'a Middle  
22 School.

23                The County does not propose to include  
24 HoKua Place in its designation of IAL lands.

25          Q       Please describe how HoKua Place complies

1 with the Kaua'i County General Plan.

2 A Kaua'i General Plan now designates HoKua  
3 land in the category of neighborhood general zoning.  
4 Neighborhood general zoning applies to property  
5 developments that are within the ten-foot radius of  
6 walking distance.

7 And purpose of that is to, one, minimize  
8 traffic, and to integrate residential developments  
9 with the town.

10 HoKua Place would accommodate residential  
11 growth in central Kapa'a, and is comprised with the  
12 goals and objectives and policies set forth in the  
13 Kaua'i General Plan.

14 Q Given the concerns expressed by some  
15 testimony regarding the location of new housing  
16 closer to employment center of Lihue, do you believe  
17 that the HoKua Place project site is an inappropriate  
18 location for a large new housing project in Kaua'i?

19 A I think it is appropriate location for a  
20 housing project to address the housing needs of  
21 Wailua and Kapa'a area.

22 Now, I belong to the (indecipherable) --  
23 and I hear chatter on the internet for the last ten  
24 years about shifting, how to where the workplace are.  
25 My belief is that sometimes plans, even architects

1 like to come up with one solution for all, and try to  
2 push their idealistic ideas into play. And sometimes  
3 we don't look at the needs in the ones of the people  
4 that we're trying to help.

5           Now, the idea of putting housing where the  
6 workplace is, works really, really well the that  
7 metropolitan areas. You can drive miles and miles  
8 and compared to Wailua and Kapa'a, drive miles and  
9 miles and you see the same, so it doesn't matter  
10 where the people live. In fact, it's a bonus if  
11 there homes are placed where they were raised.

12           Kaua'i is different. The Kapa'a and Wailua  
13 area it's suggested in an analysis that there are  
14 many families that are doubling up with siblings; are  
15 many families doubling up with parents, and choose to  
16 live up in Kapa'a for a reason. The needs are that  
17 they grew up in that area. They went to the  
18 elementary school. They went to intermediate school  
19 and the high school. They were -- the place in  
20 Kapa'a town. They went to the beach, and now an  
21 element of having to work back there is a big draw  
22 for people to want to continually live where they  
23 grew up.

24           And besides that, anything mauka of the  
25 Bypass Road or town, and even in the Wailua

1 Homestead, it's an unbelievable place to live. It's  
2 a beautiful place to live, and it's got ocean view,  
3 coastal views, majestic views, views of the mountains  
4 with trees. And, you know, they want to live there.

5 And who are we to say that if you want  
6 housing, you got to move to Lihue. You know, they  
7 don't want to move to Lihue. They don't want to go  
8 there and live and listen to the airplanes up to  
9 11:30 at night.

10 So we have to treat people and communities  
11 individually, and not use a cookie cutter solution.  
12 So I think it's appropriate to have this housing  
13 project in Kapa'a.

14 The General Plan states, the old and new  
15 General Plan states that need to address housing in  
16 Wailua and Kapa'a. Didn't say we need to address  
17 housing in Wailua and Kapa'a by moving the population  
18 to Lihue.

19 So I think we need to treat Kapa'a and  
20 Wailua rather than for people who are looking to buy  
21 their first home, cookie cutter.

22 Q Turning to the next area of questioning,  
23 are you aware of any wetlands on the HoKua Place  
24 property; and if so, how does the Petitioner intend  
25 to develop this area?



1 went on-site and searched had for U.S. Fish and  
2 Wildlife's map. And the only map I could find was a  
3 map developed in 2019 that shows the 3.8 --  
4 3.3 acres.

5 So I believe, I strongly believe that Fish  
6 and Wildlife acted on developing their own map. And  
7 going back historically, once the wetlands are  
8 delineated in a community, U.S. Fish and Wildlife,  
9 who is objectively to protect fish and wildlife, have  
10 a tendency to develop their own map and expand the  
11 wetlands, and give it a certain category, certain  
12 type of wetland. And it identified on their map.  
13 So --

14 CHAIRPERSON SCHEUER: One moment. One  
15 moment, Mr. Collins.

16 MR. COLLINS: Mr. Chair, we have an  
17 objection to this testimony. Is the party permitted  
18 to have its own witnesses impeach its previous  
19 witnesses?

20 CHAIRPERSON SCHEUER: To the degree that  
21 that is the case, which I'm not saying it is, it  
22 certainly wouldn't be in the interest of the  
23 Petitioner, but I wouldn't see why we would bar  
24 Petitioner from having their witness state what they  
25 wanted their different witnesses to state.

1 I'm not understanding the nature of your  
2 objection, Mr. Collins.

3 MR. COLLINS: Sorry, I thought it was like  
4 it related to the efficiency of the proceedings, but  
5 if that's not custom here, I'll withdraw the  
6 question.

7 CHAIRPERSON SCHEUER: If that is the case,  
8 that would be unusual.

9 MR. COLLINS: Sorry, I'll withdraw.

10 CHAIRPERSON SCHEUER: Please continue, Mr.  
11 Yuen with Mr. Agor.

12 THE WITNESS: So my feeling is that when we  
13 sent out the Draft EIS to all of the agencies,  
14 including Fish and Wildlife, it was then that Fish  
15 and Wildlife decided to address the area; and it was  
16 then that they developed their own map, and labeled  
17 30.3 (sic) acre part of kula lands as wetlands.

18 And so this is the fun part. I'm going to  
19 ramble on, but it's important.

20 Fish and Wildlife -- and I'm okay with them  
21 developing their own map. They have a mission to  
22 protect fish and wildlife, so that's okay.

23 They categorize that 3.3 acres as a certain  
24 type of wetland. And the nomenclature for this 3.3  
25 acre wetland is PFS3C. And this nomenclature, each



1 letter and number has characteristics of a land that  
2 qualifies it for this type of wetland. P stands for  
3 post (indecipherable) environment where the property  
4 is under 20 acres, and yes, it's 3.3 acres, so it  
5 qualifies. And that --

6 Q Mr. Agor, could you double check, is it 3.8  
7 or 3.3 acres?

8 A I'm sorry, 3.3 acres sorry.

9 And then the next category is having lands  
10 where there is water that's less than 2.5 meters.  
11 And there is no chance of this 3.3 acres having a  
12 body of water. The land flows a minimum of  
13 15 percent in one area, for the most part it's 30 to  
14 40 percent, but there is no way water can accumulate  
15 in a pond-like situation there.

16 And another aspect of P is ultimately and  
17 divides water. (Indecipherable.)

18 And then the last is having a strata of  
19 earth similar to that on the coastline, and this  
20 property is predominantly silted clay and a mixture  
21 silt and sandy clay.

22 Q Mr. Agor, did you physically inspect this  
23 area?

24 A Yeah, I'll get into that.

25 Q I would like to, before you go further, I

1 would like to have a slide put up, exhibit -- I'm  
2 sorry, Exhibit 37, which has been admitted into  
3 evidence.

4 CHAIRPERSON SCHEUER: Go ahead. I will  
5 say, Mr. Yuen, while I'm not commenting on Mr.  
6 Collins' objection that he withdrew, but it would be  
7 good to keep these proceedings as efficient as  
8 possible. It's going a bit slow.

9 MR. YUEN: Janna, would you put up --

10 MS. AHU: One second. Mr. Chair, can I  
11 share my screen, please?

12 CHAIRPERSON SCHEUER: Please go ahead.

13 Q (By Mr. Yuen): Mr. Agor, did you take this  
14 photograph?

15 A Yes, I did. I took it in the morning after  
16 heavy rain for a couple days and nights in the area.

17 Q Is this in the 3.3 acre area that has been  
18 classified wetland?

19 A Yes, this is on the western boundary of  
20 this 3.3 acres. And really what you see in front of  
21 you is an old cane-haul road. And you can see -- I  
22 mean, the condition of the land there is free of any  
23 flooding or any saturated land.

24 And if you look to the right, you see the  
25 slope of the land towards the bulk of HoKua property.

1 And it ranges from 15 to 40 percent slope.

2 And on the right side, it's where we have  
3 growth of java plums. It's only java plums growing  
4 up in there, except for a few weeds.

5 To the left there is a lot of hau bush.

6 Q Is there any native species there?

7 A No, no.

8 Q What is the Petitioner's plan for this  
9 area?

10 A This area has always been in the green zone  
11 of site planning. There were absolutely no  
12 intentions of going vertical in this area at all.

13 Q Notwithstanding its designation as a  
14 wetland, is it appropriate to include this 3.3 acre  
15 area of land to be reclassified to the Urban  
16 District?

17 A I need it to be included in the Petition  
18 Area. When we start out planning, on the County map,  
19 if we end up with a density of 410, that's ten units  
20 per acre, 3.3 acres converts into 33 units. And then  
21 it converts into nine affordable housing units. And  
22 I cannot lose 30 units.

23 Q From a regulatory perspective, is it  
24 appropriate to reclassify the land into the Urban  
25 District --

1 A Well --

2 Q -- from the perspective of zoning controls  
3 and other regulations?

4 A Yes, it's appropriate to have it be part of  
5 the boundary amendment.

6 Q Next, can you please describe the work of  
7 your botanical consultant Kenneth Wood and Megan  
8 Kirkpatrick, your biological consultant Reginald  
9 David, and your invertebrate consultant Steven  
10 Montgomery?

11 A Well, most studies found that that there  
12 were no --

13 CHAIRPERSON SCHEUER: Who is shuffling  
14 papers?

15 MR. YUEN: I believe that was the witness.

16 Q Go ahead.

17 A No endangered or threatened plants, fish --  
18 plant, bird, mammals was on the property and no  
19 endangered invertebrates were found on the property.

20 Q What measures will HoKua Place implement to  
21 minimize noise pollution?

22 A The increase in traffic related noise to  
23 HoKua Place operation are not expected to cause a  
24 significant noise impact. No mitigation measures  
25 beyond the compliance with applicable regulations.

1 Contractors must consult with DOH. That's  
2 Chapter 46 on Community Noise Control, construction  
3 noise levels are expected at any time to exceed DOH  
4 maximum permissible property-line noise levels.

5 Other sound measures can be incorporated  
6 into the project plan to help buffer the project  
7 traffic noise, as well as minimize impacts of noise  
8 from the project on nearby residences.

9 Q Next, Mr. Agor, turning to air quality,  
10 what measures will HoKua Place implement to minimize  
11 adverse impacts to the air quality?

12 A Short-term impacts to air quality during  
13 construction can be expected from fugitive dust.

14 Mitigation measures include watering and  
15 installation of construction screens.

16 Following construction, any change in air  
17 quality during HoKua Place expected to be well within  
18 the Federal and State ambient air quality standards.

19 HoKua Place will participate in any air  
20 quality monitoring programs required by DOH.

21 Q Could you please discuss the availability  
22 of government services and utility services to HoKua  
23 Place?

24 A The Kaua'i Police Department provides  
25 police protection for the Kapa'a area from a

1 substation in Kapa'a Town approximately half a mile  
2 from the property.

3 Kaua'i Fire Department provides fire  
4 protection for Kapa'a area from a new County fire  
5 station at the north end of Kapa'a Town approximately  
6 two miles from the property.

7 On the hospital --

8 CHAIRPERSON SCHEUER: One moment, one  
9 moment. Mr. Collins.

10 MR. COLLINS: I'm very sorry. It sounds  
11 like somebody is dragging something somewhere, and  
12 I've having a very difficult time hearing the witness  
13 at certain points.

14 Is it possible, whoever is dragging  
15 something near a microphone, if they could stop doing  
16 that, or could I ask the Chair to ask whoever is  
17 doing that to stop doing that?

18 CHAIRPERSON SCHEUER: I think it might be  
19 coming from Mr. Yuen's office.

20 MR. YUEN: I have just moved the witness'  
21 microphone. That might solve the problem.

22 CHAIRPERSON SCHEUER: Just if we could, we  
23 all can read the PowerPoint, so let's, you know, take  
24 the great advantage of the expertise of the witness  
25 being with us to his direct testimony, please.

1 MR. YUEN: I'll go to the next question.

2 Q Are public school facilities available to  
3 HoKua Place?

4 A Yes.

5 Kapa'a Elementary School and Kapa'a Middle  
6 school have capacity beyond the proposed or projected  
7 enrollment.

8 The Kapa'a High School capacity is less  
9 than what is expected in enrollment in the area.

10 HoKua Place is not a designated School  
11 Impact Fee District. No contributions are required.

12 Q Would you please describe HoKua Place's  
13 compliance with the Hawaii State Plan and the State  
14 Functional Plans?

15 A HoKua Place's compliance with many goals  
16 and objectives and policies set forth by the State  
17 Plan and State Functional Plans, particularly plans  
18 for affordable housing, socio-cultural advancement,  
19 employment, population growth, transportation, and  
20 recreation.

21 Q Have you had any conversations with the  
22 County Housing Agency regarding compliance with  
23 affordable housing requirements and continued  
24 enforcement of affordable housing guidelines?

25 A I have had discussions with the County

1 Housing Agency, and we just briefly spoke about the  
2 housing project. We didn't really get into that.

3 But I've had extensive discussions with the  
4 founders of the Affordable Housing Law, and I would  
5 like to address an issue that came up yesterday with  
6 regard to the idea that affordable housing for this  
7 project should be kept in perpetuated. The project  
8 intends to provide 233 affordable units.

9 The founders of the housing law knew that  
10 it wasn't reasonable to put limits on the equity, or  
11 when people who buy affordable homes in private  
12 developments be restricted.

13 And I have to say, I believe in American  
14 way, and I believe in (indecipherable) and having  
15 family buy their first home and use their equity at  
16 their discretion to advance themselves in our  
17 community for a better life, a huge part of life,  
18 huge part of great pursuit of happiness.

19 I believe when government restricts a use  
20 of land, say putting a ten-year time limit, all  
21 they're doing is keeping the poor poorer.

22 And I would like to see that, with help,  
23 231 families to advance, with their effort at their  
24 discretion, and if we all feel that we need more  
25 affordable housing, then we will go through the



1 process of approving another project with another  
2 231.

3 And anyway, that's my belief in trying to  
4 restrict affordable unit buyers in exercising their  
5 rights.

6 Q Would you next turn to the -- describe the  
7 compliance of this project with Coastal Zone  
8 Management criteria?

9 A HoKua Place is one-half mile inland from  
10 the shoreline.

11 HoKua Place will mitigate storm and surface  
12 water runoff concerns by retaining excess storm water  
13 in onsite detention basins.

14 No known historic sites or burial sites or  
15 customary and traditional native Hawaiian  
16 subsistence, cultural or religious practices  
17 exercised on property.

18 Satisfies the Ka Pa'akai o Ka Aina test.

19 Now, I heard Tom talk about just because an  
20 archeologist did not find any historic sites, doesn't  
21 mean they may not exist; or just because we didn't  
22 find traditional native Hawaiian practices, that that  
23 too doesn't come into play.

24 And I sat on the State Land Board for eight  
25 years prior to the current members, and I know that

1 there are sometimes, on projects, inadvertent  
2 findings of historic sites and burial sites, and  
3 there is a mechanism to take care of that.

