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OFFICE OF THE CITY CLERK COUNTY OF KAUAI

Roy Ho
Chair

Donna Apisa
Vice Chair

Member:
Francis DeGracia

COUNTY OF KAUAI PLANNING COMMISSION

NOTICE OF TELECONFERENCE MEETING AND SUBDIVISION COMMITTEE AGENDA

Tuesday, July 14, 2020

8:30 a.m. or shortly thereafter

Microsoft Teams Audio: +1 469-848-0234, Conference ID: 499 012 761#

The meeting will be held via Microsoft Teams conferencing only. Members of the public are invited to join this meeting by calling the number above with the conference ID information. You may testify during the video conference or submit written testimony in advance of the meeting via e-mail or mail. To avoid excessive noise/feedback, please mute your microphone except to testify.

A. CALL TO ORDER

B. ROLL CALL

C. APPROVAL OF AGENDA

D. MINUTES of the meeting(s) of the Subdivision Committee

1. Meeting of May 12, 2020

E. RECEIPT OF ITEMS FOR THE RECORD (None)

F. HEARINGS AND PUBLIC COMMENT The Planning Commission will accept written testimony for any agenda item herein. Written testimony indicating your 1) name, and if applicable, your position/title and organization you are representing, and 2) the agenda item that you are providing comment on, may be submitted in writing to planningdepartment@kauai.gov or mailed to the County of Kauai Planning Department, 4444 Rice Street, Suite 473, Lihue, Hawaii 96766. Written testimony received by the Planning Department before 8:30 a.m. on Monday, July 13, 2020, will be distributed to all Planning Commissioners prior to the meeting. Written testimony received after 8:30 a.m. on Monday, July 13, 2020, will be summarized by the Clerk of the Commission during the meeting and added to the record thereafter.

G. GENERAL BUSINESS MATTERS (None)

H. UNFINISHED BUSINESS (None)

I. NEW BUSINESS (For Action)

1. Final Subdivision Map Approval

   a. Subdivision Application No. S-2020-6
   (Tallac Properties LLC.)
   Proposed 2-lot Consolidation
   TMK: (4) 2-6-022:030 & 031
   Kukui'ula, Kaua'i

      1) Subdivision Report pertaining to this matter.

2. Tentative Subdivision Extension Request

   a. Subdivision Application No. S-2019-4
   (Tim Beckman & Mira Hess)
   Proposed 5-lot Boundary Adjustment
   TMKs: (4) 2-8-014:038 & 042
   Po'ipū, Kaua'i

      1) Subdivision Report pertaining to this matter.

3. Recertification of Final Subdivision Map Approval

   a. Subdivision Application No. S-2003-43
   (Kaua'i Bible Church)
   2-lot Boundary Adjustment
   TMK: (4) 2-5-001:002
   'Ōma'ō, Kaua'i

      1) Subdivision Report pertaining to this matter.

   b. Subdivision Application No. S-2011-5
   (S. Otsuka Estates)
   10-lot Subdivision
   TMK: (4) 4-3-009:004
   Wailua, Kaua'i

      1) Subdivision Report pertaining to this matter.

J. ADJOURNMENT

NOTE: IF YOU NEED AN AUXILIARY AID/SERVICE, OTHER ACCOMMODATION DUE TO A DISBILITY, OR AN INTERPRETER FOR NON-ENGLISH SPEAKING PERSONS, PLEASE CONTACT THE OFFICE OF BOARDS & COMMISSIONS AT (808) 241-4917 OR ASEGRETI@KAUAI.GOV AS SOON AS POSSIBLE. REQUESTS MADE AS EARLY AS POSSIBLE WILL ALLOW ADEQUATE TIME TO FULFILL YOUR REQUEST. UPON REQUEST, THIS NOTICE IS AVAILABLE IN ALTERNATE FORMATS SUCH AS LARGE PRINT, BRAILLE, OR ELECTRONIC COPY.

KAUA'I PLANNING COMMISSION
SUBDIVISION COMMITTEE MEETING
May 12, 2020

The regular meeting of the Planning Commission Subdivision Committee of the County of Kaua'i was called to order at 8:31 a.m., Microsoft Teleconference. The following Commissioners were present:

Roy Ho
Ms. Donna Apisa

Absent:

The following staff members were present: Planning Department Director Kaaina Hull – Planning Deputy Director Jodi Higuchi Sayegusa, Chance Bukoski, and Planning Commission Secretary Leslie Takasaki; Office of the County Attorney – Deputy County Attorney Nicholas Courson; Office of Boards and Commissions – Commission Support Clerk Arleen Kuwamura.

CALL TO ORDER

Subdivision Committee Chair Ho: Called the meeting to order at 8:31 a.m.

ROLL CALL

Chair Ho: Good morning all and to those who are viewing us, and the abbreviated Calendar. Mr. Hull will you start us off with our roll, please.

Planning Director Mr. Kaaina Hull: All right. Chair Ho. Roll call. Commissioner Apisa.

Ms. Apisa: Here.

Mr. Hull: Chair Ho.

Chair Ho: Here

Mr. Hull: Chair Ho, you have a quorum.

APPROVAL OF AGENDA

Mr. Hull: The next order of business is the Approval of the Agenda. The Department does not have any recommended changes to the agenda.

Ms. Apisa: I move that we approve the Agenda as submitted.

Chair Ho: The motion before us is to approve the Agenda. All in favor? Aye (Unanimous voice vote) approved. Motion carries 2:0.

MINUTES of the meeting(s) of the Subdivision Committee

Mr. Hull: Thank you Chair. Moving on to Agenda Item D, Minutes the first being Minutes of the January 28, 2020 meeting.

Ms. Apisa: I move to approve the minutes as submitted.

Chair Ho: We have two minutes here Kaaina. One for January 28th and one for February 11th, 2020. Could we do both at one time?

Mr. Hull: Yes, you can.

Ms. Apisa: I move to approve the minutes of January 28, 2020 and February 11, 2020 minutes.

Chair Ho: Motion before us is to approve the minutes of the meetings on January 28th and February 11th, 2020. All in favor? Aye (Unanimous voice vote) approved. Motion carries 2:0.

RECEIPT OF ITEMS FOR THE RECORD (None)

Mr. Hull: Next, we have Receipts of Items for the Record. We have no Receipt of Items for the Record.

HEARINGS AND PUBLIC COMMENT

Mr. Hull: The following Agenda Item is F, Hearings and Public Comment. In which the Planning Commission can accept written testimony. We did post it on the agenda and on our notice that written testimonies needs to be, submitted 24 hours in advance before the hearing for the Commission to receive the written format. We have not received written testimonies for this agenda. We also can transmit anything that we have receive, at a later date, but we would read it on to the record at this meeting. We have not received any testimony at this time, between the 24-hour periods. We have no written testimonies. I am looking…and it does appear because we have made this publicly available for the public to call in as well as testify on any of the agenda items. I am not seeing any individual numbers of the members of the public to call in. Let me double check with Jodi. Jodi do we have anybody that has called in, and is listening and would like to testify? Jodi, I think you are muted.

Planning Deputy Director Ms. Jodi Higuchi Sayegusa: Nobody called in.

Mr. Hull: Thanks, Jodi.

GENERAL BUSINESS MATTERS

Mr. Hull: Moving on. We have no G, General Business Matters.

UNFINISHED BUSINESS (For Action)

Mr. Hull: We have no H, Unfinished Business.

NEW BUSINESS (For Action)

Final Subdivision Map Approval.

Subdivision Application No. S-2019-09 *Kukui'ula Development Co., LLC (Parcel FF)* Proposed 10-lot Subdivision
TMK: (4) 2-6-019: 017, & 026 Koloa, Kauai

Mr. Hull: Moving on to Item I, New Business for action. Subdivision action Items 1.a & b. I will just give you a primer as to what happened here and then I will turn it over to the Planner Chance Bukoski, to give you folks a brief report. Both Subdivisions were before you folks for a year or two and then they received Tentative Approval and were cued up for Final Approval in early March. After that, we went into the Covid-19 crisis and all the Planning Commission meetings were canceled until further notice. The applicant was or had at the time, and still has some timeline issues that they needed to meet, and so in analyzing it as well as the emergency proclamation that the Governor had put into place suspending among other things Chapter 46, which gives us police powers. We had a discussion with both the County Attorney's Office, Jodi, myself, and the Planning Commission Chair and Subdivision Chair, Mr. Ho, to allow an approval via that proclamation. So ultimately, there is a letter in this packet that was transmitted signed by the Planning Commission Chair and the Subdivision Committee Chair, approving the Subdivision application pursuant to what has been submitted as well as, under the emergency proclamation powers.

What you folks have before you are essentially is we are returning before you folks and saying, this action did happen. If you have any questions and want to discuss it, we are here for you to answer any of those questions. Ultimately, we are here to ask you folks, to memorialize and ratify the actions of the Department, as well as the Chair and, the Subdivision Committee Chair. With that, do you folks have any questions about the emergency proclamation or the actions that we took? If not, I will turn it over to Chance, to give a brief report.

Chair Ho: I am good.

Ms. Apisa: I am good.

Mr. Hull: Thank you, Commissioners. Chance, if you just want to give a brief layout of Subdivision Application No. S-2019-09, and then we will do the second subdivision after that.

Mr. Bukoski read the Subdivision Report for the record (on file with the Planning Department).

Staff Planner Mr. Bukoski: Sure. So, looking at New Business for Action I, one, Final Subdivision Map Approval and for the Ratification of the evaluation of the project; the proposed development consolidates two parcels and re-subdivides the said parcel into a total of 10-lots. The surrounding parcels feature an assortment of Zoning Districts that include Residential, Resort, Open, and Special Treatment Open, and they are all situated within the State Land Use Urban Districts. Chair and Commissioner, we have received all agencies' comments and the applicants have met all the agencies' comments. We are recommending final subdivision map approval.

Chair Ho: Any other questions, Donna?

Ms. Apisa: No questions. It is straight forward.

Chair Ho: I will entertain a motion, please.

Ms. Apisa: I move that we memorialize and ratify the actions of the Planning Department. Is that sufficient or do we need more in the motion?