4 If you find something, you shut it up, call  
5 SHPD, and they deal with it, continue on  
6 construction.

7 As far as the traditional native Hawaiian  
8 practice exercising on property, I always emphasize  
9 to property owners that one day someone may approach  
10 you and say that my grandfather exercised and I  
11 would like to do the same practices here. And if  
12 that happens, be smart and compensate them. And I  
13 think, I know, that the development -- developers of  
14 HoKua property will honor that situation.

15 CHAIRPERSON SCHEUER: Sorry, Mr. Yuen, how  
16 much longer?

17 MR. YUEN: I have about probably ten  
18 minutes.

19 CHAIRPERSON SCHEUER: Okay.

20 Q (By Mr. Yuen): Would you please -- you've  
21 heard testimony that no one has discussed the HoKua  
22 Place project with them, or other people may have  
23 said nobody has solicited their input on this  
24 project.

25 Can you describe your personal community

1 outreach efforts and community meetings you have  
2 attended where the HoKua Place project has been  
3 discussed?

4 A You know, this is a really important  
5 section, because every project, every project should  
6 engage in as much community contact as possible.

7 I was disappointed to hear that the Sierra  
8 Club member that spoke said that we never contacted  
9 them or never discussed HoKua Place with them.

10 And evidence shows in the Draft EIS and the  
11 Final EIS that documents were sent to them. They  
12 made comment. We responded to the comment. And I  
13 even personally delivered the Final Draft EIS and the  
14 Final EIS to one of their board members at the Kapa'a  
15 Library.

16 We have done a lot of outreach for this  
17 community, for this community on this project.  
18 Presented the project to the Kaua'i Business  
19 Association; presented the project to the Rotary  
20 Club. We had a conference on the General Plan  
21 Update. At that conference we managed to have a  
22 separate meeting to present HoKua project to  
23 representatives of Kapa'a and Wailua, should they  
24 choose to attend. We had a pretty good meeting,  
25 pretty good dialogue.

1           We also testified in front of the Planning  
2 Commission and the County Council twice in the public  
3 setting held so everybody could see, and we talked  
4 about the HoKua lands in those meetings.

5           And I personally, on all of my projects, I  
6 made contact with the community. And I walked around  
7 Kapa'a Town and stopping people and introducing HoKua  
8 lands to them, and got input from them.

9           And Kaua'i is a small town, so it's needed  
10 to do that, because you recognize everybody, easy to  
11 approach them. I even put a little site plan on a  
12 cardboard and stood in front of Safeway and tried to  
13 talk to people.

14           So there was a lot of community outreach,  
15 and I don't want the Commission to think that we  
16 never reached out to the community about the project,  
17 because we did.

18           Q       Before I turn to the next -- let me finish  
19 this line of questioning.

20                    Could you describe HoKua Place's compliance  
21 to the Urban District Standards?

22                    Janna, the last, Urban District Standards.

23           A       HoKua Place site is bordered by Kapa'a Town  
24 lands either used or planned for residential and  
25 other urban development, and characterized by

1 city-like concentrations of people, structures,  
2 streets, urban services and related land uses.

3 The project implements policies of 2018  
4 Kaua'i General Plan by developing lands designated --

5 CHAIRPERSON SCHEUER: Sorry, I need to  
6 interrupt.

7 Mr. Collins.

8 MR. COLLINS: I'm sorry. We have an  
9 objection. We believe that reading this entire  
10 slide, which is much lengthier than other slides, is  
11 cumulative and inefficient of time.

12 CHAIRPERSON SCHEUER: I have tried to  
13 suggest to the Petitioner, maybe too indirectly, that  
14 this is going very slowly. I don't want the  
15 Petitioner at all to feel prejudiced in presenting  
16 their case, but I would observe, based on body  
17 language, I think the attention of my fellow  
18 Commissioners may be lagging.

19 MR. YUEN: We will waive the reading of the  
20 rest of the standards, and assume that it is entered  
21 into evidence.

22 I do have one other area that I want to  
23 examine Mr. Agor on, and that concerns Petitioner's  
24 Exhibits 44, together with 46, those two are the  
25 subject of a stipulation. They have not been entered

1 into evidence yet. And at this time, I would like to  
2 move Exhibits 44 and 46 into evidence so that I can  
3 examine Mr. Agor regarding this exhibit.

4 CHAIRPERSON SCHEUER: Once again, 44 and 46  
5 are?

6 MR. YUEN: 46 is the contract with the  
7 developer and Randall Okaneku that the Commission  
8 requested; and 44 is an estimate of development cost  
9 that --

10 CHAIRPERSON SCHEUER: Was requested by the  
11 Commission. Thank you.

12 Are there any objections from any of the  
13 parties from entering these into the record, starting  
14 with County?

15 MR. DONOHOE: No objection by the County,  
16 Chair. Thank you.

17 CHAIRPERSON SCHEUER: Ms. Kato for Office  
18 of Planning?

19 MS. KATO: No objection, thank you.

20 CHAIRPERSON SCHEUER: Intervenor?

21 MR. COLLINS: Mr. Chair, we just want some  
22 clarity that Architect Agor is able to answer  
23 questions related to these exhibits on  
24 cross-examination.

25 CHAIRPERSON SCHEUER: Mr. Yuen, is that

1 expectation --

2 MR. YUEN: He's going to answer questions  
3 on 44, but not on 46. The only reason we are putting  
4 in 46, is one of the Commissioners requested it.

5 MR. COLLINS: Mr. Chair, could we ask that  
6 46 be taken up after Architect Agor's testimony?

7 CHAIRPERSON SCHEUER: Yeah, if and when I  
8 think we choose to recall Mr. Bracken, perhaps would  
9 be the best time for 46, Mr. Yuen.

10 MR. YUEN: Okay. What about 44?

11 CHAIRPERSON SCHEUER: 44 is the agreement  
12 with Mr. Okaneku?

13 MR. YUEN: Development cost estimate.

14 CHAIRPERSON SCHEUER: So that's, I think  
15 what we are saying is, let's -- we only -- I'm  
16 suggesting we only try to admit the one that Mr. Agor  
17 is speaking to. Which one is that, 44?

18 MR. YUEN: 44.

19 CHAIRPERSON SCHEUER: Are you -- is the  
20 Petitioner okay with that, just admitting 44 at this  
21 time?

22 MR. YUEN: Yes.

23 CHAIRPERSON SCHEUER: Mr. Aczon,  
24 Commissioner Aczon, you have your hand raised.

25 VICE CHAIR ACZON: Going back to the last

1 PowerPoint, I just want to make sure that the  
2 witness, are they at a point were that was properly  
3 conveyed on that PowerPoint? Perhaps not reading the  
4 PowerPoint, but point by point.

5 CHAIRPERSON SCHEUER: Hold on. I thought  
6 you were speaking directly about the admission of  
7 evidence. I will take that up in a second.

8 No objections to admitting the one  
9 additional piece of evidence into the record, is that  
10 correct? Nothing from the County; nothing from  
11 Office of Planning. Mr. Collins?

12 MR. COLLINS: Yes, we don't have an  
13 objection to admitting at this time the exhibit that  
14 Architect Agor is able to speak to.

15 CHAIRPERSON SCHEUER: Commissioners, any  
16 objections? Seeing none, it's admitted.

17 Taking up the concern of Mr. Aczon, he just  
18 wants to ensure, which I've tried to also convey in  
19 my statements to the Petitioner, we are not trying to  
20 in any manner restrict your ability to have your  
21 witness present information, we just want to maintain  
22 efficiency of the proceedings.

23 Is that understood, Mr. Yuen?

24 MR. YUEN: Yes.

25 CHAIRPERSON SCHEUER: Please continue.



1 Q (By Mr. Yuen): Directing your attention to  
2 Exhibit Number 44, which is a summary of the  
3 projected development cost for HoKua Place, can you  
4 please describe how you arrived at these cost  
5 estimates starting with the estimates for  
6 construction cost?

7 MS. AHU: Mr. Chair, can I share my screen?

8 CHAIRPERSON SCHEUER: I wish you would.

9 MS. AHU: Let me know where you want to go,  
10 Bill.

11 Q (By Mr. Yuen): Ron, what page do want to  
12 start on?

13 A Well, you know, I had lengthy discussions  
14 with Mr. Cassidy. He and I and information that I  
15 gathered from current contractors in the area, came  
16 up with quantities, square footage cost based on the  
17 projected size of the units, and that's how we came  
18 up with the vertical cost.

19 And it speaks for itself really. Just a  
20 little over \$211 million dollars for the vertical  
21 construction cost.

22 And total projected development cost  
23 included the site infrastructure cost to develop by  
24 Bow Engineering, and then we added 15 percent soft  
25 cost for the total comes up to just under

1 \$400 million.

2 Q Under \$400 million or under \$340 million?

3 A \$340 million.

4 Q For the Commission, can you explain what  
5 you consider to be soft cost?

6 A Fees, loan fees, permit fees, land use.

7 Q So the total development cost including  
8 land would be approximately \$340 million?

9 A Correct.

10 Q And because this project is going to be  
11 developed over a series of years, what do you  
12 estimate to be the potential amount of cost that the  
13 Petitioner would be exposed to at any one time  
14 maximum?

15 A Go to some of the projects that we have  
16 done, the percentage I interject was 25 percent of  
17 the development cost at any one time.

18 Q What would that figure be?

19 A \$85 million.

20 Q I have no further questions for this  
21 witness.

22 CHAIRPERSON SCHEUER: Thank you.

23 It's 1:51. Let's begin with the cross by  
24 County.

25 Commissioner Ohigashi?

1           COMMISSIONER OHIGASHI: Before we go  
2 further, is it -- I'm trying to look it up so I have  
3 a copy of it. Do we have one in our -- that has been  
4 provided to us? I'm just trying to find it in my  
5 exhibits, Exhibit 44.

6           CHAIRPERSON SCHEUER: Yes. Mr. Hakoda, is  
7 it posted?

8           CHIEF CLERK: I don't believe it is, Chair.  
9 We're checking on the website posting. Just a  
10 moment, Mr. Chair.

11          MR. YUEN: We did submit it last week.

12          CHIEF CLERK: It wasn't admitted until  
13 about two minutes ago.

14          CHAIRPERSON SCHEUER: If it could be  
15 emailed to the Commissioners and parties, please.

16                 While we are waiting, Mr. Donohoe, how long  
17 do you think you have?

18          MR. DONOHOE: Chair, I have about  
19 25 minutes to half hour. I'll try to speak fast, but  
20 I don't want to underestimate.

21          CHAIRPERSON SCHEUER: Ms. Kato.

22          MS. KATO: Sorry, maybe 20 minutes.

23          CHAIRPERSON SCHEUER: Ms. Isaki.

24          MR. COLLINS: I'll be doing the  
25 cross-examination of this witness. I'm hoping five

1 or ten, maybe less if the County and Office of  
2 Planning ask questions that are on our list.

3 CHAIRPERSON SCHEUER: Does anybody have a  
4 concern with us proceeding with County's cross while  
5 the Commission is emailing the newly admitted  
6 exhibits to the parties and Commissioners?

7 Any objection from anyone, County?

8 MR. DONOHOE: Thank you, Chair.

9 CHAIRPERSON SCHEUER: County, any  
10 objection?

11 MR. DONOHOE: I have no objection.

12 CHAIRPERSON SCHEUER: OP?

13 MS. KATO: No objection.

14 CHAIRPERSON SCHEUER: Intervenors?

15 MR. COLLINS: No objection.

16 CHAIRPERSON SCHEUER: Commissioners, okay.  
17 Please proceed, Mr. Donohoe, and we will go at least  
18 like ten minutes or so and see where you're at and  
19 assess the need for a break.

20 CROSS-EXAMINATION

21 BY MR. DONOHOE:

22 Q Thank you for being here. I just have a  
23 couple questions to start about your background.

24 I notice that you list -- so you're the  
25 main architectural firm that was responsible for the

1 design of HoKua Place?

2 A HoKua Place?

3 Q Yes.

4 A Yes. The project hasn't been designed yet.

5 We are not going to break into design until the  
6 process with the County.

7 Q Yes, but there are site plans, correct?

8 A Yes.

9 Q Were you the designer of those?

10 A Yes.

11 Q You list several colleges that you  
12 attended, but I was curious what specific degrees do  
13 you have and in what fields?

14 A My schooling was at Cal Poly San Luis  
15 Obispo in architecture and planning.

16 Q Okay. So on page three of your PowerPoint  
17 presentation you stated that HoKua Place is subject  
18 to trade winds, lacks irrigation water, and is  
19 inappropriate for intensive cultivation given  
20 proximity to Kapa'a Middle School, correct?

21 A Right.

22 Q So specifically if your educational  
23 background is in architecture and planning, who's  
24 opinion did you rely on for that statement?

25 A My consultants.

1 Q So you didn't conduct a study yourself?

2 A No. I'm the manager of the Final EIS. My  
3 job is to pull together the studies from my  
4 consultants, put together in a form to present to be  
5 published for your approval.

6 Q So the opinions that you've given on the  
7 traffic issues, and the -- on the traffic issue, that  
8 was based upon what you were told; that's it?

9 A Exactly, exactly. From what I read.

10 Q And then your presentation, you also made  
11 statements about the wetland area in the Petition  
12 Area. And you stated that you made a reference to  
13 discussions that you had with U.S. Fish and Wildlife,  
14 correct?

15 A Not U.S. Fish and Wildlife. I met with the  
16 Wildlife Division DAR of DLNR.

17 Q And then maybe I misunderstood your  
18 testimony, you stated that the maps that the Fish and  
19 Wildlife had about this wetland area was not  
20 accurate?

21 A The designation, the physical aspects of  
22 the 3.3 acres do not match the category designated  
23 wetland. It doesn't match. It appeared somebody  
24 just drew the 3.3 acres and designation without going  
25 to the site.

1           I mean, part of a dozen qualifications for  
2 the property to be that type of wetland PFS3C, only  
3 one characteristic applied for the 3.3 acres in that  
4 land being less than 20 acres. All the other  
5 characteristics --

6           Q     Let me stop you there.

7           But you don't know what they did to make  
8 their map, correct? That's just your opinion that it  
9 is inaccurate?

10          A     Yeah. I said it was my opinion, sir. I  
11 was trying to figure out why the map suddenly  
12 appeared in 2019.

13          Q     Again, the statements that you made about  
14 the endangered threatened species of plant life,  
15 birds, mammals, that was just based on studies not  
16 that you did, but that's just the opinions that you  
17 were given?

18          A     Exactly.

19          Q     So on page five of your PowerPoint, and you  
20 touched upon it briefly, you state that HoKua Place  
21 complies with the goals, objectives and policies set  
22 forth in the 2018 Kaua'i General Plan, correct?

23          A     Correct.

24          Q     And you're familiar with the General Plan?

25          A     Yes.

1           Q       So in your analysis, did you specifically  
2 analyze each of the proposed visioning goals and  
3 policies to guide growth listed in the 2018 General  
4 Plan in your analysis of HoKua Place?

5           A       Correct.

6           Q       So specifically regarding the four visions  
7 and goals, is there any information that you  
8 contained for meeting goal number one, a sustainable  
9 island? How the HoKua Place would lead to  
10 sustainable island?