Mr. Hull: Just for clarification, I think the request should be a motion to ratify for Final Subdivision Map Approval for Subdivision application No. S-2019-09.

Ms. Apisa: I withdraw the other motion. I move that we ratify the Final Subdivision Map Approval for Application No. S-2019-09.

Chair Ho: The motion on the floor before us is for Final Map Approval Application No. 2019-09, Kukui'ula Development Co., LLC. All in favor? Aye (Unanimous voice vote) approved. Motion carries 2:0.

Subdivision Application No. S-2019- 13; *Kukui'ula Development Co., LLC (Kainani Villas)* Proposed 7-lot Subdivision
TMK: (4) 2-6-021:005 Koloa, Kauai

Mr. Bukoski: Thank you Chair. Moving on to the next Item I.1.b., Subdivision Application No. S-2019- 13, the applicant is Kukui'ula Development Co., LLC, also known as Kainani Villas Subdivision. Proposed 7-lot Subdivision TMK: (4) 2-6-021:005 Koloa, Kauai.

Mr. Bukoski read the Subdivision Report for the record (on file with the Planning Department).

Mr. Bukoski: The evaluation of the project; the proposed development consolidates two parcels and re-subdivides said parcels into 7-lots. The surrounding parcels are County Zoned Residential and Open all of which are within the State Land Use Permit Districts. Commissioners, again, the applicant has...we have received all the agencies' comments and we are recommending ratifying Final Subdivision Map Approval for ratification.

Ms. Apisa: I move that we ratify the Final Subdivision Map Approval for application No. S-2019-13, for Kukui'ula Development Co., LLC, Kainani Villas.

Chair Ho: Motion before us is Final Map Approval for application No. S-2019-13, Kukui'ula Development Co., LLC. Kainani Villas. All in favor? Aye. (Unanimous voice vote) approved. Motion carries 2:0.

ADJOURNMENT

Mr. Bukoski: Thank you, Chair. Moving on to Item J, Adjournment.

Chair Ho: One moment Please. Before you leave Chance, Kukui'ula, has been I imagine within the last year has been active before us asking for final map approval or applications for subdivisions. Is there an overall map that you could provide us with showing us where they are? What I want is a whole map showing what they are doing and where areas are and what remains un-subdivided?

Mr. Bukoski: Yes, I could reach out to the applicant to get such a map. I do have a map in the Department that shows or depicts the areas in which parcels will be sub-dividing. Granted, things could ultimately change due to the nature of what is going on in the economy. Therefore, I can ask Dave for the most updated map.

Mr. Hull: I will just add to that, Chair Ho, that the reason you see Kukui'ula coming in a lot is one, the nature of what they are marketing and how it sometimes changes. They have plans to do a certain type of product one year, and as the market shifts, and then they adjust the product and come back to you folks for subdivision amendments or whatnot. The other part that makes it that much more complex is that Kukui'ula property enjoys a Floating Zoning Districts. Meaning, their R-4's, their R-6's, their R-10 is in the Zoning Ordinance, the Council granted them authority to move these things around.

So, it is not like right, when you look at General Lands, you have R-6 here, R-4 here, R-10 here, and the respective subdivision standards are at play. The Council granted them the authority to move them around as far as it keeps it the same maximum density count that they allotted to them. The map can shift strangely enough, which then changes the subdivision standards depending on where they put the R-6 or R-4 under any given time. I am not saying it is a problem. I am just saying, it is what it is, and so we can provide you with the map, but it is always somewhat malleable given the entitlements the Council gave them.

Chair Ho: The reason I ask is not only is it shifting and moving. I want to protect some of the Conditions for the subdivision that you would normally impose on other people doing subdivision like curbs and sidewalks that is probably my biggest issues. In addition, I want to make sure that those get done, and they abide by these Conditions. Also, since they are spreading, I guess they are spreading westward, would that be correct that they are moving westward toward Kekaha and Mana side? An issue that has not been brought forth in quite a while is the "right of ways" the protection of the right of ways too. I want to make sure that when you do give me the map that and they do this expansion you know, that if there are

questions regarding "right of ways" that we also protect the public and give them access to these "right of ways" for beach enjoyment and those kinds of things.

Mr. Bukoski: Absolutely. I do believe that within the Kukui'ula Ordinance back in 2005 and 2006, I believe, they do have some type of Condition that states for trails and whatnot for public access and those types of things. I would necessarily say that they are not trying to implement that, but definitely, within what they are building out they have implemented curbs, gutters, and sidewalks, and that's the main reason why they have brought in a couple of these projects for Final Subdivision Map Approval. In addition, they do have that public access to traverse through those properties for exercise and whatnot, so, it is within their Ordinance already.

Chair Ho: Also, I have not seen for quite a while the creation of parks for recreational purposes within the subdivision and I would like to see those things come out too. So, Mr. Bukoski, where are we now on our Calendar Agenda?

Mr. Bukoski: Chair, we are letter J. Adjournment.

Ms. Apisa: I move we adjourn.

Chair Ho: Motion before us is to Adjourn. All in favor? Aye. (Unanimous voice vote) Motion carries 2:0. We are adjourned.

Subdivision Committee Chair Ho: adjourned the meeting at 8:45 a.m.

Respectfully submitted by:

Arleen Kuwamura
Commission Support Clerk

( ) Approved as circulated (add date of meeting approval).

( ) Approved as amended. See minutes of _____ meeting

Ka'āina S. Hull
Director of Planning

Jodi A. Higuchi Sayegusa
Deputy Director of Planning

SUBJECT TO CHANGE

COUNTY OF KAUA'I
PLANNING DEPARTMENT
SUBDIVISION REPORT

I. SUMMARY

Action Required by Planning Commission:	Consideration of Subdivision Application No. S-2020-6 that consolidates two lots into one (1) lot.
Subdivision Permit No.	Application No. S-2020-6
Name of Applicant(s)	TALLAC PROPERTIES LLC

II. PROJECT INFORMATION

Map Title	Consolidation of lots 6 and 7 of the Kukuiula Parcel F Subdivision into Lot A Being portion of Royal Patent 4512, Mahele Award 43 to J. Y. Kanehoa at Koloa, Kona, Kauai, Hawaii		
Tax Map Key(s):	2-6-022:030 & 031	**Area:**	70,831 sq. ft.
Zoning:	Residential (R-4)		
State Land Use District(s):	Urban	**General Plan Designation:**	Residential Community

AGENCY COMMENTS

☒ **COK Public Works**	10/30/19	☐ **State DOT-Highways:**	
☒ **COK Water:**	Pending	☒ **State Health:**	11/15/19
☐ **Other(s)**		☒ **DLNR – SHPD:**	Pending

EXISTING ROAD RIGHT-OF-WAY(S)

Road Name	Existing Width	Required Width	Pavement YES	NO	Reserve
Noho Kai Street	56 feet	56 feet	☒	☐	
			☐	☐	
			☐	☐	

APPLICABLE FEES

Environmental Impact Assessment (EIA)	N/A
Park Dedication	N/A
Appraisal Report Required	N/A

III. EVALUATION

The proposed development consolidates two (2) lots into one (1) lot. The surrounding parcels are an assortment of Residential, and Open Districts. All of which are State Land Use Urban District.

IV. RECOMMENDATION

TENATIVE APPROVAL	FINAL APPROVAL
☒ Approval ☐ Denied	☐ Approval ☐ Denied
Tentative Approval subject to all requirements as noted on the follow pages:	All conditions have been complied with
Director of Planning **Date**	3/10/2020 **Director of Planning** **Date**

I.1.a.1.
JUL 14 2020
I.1.c.1.
MAR 24 2020
I.1.b.1.
DEC 10 2019

V. AGENCY REQUIREMENTS

1. Requirements of the Planning Department:

   a. An updated preliminary title report for the existing lot shall be submitted to the Planning Department for review.

   b. All existing and proposed easements, if any, shall be identified in the deed descriptions of the affected lots, draft copies of which shall be submitted to the Planning Department for review and approval.

   c. Pursuant to Section 9-3.8(b) of the Subdivision Ordinance, Kaua'i County Code (1987), the Applicant shall submit to the Planning Department an electronic record (digitized format) of the final subdivision map(s) on disk for record keeping purposes prior to final subdivision approval.

   d. The Applicant shall identify on the final subdivision map whether the proposed lot will be utilized for Transient Vacation Rental (TVR) purposes. If so, the total amount of the lots within the Kukui'ula Residential Subdivision, Parcel F shall be counted towards the total amount approved through Ordinance No. PM-2004-370.

2. Requirements of the Department of Water (DOW):

   a. The subdivider shall comply with all requirements of the Department of Water, if any, prior to final subdivision approval.

3. Requirements of the Department of Health (DOH):

   a. Temporary fugitive dust emissions during site preparation and construction could impact the nearby residents when the subdivided lots are developed. In accordance with Chapter 11-60.1, entitled "Air Pollution Control", Title 11, HAR, effective air pollution control measures shall be provided to minimize or prevent any fugitive dust emission from impacting the surrounding areas. This includes the off-street roadways used to enter/exit the project. The control measures include but are not limited to the use water wagons, sprinkler systems, dust fences, etc.

   b. Noise will be generated when construction begins on Lot A. The applicable maximum permissible sound levels as stated in Title 11, Hawaii Administrative Rules (HAR), Chapter 11-46, "Community Noise Control", shall not be exceeded, unless a noise permit is obtained from the State Department of Health (DOH).

   c. The construction waste generated when Lot A is developed shall be disposed of at a solid waste disposal facility that complies with the applicable provisions of Title 11, HAR, Chapter 11-58.1, "Solid Waste Management Control", the open burning of any of these wastes on or off site prohibited.

   d. The property may harbor rodents which will be dispersed to the surrounding areas when the site is cleared. In accordance with Chapter 11-26, entitled "Vector Control", Title 11, HAR, the applicant shall ascertain the presence or absence of rodents on the property. Should the presence of rodents be determined, the applicant shall eradicate the rodents prior to clearing the site.

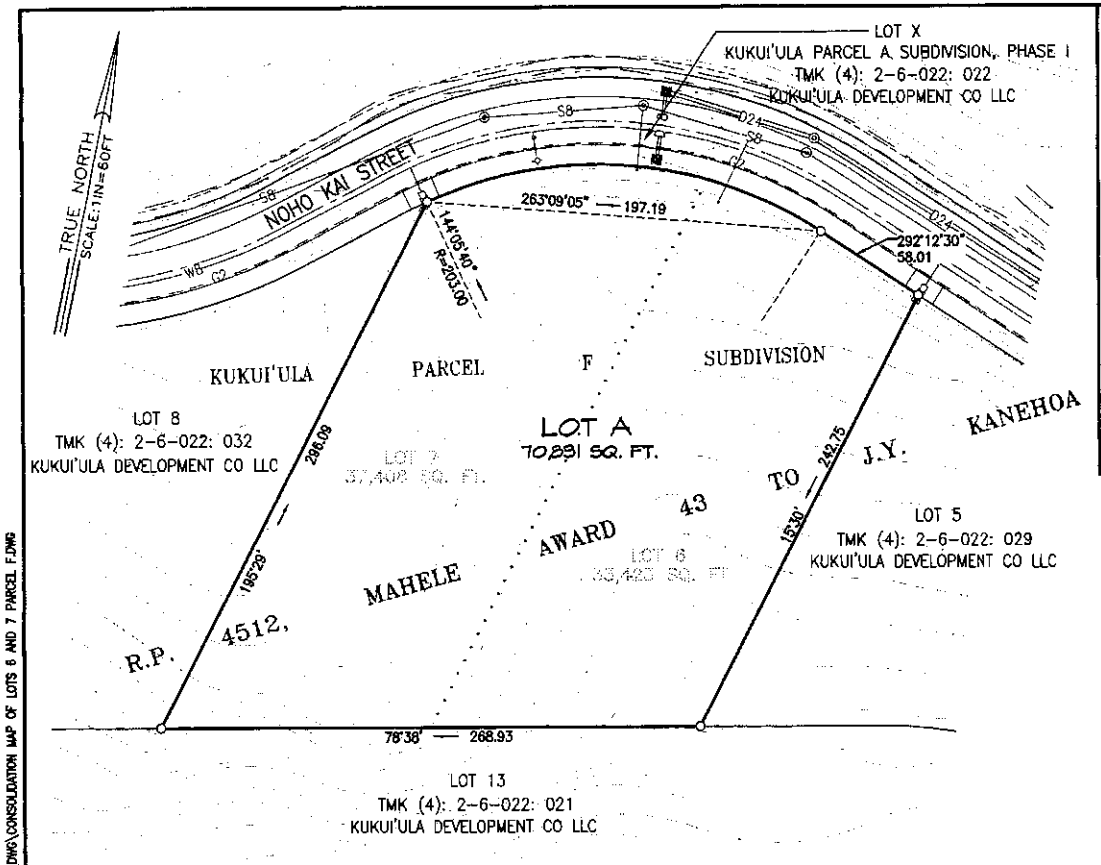
4. The Applicant is advised the should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the applicant shall contact the State Department of Land and Natural Resources, Historic Preservation Division and the Planning Department to determine mitigation measures.

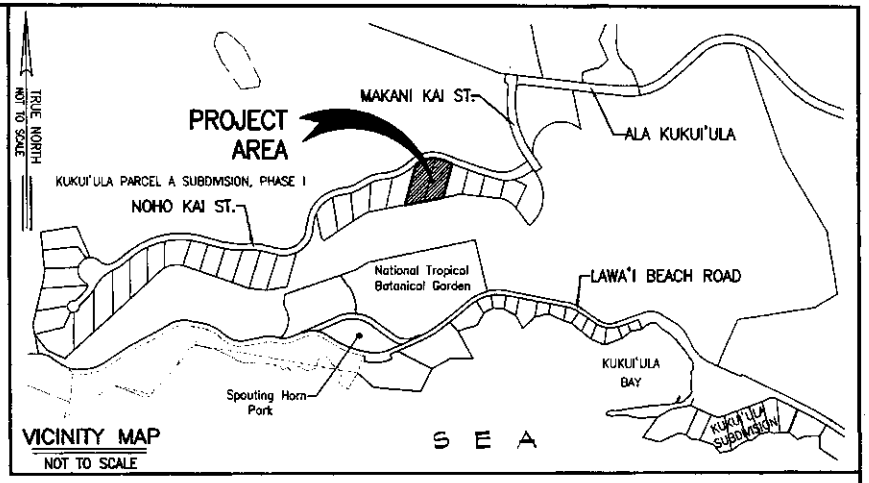
5. The Applicant is advised that prior to and/or during construction and use additional conditions may be imposed by government agencies. Should this occur, the applicant shall resolve these conditions with the respective agency(ies).

The Planning Commission is further advised that this report does not represent the Planning Department's final recommendation in view of the forthcoming public hearing process scheduled for DECEMBER 10, 2019 whereby the entire record should be considered prior to decision-making. The entire record should include but not be limited to:

a. Pending government agency comments;
b. Testimony from the general public and interested others; and
c. The Applicant's response to staff's report and recommendation as provided herein.

By _____
CHANCE BUKOSKI
Planner





VICINITY MAP
NOT TO SCALE

CONSOLIDATION OF LOTS 6 AND 7 OF THE KUKUI'ULA PARCEL F SUBDIVISION INTO LOT A

BEING A PORTION OF
ROYAL PATENT 4512, MAHELE AWARD 43 TO J. Y. KANEHOA
AT KOLOA (MAKAI), KOLOA, KONA, KAUAI, HAWAII

OWNER: LOT 6 – TALLAC PROPERTIES LLC
LOT 7 – TALLAC PROPERTIES LLC

ADDRESS: 2575 EAST CAMELBACK ROAD, SUITE 1100
PHOENIX, ARIZONA 85016

NOTES:

1. Coordinates and azimuths shown on this map are based on Government Survey Triangulation Station "WAHIAWA" A.
2. Exterior boundaries are marked with 1/2 in. pipes unless otherwise noted.
3. Subject properties are within flood zone X as shown on FIRM Panel Number 150002 0313 F, revised November 26, 2010.

ERIK S. KANESHIRO
LICENSED PROFESSIONAL LAND SURVEYOR
No. 9826
HAWAII, U.S.A.

AUSTIN, TSUTSUMI, & ASSOCIATES INC.
501 SUMNER STREET, SUITE 521
HONOLULU, HI 96817

THIS WORK WAS PREPARED BY ME OR UNDER MY SUPERVISION.

LICENSED PROFESSIONAL LAND SURVEYOR
CERTIFICATE No. 9826
EXP. 4/20

TMK: (4) 2-6-022: 030 AND 031

SEPTEMBER 25, 2019

JOB NO.: 19-325

AUSTIN, TSUTSUMI & ASSOCIATES, INC.
ENGINEERS, SURVEYORS • HONOLULU, WAILUKU, HAWAII

11" X 17"

FN: Y:\2019\19-325 KUKUIULA LOTS 6-7 CONSOLIDATION\DWG\CONSOLIDATION MAP OF LOTS 6 AND 7 PARCEL F.DWG

COUNTY OF KAUA'I
PLANNING DEPARTMENT

SUBJECT TO CHANGE

TO: **Subdivision Committee, Planning Commission**

SUBJECT: **Extension Request**

PURPOSE:
- [✓] **File Final Subdivision Maps**
- [ ] **Complete Subdivision Improvements**
- [ ] **Other:** _____

Subdiv. Application No.		**Applicant(s)**	
S-2019-4		Tim Beckman & Mira Hess	
Location:	Po'ipū	**Tax Map Key:**	(4) 2-8-014:038, 042
Extension Request No. (1st, 2nd, etc.)		**Tentative Approval Granted On:**	**Previous Ext. Expired On:**
1st		March 27, 2019	Not Applicable
Subdivision Bonded: [ ] Yes [✓] No		**Deadline to Complete Improvements:** Not Applicable	

APPLICANT'S REASONS: Additional time is being requested to comply with the conditions/requirements of tentative approval. The Applicant is currently with the various reviewing agencies in resolving the required infrastructure improvements for the subdivision.

PLANNING DEPARTMENT EVALUATION & RECOMMENDATION

EVALUATION: Please refer to next page…

RECOMMENDATION: Please refer to next page…

Staff Planner — *Date* 29 Jun 2020

[✓]**Approved and Recommended to Planning Commission** | [ ]Denied

Comments: _____

Planning Director — *Date* 6/30/2020

I.2.a.1.

JUL 1 4 2020

COUNTY OF KAUA'I
PLANNING DEPARTMENT

Extension requests are primarily processed for the purpose of continuing a tentative approval for a subdivision application. An extension approval allows an applicant additional time to comply with the requirements in order to obtain final subdivision approval.

In determining whether additional time should be granted, an evaluation is made of the project's progress as well as compliance with the requirements of tentative approval. The evaluation is primarily based on determining whether the applicant is **progressively working** towards obtaining final subdivision approval with the various reviewing agencies. The **tentative approval conditions** are then re-evaluated to determine whether the conditions/requirements are adequate to address the impacts of the proposed development in consideration of the time that has lapsed.

Pending evaluation of an extension request, one of the following can occur:

1. The extension is approved without changes to the tentative approval requirements;

2. The extension is approved with modified time frames but no modifications or additions to the tentative approval requirements;

3. The extension is approved with modifications and/or additions to the requirements; and

4. The extension is denied.

FINDINGS/BACKGROUND:

The proposed subdivision involves a boundary adjustment that consolidated five (5) existing lots and resubdivides into three (3) lots within the Open (O) zoning district. This application was granted tentative approval by the Planning Commission on March 27, 2019 and the Applicant's request is the ***first*** extension of the tentative approval.

The subject property is located along the mauka side of Po'ipū Road and adjacent to the Po'ipū Estate Residential Subdivision (refer to attached map). The total area involved is approximately 19.178 acres and the surrounding parcels are situated with the State Urban Land Use District that have been developed as residences or commercial/retail development.