11          A       Yes, let me get my notes.

12          Q       Would that information be contained in the  
13 FEIS?

14          A       Yes, it would be.

15          Q       And then is that your same answer for goals  
16 two, three and four?

17          A       What was the question again?

18          Q       For goal No. 2 in the General Plan, a  
19 unique and beautiful place. Is it your testimony  
20 that evidence of that is your findings and  
21 conclusions and your opinions is contained in the  
22 FEIS?

23          A       No, I didn't mention that in the EIS. It  
24 was just -- I mean, I know the area very well.

25          Q       Okay.



1           A       There are four goals in the General Plan  
2 and I don't (indecipherable).

3           Q       Did you include that information in your  
4 analysis in the EIS?

5           A       The vision as set forth in the General Plan  
6 has four goals, sustainable island, unique and  
7 beautiful place, healthy and resilient people, and  
8 equitable place with opportunity for all.

9           Q       Correct. And in your analysis of HoKua  
10 Place, did you submit your findings and conclusions,  
11 or your opinion as to how the General Plan for those  
12 four goals were met? Is that listed anywhere in the  
13 record such as the FEIS, and where is that?

14          A       Pages 154 to 156.

15          Q       Are you also familiar with the 19 policies  
16 to guide growth?

17          A       Yes. There is everything that pages I told  
18 you.

19          Q       154 to 156?

20          A       Yes.

21          Q       So I want to talk to you about a couple  
22 policies. Policy No. 1 is to manage growth to  
23 preserve rural character.

24                   So how specifically does the 769-unit  
25 development preserve the rural character of Hawaii?

1           A       HoKua Place is strategically placed --  
2 you're talking about Policy No. 1, yeah?

3           Q       Correct.

4           A       -- in a neighborhood general designation.  
5 It is substantially within a ten minute walk to  
6 Kapa'a Town. The project will include smart street  
7 designs, smart residential blocks, walking and  
8 bicycle path integrated to the Kapa'a Town path. The  
9 project is intended to help preserve the rural  
10 character of the town, therefore, Policy 1.

11          Q       And then for Policy 2 you testified about  
12 affordable housing. The development is proposed  
13 30 percent affordable units, correct?

14          A       Correct.

15          Q       So that would leave 70 percent not  
16 affordable under that definition, 70 percent would  
17 not qualify as affordable?

18          A       Correct.

19          Q       Thank you. You answered it.

20          A       Not in terms of lower income, yeah.

21          Q       Correct.

22                    In Policy No. 10, help business thrive. Is  
23 there any particular study that you did, or that you  
24 can point to that shows that HoKua Place --  
25 development of HoKua Place will help business in the

1 area thrive? What was the study that was done?

2 A No study. Only logical that when you have  
3 a housing project integrated with the town, the  
4 housing project will provide a workforce for the  
5 businesses in the area, and vice versa. People are  
6 looking for jobs and integrate with downtown and find  
7 jobs downtown.

8 Q Is there any study other than -- any study  
9 that demonstrates Policy 6 that the HoKua Place will  
10 specifically reduce the cost of living?

11 A Policy 6 enterprises to reduce cost of  
12 living. HoKua Place will help reduce cost of living  
13 minimally by reducing the need for driving to Kapa'a  
14 Town, and increase in population created by this  
15 project in the area, more businesses will develop,  
16 thus creating jobs where residents can live and work  
17 without the use of motor vehicles, yes.

18 Q That's not based on any study, just a guess  
19 as to what's going to happen?

20 A Yes. Yes, and in fact, the General Plan  
21 makes up what they want, and this just respond to how  
22 we're living up to the policy.

23 Q Thank you.

24 Chair, I was going to switch to just talk  
25 about the design of HoKua Place. If this is the time

1 for a break.

2 CHAIRPERSON SCHEUER: Yeah, if we are at a  
3 breaking point, I am. So it is 2:06. Let's  
4 reconvene at 2:16.

5 And I'm also going to ask for Commissioners  
6 and the parties an estimate of how long we can go  
7 after we reconvene.

8 (Recess taken.)

9 CHAIRPERSON SCHEUER: Reconvene at 2:16.  
10 We spent a lot of time on this docket.  
11 Let's move ahead. Please continue, Mr. Donohoe.

12 MR. DONOHOE: Thank you, Chair.

13 Permission to -- I was going to go over the  
14 design, the conceptual site plan.

15 Permission to share screen?

16 CHAIRPERSON SCHEUER: Please. What would  
17 you like to share?

18 MR. DONOHOE: Page 15 of the FEIS.

19 CHAIRPERSON SCHEUER: Why don't you start  
20 your questioning, see whether or not I can pull that  
21 up.

22 EXECUTIVE OFFICER: If I can interrupt for  
23 a moment.

24 I just want to note for the record Exhibits  
25 44 and 46 are posted on the website, part of a

1 stipulation that was sent to us, and as a result that  
2 caused some confusion as to what exactly is being  
3 posted.

4 CHAIRPERSON SCHEUER: Thank you.

5 Q (By Mr. Donohoe): Mr. Agor, you're  
6 familiar with the conceptual site plan that you  
7 designed in the FEIS?

8 A Correct.

9 Q It's dated March of 2015.

10 To your knowledge, does this continue to  
11 represent the conceptual site plan layout of the  
12 proposed development as of March -- or as of today?

13 A Yes.

14 Q So focusing on the entire proposed site  
15 plan that's on page 15 of the FEIS, the entire  
16 development area is separated into two phases, Phase  
17 I and Phase II; correct?

18 A Yes, yes. Page one is the HoKua ag lands  
19 and page two is the 97 acres.

20 Q And 97 acres of Phase II HoKua Place,  
21 that's the highlighted, that's the subject of this  
22 reclassification petition; correct?

23 A Correct, sir.

24 Q And the project is proposing segregated  
25 areas for multi-family units and single-family units,

1 correct?

2 A Yes, divided by Road A. But we do have  
3 multi-family next to the Kapa'a Middle School.

4 Q Would you agree that there is a market for  
5 mixed housing types, instead of just clustered high  
6 end developments?

7 A In this project, what I intend to do when  
8 entitlement process starts, is to integrate  
9 affordable homes with the market homes. Each  
10 building I want to have an element of affordable  
11 homes in it, so that there's no stigma, so to speak,  
12 and people can socially get along.

13 Q Thank you, Chair.

14 CHAIRPERSON SCHEUER: Is this the figure  
15 that you were looking for?

16 MR. DONOHOE: It is, thank you.

17 Q And separately Phase I, the large ag lots  
18 from HoKua Phase II, there is a single road going  
19 through the entire complex that would separate the ag  
20 lots from HoKua Place, correct?

21 A Yes.

22 Q And then how you just testified about the  
23 multi-family, single family, the proposed site shows  
24 the multi-family units in the southern portion and  
25 then just east of it would be the single-family

1 residences, correct?

2 A Right.

3 Q And then there would be a greenbelt north  
4 of that, and then another single-family residence and  
5 another greenbelt?

6 A Yes.

7 Q And then the last section of multi-family  
8 units would be located right next to the Kapa'a  
9 Middle School?

10 A Correct.

11 Q Where specifically, if you know, in the  
12 proposed site would the location of the workforce or  
13 affordable housing units be?

14 A I don't -- like I said, in the entitlement  
15 process, I'm not looking forward to --

16 CHAIRPERSON SCHEUER: Is the answer it's  
17 not located yet?

18 THE WITNESS: No, it's not located yet.

19 Q (By Mr. Donohoe): If you know the intent  
20 of the developer to integrate multi-family units, the  
21 affordable housing units with the market rate units?

22 A I mentioned it to them, and one of -- one  
23 of the conditions you need to understand that I took  
24 on this project with -- was basically I wanted to 231  
25 affordable units in there. And I had mentioned that

1 I wanted to integrate that with the market housing.

2 I don't want people to drive through the  
3 subdivision and, say, oh, wow, there is affordable  
4 units, and on the right, oh -- I don't want condition  
5 of separation there. So I'm hoping to integrate  
6 them.

7 CHAIRPERSON SCHEUER: Mr. Donohoe, do you  
8 still need this pulled up?

9 MR. DONOHOE: No, that's it. Thank you,  
10 Chair.

11 Q Have you discussed with the developer, and  
12 would it be your recommendation to possibly have a  
13 phased development that requires -- that a percentage  
14 of workforce housing be constructed on pace with the  
15 higher end development?

16 For instance, like a schedule that certain  
17 amount of workforce housing has to be done on par  
18 with the market rate units?

19 A In terms of its location?

20 Q Yes.

21 A Yes. I discussed it with them.

22 Q And is that something the developer is open  
23 to?

24 A Yes.

25 Q Are you familiar with smart code or form



1 based code?

2 A Say that again.

3 Q Are you familiar with a form based code?

4 A I think you can describe it, then I would  
5 be able to say I'm familiar with it. I'm not too  
6 familiar with that terminology.

7 Q It's a land development regulation  
8 that's -- foster predictable build results by using  
9 physical forms of buildings to create a matching  
10 looking feel of a place to match the surrounding  
11 areas.

12 Are you familiar with that process of form  
13 based code?

14 A Yes. As an architect that's what we do.

15 Q How about, are you familiar with the  
16 process of -- I believe smart code is referred to in  
17 the FEIS. What is smart code?

18 A No, I'm not. I mean, again, if you  
19 describe it, then I can tell you if I'm familiar with  
20 that process or not.

21 Q So you don't know if something similar to  
22 form base would be applied to HoKua Place?

23 A Yes.

24 Q Yes, it would be; or yes, you're not?

25 A Yes, it would be.

1 Q And then do you understand that should the  
2 State Land Use Commission grant the Amended Petition  
3 for Boundary Amendment, the proposed development will  
4 still have to be reassessed at the County level? I  
5 think you testified you understood that.

6 A Yes, I understand that.

7 Q And that the County may recommend a master  
8 plan to be required before a zoning amendment?

9 A Absolutely.

10 Q Will you agree that the master plan will  
11 increase the cost and timeline for the project?

12 A Cost and timeline -- I think in my proposal  
13 to the developers, that's always, yes  
14 (indecipherable).

15 Q As a result of the master planning process,  
16 do you understand the County may require that form  
17 base code may be included in the zoning amendment if  
18 that's what is recommended?

19 A Oh, oh, I'm well-aware that that process is  
20 expected in developments like this, yes.

21 Q Thank you.

22 Thank you Chair. Thank you, Commission. I  
23 have no further questions.

24 Thank you, Mr. Agor.

25 CHAIRPERSON SCHEUER: Thank you, Mr.

1 Donohoe.

2 Ms. Kato.

3 CROSS-EXAMINATION

4 BY MS. KATO:

5 Q Hello, Mr. Agor.

6 Initially it was mentioned by the County,  
7 but there are a number of witness subject matters  
8 that are listed that you're testifying on. So I just  
9 want to clarify, or could you clarify what your role  
10 and responsibility is for this project exactly?

11 A Well, I would have to continue the  
12 completion of the EIS as the manager for the EIS  
13 process, and I've been retained to be the planner,  
14 development planner when the entitlement process,  
15 which the county begins, where we actually really  
16 start the planning on the subdivision.

17 Q Are you thoroughly responsible for  
18 overseeing all the consultants?

19 A Yes.

20 Q With respect to your responses on the  
21 location of the wetlands and the U.S. Fish and  
22 Wildlife designation of the wetlands, do you have any  
23 specific expertise regarding this matter?

24 A Do I have any --

25 Q Expertise regarding the wetlands?

1           A       Expertise?

2           Q       Yes.

3           A       Well, as far as the designation of the  
4 wetlands of the 3.3 acre, I am now.

5           Q       Can you please describe your qualifications  
6 for that?

7           A       When we were notified of the discovery of  
8 3.3 acre -- I'm an educated architect, and I have  
9 experience in engineering. And it doesn't take a lot  
10 to do research, and find out what the designation was  
11 and what the qualifications of the lands to qualify  
12 for that category of wetland.

13                   I have diagrams all over the mirror in my  
14 bathroom. I studied it. And I know it.

15           Q       Okay, so this is --

16           A       And besides, I will be putting together my  
17 findings and sending it to DLNR and asking them to  
18 confirm or deny my findings. And it's so black and  
19 white so.

20           Q       Okay, so my understanding is this is based  
21 on your self study then regarding this issue?

22           A       Yes.

23           Q       And it's your opinion that the U.S. Fish  
24 and Wildlife designation of that area as wetlands is  
25 not correct?

1           A        It's not correct.  But I'm recommending to  
2 my clients to respect and accept the designation for  
3 two reasons, yeah.

4                    One, 3.3 acres has always been in the -- I  
5 keep forgetting -- the green zone.  And we have no  
6 intention, absolutely no intention of going vertical  
7 in that area.

8                    And the second reason is that I feel  
9 confident we can change the designation, but it will  
10 probably take three years to do it, and every year  
11 goes by, the cost of construction goes up.  Every  
12 year goes by the cost of affordable housing goes up.  
13 So I'm recommending to my clients not to go there,  
14 just accept it and move forward, because we're not  
15 going to do anything there anyway.

16           Q        You previously mentioned that -- sorry, I'm  
17 not sure if I got this right.  You previously  
18 mentioned you are aware of there being a possibility  
19 of .3 wetlands in the area, but you said it wasn't in  
20 the Petition Area; is that correct?

21           A        Not necessarily in the Petition Area.  And  
22 as I look at the map, it's really close.  It's really  
23 hard.  You have to survey it to find out if it is or  
24 not.

25           Q        So you know there was a possibility of

1 there being wetlands, but you thought it wasn't in  
2 the Petition Area?

3 A Correct. And if it is, it's just a small  
4 portion of it.

5 Q Okay. Prior to the 3.3 area of being an  
6 issue, did you do anything else to investigate the  
7 existence of wetlands in that area?

8 A Only to the extent that I walked the site  
9 and felt comfortable with what we're doing at HoKua  
10 Place wasn't going to negatively impact the wetland  
11 areas in the adjacent land to the Petition Area.

12 Q When you say your walk through, you mean  
13 before the 3.3 area was raised?

14 A Yes. I walked the site early on, two years  
15 ago. And then a later point of extensively walking  
16 the site after the 3.3 acres were discovered.

17 Q Okay. So you went -- after the 3.3 acres  
18 were discovered, you said you went to the actual area  
19 and took a look to see if there were wetlands; is  
20 that correct?

21 A Yes.

22 Q Around what date was that?

23 A Excuse me?

24 Q When was that?

25 A That was in mid January, February.

1           Again, I went there approximately five  
2 times. And I stayed there one evening to see if any  
3 birds would try to and rest there.

4           I even went there one night with my  
5 flashlight to see if I could find any bat or any bird  
6 threatened at night. I didn't see anything.

7           CHAIRPERSON SCHEUER: Ms. Kato, is that you  
8 typing, perhaps?

9           No. Someone is typing. We're picking it  
10 up. Please continue.

11          MS. KATO: I have -- actually, Chair,  
12 there's something else that I wanted to mention.

13          I'm not sure if there will be an issue or  
14 not, but regarding the scheduling, Rodney Funakoshi  
15 will not be available from 3:45 p.m.

16          CHAIRPERSON SCHEUER: Okay.

17          MS. KATO: I wasn't aware of that before.

18          CHAIRPERSON SCHEUER: I think we can  
19 proceed with just his counsel.

20          Q        (By Ms. Kato) so there's an Exhibit 37  
21 which was a picture that you took of the wetlands; is  
22 that correct?