PROGRESS OF THE SUBDIVISION:

In considering the extension request, it should be noted that the Applicant has shown some

progress with the development. As represented, the Applicant has been trying to comply with the requirements of tentative approval.

The Applicant is still working to resolve the required infrastructure improvements associated with this application and determining the applicable requirements of the COK Departments of Water (DOW) and Public Works (DPW) . Since it is uncertain as to when the Applicant will be in compliance with the requirements of Tentative Approval, another time extension is being requested.

Based on the foregoing circumstances, the Applicant's reasons are justifiable and no problems are foreseen in granting the extension request. The Departments of Public Works and Water have no objections to the request.

Additionally, the Applicant should demonstrate further progress with the subdivision within one (1) year from the approval of this extension request. As such, the Applicant shall be made aware that in further considering extension requests involving the proposed development, the Applicant shall continue to submit to the Planning Department an updated status report on the subdivision with a detailed time chronology on the progress of the tentative approval requirements. The status report shall be submitted to the Planning Department no later than sixty (60) days prior to the expiration date in order to allow sufficient time to evaluate whether progress have been made and conditions satisfied.

RECOMMENDATION:

It is recommended that an extension until **MARCH 27, 2021** be granted to obtain final subdivision approval. However, the Applicant is made aware that an updated status report on the subdivision with a detailed time chronology on the progress of the tentative approval requirements shall be submitted to the Planning Department for review for further extensions requests. The status report shall be submitted to the Planning Department no later than sixty (60) days prior to the expiration date.

NOTE:

DENOTES NO ACCESS PERMITTED

LOT C
1.849 ACRES

LOT A
14.462 ACRES

LOT B
2.867 ACRES

SEE INSET

MAKALEA STREET

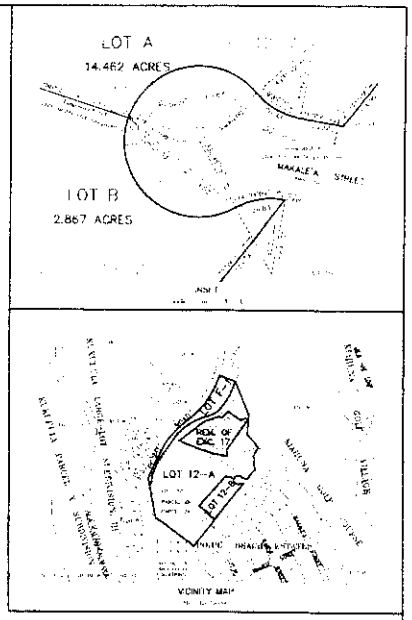
MAKAO STREET

MALALU STREET

KUHIO HIGHWAY

TRUE NORTH

GRAPHIC SCALE



PRELIMINARY
CONSOLIDATION OF
LOTS 12-A, AND 12-B
(DEREGISTRATION DOC. NO. A-65280621,
DATED NOVEMBER 15, 2017)
LOT F-1, LOT J, AND REMAINDER OF EXC. 17
AND RESUBDIVISION OF SAID CONSOLIDATION
INTO LOTS A, B AND C

Being portion of R. P. 6714, L. C. Aw. 7734-B
Apana 2 to M. Kekuaiwa no Ka Hui
AT KOLOA, KAUAI, HAWAII
Tax Map Key: (4) 2-8-14: 35, 42
Owners: Timothy Beckman Trust, and Mina Hess Trust
Date: August 27, 2018

ASAKI SURVEYING & MAPPING, INC.

COUNTY OF KAUA'I
PLANNING DEPARTMENT
SUBDIVISION REPORT

SUBJECT TO CHANGE

RE: Subdivision Application No. S-2003-43
Recertification of Final Subdivision Map
Tax Map Key: (4) 2-5-001:002 (Portion)
'Ōma'ō, Kaua'i

APPLICANT: **Kaua'i Bible Church**

BACKGROUND:

The application involves a 2-lot boundary adjustment and the intent was to accommodate the future expansion of the Kaua'i Bible Church facility. The application received Final Subdivision Map approval by the Planning Commission on August 26, 2003. The final subdivision map was previously recertified on April 13, 2004 (refer to attached exhibit).

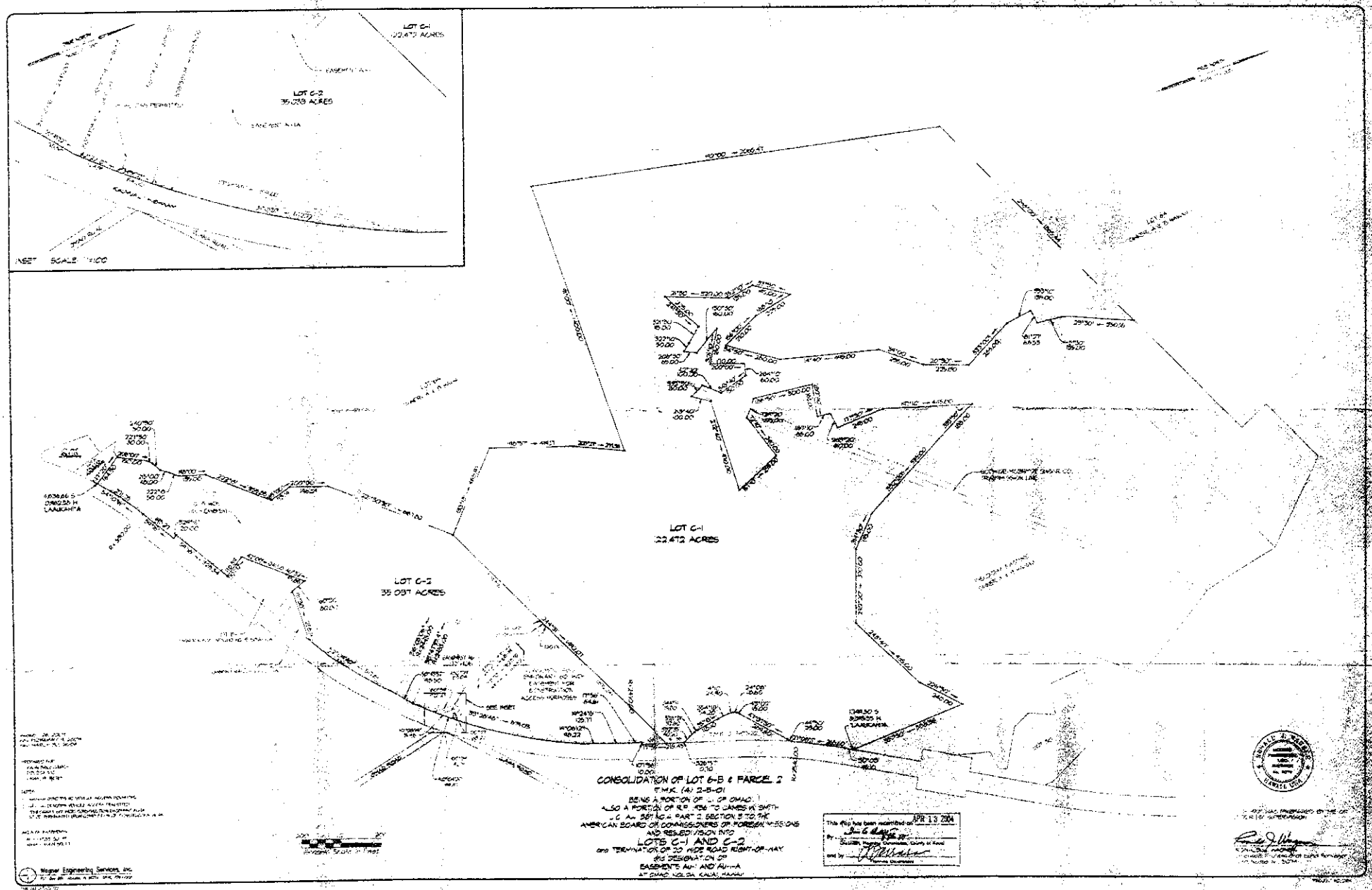
RECOMMENDATION:

The department has reviewed the subdivision map provided and recommends **approval** for final subdivision map recertification.

By _____
Dale A. Cua
Planner

I. 3. a. 1.

JUL 1 4 2020


LOT C-1
22.472 ACRES
LOT C-2
35.097 ACRES
INSET SCALE 1"=100'
CONSOLIDATION OF LOT 6-B & PARCEL 2
T.M.K. (4) 2-5-01
BEING A PORTION OF L.C. OF OMAO
ALSO A PORTION OF R.P. 426 TO JAMES W. SMITH
L.C. Aw. 5571 Ac. 4 PART 2 SECTION 5 TO THE
AMERICAN BOARD OF COMMISSIONERS OF FOREIGN MISSIONS
AND RESUBDIVISION INTO
LOTS C-1 AND C-2
and TERMINATION OF 30 FOOT ROAD RIGHT-OF-WAY
AND DESIGNATION OF
EASEMENTS A-1 AND A-1-A
AT OMAO, KOLOA, KAUAI, HAWAII
This Map has been examined and approved on APR 13 2004
Wagner Engineering Services, Inc.

COUNTY OF KAUA'I
PLANNING DEPARTMENT
SUBDIVISION REPORT

SUBJECT TO CHANGE

RE: Subdivision Application No. S-2011-5
Recertification of Final Subdivision Map
Tax Map Key: (4) 4-3-009:004
Wailua, Kaua'i

APPLICANT: **S. Otsuka Estates, Inc./County of Kaua'i**

BACKGROUND:

The application involves a 10-lot subdivision and the intent was to facilitate the County of Kauai's bike path along the Kūhiō Highway corridor in Wailua. The application received Final Subdivision Map approval by the Planning Commission on May 10, 2011 (refer to attached exhibit).