23          A        Right.

24          Q        When was that picture taken approximately?

25          A        I think I took it in late January, I think.

1 Q January.

2 So when you went to look at the wetlands,  
3 did you go with any other person?

4 A Yes. I met State Fish and Wildlife  
5 Division, and I met with DAR from DLNR.

6 Q Have you seen the Office of Planning's  
7 Exhibit 15?

8 A What's Exhibit 15?

9 Q It's a series of pictures.

10 A I'm not really familiar with Exhibit 15.  
11 Can you describe it?

12 Q I guess I tried to share my screen but I'm  
13 not too sure how to. I'm going to try and share my  
14 screen with the exhibit.

15 CHAIRPERSON SCHEUER: Please go ahead.

16 Q (By Ms. Kato): Do you see it?

17 A Yes, photographs.

18 Q So these are -- this is Exhibit 15 from the  
19 Office of Planning, and these are pictures that were  
20 taken of the wetland area. And so --

21 A Yeah, that's looking out of the haul-cane  
22 road. The body of water you see over there is  
23 outside of the Petition Area, mostly outside of the  
24 property, actually.

25 Q Are you saying that the pond is outside of



1 the Petition Area?

2 A Yeah.

3 Q It was my understanding that it was within  
4 the Petition Area. So that's not your understanding?

5 A Right.

6 MS. KATO: Does that work?

7 CHAIRPERSON SCHEUER: Yes, you stopped.

8 MS. KATO: I have not done that before.

9 CHAIRPERSON SCHEUER: You passed with  
10 flying colors, counselor.

11 Q (By Ms. Kato): So the wetland areas,  
12 you're saying that you first became aware of there  
13 being wetland areas on the Petition Area only after  
14 you heard about the 3.3 acres?

15 A Yes.

16 Q So after you learned about the wetland, I  
17 understand you went to the property to take a look  
18 and met some other people.

19 Did you have a qualified engineer or a  
20 biologist examine the wetland area?

21 A No. But I will put together my findings  
22 and my intentions is to send it over to the experts  
23 at DLNR, because nobody is going to listen to me. I  
24 sent it to the a government agency. I asked fish --  
25 not fish and wildlife, I asked extensively couple

1 times for an extensive report from the Division of  
2 Wildlife, who joined me, to give me a report of what  
3 he saw up there. And they're not going to do it.

4 Q So with regarding the location of the  
5 boundary of the Petition Area, you're saying that the  
6 pond in the exhibit was outside of the boundary. How  
7 do you know exactly where the boundary is on the  
8 land?

9 A It parallels the haul-cane road that we  
10 were walking on.

11 Q So it's just by your visual, there's no  
12 GPS?

13 A Yes.

14 Q No property line staked out?

15 A No.

16 Q So would you say it's a little unclear  
17 exactly where the boundary is on the ground?

18 A While I was walking it? Yeah, it was just  
19 supposition, knowing where the cane-haul road was in  
20 relationship to the maps.

21 Q So is it possible that you may have been  
22 mistaken as to whether some of that water was within  
23 the Petition Area?

24 A Of course, always a possibility.

25 Q Okay, and --

1           A       Always a possibility.

2           Q       Regarding the exact location of the  
3 wetlands in the Petition Area, do you intend to  
4 conduct a wetland delineation survey?

5           A       One would do that if one wants to challenge  
6 the designation, and we're not challenging the  
7 designation. We're respecting it and accept it. So  
8 there is no need for it.

9           Q       Do you intend to do anything to determine  
10 where the exact boundaries of the wetlands are?

11                    Are you relying on the U.S. Fish and  
12 Wildlife map?

13           A       I'm relying on the USDA map. You mean  
14 about the 3.8 (sic) acres? I rely on Fish and  
15 Wildlife map. And it's okay.

16           Q       So with respect to mitigation measures, if  
17 you're not having a qualified engineer or biologist  
18 examine the area, how do you intend to determine what  
19 mitigation measures would be necessary with respect  
20 to the wetland area?

21           A       I recommended, and I think I've gotten a  
22 go-ahead on it to work with Fish and Wildlife in the  
23 habitat restoration program.

24                    That area -- are you familiar with the  
25 restoration habitat restoration program where we have

1 the use of Fish and Wildlife experts to help identify  
2 invasive plants, and any contamination on the lot,  
3 and come up with a plan to clean the area if need be,  
4 or remove invasive species.

5 And that's part of the restoration plan  
6 that Fish and Wildlife offers.

7 Q Okay. So any mitigation measures that are  
8 suggested, you think Petitioner will agree to follow  
9 those?

10 A Yes.

11 Q So have you seen the Office of Planning's  
12 Exhibit 16, which is a map showing the proposed  
13 buffer area around the wetlands?

14 A Yes.

15 Q You have seen it?

16 A Yes, I have seen it. But I'm going to be  
17 negotiating that with Fish and Wildlife and State  
18 Wildlife Division.

19 CHAIRPERSON SCHEUER: Ms. Kato, about how  
20 much longer?

21 MS. KATO: 15 minutes. I added questions  
22 in, it took a little longer.

23 COMMISSIONER OKUDA: Chair, can I ask for  
24 an offer of proof?

25 CHAIRPERSON SCHEUER: Can you expand on

1 that, Mr. Okuda, Commissioner Okuda?

2 COMMISSIONER OKUDA: In other words, what  
3 are the points counsel are trying to make? At this  
4 point in time it might be cumulative.

5 CHAIRPERSON SCHEUER: It would -- my  
6 concern is, without prejudicing the Office of  
7 Planning's points, but I'm not -- I am trying to  
8 understand where you're going, and how that's getting  
9 us to really the first hurdle we must overcome, which  
10 is whether or not the Petitioner has at a minimum met  
11 their burden.

12 MS. KATO: Our concern is just that, you  
13 know, we did not know about these wetlands. We have  
14 not been able to receive comments on it. And we just  
15 want to know where the wetlands are and if it's being  
16 appropriately addressed.

17 CHAIRPERSON SCHEUER: So I have gathered,  
18 at least from your cross of Mr. Agor so far, that  
19 he -- while he has visited the site, he cannot  
20 definitively state where they are, and most of his  
21 addressing of these matters will be in the future,  
22 but he has nothing currently to describe his  
23 mitigation or his counteracting disagreement with the  
24 previous determinations of the existence of wetlands.

25 MS. KATO: My current questioning regarding

1 the proposed buffer area is to see if the Petitioner  
2 will be willing to agree to a buffer area adjacent to  
3 the wetlands that Office of Planning has proposed.

4 CHAIRPERSON SCHEUER: If you can go there  
5 as directly as possible.

6 THE WITNESS: You want me to answer that  
7 question?

8 Q (By Mr. Kato): Yes, please.

9 A Yes, I'm going to agree to a buffer. But  
10 the exact location may not be there, yeah? Because  
11 nationally in non-wetland areas, average buffer  
12 distance is between approximately 50 feet. And on  
13 your sensitive wetlands, they range anywhere from  
14 75 feet to 150 feet.

15 So I would like to negotiate like a 25-foot  
16 buffer. After I get a response from DLNR, I'll  
17 refine my findings of the wetland. And I'm confident  
18 that they going to find my research on it and be --

19 CHAIRPERSON SCHEUER: For the efficiency of  
20 these proceedings --

21 THE WITNESS: Sorry, I ramble on.

22 MS. KATO: We can move on.

23 Q So during construction, I understand that  
24 there will be -- there's going to be mitigation  
25 measures such as you will be putting up a

1 construction fence to prevent seabirds from moving  
2 into the construction?

3 A Yes, yes. In my discussion with wildlife  
4 representatives from the State, we talked about  
5 reinforcing the wire fence on the left-hand side of  
6 the road, haul-cane road to keep any species from  
7 going up to the construction site.

8 And we also talked about providing fencing  
9 to keep animals and people from going down to the  
10 wetlands of the area -- (indecipherable).

11 CHAIRPERSON SCHEUER: I'm going to ask the  
12 witness to really answer as simply as possible the  
13 question that's asked to him.

14 Repeat the question, Ms. Kato.

15 Q (By Ms. Kato): Sorry, I just wanted to  
16 confirm that they are willing to put up sufficient  
17 construction fencing to keep seabirds from moving  
18 into the construction area.

19 CHAIRPERSON SCHEUER: Yes, no, or I don't  
20 know is a sufficient answer.

21 THE WITNESS: Yes.

22 Q (By Ms. Kato): Thank you.

23 Also you mentioned it too, but you will  
24 also be putting up a permanent fence to keep animals  
25 such as dogs, I guess, feral cats from entering and

1 attacking seabirds?

2 A Yes.

3 Q Thank you.

4 This will also include proper signage,  
5 correct?

6 A Yes.

7 Q With respect to the developing a plan  
8 preventing feral cats and other predators from  
9 entering the wetlands, will this include a  
10 prohibition of feeding feral cats and establish and  
11 maintaining feral cat colonies within the Petition  
12 Area at HoKua Place?

13 A Yes. We have already discussed that --  
14 I've already discussed that with the clients and  
15 we're going to have that in there.

16 CHAIRPERSON SCHEUER: Again, yes, no, or I  
17 don't know, unless it really requires some expansion.

18 THE WITNESS: Yes, yes.

19 Q (By Ms. Kato): Thank you.

20 I will try to move on more quickly.

21 So I didn't see this in the statements  
22 regarding petitions, but regarding invasive species,  
23 will you -- will the Petitioner contact and consult  
24 with the Kaua'i Invasive Species Committee to  
25 minimize the risk of spreading invasive species?



1           A       Yes.

2           Q       So does your Habitat Restoration Plan  
3 include any establishment and continued maintenance  
4 of native wetland vegetation?

5           A       Yes.

6           Q       Thank you.

7                    So one of your areas listed is flora. So  
8 regarding the vegetation and plants in the Petition  
9 Area, I understand that botanical survey was  
10 performed on the Petition Area in May 2012; is that  
11 correct?

12          A       I believe so.

13          Q       The survey states that several transects  
14 were done. Approximately do you know how far apart  
15 those transects were?

16          A       No, I don't.

17          Q       The conclusion that no certain or invasive  
18 species plants were found though, correct?

19          A       Repeat the question.

20          Q       I'm going to move on.

21                    With respect to the indigenous plants,  
22 three indigenous plants were identified.

23                    Is that correct?

24          A       By experts, yes.

25          Q       This is during cross-examination of Nancy

1 McMahon, she stated that there are -- she did see  
2 some of those indigenous plants and that there are  
3 native Hawaiian cultural uses for the plants, one of  
4 them she mentioned had medicinal uses.

5           Were there any efforts made to identify  
6 cultural or traditional uses for these plants?

7           A     No.

8           Q     Were there any efforts made to determine  
9 the availability of these indigenous plants outside  
10 the Petition Area?

11          A     Not yet.

12          Q     Thank you. That's all the questions I  
13 have. Thank you very much.

14                   CHAIRPERSON SCHEUER: Thank you very much,  
15 Ms. Kato.

16                   Intervenor. And, again, I would like to  
17 keep these proceedings as efficient as possible.

18                   Mr. Collins.

19                   MR. COLLINS: Thank you, Mr. Chair.

20                                   CROSS-EXAMINATION

21 BY MR. COLLINS:

22           Q     Good afternoon, Mr. Agor.

23           A     Good afternoon.

24           Q     I just want to say just before we begin  
25 that I wanted to thank you for being part of the

1 group that picked the centennial logo. I thought it  
2 was beautiful and represented it very well. I never  
3 had the opportunity to thank you.

4 I'm going to be asking you mostly yes or no  
5 questions, and I've had an opportunity to refine my  
6 questions so we can try to get through the questions  
7 sooner than later. So I apologize if I seem  
8 impolite. I just would like to get through the  
9 questions in response to the Chair's desire.

10 The first question is, did you tell William  
11 Bow not to include his revised drainage detention  
12 plan, the one submitted as Exhibit P27 this February  
13 as part of the Final EIS; yes or no?

14 A No.

15 Q You discuss the County General Plan in your  
16 presentation, your direct examination.

17 Did you examine the consistency of this  
18 project with the applicable community development  
19 plan; yes or no?

20 A No.

21 Q Will the developer have a declaration of  
22 covenants, conditions and restrictions or some other  
23 instrument to ensure representations about uses of  
24 the homes are enforced?

25 A It will be, yes.

1           Q       Does the EIS or Petition address uses of  
2 homes as transient vacation rentals?

3           A       No.

4           Q       What about the addition of accessory  
5 dwelling units on single-family unit lots?

6           A       I can't answer that.

7           Q       Does the EIS concede that there are  
8 unmitigatable traffic impacts, such that the  
9 community would have to stay home during peak traffic  
10 hours or sit in heavy traffic?

11          A       Most certainly.

12          Q       Does the Petitioner have an agreement or  
13 letter from the County Public Works Department  
14 agreeing to provide capacity to HoKua Place with  
15 respect to wastewater?

16          A       No agreement.

17          Q       Did you respond to comments on  
18 infrastructure in the EIS by stating, quote, "HoKua  
19 Place will not have a major impact on infrastructure  
20 as stated in the second Draft EIS an the Final EIS.  
21 The County wastewater department have accepted the  
22 project with the developer assisting in the  
23 maintenance of the sewage treatment plant." End  
24 quote.

25          A       Yes.

1           Q       Did you also respond to public comments  
2 stating, quote, "infrastructure is adequate for this  
3 project as DOW have been offered to take over the  
4 potable water well, which will provide all of HoKua  
5 the County Wastewater Treatment Plant for the area  
6 has the capacity to handle the project." End quote.

7           A       Yes.

8           Q       Isn't it also the case that the County  
9 Wastewater's comment on the EIS was, quote, "there  
10 may need to be improvements at the WWTP prior to the  
11 County having adequate capacity for full build out of  
12 the project," end quote?

13          A       Yes.

14          Q       Is it still the Petitioner's position that  
15 the County wastewater treatment plant will have  
16 capacity for the project?

17          A       Yes.

18          Q       Did you respond to commentor's concerns  
19 about overdevelopment by saying the developer wants  
20 to help the housing crisis, and walked away from,  
21 quote, "big bucks" specifically referencing rich  
22 people ag subdivision?

23          A       Can't remember.

24          Q       Do you remember saying, quote, "you need to  
25 know that the developer originally had an ag

1 subdivision about to be approved and ready to go to  
2 market --

3 A Yes.

4 Q In your response to public comments, did  
5 you state, quote, "it is anticipated that many of the  
6 homes in HoKua will be filled with families currently  
7 doubling up, so the people are already in the area.  
8 Many of them will have the opportunity to be  
9 relocated in well-designed housing complex, thus, the  
10 island's solid waste facilities will be minimally  
11 impacted," end quote?

12 A Yes.

13 Q But doesn't it also say in the economic  
14 opportunities portion of the sustainability plan,  
15 quote, "development of facilities would generate  
16 employment and consequent income and taxes in  
17 addition by providing the opportunities for new  
18 residents to the Island of Kaua'i and generating  
19 additional real estate activity. The project is  
20 expected to support long-term impacts including  
21 additional consumer expenditures, employment  
22 opportunities, personal income, and government  
23 revenue enhancements," end quote?

24 A Yes.

25 Q So the project isn't to be sold to doubled

1 up local families exclusively, but also to new  
2 residents that would impact infrastructural services,  
3 correct?

4 A Most likely.

5 Q Substantially, all of your responses to  
6 comments cited, quote, 23 of -- 231 affordable units  
7 in the range of 175,000 to 275,000 with respect to  
8 affordable housing; is that correct?

9 A That's correct.

10 Q But doesn't Cassidy's market study say  
11 that affordables -- (cell phone disturbance) -- will  
12 be 225,000 to 325,000?

13 Would you like me to repeat the question?

14 CHAIRPERSON SCHEUER: Please.

15 Q (By Mr. Collins): But didn't Cassidy's  
16 market study say that affordables will be from  
17 225,000 to \$325,000?

18 A Hard to answer yes or no without -- but,  
19 yes.

20 Q Your attorney is totally free to reexamine  
21 you on any of these if you feel that the yes or no  
22 somehow needs further explanation.

23 And so Cassidy's market study information  
24 is not in the FEIS; is it?

25 A No.

1 Q But this is a substantive change, correct?

2 A Yes.

3 Q Has HoKua Place planned or considered  
4 providing a performance bond for LUC approval?

5 A No.

6 Q Your engineer, Mr. Bow, said infrastructure  
7 cost are based on the per acre infrastructure costs  
8 from two Kaua'i developments he worked on Koa'e  
9 Makana, and Huakahi; is that right?

10 A Yes.

11 Q Isn't it true that these workforce housing  
12 developments are on land without any significant  
13 slope?

14 A Yes.

15 Q Are you aware that there is available  
16 utility sewer and water service hookups for these two  
17 other projects already?

18 A No.

19 Q Were you responsible for -- you were  
20 responsible for preparing the EIS documents, correct?  
21 That was your testimony during direct examination.

22 A No.

23 Q No?

24 A I'm the manager.

25 Q Do the documents discuss wetlands or native



1 wetland birds, including any the botanical or  
2 biological surveys?

3 A Yes.

4 Q Did the U.S. Fish and Wildlife Service  
5 comment on the existence of native wetlands in  
6 response to the EIS?

7 A No.

8 Q So they did not specifically say that the  
9 detention basin would be an attractive nuisance for  
10 listed wetland birds in the area?

11 A No.

12 Q Ms. McMahon stated that her trenching map  
13 is in an archaeological assessment in the EIS. Are  
14 you familiar with that at all?

15 A No.

16 Q The FEIS discussed the availability of  
17 health care services by pointing to the Mahelona  
18 Medical center.

19 How many ICU beds does that medical center  
20 have?

21 A I don't know.

22 Q Do you know how many ICU beds are on Kaua'i  
23 total?

24 A No, I don't.

25 Q The FEIS states that, quote, "subdivision

1 improvements including roads, water system,  
2 wastewater, utilities, and other improvements,"  
3 quote, "are estimated at 22 million"; is that  
4 correct?

5 A I need to verify that.

6 Q Okay. Could you take a look at  
7 Petitioner's Exhibit 4 at page 20.

8 A Yes.

9 Q But does the FEIS also refer to Road A as  
10 the new connector road between Olohena Road and the  
11 Kapa'a Bypass Road," end quote, and states that,  
12 quote, "construction cost at the connector road was  
13 estimated at \$25,824,000," end quote? That's at page  
14 128.

15 A Correct, it stated that.

16 Q In Cassidy's report he refers to  
17 infrastructure being \$82,931,400, not including  
18 vertical construction, which would be an additional  
19 \$218,000,000?

20 Do you agree that \$22 million that is  
21 stated in the 2019 FEIS is nowhere near the 83  
22 million that's in the Cassidy report?

23 A Yes.

24 Q Did you indicate at any time that homeowner  
25 association fees for multi-family units would be

1 between 800 and \$1200 per month?

2 A No.

3 Q Is the HoKua Place Water Master Plan in the  
4 FEIS?

5 A Yes.

6 Q Does the Water Master Plan include plans  
7 for storage?

8 A Yes.

9 Q Does the Water Master Plan include  
10 contingency plans if the well is not productive?

11 A I can't answer that.

12 Q Was the discussion with KDOW regarding the  
13 Water Master Plan for 50 farm dwelling units and goat  
14 raising operations?

15 A I can't answer that.

16 Q I'll skip over these.

17 Are you able to answer questions about  
18 financing?

19 A No.

20 Q I'm skipping over all of those.

21 Are the wetland buffer protective fencing  
22 for wetland birds, feral cat plan or habitat  
23 restoration plan in the EIS.

24 A No.

25 Q Are you aware that the County Code allows

1 the County to exempt a developer from affordable  
2 housing requirements if the land is zoned R10 or  
3 greater density?

4 A Yes, I'm aware of that.

5 Q In your PowerPoint you read the statement  
6 that the project satisfies the Ka Pa'akai O Ka Aina  
7 test.

8 What are the elements of the Ka Pa'akai O  
9 Ka Aina test?

10 A I don't know that offhand.

11 Q But are you sure that the project satisfies  
12 the Ka Pa'akai O Ka Aina test?

13 A Yes, from my consultant, yes.

14 Q Which consultant is that?

15 A Nancy McMahan for one.

16 Q Are there others?

17 A Not that I know.

18 Q How did you folks get the name HoKua Place?

19 A HoKua Place, we came up with, Mr. Allen and  
20 myself, and really it refers to looking out and  
21 seeing the horizon meeting the sky, and certainly  
22 from HoKua looking out you will see the horizon of  
23 the ocean and integration with the sky, and sometimes  
24 you don't know the difference between the sky and the  
25 ocean. Something like that.

1 Q And you said Michelle. Which Michelle is  
2 that?

3 A I didn't say Michelle.

4 Q You said you discussed this with somebody  
5 else?

6 A Oh, oh, oh, with the Allen family.

7 Q Sorry, I misunderstood.

8 A At the time they were the sole owners. I  
9 spoke with them about it.

10 Q And you're talking about the Allen family  
11 that's like Greg Allen and his family?

12 A Yes.

13 Q Thank you very much, Mr. Agor, for allowing  
14 us to move through this quickly. I appreciate it  
15 very much.

16 Mr. Chair, we have no further questions for  
17 this witness. Thank you.

18 CHAIRPERSON SCHEUER: Thank you, I  
19 appreciate it very much as well to both the witness  
20 and to the Intervenor.

21 Commissioners, can I get a show of hands of  
22 how many people might have questions for the witness?

23 Commissioner Chang, Commissioner Giovanni.  
24 About how long do you think you have?

25 COMMISSIONER GIOVANNI: Five minutes.

1 CHAIRPERSON SCHEUER: Commissioner Chang.

2 COMMISSIONER CHANG: Likewise, and I might  
3 not even have a question after I hear Commissioner  
4 Giovanni.

5 CHAIRPERSON SCHEUER: Let's continue on.  
6 See whether we can finish at least with the  
7 Commissioners questions.

8 Commissioner Giovanni.

9 COMMISSIONER GIOVANNI: Thank you.

10 Thank you, Mr. Agor, for being here today.  
11 In view of the time constraints on us today, and our  
12 interest to move efficiently, I'm going to confine my  
13 questions to one narrow area. It has to do with your  
14 remarks regarding the General Plan.

15 So can you give me your familiarity,  
16 involvement and understanding of the General Plan,  
17 18, you referred to that as the new General Plan?

18 THE WITNESS: Yes, I kept track of the  
19 update of the General Plan and the outcome of the  
20 General Plan, four visions and 19 policies to reflect  
21 what the General Plan and the community has said that  
22 Kaua'i would be like.

23 COMMISSIONER GIOVANNI: I'm going to quote  
24 from the General Plan and you tell me if you agree  
25 with your understanding.

1           "The vision and goals are aspirational in  
2 nature. They describe Kaua'i's ideal and desired  
3 state by the year 2035." End of quote.

4           Does that sound familiar from your  
5 understanding?

6           THE WITNESS: Yes.

7           COMMISSIONER GIOVANNI: I'm going to quote  
8 again. It says: "The General Plan covers six  
9 planning districts on the Island of Kaua'i, North  
10 Shore, East Kaua'i, Lihue, South Kaua'i, Hanapepe,  
11 Ele'ele, and Waimea, Kekaha." End quote.

12           Does that sound familiar?

13           THE WITNESS: Yes.

14           COMMISSIONER GIOVANNI: The General Plan  
15 goes on to refer to a community plan, also referred  
16 to as developmental plans.

17           Does that ring a bell with you? Do you  
18 know what I'm talking about when I refer to a  
19 community plan?

20           THE WITNESS: Correct. I don't believe  
21 they completed that plan yet.

22           COMMISSIONER GIOVANNI: So let me quote:

23           "Community plans means a public document  
24 that provides specific proposals for future land  
25 uses, developments, public improvements, given

1 community within the County of Kaua'i."

2 Does that sound familiar with what the  
3 intent of the community plan is?

4 THE WITNESS: Correct. But -- gosh, I'll  
5 just say correct.

6 COMMISSIONER GIOVANNI: Fair enough.

7 And community plans are intended to be  
8 region specific and capture the community's vision  
9 for the area.

10 Does that sound familiar?

11 THE WITNESS: Right, right.

12 COMMISSIONER GIOVANNI: Has a Community  
13 plan been produced and made public for the East  
14 Kaua'i community based on the General Plan?

15 THE WITNESS: At the time of the submittals  
16 of the Final EIS, the County and the community had  
17 not finalized the community plan. And right now I  
18 don't know if they have completed yet or not. They  
19 may have, but I'm not aware of it.

20 COMMISSIONER GIOVANNI: I'm aware that they  
21 have not. It's not been done. It's been completed  
22 for other districts, but not East Kaua'i. And one of  
23 my concerns is that's really the step in the planning  
24 process where a general plan goes from aspirational  
25 to specific. And where the community gets an



1 opportunity to really share its vision for the plans  
2 for the area in which they live, which has not  
3 occurred as of yet for East Kaua'i.

4           Would that surprise you or would you  
5 disagree with me?

6           THE WITNESS: Oh, I agree with you. And  
7 hopefully it's done before we go to the entitlement  
8 process with the County.

9           COMMISSIONER GIOVANNI: One of my concerns  
10 is that there are representations in the testimony of  
11 the Petitioner that this should move forward before  
12 the LUC, because it's consistent with the  
13 aspirational -- my words, not the Petitioners -- in  
14 terms of the General Plan, and yet we don't have a  
15 community plan, and instead what we have heard from  
16 an unbelievable, in my view, number of community  
17 participants in this docket, is that they never  
18 really had an opportunity to participate in the  
19 planning process and to weigh in on this specific  
20 project, despite your representations of outreach.

21           Would you disagree with me or would you  
22 want to describe it differently?

23           THE WITNESS: I do agree with you, but  
24 there is a mechanism where the community can have  
25 their input during the entitlement process, and it

1 could have the possibility of shutting the project  
2 down, depending on how well their concerns are. And  
3 I'm hoping that Wailua Community Plan is done by that  
4 time.

5 COMMISSIONER GIOVANNI: Here we are today.  
6 The community plan has not been developed, and yet  
7 you're asking the Land Use Commission to grant a  
8 redistricting of this area, largely based on the  
9 aspirational perspective expressed in the General  
10 Plan.

11 Would you agree that we would be in a far  
12 better position today at the Land Use Commission to  
13 take up a matter such as this if we had the benefit  
14 of a community plan that had the input of the  
15 residents and a lot of community input to that plan?

16 THE WITNESS: We certainly would be, but  
17 that doesn't prohibit -- saying that we don't have  
18 it, that doesn't prohibit us to move forward, because  
19 like I said, there is another mechanism for the  
20 community to have their input.

21 COMMISSIONER GIOVANNI: My question was not  
22 whether we are prohibited from moving forward. I  
23 don't think we are prohibited, I would agree with you  
24 on that.

25 My question was, wouldn't we be far better

1 off if we had a community plan to rely on for the  
2 decision-making that's being asked of this Commission  
3 today relative to this project?

4 THE WITNESS: Absolutely, sure.

5 COMMISSIONER GIOVANNI: Thank you. Nothing  
6 further, Chair.

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

9 Commissioner Chang?

10 COMMISSIONER CHANG: Thank you.

11 Thank you very much, Mr. Agor. Nice to see  
12 you here today, and I appreciate your testimony. I  
13 just have one question for you.

14 I want to just confirm that the consultant  
15 who has the knowledge and expertise regarding the Ka  
16 Pa'akai analysis is Nancy McMahon and not yourself?

17 THE WITNESS: Yes, Nancy McMahon.

18 COMMISSIONER CHANG: That's all the  
19 questions I have. Thank you so very much.

20 CHAIRPERSON SCHEUER: Anything further,  
21 Commissioners?

22 Mr. Yuen, is there any redirect of Mr.  
23 Agor?

24 MR. YUEN: No redirect.

25 CHAIRPERSON SCHEUER: It is 3:15. I want

1 to take a ten-minute break.

2 Are there any Commissioners who intend to  
3 ask for Mr. Bracken's appearance?

4 Do you intend to recall Mr. Bracken, Mr.  
5 Yuen?

6 MR. YUEN: Yes, I do.

7 CHAIRPERSON SCHEUER: He's available in ten  
8 minutes?

9 MR. YUEN: I would have to give him a call  
10 to see, to verify. I did speak to him earlier today.

11 CHAIRPERSON SCHEUER: I thought you had  
12 assured me he was available in the afternoon.

13 MR. YUEN: He did say he was available. I  
14 have to call and confirm.

15 Can you see if he's a participant. I know  
16 he was on.

17 CHAIRPERSON SCHEUER: Mr. Collins.

18 MR. COLLINS: I was just going to note that  
19 he's listed as an attendee presently.

20 CHAIRPERSON SCHEUER: He's raised his hand.  
21 I'm promoting him to be a panelist.

22 It's 3:16, we will reconvene for the recall  
23 of Mr. Bracken at 3:26, and that should be the  
24 conclusion of the Petitioner's witnesses and  
25 evidentiary presentations.

1           Recess until 3:26.

2           (Recess taken.)

3           CHAIRPERSON SCHEUER: I'm going to note the  
4 presence of the Deputy Attorney General Bryan Yee as  
5 well.

6           Mr. Yuen, you recalled Mr. Bracken. Mr.  
7 Bracken, you remain under oath.

8                           JAKE BRACKEN

9 Was recalled as a witness by and on behalf of the  
10 Petitioner, was previously sworn to tell the truth,  
11 was examined and testified as follows:

12                           REBUTTAL EXAMINATION

13 BY MR. YUEN:

14           Q       Mr. Bracken, can you hear me?

15           A       Yes, I can hear you.

16           Q       Mr. Bracken, first, we had put into  
17 evidence and marked as Exhibit 46 --

18                           CHAIRPERSON SCHEUER: Mr. Yuen.

19           MR. YUEN: I know, I got a -- okay.

20           Q       We had marked as Exhibit Number 46 your  
21 contract with Randell Okaneku to perform a traffic  
22 study for this project.

23                           Did you see this exhibit, Mr. Bracken?

24           A       Yes, I did.

25           Q       And is this your contract with Mr. Okaneku?



1 date in acquiring the land and, you know, getting us  
2 to this point.