RECOMMENDATION:

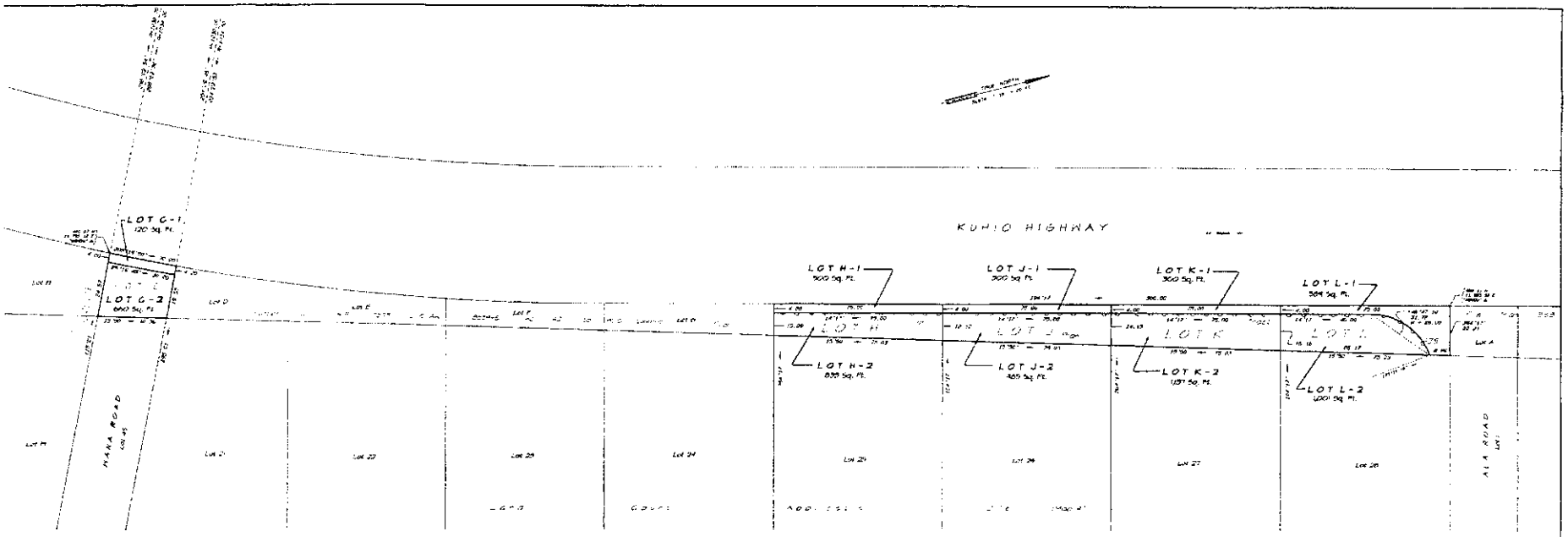
The department has reviewed the subdivision map provided and recommends **approval** for final subdivision map recertification.

By _____
Dale A. Cua
Planner

I.3.b.1.

C:\dcua.files\Regulatory Files\Subdivision\Reports\Recertification\Report-1 7.6.20 DC S-2011-5 Otskua Estates-COK_bikepath map Recertification.docx

JUL 1 4 2020



SUBDIVISION OF
LOTS C, H, J, K AND L
Niuloni Tract (First Addition),
As shown on File Plan 455
Being a portion of R. P. 7373, L. C. Ar. 8554-B Ap. 42 to H. S. Lundlio
INTO
LOTS C-1, C-2, H-1, H-2, J-1, J-2, K-1, K-2, L-1 AND L-2

At Hoipoili, Kawaihau, Kauai, Hawaii

Owner: S. Otsuka Estates, Inc.
"Kapaa Shore" Condominium

Site Address: 400 Kuhio Highway,
Kapaa, Hawaii 96746

The map was approved by the Planning Commission of the County of Kauai, at their Meeting on APR 26 2011
Approved by: [signature]
Chairman, Planning Commission
County of Kauai

FINAL MAP ACCEPTED APR 26 2011
Date
By: [signature]
Planning Director

Portugal Surveying & Mapping Inc.
4460 Lawaiani Street
Lihue, Kauai Hawaii

RECEIVED

'20 JUL -7 A7:40

OFFICE OF
THE COUNTY CLERK
COUNTY OF KAUAI

Glenda Nogami Streufert
Chair

Donna Apisa
Vice Chair

Members:
Melvin Chiba
Helen Cox
Francis DeGracia
Roy Ho
Lori Otsuka

COUNTY OF KAUAI PLANNING COMMISSION
NOTICE OF TELECONFERENCE AGENDA
Tuesday, July 14, 2020
9:00 a.m. or shortly thereafter

Microsoft Teams Audio: +1 469-848-0234, Conference ID: 697 017 777#

The meeting will be held via Microsoft Teams conferencing only. Members of the public are invited to join this meeting by calling the number above with the conference ID information. You may testify during the video conference or submit written testimony in advance of the meeting via e-mail or mail. To avoid excessive noise/feedback, please mute your microphone except to testify.

A. CALL TO ORDER

B. ROLL CALL

C. APPROVAL OF AGENDA

D. MINUTES of the meeting(s) of the Planning Commission

1. Meeting of May 12, 2020

E. RECEIPT OF ITEMS FOR THE RECORD

F. HEARINGS AND PUBLIC COMMENT The Planning Commission will accept written testimony for any agenda item herein. Written testimony indicating your 1) name, and if applicable, your position/title and organization you are representing, and 2) the agenda item that you are providing comment on, may be submitted in writing to planningdepartment@kauai.gov or mailed to the County of Kauai Planning Department, 4444 Rice Street, Suite 473, Lihue, Hawaii 96766. Written testimony received by the Planning Department before 9:00 a.m. on Monday, July 13, 2020, will be distributed to all Planning Commissioners prior to the meeting. Written testimony received after 9:00 a.m. on Monday, July 13, 2020, will be summarized by the Clerk of the Commission during the meeting and added to the record thereafter.

1. Continued Agency Hearing

a. Amendment to Special Management Area Use Permit SMA(U)-2008-5, Class IV Zoning Permit Z-IV-2008-6, and Use Permit U-2008-4 involving the construction of two single-family residences/farm dwelling units, barn, and associate site improvements on a parcel situated near the terminus of Kahili Quarry Road in Kilauea, further identified as 1957 Kahili Quarry Road, Tax Map Key: 5-2-012:035 and 5-2-004:047, CPR Unit 2, and affecting an area approx. 161.88 acres = ***Charles M. Somers & West Sunset 32 Phase I, LLC.***

F. HEARINGS AND PUBLIC COMMENT (Cont'd)

1. Continued Agency Hearing (Cont'd)

a. Amendment to Special Management Area Use Permit SMA(U)-2008-5, Class IV Zoning Permit Z-IV-2008-6, and Use Permit U-2008-4 = ***Charles M. Somers & West Sunset 32 Phase I, LLC.*** **(Cont'd)**

[Meeting cancelled 3/24/20, Director's Report, Supplement No. 1, Letter (5/8/20) from Max Graham w/Memorandum in Support of Application and Motion for Second Amendment to Master Permit received, and hearing continued 5/12/20.]

1. Supplement No. 2 to Director's Report pertaining to this matter.
2. Letter (5/11/20) from Max Graham, Esq., submitting a letter from Laura H.E.Kaakua, CEO, Hawaiian Islands Land Trust, dated May 11, 2020.

2. New Agency Hearing

3. Continued Public Hearing

4. New Public Hearing

5 All remaining public testimony pursuant to HRS 92 (Sunshine Law)

G. CONSENT CALENDAR

1. Status Reports

a. Updated Seventh Status Report (5/18/20) for Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6, Tax Map Key: (4) 5-2-012:035 = ***Charles Somers, as Trustee of the Charles Somers Living Trust dated 11/12/2002, and West Sunset 32 Phase 1, LLC.***

2. Director's Report for Project Scheduled for Agency Hearing on July 28, 2020. NONE

H. EXECUTIVE SESSION

I. GENERAL BUSINESS MATTERS

1. Hearing Officer's Report and Recommendation of Contested Case re Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai Tax Map Key (4) 58005005 containing 26,092 sq. ft. = ***Patricia D. McConnell,*** Petitioner. [Deferred 5/12/20.]

   a. Petitioner's Exceptions to Hearing Officer's Report and Recommendation of Contested Case; Request for Oral Argument; Certificate of Service for Case No. CC-2017-4, TMK (4) 5-8-005:005 = ***Patricia D. McConnell,*** Petitioner. [Deferred 5/12/20.]

I. GENERAL BUSINESS MATTERS (Cont'd)

2. In the Matter of the Application of ***Blaine Perrella*** appealing zoning classification Determination and Allowable Building Area Determination for Unit B of Kukuna Seaside Estates on land located in Aliomanu, Kawaihau, Puna, Kauai, Hawaii, Tax Map Key No. (4) 4-9-005:015 0002.

   a. Petition to Appeal Decision of the Planning Director, Exhibits A –C, Certificate of Service by Gary G. Grimmer and Ann Correa, Attorneys for Appellant Blaine Perrella.

3. Letter (7/6/20) from Kaaina S. Hull, Director of Planning to Glenda Nogami Streufert, Chair and Kauai Planning Commission relating to Memorandums of Understanding.

   a. Memorandum of Understanding between Expedia, Inc. and County of Kauai.
   b. Memorandum of Understanding between Airbnb, Inc. and County of Kauai.

J. COMMUNICATION (For Action)

K. COMMITTEE REPORTS

1. **Subdivision** Subdivision Action matters listed in the Subdivision Committee Agenda (attached)

L. UNFINISHED BUSINESS (For Action)

M. NEW BUSINESS

1. For Action – See Agenda F for Project Descriptions

N. ANNOUNCEMENTS

1. Topics for Future Meetings

2. The following regularly scheduled Planning Commission meeting will be held at 9:00 a.m., or shortly thereafter on July 28, 2020. The Planning Commission anticipates meeting via teleconference, but will announce its intended meeting method via an agenda electronically posted at least six days prior to the meeting date.

O. ADJOURNMENT

EXECUTIVE SESSION: The Commission may go into an executive session on an agenda item for one of the permitted purposes listed in Section 92-5(a) Hawaii Revised Statutes ("H.R.S."), without noticing the executive session on the agenda where the executive session was not anticipated in advance. HRS Section 92-7(a). The executive session may only be held, however, upon an affirmative vote of two-thirds of the members present, which must also be the majority of the members to which the board is entitled. HRS Section 92-4. The reason for holding the executive session shall be publicly announced.

NOTE: IF YOU NEED AN AUXILIARY AID/SERVICE, OTHER ACCOMMODATION DUE TO A DISBILITY, OR AN INTERPRETER FOR NON-ENGLISH SPEAKING PERSONS, PLEASE CONTACT THE OFFICE OF BOARDS & COMMISSIONS AT (808) 241-4917 OR ASEGRETI@KAUALGOV AS SOON AS POSSIBLE. REQUESTS MADE AS EARLY AS POSSIBLE WILL ALLOW ADEQUATE TIME TO FULFILL YOUR REQUEST.
UPON REQUEST, THIS NOTICE IS AVAILABLE IN ALTERNATE FORMATS SUCH AS LARGE PRINT, BRAILLE, OR ELECTRONIC COPY.

Roy Ho
Chair

Donna Apisa
Vice Chair

Member:
Francis DeGracia

COUNTY OF KAUAI PLANNING COMMISSION
NOTICE OF TELECONFERENCE MEETING AND SUBDIVISION COMMITTEE AGENDA
Tuesday, July 14, 2020
8:30 a.m. or shortly thereafter

Microsoft Teams Audio: +1 469-848-0234, Conference ID: 499 012 761#

The meeting will be held via Microsoft Teams conferencing only. Members of the public are invited to join this meeting by calling the number above with the conference ID information. You may testify during the video conference or submit written testimony in advance of the meeting via e-mail or mail. To avoid excessive noise/feedback, please mute your microphone except to testify.

A. CALL TO ORDER

B. ROLL CALL

C. APPROVAL OF AGENDA

D. MINUTES of the meeting(s) of the Subdivision Committee

1. Meeting of May 12, 2020

E. RECEIPT OF ITEMS FOR THE RECORD (None)

F. HEARINGS AND PUBLIC COMMENT The Planning Commission will accept written testimony for any agenda item herein. Written testimony indicating your 1) name, and if applicable, your position/title and organization you are representing, and 2) the agenda item that you are providing comment on, may be submitted in writing to planningdepartment@kauai.gov or mailed to the County of Kauai Planning Department, 4444 Rice Street, Suite 473, Lihue, Hawaii 96766. Written testimony received by the Planning Department before 8:30 a.m. on Monday, July 13, 2020, will be distributed to all Planning Commissioners prior to the meeting. Written testimony received after 8:30 a.m. on Monday, July 13, 2020, will be summarized by the Clerk of the Commission during the meeting and added to the record thereafter.

G. GENERAL BUSINESS MATTERS (None)

H. UNFINISHED BUSINESS (None)

I. NEW BUSINESS (For Action)

1. Final Subdivision Map Approval

   a. Subdivision Application No. S-2020-6
   (Tallac Properties LLC.)
   Proposed 2-lot Consolidation
   TMK: (4) 2-6-022:030 & 031
   Kukui'ula, Kaua'i

      1) Subdivision Report pertaining to this matter.

2. Tentative Subdivision Extension Request

   a. Subdivision Application No. S-2019-4
   (Tim Beckman & Mira Hess)
   Proposed 5-lot Boundary Adjustment
   TMKs: (4) 2-8-014:038 & 042
   Po'ipū, Kaua'i

      1) Subdivision Report pertaining to this matter.

3. Recertification of Final Subdivision Map Approval

   a. Subdivision Application No. S-2003-43
   (Kaua'i Bible Church)
   2-lot Boundary Adjustment
   TMK: (4) 2-5-001:002
   'Ōma'ō, Kaua'i

      1) Subdivision Report pertaining to this matter.

   b. Subdivision Application No. S-2011-5
   (S. Otsuka Estates)
   10-lot Subdivision
   TMK: (4) 4-3-009:004
   Wailua, Kaua'i

      1) Subdivision Report pertaining to this matter.

J. ADJOURNMENT

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Pursuant to Section 8-27.8 (6) of the Kaua'i County Code (1987), as amended, the following shoreline setback determinations by the Director are disclosed for purposes of public notification.

July 14, 2020

SHORELINE SETBACK DETERMINATIONS

Application No.	**Name of Applicant(s)**	**Property I.D. (Tax Map Key)**	**Location**	**Reasons**
SSD-2021-1	Vincent Ortolano	(4) 4-3-009:006	Kapa'a	New single-family dwelling
SSD-2021-2	Neighborhood Housing Community Development Corp.	(4) 4-3-009:049 & (4) 4-3-009:048	Kapa'a	17 unit Multi-family dwellings
SSD-2021-3	J&C Property, LLC	(4) 5-3-006:018	'Anini	Interior renovation and repair

KAUA'I PLANNING COMMISSION
REGULAR MEETING
May 12, 2020

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair Glenda Nogami Streufert at 9:01 a.m., - Microsoft Teams Audio +1 469-848-0234, Conference ID: 586 282 627# The following Commissioners were present:

Ms. Glenda Nogami Streufert
Ms. Donna Apisa
Mr. Melvin Chiba
Ms. Helen Cox
Mr. Francis DeGracia
Mr. Roy Ho
Ms. Lori Otsuka

Absent:

The following staff members were present: Planning Department – Director Kaaina Hull, Deputy Director Jodi Higuchi Sayegusa, Myles Hironaka, Dale Cua, Marie Williams, and Planning Commission Secretary Leslie Takasaki; Office of the County Attorney – Deputy County Attorney Nicholas Courson; Office of Boards and Commissions - Administrator Ellen Ching –Support Clerk Arleen Kuwamura

CALL TO ORDER

Chair Nogami Streufert: Called the meeting to order at 9:01 a.m.

ROLL CALL

Planning Director Mr. Kaaina Hull: Thank you, Madame Chair. For those of you here, this is our first Planning Commission teleconference meeting and I want to thank all of you for baring with us through this time. There will probably be some technical difficulties as we move through the agenda. I would just like to ask for all people who have called in, in order to not a lot of feedback to please mute your phones or teleconference systems that you are calling in from, and only unmute it when you intend to speak.

Please remember that when you want to speak you will have to unmute yourself. If anybody fails to mute yourself, we have Jodi Sayegusa, our Deputy Director who will be monitoring our meeting and will be muting individuals, to make sure that feedback does not happen. So, please do not take it personally. She is doing that to ensure that the meeting can go on with as little noise feedback as possible. So, without further a due we will go into roll call. Commissioner Apisa.

Ms. Apisa: Here. I was muted.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Here.

Mr. Hull: Commissioner Cox. Commissioner DeGracia.

Mr. DeGracia: Here.

Mr. Hull: Commissioner Ho.

Mr. Ho: Here.

Chair Nogami Streufert: I cannot hear you Kaaina.

Mr. Hull: I am sorry; I called Chair Nogami Streufert for roll call.

Chair Nogami Streufert: Here. I am not hearing you, Kaaina.

Mr. Ho: I am not hearing you, Kaaina.

Mr. Hull: Can you hear me know?

Chair Nogami Streufert: Yes.

Mr. Ho: Yes.

Mr. Hull: Commissioner Cox.

Chair Nogami Streufert: Before we do this, could I just make a…or to see if this is approved. Because we are doing it in this way, that we cannot see anyone else. Usually the Chair will recognize a commission member before they can speak. However, this case, because this is a new system, I am not going to stand on ceremony if any commissioner at any point and time wants to say something. Do not wait to be recognized just say what you need to say as long as it is just one person at a time, I think we will be fine. Does that work for you folks, Kaaina?

Mr. Hull: It is fine for us, Madame Chair.

Chair Nogami Streufert: Okay, so then we are now on to the Approval of the Agenda.

Ms. Otsuka: I am sorry. I did not hear my name for roll call.

Mr. Hull: Sorry. Commissioner Otsuka.

Ms. Otsuka: Here.

Mr. Hull: I believe we are still having some difficulties with Commissioner Cox, but we will keep the meeting moving and I will have Leslie, get in touch with Helen, on the side to see if she could resolve that.

Chair Nogami Streufert: Would you like to wait for a minute to see if she can get on?

Ms. Cox: He still cannot hear me.

Mr. Hull: Helen, is that you?

Ms. Cox: Yes, that was me.

Mr. Hull: Okay, we do have you on. You do have a quorum, Madame Chair.

APPROVAL OF AGENDA

Mr. Hull: The next Agenda Item is Approval of the Agenda. Madame Chair, The Department has no recommended changes to the agenda.

Chair Nogami Streufert: If there are no objections, do we have a motion to approve the Agenda?

Ms. Otsuka: I would like to make a motion to approve the Agenda.

Mr. Ho: Second.

Chair Nogami Streufert: It has been moved and seconded. If there are no objections? The Agenda has been approved without a vote. If there are any objections, please let me know? Going once? Going twice? The Agenda has been approved. Motion carried. 7:0.

APPOINTMENT OF SUBDIVISION COMMITTEE MEMBER

Mr. Hull: Next Agenda Item is agenda Item D. Appointment of the Subdivision Committee Member. Generally, appointments occur in January with the new appointment of the Chair. In this situation, Commissioner Mahoney was kept on until March, which is permissible under the County Code for a lag time to be allowed, and he was on the Subdivision Committee. So, when Commissioner Mahoney, had his last day in March, it left a vacancy open. This is now where we are and general point for the Chair, who will be making that appointment.

Chair Nogami Streufert: To fill the vacancy of the Subdivision Committee I hereby appoint Commissioner DeGracia to serve as the third member of the Subdivision Committee. Do I have a motion to confirm the Commission?

Ms. Cox: I move to—

Chair Nogami Streufert: Did I hear someone move to approve the appointment?

Ms. Cox: I move to confirm. This is Commissioner Cox; can you hear me?

Mr. Hull: Yes, we can hear you.

Chair Nogami Streufert: Yes, we can hear you.

Mr. Ho: Second.

Chair Nogami Streufert: It has been moved and seconded. Any discussion? All those in favor, signify by saying, aye. Aye. (Unanimous voice vote).

Mr. Hull: Madame Chair, for these votes, I would recommend we take a roll call. Sorry.

Chair Nogami Streufert: Okay, let us have a roll call vote.