3 In addition to that, we do plan on getting  
4 as much traditional financing as we can, as we are  
5 aware. We are involved in other real estate projects  
6 that are currently profitable and are cash flowing.  
7 And, in fact, you know, we do have the ability from  
8 existing operations at sister projects to cover those  
9 cash flows as well. But our goal, our plan would be  
10 to utilize as much traditional financing as possible  
11 at that point.

12 Q Now, the exhibit prepared by Mr. Agor shows  
13 approximately total project cost of \$320 million, but  
14 25 percent of that, or approximately 85 million would  
15 be utilized at any one time at a maximum.

16 Could you explain how you would see your  
17 particular cash flow issues with that portion, and  
18 whether you would enlist other development partners  
19 or contractors?

20 A We are not a licensed contractor in Hawaii,  
21 so we certainly would be, you know, relying on and  
22 looking to either partner or to sell some of those  
23 lots to local contractors for the vertical  
24 construction.

25 That's typically how we do much of our

1 development, is we do the land development, and then  
2 we partner or sell the lots for contractors on the  
3 vertical construction, and that would be consistent  
4 with how we've worked in the past.

5 Q So a good portion of the \$85 million at any  
6 one time outstanding would consist of the actual  
7 improvements to the property, and the multi-family  
8 homes to be built; is that your understanding?

9 A Yes, that's my understanding.

10 Q But you would not be financing that portion  
11 directly yourself; is that true?

12 A That is true.

13 Q I would like to turn to another area, and  
14 that is -- there has been some discussion about  
15 the -- having you as the master developer post a bond  
16 for completion of this project.

17 Can you explain to the Commission whether  
18 that kind of thing would be possible or desirable  
19 from your perspective?

20 A We have, you know, looked into that as much  
21 as we can. The problem we have, or the concern that  
22 I see with that is that we are just not at that point  
23 yet.

24 For a performance bond, usually we need to  
25 have designs; we need to have cost breakdowns; we



1 need to have more firm numbers to take that to the  
2 person who would be issuing that bond.

3 And we just -- we haven't gotten to that  
4 point yet, because we don't know the constraints, you  
5 know, from both the Land Use Commission and the  
6 County level that we need to do that planning around.

7 We've got a general concept, but once we  
8 kind of know what the constraints are and where our  
9 boundaries are going to be, and what the number of  
10 units we really is appropriate, then we can design  
11 with those constraints in mind, and that would be a  
12 more appropriate time for something like that is when  
13 we had those construction drawings in hand and we  
14 were working with this at the County level.

15 Q And you have posted bonds in the past in  
16 other developers, have you not?

17 A Yeah, I would say it is very common. Any  
18 time we're building infrastructure, roads, utilities,  
19 we've almost always had to post a bond, not only a  
20 performance bond, but oftentimes some form of a hold  
21 back or warranty bond for a period of time for those  
22 municipalities.

23 Q And so the appropriate time when a bond  
24 like this is posted would be at the subdivision  
25 level; is that your understanding?

1           A       That's my experience.

2           Q       And not at a preliminary stage where the  
3 County has not imposed any design requirements on you  
4 to date?

5           A       Yes.

6           Q       I have no further questions.

7           CHAIRPERSON SCHEUER: Thank you.  
8 County?

9           MR. DONOHOE: Thank you, Chair.

10                       REBUTTAL CROSS-EXAMINATION

11 BY MR. DONOHOE:

12           Q       Mr. Bracken, just --

13           CHAIRPERSON SCHEUER: Sorry, give me a  
14 sense of how long you think --

15           MR. DONOHOE: I just want to cover one  
16 thing on the Exhibit 44, one item based on the  
17 testimony of Mr. Nance.

18           Q       (By Mr. Donohoe): Mr. Bracken on page 1 of  
19 Exhibit 44, which is the concept cost estimate,  
20 there's primary infrastructure well development. And  
21 it says unit cost, \$1 million.

22                       Are you familiar with that?

23           A       I don't have it in front of me but that  
24 sounds appropriate.

25           Q       So if Mr. Nance testified earlier that the

1 current -- the initial well was not approved, and so  
2 abandonment has to be done and has to be completed  
3 and then another well approved and drilled, which  
4 would increase the cost potentially of, he said, at  
5 the very least \$500,000.

6           Would that throw off this cost, or would  
7 that be covered in where it says 20 percent  
8 contingency of 1.1991300?

9           A       My understanding is it would come off this  
10 cost.

11          Q       It would come off the \$1 million. So that  
12 includes the already unimproved well?

13          A       Yes, I believe, if I'm understanding right,  
14 we were suggesting a half million dollars as a rough  
15 cost for drilling the new well, and I believe it was  
16 \$250,000 to take care of the old well.

17                 And, again, we are still preliminary. We  
18 are adding a contingency there, but I believe the  
19 million dollars is covered under that.

20          Q       So that covers both wells. Okay, thank  
21 you. I have nothing further.

22                 Thank you, Mr. Bracken. Thank you, Chair.

23                 CHAIRPERSON SCHEUER: Thank you, Mr.

24 Donohoe.

25                 Office of Planning, will this be Ms. Kato

1 or Mr. Yee?

2 MS. KATO: Ms. Kato. No questions. Thank  
3 you.

4 CHAIRPERSON SCHEUER: Intervenor, Mr.  
5 Collins or Ms. Isaki?

6 MR. COLLINS: Mr. Chair we have a few  
7 questions on cross-examination for this witness.

8 CHAIRPERSON SCHEUER: About how long do you  
9 think?

10 MR. COLLINS: Hopefully not more than five  
11 minutes.

12 REBUTTAL CROSS-EXAMINATION

13 BY MR. COLLINS:

14 Q Good afternoon, Mr. Bracken.

15 A Good afternoon.

16 Q I have a few questions.

17 You previously represented that Petitioner  
18 has access to a \$5 million revolving loan shared  
19 between Roche Enterprises, Hurricane Hills, and HG  
20 Joint Venture.

21 A Correct.

22 Q Ane Hurricane Hills is developing a project  
23 called Sand Hollow Resort in Hurricane, Utah?

24 A Yes.

25 Q And it has basically access to that same

1 \$5 million of the revolving loan; right?

2 A We have not been using it. We used Sand  
3 Hollow --

4 Q Sorry, my question is, but it has access to  
5 that same \$5 million, correct?

6 A I guess, yes, it could. From an entity  
7 level, no; but yes, I will give you that.

8 Q You just said that the \$5 million loan is  
9 shared between Roche Enterprises, Hurricane Hills and  
10 HG Joint Venture.

11 A Those are the guarantors on the loan.

12 Q Got it.

13 So the Commissioner's Deed indicates that  
14 the property was paid for at \$4 million dollars at  
15 the foreclosure sale, but that you valued the  
16 property on the balance sheet at 10.6 million; is  
17 that correct?

18 A I believe that is correct.

19 Q And then you had said that, I guess, 6  
20 million was because of a second position that was a  
21 \$6 million note; is that correct?

22 A I don't remember the details, but it came  
23 from a second position note that we acquired at the  
24 time.

25 Q Do you recall what the face value of that

1 note was?

2 A I don't know that offhand, no.

3 Q But for bidding purposes, you were allowed  
4 to bid 6 million, that note was allowed to include 6  
5 million in the credit bid?

6 A I don't remember. That was 2013. I don't  
7 remember where we were on that.

8 Q And the Commissioner's Deed indicates that  
9 the conveyance tax was \$28,000 paid, and I guess  
10 computing that, it shows that conveyance tax was  
11 paid; on \$4 million dollars, that the transaction  
12 value is \$4 million; is that correct?

13 A That sounds about correct. I don't believe  
14 there was much bidding after the first position note.

15 Q And how was this other note extinguished?  
16 How was the extinguishing of it characterized to the  
17 IRS, was there a net gain or a net loss?

18 A I don't remember what that was at the time.  
19 It was contributed as part of equity into HG Kaua'i  
20 Joint Venture, but I don't remember the tax  
21 treatment.

22 Q Okay.

23 Are you aware of HRS 247-2 that says the  
24 conveyance taxes, quote, "based on the actual and  
25 full consideration whether cash or otherwise

1 including any promise, act, forbearance, property  
2 interest, value gained, advantage, benefit or profit  
3 paid or to be paid for all transfers of conveyance of  
4 realty, or any interest therein".

5 A Okay. I understand what you're saying.

6 Q And so if the conveyance tax was paid on \$4  
7 million, that means that the value, this other \$6  
8 million value was not reported to the Department of  
9 Taxation for conveyance tax purposes?

10 A I don't know what was -- how it was done.  
11 Again, this was 2013, but I believe that the value  
12 for conveyance tax purposes was the auction value  
13 that it was sold at.

14 Q Even though HRS 247 --

15 CHAIRPERSON SCHEUER: Is that your phone,  
16 Mr. Yuen.

17 MR. YUEN: Yes. I shut it off.

18 CHAIRPERSON SCHEUER: Please.

19 Q (By Mr. Collins): Even though HRS 247-2  
20 says that conveyance tax is supposed to be computed  
21 on the total value of the transfer?

22 A Again, that's going back in time quite a  
23 bit. I would say that our transfer value was the  
24 auction value. We acquired the second position note  
25 at an earlier time.

1                   CHAIRPERSON SCHEUER: Mr. Collins, can I  
2 ask? I'm not saying that these are not interesting  
3 issues, but I'm trying to get to how it relates to  
4 our proceedings.

5                   MR. COLLINS: I have one last question and  
6 I'm done. But this does relate because -- my last  
7 question will indicate the relationship of all of  
8 this.

9                   CHAIRPERSON SCHEUER: Please proceed.

10                  Q        (By Mr. Lance): So that was in 2013.  
11 Presently you testified previously that the value of  
12 this property is being valued on the balance sheet as  
13 \$10 million because of something that happened in  
14 2013, but you are not able to explain how this other  
15 \$6 million was reported to any tax authority as  
16 actually existing in 2013?

17                  A        Well, all I can say is we reported it, and  
18 we structured the transaction according to our legal  
19 and tax advice at the time. I can't tell you the  
20 details here, eight years later. I don't know that  
21 offhand.

22                  Q        But it is on your balance sheet presently?

23                  A        It is on our balance sheet presently, yes.  
24 I don't have the history though.

25                  Q        Thank you very much. We have no further



1 questions. Thank you.

2 CHAIRPERSON SCHEUER: Are there any  
3 questions from the Commissioners for Mr. Bracken?  
4 Commissioner Chang.

5 COMMISSIONER CHANG: Thank you, Mr. Chair.  
6 I'm going to try to keep my questions  
7 really short, Mr. Bracken. I want to ask you about  
8 Exhibit 44.

9 The \$83 million for infrastructure cost,  
10 does that include any traffic upgrades if they're  
11 required?

12 THE WITNESS: I don't know offhand. I  
13 don't know. It was our engineer's best guess at the  
14 total. So I assume that it does, but I can't say for  
15 sure.

16 COMMISSIONER CHANG: I'm looking at the  
17 exhibit right now, and it doesn't appear to, but  
18 okay.

19 Does your \$83 million include any wetland  
20 mitigations, since Mr. Agor said he will accept the  
21 wetland designation?

22 THE WITNESS: I believe that the intent was  
23 all of the cost that we were expecting based on their  
24 experience. So I couldn't tell you specifics, but  
25 other than these are the best estimates at this time

1 from my professionals that are advising me.

2 COMMISSIONER CHANG: The last question is  
3 about the performance bond.

4 What I understand, your testimony is that  
5 it's premature, because it's not -- you don't have  
6 development plans at this point in time, and it's too  
7 early to tell; is that what you're saying?

8 THE WITNESS: Yes. And in particular, a  
9 bonding agent, somebody who would be issuing a bond  
10 would want something to bond, specific plans for what  
11 they would be bonding for. Right now we've got  
12 guesses, back of the napkin, our best guess of what  
13 things are going to look like, and we don't have a  
14 specific plan to bond against.

15 COMMISSIONER CHANG: This is a pretty nice  
16 napkin that you gave to us on Exhibit 44. You've  
17 given us vertical construction cost of 200 -- almost  
18 \$212,000,000. What is that based on?

19 THE WITNESS: That was based on, I think, a  
20 lot of -- Cassidy and Ron Agor got together and they  
21 were basing that on your average vertical  
22 construction cost.

23 Making assumptions based on the number of  
24 units and their best guess of square footage.

25 COMMISSIONER CHANG: But you must have --

1 all you have is just numbers. You're telling me you  
2 don't have any designs, you just have total number of  
3 units?

4 THE WITNESS: Yeah. I believe they took  
5 total number of units and their best guess on average  
6 unit size, and used average square foot cost to come  
7 to that, which is typically how I would do this sort  
8 of assessment myself.

9 COMMISSIONER CHANG: Thank you very much.  
10 I have no further questions.

11 CHAIRPERSON SCHEUER: Commissioners, any  
12 further questions for Mr. Bracken? Seeing none.

13 Any redirect, Mr. Yuen?

14 MR. YUEN: I have none.

15 CHAIRPERSON SCHEUER: Thank you very much,  
16 Mr. Bracken.

17 THE WITNESS: Thank you, Chair. Thank you,  
18 Commissioners.

19 CHAIRPERSON SCHEUER: The Petitioner, now  
20 having admitted all their exhibits and called all  
21 witnesses, and recalled Mr. Bracken, we would next  
22 normally proceed to the presentation of the case by  
23 the County.

24 Mr. Collins?

25 MR. COLLINS: Mr. Chair, at the appropriate

1 time before the County begins its thing, we would  
2 like to make a motion.

3 CHAIRPERSON SCHEUER: Let me finish at this  
4 point, Mr. Collins, with what I was going to say.

5 A number of Commissioners, before we take  
6 on the County's presentation, a number of the  
7 Commissioners have already, during the presentation  
8 of the Petitioner's case, have expressed some  
9 significant concerns, and I would like to give the  
10 Commission a moment to discuss these matters.

11 Commissioner Okuda?

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

14 First, if I can ask Mr. Yuen, so the record  
15 is clear.

16 Has the Petitioner rested its case?

17 MR. YUEN: Yes.

18 COMMISSIONER OKUDA: Mr. Chair, that being  
19 the case, that the Petitioner has rested its case, I  
20 make a motion to dismiss or deny this Petition. If  
21 my motion is seconded, I will spell out in detail the  
22 reasons in support of my motion.

23 CHAIRPERSON SCHEUER: Commissioners, there  
24 is a motion before us.

25 Commissioner Giovanni.

1           COMMISSIONER GIOVANNI: I second the  
2 motion.

3           CHAIRPERSON SCHEUER: Commissioner Okuda,  
4 please speak to, and I hope in great detail, explain  
5 the reasons for your motion, and I'll give a chance  
6 for the seconder to speak to the motion, and then we  
7 will move into discussion.

8           COMMISSIONER OKUDA: As we all know, the  
9 Land Use Commission is a quasi-judicial body that is  
10 required by statute, specifically the Hawaii version  
11 of Administrative Procedures Act, to make its  
12 decisions based on the law and the evidence which is  
13 adduced properly under the statute.

14           What that basically means in plain English  
15 is we as individuals are to put aside whatever  
16 prejudices or biases, or whatever we have, look at  
17 the law and apply the law fairly without favor or  
18 prejudice based on the evidence adduced.

19           And the guiding point of our actions in a  
20 boundary amendment case comes from HRS Section 205-4,  
21 subparen (h), and what that says is basically this,  
22 and I quote, paren (h) close paren:

23           "No amendment of a land use district  
24 boundary shall be approved unless the Commission  
25 finds upon the clear preponderance of the evidence

1 that the proposed boundary is reasonable, not  
2 violative of Section 205-2 and Part III of this  
3 chapter, and consistent with the policies and  
4 criteria established pursuant to Sections 205-16 and  
5 205-17."

6 Now, with respect to the process or  
7 procedure that we are to follow here, both the  
8 Administrative Procedures Act is enacted in Hawaii  
9 Chapter 91, and also the Hawaii Administrative Rules  
10 set forth the process in the conduct of the hearing.

11 And that's specifically HAR Section  
12 15-15-59 which states the following, and I quote:

13 "(a) the hearing shall be conducted in  
14 accordance with this subchapter. Unless otherwise  
15 provided by law, the party initiating the proceeding  
16 shall have the burden of proof, including the burden  
17 of producing evidence, and the burden of persuasion."

18 That basically means that the Petitioner  
19 seeking the boundary amendment has the burden of  
20 proof, the burden of persuasion, and the burden of  
21 coming forth with the evidence.

22 I would also note that section HAR 15-15-41  
23 allows parties or the Land Use Commission to bring a  
24 motion to dismiss a petition if such petition or  
25 document is insufficient, but that is not the only

1 basis upon which such a motion to dismiss can be  
2 brought.

3 In this case here, I believe, even taking a  
4 very easy -- or looking the other way and trying to  
5 view things somewhat in the light most favorable to  
6 the Petitioner, the Petitioner simply has not met its  
7 burden of proof.

8 And these are some of the bases, and I  
9 hesitate on giving the entire laundry list, which is  
10 documented in the transcripts, because frankly, I  
11 think we'd be here a long time.

12 One of the major defects is the fact that  
13 the Final Environmental Impact Statement simply does  
14 not satisfy the standards under the law. And one of  
15 the standards we have to look at is HAR, Hawaii  
16 Administrative Rules Section 11-200.1-30.

17 That's the section of the administrative  
18 rules that deal with when a supplemental  
19 environmental impact statement is required. And I  
20 quote from subparagraph (a) in that section. It says  
21 this, quote:

22 "If there is any change in any of these  
23 characteristics which may have a significant effect,  
24 the original EIS that was changed shall no longer be  
25 valid, because an essentially different action would

1 be under consideration, and a supplemental EIS shall  
2 be prepared and reviewed as provided by this  
3 chapter."

4 And it goes on that if you don't have these  
5 types of substantial changes, you don't have to file  
6 a supplemental Environmental Impact Statement.

7 The Hawaii Supreme Court has made clear  
8 that these requirements under the statute governing  
9 environmental impact statements and the  
10 administrative rules, they really mean something.  
11 And, for example, I believe the Kuilima Development  
12 Company found that out in the case which I have  
13 quoted before, cited before, Unite Here! Local 5  
14 versus City and County of Honolulu, which is found at  
15 123 Hawaii Reports 150, specifically page 181, and  
16 the Pacific 3d citation is 231 Pacific 3d, 423 at  
17 454, which is a 20010 -- or 2010 rather.

18 Hawaii Supreme Court case, makes clear that  
19 where the environmental impact statement no longer  
20 reflects what really is going on, the agency cannot  
21 go forward, and in fact the agency's decision will be  
22 reversed unless there's a supplemental environmental  
23 impact statement filed, or unless remedial matters  
24 regarding environmental impact statement are  
25 submitted.



1           And, you know, the record is replete with  
2 the fact that this environmental impact statement is  
3 either insufficient as a matter of law, or requires  
4 supplementation as a matter of law.

5           And I went back, and I assure everyone I  
6 have gone back and I've read the transcripts just to  
7 be sure that my recollection is not wrong, so I'm not  
8 relying on my recollection, I'm relying on the  
9 transcript.

10           And, for example, this was a question, and  
11 I'm not going to read the whole section of the  
12 transcript, but from my questioning of Mr. Bow, and  
13 this is the March 25th, 2021 transcript at page 193.  
14 The section really starts at line two through page  
15 194, line eight. But at the ending of my questions I  
16 asked Mr. Bow, and this is regarding the fact that  
17 the environmental impact statement did not have  
18 certain information about the wetlands.

19           My question to him was this, and I quote:

20           "Do you believe, based on your experience  
21 and your profession, including your experience with  
22 environmental impact statements, that this is the  
23 type of information that should be included in an  
24 environmental impact statement?" Question mark.

25           And his answer was: "Yes. Yes. I would

1 say so."

2 Mr. Bow at the March 25, 2021 transcript  
3 page 183 lines 3 through 18 admitted that rainfall  
4 data really needed to be updated, because that is --  
5 the increase in rainfall is relevant, and affects his  
6 drainage calculations. That's basically one ground.

7 There are other --

8 CHAIRPERSON SCHEUER: Commissioner Okuda, I  
9 do want to -- given our time constraints, I want to  
10 have you speak to your motion and also give time for  
11 deliberation.

12 COMMISSIONER OKUDA: Okay. Very quickly,  
13 the Chair asked Mr. Winchester about whether or not  
14 his report satisfied HAR 15-15-50, part 24. He  
15 admitted -- that's the March 25th transcript at page  
16 159, lines 5 through 15, that his report simply did  
17 not comply with that statute.

18 You know, I'm not going to go and repeat  
19 the Ka Pa'akai analysis, or Ka Pa'akai issues, let me  
20 just say this. I believe the colloquy and answers to  
21 Commissioner Chang's questions about Ka Pa'akai  
22 demonstrate that there simply was not compliance with  
23 the Ka Pa'akai standards. And as the Mauna Kea two  
24 case made clear, that's 143 Hawaii 379 at 397. It's  
25 not -- the Ka Pa'akai standards are not simply

1 regarding a traditional and customary native Hawaiian  
2 rights or impact on it, it deals with to the extent  
3 which cultural resources in general are impacted.  
4 And there's simply failure to comply with that.

5 My final point is this: Compliance with Ka  
6 Pa'akai is not simply a Hawaiian matter, that's part  
7 of the 1978 Constitutional Convention where native  
8 Hawaiians did not comprise very many of the  
9 delegates. The provisions in the constitution, which  
10 we are trying to implement here or comply with here  
11 in these hearings, these are statements of the broad  
12 rainbow of people in the community who believe that  
13 protection of these cultural rights, protection of  
14 resources, and frankly, following these procedures  
15 that are set forth by law, these are common goals and  
16 aspirations.

17 So, Mr. Chair, for those reasons -- and by  
18 the way, let me just say one last thing here.

19 I find really a problem with the Final  
20 Environmental Impact Statement. Mr. Bow's testimony,  
21 that he had brought up a number of these facts before  
22 the Final EIS was sent to the Commission, and he was  
23 basically told that, and I can quote the section from  
24 the transcript:

25 "We are basically too far in", close quote,

1 to include his comments, his updated drainage plan in  
2 the Final Environmental Impact Statement.

3 I think there is an issue here about  
4 whether we have a material omission of fact under the  
5 case *AIG versus Batman, B-a-t-m-a-n*.

6 So that's some of the basis, Mr. Chair, in  
7 support of my motion. Thank you.

8 CHAIRPERSON SCHEUER: Commissioner  
9 Giovanni, you seconded the motion.

10 COMMISSIONER GIOVANNI: Thank you, Chair.  
11 I did second the motion, and I also agree with  
12 Commissioner Okuda in his motion to dismiss this  
13 petition before the LUC.

14 I'm not going to go into all the detail  
15 that Mr. Okuda did, but let me just say, I'm a  
16 student of Mr. Okuda's teachings, and I understand  
17 and appreciate and concur with the perspective that  
18 he's brought forth in support of this motion.

19 My areas of concern are three general  
20 categories. One is the FEIS that we accepted in late  
21 2019. At the time the Chair remarked that we were  
22 approving that FEIS recognizing that it was a very  
23 low bar, and they had just barely crept over the  
24 edge of it.

25 What I have learned in this, in the

1 evidence that's been brought forth in this docket has  
2 convinced me that they did not meet that bar at the  
3 time. And that we -- if I knew then what I know now,  
4 I would have argued strenuously not to accept the  
5 FEIS at that time.

6           Secondly, I think the proposed project is  
7 in conflict with the will of the community at large,  
8 and it would be most directly affected by this  
9 project on Kaua'i.

10           And thirdly, has to do with whether or not  
11 they have met the burden of persuasion at this point  
12 in this juncture, in this docket, and I feel they  
13 have not.

14           And my concerns are in many different  
15 areas, and the more I learned -- and we haven't even  
16 gotten to the case from Intervenors and others  
17 whether it be traffic, wastewater, storm water,  
18 infrastructure, the wetlands, and whether or not this  
19 really does constitute affordable housing that would  
20 be taken up by the residents of Kaua'i at this time  
21 at this place. These are all big areas in which I  
22 have not been persuaded that this project is in the  
23 best interest of our community, and therefore, I urge  
24 my fellow Commissioners to join with Mr. Okuda and  
25 myself and vote in favor of this motion. Thank you.

1           CHAIRPERSON SCHEUER: Before I call on  
2 Commissioner Chang, I just want to acknowledge that I  
3 indicated to the Intervenor that I was wanting to  
4 provide time for the Commissioners to discuss. The  
5 Intervenor suggested they wished to make a motion.

6           I'm going to just offer the opportunity  
7 very briefly for the Intervenor to say anything at  
8 this time if they wish to.

9           MR. COLLINS: Mr. Chair, we were going to  
10 make a motion to do exactly what is now before the  
11 Commission. We just wanted to note procedurally that  
12 we believe under the case of Kim v State 62 Hawaii  
13 483 that the Commission has the authority to do this  
14 procedure at the close of the Petitioner's case where  
15 no right to relief has been demonstrated.

16           And also that for the other procedural  
17 proposition that you folks may weigh and evaluate the  
18 evidence without special inferences favoring the  
19 Petitioner, resolve conflicts therein, and determine  
20 whether the clear preponderance of the evidence has  
21 been met.

22           CHAIRPERSON SCHEUER: Thank you.  
23 Indicating you wanted to make a motion, I wanted  
24 to -- I didn't want to cut you off. I wanted to make  
25 sure you had an opportunity to speak.

1 Commissioner Chang.

2 COMMISSIONER CHANG: Thank you, Mr. Chair.

3 I will try to keep my comments very brief  
4 as I know others would like to speak.

5 I too will be joining and supporting the  
6 motion. I will tell you it is with heavy heart,  
7 because this project potentially did provide housing  
8 to the community.

9 However, we have heard -- I mean, days of  
10 testimony. And I too do not feel that they have met  
11 their burden of proof of satisfying the boundary  
12 amendment.

13 For me it is the constitutional obligation  
14 that we have under the Ka Pa'akai. I do not believe  
15 that there's sufficient evidence. I know for me  
16 personally there's not sufficient evidence in the  
17 record for me, as a Commissioner, to make that  
18 determination.

19 So I do believe that the record is  
20 incomplete on that. And then I support all the other  
21 basis that Commissioners Okuda talked about, and I  
22 realized that there are many others, but my primary  
23 concern is Ka Pa'akai analysis. And I do not  
24 believe -- I think their own witness admits to the  
25 inadequacy, so it's not just our conclusion.

1           But thank you very much, Mr. Chair.

2           CHAIRPERSON SCHEUER: Thank you,  
3 Commissioner Chang. Commissioner Aczon.

4           VICE CHAIR ACZON: Thank you, Mr. Chair.  
5 I'm not a lawyer, and I cannot really dispute what  
6 Commissioner Okuda analysis are, but without  
7 discussing the full process like we normally do, and  
8 without hearing the rest of the parties, their  
9 presentations, I'm really uncomfortable supporting  
10 this motion.

11           Who knows, probably if the whole process  
12 taken place, I might vote the same way as my fellow  
13 Commissioners going to be voting.

14           But, again, I'm very uncomfortable  
15 supporting this motion without going through the  
16 normal process that we normally do without hearing  
17 the rest of the parties. So I will be voting against  
18 the motion.

19           CHAIRPERSON SCHEUER: Thank you,  
20 Commissioner Aczon.

21           Commissioners, I'm noting that Mr. Yee has  
22 raised his hand, and because he previously started to  
23 speak, I allowed the Intervenor to speak.

24           Does the Commission wish to allow for some  
25 brief statements from the parties? If so, I'm going



1 to call on -- sorry, Commissioner Ohigashi?

2 COMMISSIONER OHIGASHI: Sorry, but I think  
3 that if we allow the Intervenors to speak, all  
4 parties should be allowed to make an argument in this  
5 case. I'm concerned about procedurally, to permit  
6 process -- I'm requesting that we should give an  
7 opportunity to all parties.

8 CHAIRPERSON SCHEUER: Thank you,  
9 Commissioner Ohigashi. And I'm willing to grant that  
10 motion, grant that request now, but let me be clear.

11 The intervenor -- I cut the Intervenor off  
12 when they were making a motion during the regular  
13 portion of the proceedings. Then a motion was made  
14 by the Commissioners. Normally parties are not  
15 called on once the Commission has ventured into  
16 deliberation. I do believe the Petitioner has had  
17 many, many hearing dates with the known standard to  
18 make their case, but I am more than willing to  
19 provide additional opportunity right now to hear from  
20 all the parties.

21 I'll hear from Mr. Yuen, then the County,  
22 then from Mr. Yee, Office are Planning, and we have  
23 already heard from the Intervenor.

24 Mr. Yuen.

25 MR. YUEN: Mr. Chair, I would like the

1 opportunity to respond in writing before the  
2 Commission acts.

3 CHAIRPERSON SCHEUER: This would be highly  
4 unusual.

5 Commissioner Okuda?

6 COMMISSIONER OKUDA: Thank you, Mr. Chair.

7 Since I brought the motion, in the interest  
8 of letting everyone put their arguments down in  
9 writing, I would have no problem, personally anyway,  
10 even though I know it's up to the Chair to manage  
11 this, to allow Mr. Yuen and all parties to submit  
12 something in writing, although if the Chair decides  
13 to do that, I think there should be a clear deadline  
14 made as far as when that would be submitted and  
15 clarity on whether or not there will be a hearing  
16 where there's going to be oral arguments, and what  
17 the schedule is.

18 In other words, whether each party gets to  
19 file something in writing and each party thereafter  
20 has certain amount of days to file reply.

21 CHAIRPERSON SCHEUER: I may need --  
22 Commissioner Ohigashi.

23 COMMISSIONER OHIGASHI: I would like to  
24 move for an executive session for purposes of  
25 consulting our attorney, determining process, duties

1 and responsibilities of this Commission.

2 CHAIRPERSON SCHEUER: Is there a second for  
3 that motion? I see no second.

4 COMMISSIONER ACZON: Chair, second.

5 CHAIRPERSON SCHEUER: There is a second for  
6 the motion.

7 So procedurally, if we go into executive  
8 session with our attorney general right now, we will  
9 need to briefly reemerge from executive session to  
10 public session at 4:30 to end today's proceedings.  
11 We are out of time.