Mr. Hull: Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7:0. Madame Chair.

Chair Nogami Streufert: This is also to note that Commissioner Ho, will continue to serve as the Subdivision Committee's Chair and Commissioner Apisa will continue to serve as the Committee's Vice Chair. Congratulations Commissioner DeGracia. Thank you.

Ms. Apisa: Welcome to the Committee.

Ms. Otsuka: Congratulations.

MINUTES of the meeting(s) of the Planning Commission

Meeting of January 28, 2020
Meeting of February 11, 2020
Meeting of February 25, 2020

Mr. Hull: Next agenda Item we have is E. Minutes of the Meeting of the Planning Commission. We may want to go through these by the individual minute's Madame Chair. So, the first agenda items are Meeting Minutes of January 28, 2020.

Ms. Apisa: I move that we approve it with one slight correction. On the top of page three, it mentioned "Commissioner Apisa has been nominated to fill the position of Commission Chairman" and then later on it states" Planning Commission "Vice Chair" it is redundant but it also misses the word Vice Chair in there." I think we just need to strike "chairman" and it would read "position of the Planning Commission Vice Chair. With that modification, I move that we approve the January 28, 2020 Meeting.

Chair Nogami Streufert: Is there a second?

Mr. Ho: Second.

Chair Nogami Streufert: It has been moved and seconded to approve the Meeting Minutes of January 28, 2020, with that one amendment. Any discussion? Do we need a roll call on this? Or could I just assume that if there are no objections that it passes?

Mr. Hull: On the minutes on the agenda item Madame Chair, it would be appropriate to just go with a hereby approve seeing no objections.

Chair Nogami Streufert: If there are no objections then the Minutes for the Meeting of January 28, 2020, with the change has been approved. Passes. 7:0. We have the Meeting Minutes of February 11, 2020 next.

Mr. Chiba: This is Mel Chiba. I move to approve the Planning Commission Meeting Minutes of February 11, 2020.

Ms. Apisa: Second.

Chair Nogami Streufert: It has been moved and seconded that we approve the Minutes of the Meeting of February 11, 2020. Any discussion? If not, and there are no objections. The Minutes of the meeting of February 11, 2020, is approved. Passes. 7:0.

Next the Minutes of the Meeting for February 25, 2020.

Ms. Apisa: I move that we approve the minutes of the Meeting of February 25, 2020, Planning Commission Meeting.

Ms. Otsuka: I second.

Chair Nogami Streufert: It has been moved and seconded that we approve the Minutes of the Meeting of February 25, 2020. Any discussion? If not, and there are no objections. The Minutes of the Meeting of February 25, 2020, is approved. Passes. 7:0.

RECEIPT OF ITEMS FOR THE RECORD (None)

Mr. Hull: There are no Receipt of Items for the record.

HEARINGS AND PUBLIC COMMENT

Mr. Hull: Moving on to G. Hearing and Public Comment. The Planning Commission will accept written testimony for any Agenda Item herein. We posted on our agenda as well as noticed that written testimony needed to be submitted 24-hours in advance in order for it to be transmitted to the Commission before the meeting. We have not received any written testimony for any of the agenda items within 24-hour advance of this meeting. We also do accept written testimony that we recognize and will transmitted to you at a later date. We have not received any additional testimonies after that 24 period, so there is nothing left to transmit to you folks. Currently, we do allow public testimony to happen. I am seeing that we have three (3) phone numbers of individuals who have called in to witness. So, at this point, for those of you who called in, you can testify on any of the agenda items. As we go through respective agency hearings as well, there will be testimony times, but you are limited to three minutes. After those three minutes, the Commission may have questions for your testimony. I will be calling on the phone number that have called in. For phone number area code 206-***-***. Do you have any testimony?

Phone number area code 206-***-***: No, I do not.

Mr. Hull: Thank you. For phone number 36…Sorry, just let me check with phone number area code 296-***-***, this is for testimony on the top of the agenda just so that you are aware. Do you plan to testify on any of the subsequent agency hearings?

Phone number area code 206-***-***: No, I do not.

Mr. Hull: Thank you for that. For phone number area code 360-***-****. Do you have any testimony at this time?

Phone number area code 360-***-***: No, (inaudible).

Mr. Hull: Thank you. For area code 808-***-****. I believe this is Mr. Graham, but I just want to check.

Mr. Max Graham: That is correct. Can you hear me?

Mr. Hull: Yes. I just want to check with you. I know you are calling in as a representative for the applicant, which we will be calling you up during your agenda item, but I just must check. Are you calling in to testify on any other agenda item as a member of the public?

Mr. Graham: No. I am just representing on the agenda item.

Mr. Hull: Okay. Thank you, Max, we will call you at that time.

Mr. Graham: Okay, thank you.

Mr. Hull: Okay. I see no other phone numbers of individuals who have called in, but just to check. Is there anybody on the line or on the Teams meeting that is a member of the public who would like to testify on any agenda item? Seeing none.

Continued Agency Hearing

New Agency Hearing

Amendment to Special Management Area use Permit SMA (U)-2008-5, Class IV Zoning Permit Z-IV-2008-6, and Use Permit U-2008-4 involving the construction of two single-family residence/farm dwelling units, barn, and associate site improvements on a parcel situated near the terminus of Kahili Quarry Road in Kilauea, further identified as 1957 Kahili Quarry Road, Tax Map Key: 5-2-012:035 and 5-2-004:047, CPR Unit 2, and affecting an area approx. 161.88 acres = *Charles M. Somers West Sunset 32 Phase I, LLC.*

Mr. Hull: We will move on to the next agenda item G.2a., New Agency Hearing. Amendment to Special Management Area use Permit SMA (U)-2008-5, Class IV Zoning Permit Z-IV-2008-6, and Use Permit U-2008-4 involving the construction of two single-family residence/farm dwelling units, barn, and associate site improvements on a parcel situated near the terminus of Kahili Quarry Road in Kilauea, further identified as 1957 Kahili Quarry Road, Tax Map Key: 5-2-012:035 and 5-2-004:047, CPR Unit 2, and affecting an area approx. 161.88 acres. Charles M. Somers West Sunset 32 Phase I, LLC, is the applicant.

I just realized we made an error in setting up. To move this along and Nick, you may have to jump in to correct me. Sorry, Chair. I know we kind of talked about this before, but could we possibly amend the Agenda? And I guess Nick, this is for you first. Could we amend the agenda so that we are hearing the actual action items subsequent to the hearings themselves so that we do not have to go through them twice?

Deputy County Attorney Nicholas Courson: I do not see why not, that is just changing the order it is not changing anything substantively.

Mr. Hull: So, Chair, so Nick, would it be appropriate to ask for an amendment to the agenda at this time?

Mr. Courson: Yes. If you are going to change things around, it is appropriate for the body to

deliberate and decide on that.

Mr. Hull: So Commissioners and Chair, the Department would ask that the Agenda be amended so that agenda item M, For Action and N, For Action be amended to follow each respective agency hearing for those agenda items, so that we can take them in tandem instead of splitting them apart.

Chair Nogami Streufert: So, we would do the Somer's separately. And for all the zoning amendments, would that go in as one? Or do we do each one separately?

Mr. Hull: The zoning amendments would each have to be done separately, but we could have the agency hearing if there are any testimony and go into, the actual zoning amendment itself. Because right now with the way that the agenda is set up is, we would have to do the Somer's testimony even though we heard that the two or three people that have called in have no testimony for it. We would have to have that hearing and either defer the hearing, close it, or move on to the next hearing individually, go through all those hearings. Then return to them for the actual action and discussion for the purposes of moving the meeting along. From the Departments perspective, it would be appropriate to amend all those action items to subsequently, follow each of the agency hearings.

Chair Nogami Streufert: Okay.

Ms. Apisa: I move that we amend our Agenda to have item M, Unfinished Business for Action and item N, New Business for Action to follow each respective Agency Hearing.

Ms. Otsuka: I second.

Mr. Ho: What? I have a discussion Glenda.

Chair Nogami Streufert: Yes, discussion.

Mr. Ho: You kind of lost me. What is going to happen with Mr. Somers?

Mr. Hull: If the motion passes, we would ask for public testimony. It appears that no one will testify. After the public testimony, we would move right into the agenda item itself for the Planning Department staff to give his report and you folks could have any discussion you want with the Planning staff and myself. After the staff's report, then Mr. Graham, who is the applicant's representative will give a presentation he has and then engage in any discussion. Then ultimately, it would be up to your discretion on whether or not you would want to take action today.

Mr. Ho: Thank you.

Chair Nogami Streufert: So, we have a motion and a second to amend the Agenda. Since this is a procedural thing and if there are no objections, we will approve the agenda as amended. It has been moved and seconded. Motion passes. 7:0.

Mr. Hull: Okay. Moving on, let me ask...and I know that he members who called in said there is not, but for clarification and transparency. I would open and ask if there is anybody who has called in who would like to testify on the Charles M. Somers & West Sunset 32 Phase I, LLC, application? Seeing none. I will turn this over to Dale Cua who is our staff planner to give a summary of his report and supplemental to the report.

Staff Planner Dale Cua: Good morning, Madame Chair, and members of the Planning Commission.

Mr. Hull: I am sorry. Let me just interrupt one small point before Dale gets into it. You folks were also transmitted a supplement from the applicant in addition to Dale's supplemental report. In addition, a letter was submitted yesterday around 3 p.m. that did not make that 24-hour cut off for us to draft up a supplement to get it to you folks. However, that letter will be transmitted to you folks subsequent to this meeting. The letter does include a transmission from Hawaii Island Land Trust concerning the proposed amendments and we can get into to it later, but I just want to make that note for the record. I will turn it over to Dale. Thanks Dale.

Chair Nogami Streufert: Thank you, Dale.

Mr. Cua: Sure. What you have before you, involves an amendment to the project. Previously transmitted to you was the Directors Report and following that report was a supplement to the Director's Report that summarizes what is being proposed as an amendment to the project.

> Mr. Cua read the Summary, Project Description and Use, and Applicant's Reasons/Justification sections of the Director's Report for the record (on file with the Planning Department).