12 So we would leave today's proceedings  
13 without any clear action of any of the parties.  
14 Before we move onto further discussion, would it be  
15 possible, I ask of our attorney general, that the  
16 Commission could issue, the Chair could issue an  
17 order giving a schedule and written responses if  
18 that's the Chair's inclination?

19 MS. CHOW: Yes. As the presiding officer  
20 you could do that.

21 CHAIRPERSON SCHEUER: Mr. Yee, you're  
22 speaking about going into executive session briefly,  
23 please.

24 MR. YEE: My comments will involve issues  
25 of procedure in which I would ask basically the LUC

1 to correct matters that I think need correcting.

2 I won't get into it because if you go  
3 straight into executive session, and then out and not  
4 hear from the parties, my concern is there is a  
5 procedural issue that I think could be fixed today,  
6 otherwise, it would have to be fixed later. I can  
7 get into the reasons if you --

8 CHAIRPERSON SCHEUER: I'm socially minded  
9 here.

10 MR. YEE: I believe that the motion from  
11 the Land Use Commission needs to be specific in  
12 explaining the specific bases, so I don't think it  
13 could be sufficient to simply say you failed to  
14 comply with Ka Pa'akai. You have to identify what  
15 part of Ka Pa'akai and what is missing from their  
16 facts.

17 Similarly, I think there was a variety of  
18 reasons why you would be dismissing this matter. In  
19 order to allow the parties or the Petitioner to reply  
20 (indecipherable) -- must testify bases by which  
21 you're proposing to dismiss at this stage of the  
22 process.

23 I think you have some, but only some bases  
24 by which you would want to make a decision,  
25 consequently, you're going to be restricted to these

1 issues the next time you come back.

2 Also, Mr. Collins, I'm guessing, would have  
3 other bases by which he would argue, specific bases  
4 by which he could argue and could lay out, and that  
5 could be done by way of a written motion as well, and  
6 I think he should be allowed to file that to also be  
7 answered by the parties.

8 I'll stop there. Thank you.

9 CHAIRPERSON SCHEUER: Ms. Chow, without  
10 violating any particular privileges, I could use a  
11 bit of procedural guidance here.

12 We have two motions here, I certainly want  
13 to -- let me frame this.

14 Yes, it is unusual that a Commissioner  
15 would make, concluding only portions of the  
16 proceedings, a motion to dismiss. However, this has  
17 been a very unusual docket. And I believe there is  
18 certainly, as evidenced by the second and the  
19 comments of Commissioner Chang, certainly at least  
20 some belief in the merit of such a motion.

21 How might you suggest that we, without  
22 unduly prejudicing any of the parties, move forward  
23 with this matter?

24 MS. CHOW: So you know, if this -- it's  
25 difficult to do it in open session, but my standard

1 advice would be that if this matter were to go up on  
2 appeal, a fuller record would be better than one that  
3 does not have as much information in it.

4           And so I'm not saying that it should go  
5 through the entire hearing, but if the LUC or the  
6 Commission wants to make a decision on this motion,  
7 they should provide as much opportunity for the  
8 parties to address this particular basis of this  
9 motion, and to have an opportunity to respond before  
10 the Commission makes its decision, so that the basis  
11 for the Commission's decision has been fully vetted.

12           CHAIRPERSON SCHEUER: Thank you, Ms. Chow.  
13           Commissioner Okuda.

14           COMMISSIONER OKUDA: Thank you, Mr. Chair.  
15 I did not make a motion just simply to save time. So  
16 that wasn't the intention. But since we are out of  
17 time anyway, I'm willing to withdraw my motion. We  
18 can come back for further days of hearings, that's  
19 not a problem.

20           So, I mean, if we're now going to have  
21 questions about a full record -- and I don't intend  
22 to just create more paperwork for everyone -- maybe  
23 it's more efficient since we are really out of time  
24 anyway, I withdraw my motion, and we just proceed now  
25 with the other parties' cases since the Petitioner

1 has rested?

2 CHAIRPERSON SCHEUER: Ms. Chow.

3 MS. CHOW: Just to clarify, Commissioner  
4 Okuda. I was not suggesting that the Commission  
5 should go through the entire hearing, but that the  
6 basis for the motion itself, the motion to dismiss  
7 should be more fully set forth than, you know, in  
8 sort of an eye towards the fact that we want to close  
9 the meeting at a certain time.

10 So, you know, if Commissioner Okuda would  
11 want to more fully flesh out his reasons for the  
12 motion in sort of written form, that might actually  
13 help the parties and the Commissioners to review it  
14 and some to respond to it.

15 COMMISSIONER OKUDA: If I can respond, I'm  
16 happy to put things in writing, and, in fact, as you  
17 can tell, I was trying not to just talk off the top  
18 of my head.

19 However, if that's going to be the case, my  
20 suggestion is I withdraw my motion, and let's just go  
21 forward with maybe one or two more days of hearing.

22 CHAIRPERSON SCHEUER: Commissioner Ohigashi  
23 followed by Commissioner Chang.

24 COMMISSIONER OHIGASHI: Given the advice  
25 that Linda Chow has given that hopefully we would

1 elicit in executive session, I withdraw my request  
2 for executive session at this time.

3 CHAIRPERSON SCHEUER: So Commissioner  
4 Chang.

5 COMMISSIONER CHANG: Thank you, Mr. Chair.

6 My only recommendation is following Deputy  
7 Attorney General Linda Chow, I think the parties  
8 recognize what the motion is that's been made by Mr.  
9 Okuda. And I would accept Mr. Yuen's request to put  
10 it in writing, to give all the parties an opportunity  
11 to put -- to respond.

12 And then I don't know when this is  
13 scheduled again, but I would like a full record. I  
14 don't want to do this again, don't want to do these  
15 hearings again. So let's get it right the first  
16 time.

17 I think Mr. Yuen has asked for an  
18 opportunity to respond in writing, and I would just  
19 urge that we provide him that opportunity as well as  
20 the other parties.

21 CHAIRPERSON SCHEUER: Thank you,  
22 Commissioner Chang.

23 Commissioner Giovanni.

24 COMMISSIONER GIOVANNI: I concur with  
25 Commissioner Chang, and I respect Mr. Yuen's request.



1 I think it's a reasonable request, and I for one  
2 would like to hear and see in writing positions of  
3 all the parties on this matter.

4 I would encourage Mr. Okuda not to withdraw  
5 his motion, however. I think it might move these  
6 whole proceedings further if we can give this  
7 particular motion the attention it deserves and in  
8 the end it might save time, it might not, but we will  
9 have a full hearing on the matter.

10 CHAIRPERSON SCHEUER: So the movants of the  
11 two motions have suggested they wish to remove their  
12 motions. I haven't formally acknowledged that yet.

13 We also have on the record that had the  
14 Commission not made its motion, that Intervenor was  
15 planning to make a motion substantively regarding the  
16 same matters.

17 Commissioner Okuda.

18 COMMISSIONER OKUDA: Thank you, Mr. Chair.

19 Based on comments of Commissioner Giovanni,  
20 I withdraw my suggestion that I withdraw my motion.

21 CHAIRPERSON SCHEUER: Okay. You all making  
22 this challenging. Let me summarize how I feel right  
23 now.

24 Here's what I would like to do. I would  
25 like to first clarify with Commissioners Ohigashi and

1 Aczon that the motion to go into executive session is  
2 withdrawn. Ohigashi? The second is withdrawn? Yes,  
3 okay.

4 We now still have a motion before us made  
5 by Commissioner Okuda and seconded by Commissioner  
6 Giovanni.

7 There has been a request from the  
8 Petitioner to do written briefing on, I believe,  
9 particularly the issue of whether or not the  
10 Petitioner has met the statutory requirements of  
11 their burden of proof under the law and rules in this  
12 case as well as case law.

13 And I am willing, and think it would give  
14 us a full record in these proceedings to have written  
15 briefings on this followed by oral argument.

16 Mr. Orodener, do you have a suggested  
17 schedule for this matter?

18 EXECUTIVE OFFICER: Yes, Mr. Chair. I  
19 would suggest, given the heavy schedule coming up,  
20 that we allow the parties two weeks to file briefs,  
21 and that we'll schedule oral argument on this matter  
22 and decision-making for June 10th.

23 CHAIRPERSON SCHEUER: So can you be more  
24 detailed in the order of briefs, and if you would  
25 suggest that there is any responses, written

1 responsive briefs.

2 EXECUTIVE OFFICER: Briefs would be due by  
3 the 27th, and then rebuttals would be due, if the  
4 Chair is to allow rebuttal briefs, they would be due  
5 on the 2nd of June.

6 CHAIRPERSON SCHEUER: And oral arguments  
7 schedule for June 10th?

8 EXECUTIVE OFFICER: Yes, that's correct.

9 CHAIRPERSON SCHEUER: I believe, as the  
10 Chair, I can order this to occur, but I'm just going  
11 to ask the parties whether they have any concerns  
12 with the schedule. Mr. Yuen?

13 MR. YUEN: Will we get a written statement  
14 of the grounds for dismissal?

15 CHAIRPERSON SCHEUER: You will rely right  
16 now on the transcripts of today's hearing, and the  
17 recording, which will be available within a couple  
18 hours after the close of this hearing for the  
19 statements that have already been made by  
20 Commissioner Okuda, Giovanni and Chang.

21 If a motion is withdrawn and remade there  
22 might be additional detailed reasons for  
23 Commissioner's inclinations.

24 Do you have further questions, Mr. Yuen?

25 MR. YUEN: No. I guess we would agree with

1 the schedule.

2 CHAIRPERSON SCHEUER: Thank you.

3 Mr. Donohoe.

4 MR. DONOHOE: Thank you, Chair, the County  
5 is agreeable to the schedule as well.

6 CHAIRPERSON SCHEUER: Ms. Kato.

7 MR. YEE: Chair.

8 CHAIRPERSON SCHEUER: Mr. Yee, who is also  
9 on ZOOM.

10 MR. YEE: So sorry, the schedule itself we  
11 have no objection to. We do think Intervenor should  
12 be allowed to file a motion in particular, because we  
13 believe that the Land Use Commission will be  
14 restricted to the specific matters identified, not  
15 the more general questions it has as to the adequacy  
16 of the proof, and I believe Intervenors may have an  
17 ability to present it with better specificity.

18 CHAIRPERSON SCHEUER: If I'm correct, the  
19 Intervenor at any time can file a written motion on  
20 this matter.

21 MR. YEE: Right. I think that should be  
22 worked into the schedule so that we can all file, you  
23 know, all know when to file.

24 CHAIRPERSON SCHEUER: Which would be also  
25 pendent along with Commissioner Okuda's motion.

1           When could the Intervenor file the motion  
2 that they orally discussed in written form, and could  
3 it comply with the proposed schedule that we  
4 discussed?

5           MR. COLLINS: I was going to ask if we  
6 would be allowed to file basically a motion at the  
7 same time as the first briefs are due on the 27th,  
8 and then, of course, allow all parties to respond to  
9 that. I think that's more generous than what the  
10 default rules permit in terms of filing motions and  
11 responding.

12           And I think most of our brief in support of  
13 Commissioner Okuda's motion is going to be  
14 duplicative of what is in our motion, there probably  
15 will be additional things, but --

16           CHAIRPERSON SCHEUER: Thank you. I'm going  
17 to -- we have five minutes.

18           Commissioner Ohigashi.

19           COMMISSIONER OHIGASHI: I just have one  
20 question.

21           Mr. Collins, does that mean that you'll be  
22 filing a combination memorandum as well as a motion  
23 at the same time, and that the rebuttal schedule will  
24 be set at the same time, and no additional time is  
25 necessary?

1           MR. COLLINS: Yes, Commissioner Ohigashi,  
2 we are suggesting that. It won't be a combination,  
3 we will separate it so the record is clear, but it  
4 will be all at same time.

5           CHAIRPERSON SCHEUER: Mr. Donohoe.

6           MR. DONOHOE: For logistic purposes for the  
7 June 10th, is the County dependent on the outcome of  
8 the motion to have its witnesses ready?

9           CHAIRPERSON SCHEUER: No. No, if either  
10 Commissioner Okuda or the Intervenor's motion fails,  
11 the next step would be to then schedule further  
12 proceedings for the County to proceed with their  
13 case.

14          MR. DONOHOE: Thank you, Chair.

15          CHAIRPERSON SCHEUER: I'm going to circle  
16 back. Commissioner Cabral.

17          VICE CHAIR CABRAL: Yes, thank you. I know  
18 we are in a hurry, but I got to get my two cents in.

19                 I want to say, although I think the  
20 writings on the wall, so to speak, but I would want  
21 to tell the Petitioner how desperately clearly the  
22 island and community appears to need housing, and to  
23 look at where the questions --

24          CHAIRPERSON SCHEUER: Commissioner Cabral,  
25 I'm going to just focus this purely on procedure

1 right now.

2 VICE CHAIR CABRAL: Okay, thank you.

3 EXECUTIVE OFFICER: Chair, if I may.

4 CHAIRPERSON SCHEUER: Mr. Orodanker.

5 EXECUTIVE OFFICER: I just want to point  
6 out that we have -- there is some concern about this,  
7 and I would point out that this motion may have to  
8 be -- we will have to see how the scheduling goes.  
9 We have two SPs on the 9th and 10th that have to be  
10 heard, because of time constraints on those days.

11 So if we cannot finish those, this motion  
12 will have to be deferred.

13 CHAIRPERSON SCHEUER: The oral arguments on  
14 this motion?

15 EXECUTIVE OFFICER: Yes, that is correct.

16 CHAIRPERSON SCHEUER: Okay, but that does  
17 not necessarily change the briefing schedule at this  
18 point, correct?

19 EXECUTIVE OFFICER: No, it does not.

20 CHAIRPERSON SCHEUER: Thank you.

21 I'm going to circle back with Mr. Yuen, the  
22 Petitioner. We have discussed slightly different  
23 revised schedule that would also have the Intervenor  
24 file a motion along with their briefing on the  
25 Commission's motion on the first date of deadline,

1 and the scheduling going on as further. Do you have  
2 any problems with this procedure?

3 MR. YUEN: So essentially if the Intervenor  
4 files a motion by May 27th, our opportunity to  
5 respond to the Intervenor's motion is June 2nd; is  
6 that correct?

7 CHAIRPERSON SCHEUER: That is correct,  
8 under this proposed schedule.

9 MR. YUEN: I guess if that's the schedule  
10 that you're going to impose, that's the schedule we  
11 follow.

12 CHAIRPERSON SCHEUER: County?

13 MR. DONOHOE: Sorry, Chair. I'm okay with  
14 that.

15 CHAIRPERSON SCHEUER: OP?

16 MR. YEE: No objection.

17 CHAIRPERSON SCHEUER: Commissioners?  
18 Having resolved the scheduling matters and set this  
19 matter for further proceedings, there being no other  
20 business on our schedule, I'm going to adjourn our  
21 meeting for today.

22 (The proceedings were adjourned at 4:29  
23 p.m.)

24

25



## CERTIFICATE

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

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on May 13, 2021, at 9:00 a.m., the  
6 proceedings contained herein was taken down by me in  
7 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 13th day of May, 2021, in Honolulu,  
16 Hawaii.

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