Mr. Cua: The Department provided a conclusion for the project and at this time, I will hold off on the recommendation. However, the recommendation is there in front of you, and maybe I will leave the presentation of the project by the applicant.

Chair Nogami Streufert: Dale, could I ask a question?

Mr. Cua: Sure.

Chair Nogami Streufert: There was supposed to be an Annual Status Report for this project. Is this instead of the Annual Status Report? Or how does this work?

Mr. Cua: The Annual Status Report is separate and apart from this proposal. So, this proposal that you have before you are an actual request to amend portions of the project. In addition, the amendment is listed before you in the supplemental.

Chair Nogami Streufert: So that means from 2016 to 2019, there were no Status Reports?

Mr. Cua: I did not see any in our files.

Chair Nogami Streufert: Thank you.

Mr. Ho: I have a question, please.

Chair Nogami Streufert: Yes, please.

Mr. Ho: Dale, by filing new amendments, the applicant is asking to reset timelines from older timelines that were set. I do not see that as being conducive. I mean, if the primary Conditions where set about the guidelines and they were having trouble making those guidelines, they should have come before the Commission earlier, so we could either approve or deny. So, I am asking you this, when people file amendments do new timelines, new time guidelines come up are they accepted as part of the amendment? Or should the old timelines be adhered to?

Mr. Cua: I can say that anytime there is an amendment to a project, it gives the Planning Commission an opportunity to review the Conditions that were originally imposed to the project. Moreover, it would be a time where it could provide new Conditions or update Conditions in terms of performance or even certain standards. So, it is a time to look at a project and if you feel that it is necessary to impose additional requirements you are more than welcome to do so.

Mr. Ho: And getting back to Glenda's inquiry about the annual briefing. Would not that have come up in the annual briefing if they required additional time?

Mr. Cua: Yes. Absolutely.

Mr. Ho: And in the absence of the annual reports, we had no opportunity to rule on this.

Mr. Cua: Correct.

Mr. Ho: Does this become a voting item now?

Mr. Cua: Well the Status Report is a separate action. It is a different Condition that was imposed as part of the project requirements. What you have before you are an applicant's request to amend the project. Just like the previous action that was taken again, it was an amendment to the project.

Chair Nogami Streufert: Correct me if am wrong, but in 2016, didn't they delete the bathroom and the loft and now it is back on? Is that the amendment that there will now be a loft?

Mr. Cua: Correct.

Chair Nogami Streufert: They took off in 2016, because it was over the height limit and now, they got the loft back in again, as an amendment. Is that correct?

Mr. Cua: Well when I did the evaluation for the project, I also took into consideration the elimination of the proposed caretakers house as well. So, I looked at the overall development.

Chair Nogami Streufert: Okay. Any other questions for the Planner?

Mr. Hull: I also want to point out too, Chair Streufert and Commissioner Ho. Your questions about the timelines and status reports if you folks would like to get a status report as part of this

petition on each of the Conditions and where they are in meeting those Conditions that would be entirely appropriate. As well as Commissioner Ho, you brought up a good point about the lapsing of permits and certain deadlines and timelines. The Department under the advice of the County Attorney's office, for several years now, have functioned under the premise that, indeed, SMA Permits do have certain deadlines particularly, the two-year time limitation to get substantial construction completed. However, in consultation with the Attorneys Office as well as the Commission in consultation with the Attorneys office on this, it has always been the determination that a Special Management Area Permit is not actually dead even though it moves beyond its expiration date. In order for it to be officially retracted and done, the Planning Commission needs to take action in the affirmative to remove that entitlement; it does not lapse on its own.

So, for years that advice and input from the Attorney's Office, we have had several applicants come two, three, four, years after that two-year window to re-up their permits. That is just a way business has done because of that interpretation. It has come to the forefront of discussion on permitting for no other reason than quite honestly, this applicant is currently suing the Planning Commission and the Department for taking that position on a neighboring property. That is not part of the agenda item right now, but it is a valid point. This applicant has taken advantage of the interpretation in the past and I am just stating this for record. We are taking that interpretation for this application as well. Therefore, we are treating applicant even and equal as we have done with all other applicants. I can say that the applicant in this case has also availed himself to a full-blown public hearing and intervention should that type of petition come in. However, the Department has not received an intervention request at this time.

Mr. Ho: I have a...let me ask this that updated status report you are offering to the Commissioners. Is that something that would be done by the Planning Department? Or should it be done by the attorney for the plaintiff?

Mr. Hull: It would be appropriate for the representative for the applicant to do it, and the Department will verify as to whether or of the veracity of that report.

Mr. Ho: The last points here. In the lapsing of the action on the permit and the timeline is not met. The permit would expire and then they would have to reapply for the permit?

Mr. Hull: What has been done in a multitude of other cases as well as with this application? Several years ago, is after the two year has expired the applicant would come back and ask for an amendment to extend the timeline deadline of the expiration date. And to propose construction or sometimes changes to construction within that window.

Mr. Ho: That amendment would be before the Commission, to be approved.

Mr. Hull: Correct.

Mr. Ho: Thank you.

Mr. Hull: If you folks do not have any further questions. It may be appropriate to—

Chair Nogami Streufert: There is now a sink and a countertop in this barn where we had said there would be no kitchen. What is the definition of a kitchen?

Mr. Hull: So, I am looking at Dale, I can jump in there. So, the definition of kitchen is to have all food preparation devices and it is three-fold. You need food storage I.E., refrigerator, food preparation, which would be a sink, and as well as food cooking, which would be a stove or cooking surface. Essentially, refrigerator, a sink, and a cooking surface. Absent of those items, it does not constitute a kitchen, but if all those three were in there, it would constitute a kitchen which would constitute a habitable structure.

Chair Nogami Streufert: There was something in there in the planning's and thoughts about Twenty (20) parking spots? I am not sure what those were for—

Mr. Hull: The, the—

Chair Nogami Streufert: Go ahead Kaaina. I am sorry.

Mr. Hull: I will defer it. It may be appropriate for Dale, but ultimately, it may be more appropriate for the representative to answer that. Dale you are muted. Dale you are muted.

Mr. Cua: Sorry. Yes, I think it is a question that could be directed to the applicant in terms of provision of the onsite parking.

Chair Nogami Streufert: And the Fire Department had a concern about access in an emergency. Has that been resolved?

Mr. Cua: I believe it remains on going, but there have been site improvements the initial application of the project. At the time, the project came in for permits there were no improvements. Since then, there is a driveway providing access to the residents. With this proposal, a new driveway will be constructed to provide access to this barn facility.

Chair Nogami Streufert: So, the amendment includes a new driveway.

Mr. Cua: Yes, correct. That would be the associated improvements.

Chair Nogami Streufert: And the building height with the loft? In 2016, that was over 25 ft. I think an intervener brought that up—

Mr. Cua: Yes, in 2016, they suggested that the barn remain a one-story. With this new proposal, it is a two-story structure, but it complies to the building height requirements in that area. The height requirement in the North shore is 25 ft. and the proposed structure complies with the requirements.

Chair Nogami Streufert: Okay. Thank you. Are there any questions from the Commissioners to the Planner? If not, would the applicant like to present his case?

Mr. Max Graham: Okay, I am unmuted. Can you hear me?

Chair Nogami Streufert: Yes.

Mr. Graham: Okay, good morning Commissioners. I am Max Graham and I represent the applicant, which is Charles Somers, a trustee of the Charles Somer's Trust & West Sunset 32 Phase I, LLC., and they are the owners of the property. Let me summarize how we got to where we are today. The property is located along the Kilauea Stream in Kilauea Valley. It contains 166.88 acres. It is located in the State Land Use Commission Agricultural District, General Plan Natural District, and the CZO Open District and Special Treatment Scenic and Ecologic Resources District and is in the SMA Special Management Area.

In order to undertake development within this area, the applicant needs to get a Special Management Area Permit as well as a Use Permit because under the Special Treatment District provisions, any development requires a Use Permit. So that is the reason we need a SMA Permit, a Use Permit, and then the Class III Zoning Permit that goes along with it. This whole process started back in...before 2008. I have given you a chronology of events in this matter. The first application was filed in 2007, and the application was for a single-family residence, a well, and associated accessory improvements, including an internal driveway is grading utility. So that the Planning Commission approved permit application, that is what we call the "master permit" and that was on October 2 of 2008. And that "master permit" was subject to eighteen (18) Conditions of approval.

After getting the master permit, the applicant conveyed conservation easement over the property to, at the time the Kauai Public Land Trust. And the Conservation Easements, there were two (2) easements; one was for 80.1 acres and one was for 69.3 acres for a total of 149.4 acres of the property. Leaving approx., 12.48 acres down near the Kilauea Stream River mouth as a building envelope. So, the building envelope is not subject to the easements. Within the building envelope, the owner retained the density for two barn dwelling units, and the remainder of the density on the property, which would have been thirty and...I think thirty farm dwelling units, was given up under the provisions of the conservation easements.

So, the conservation easements provided that the owner would not only give up the right to build farm dwelling units in the easement area, but that certain activities would also be prohibited. At the time, the Kauai Public Land Trust was the owner of the easement. The Kauai Public Land Trust has since joined a larger group of Island Land Trust, now known as the Hawaiian Island Land Trust. And the Hawaiian Island Land Trust or "HLT" as it is called, is now the owner of the easement, with the right of enforcement. After the approval of the master permit, a single-family residence or dwelling unit was built on the property together with improved driveways into the farm dwelling unit from Kahili Quarry Road. One of the Conditions of approval was that the applicant would improve Kahili Quarry Road so it could be used for vehicular access.

Kahili Quarry Road goes from Kilauea Lighthouse Road all the way, down to what is known as the Quarry Site, which is now owned by the U.S. Fish and Wildlife Service. The Conservation Easements required the...actually, did not require. The Conservation Easement allowed the

owners to undertake certain activities within the easement areas. And in a case where these activities would impact wetlands or endangered species, the applicant needed to get such approval from HLT, for such activities and needed to develop a management plan. Well, to catalog the activities going on, on the property; the applicant filed a conservation plan. So, the management plan was called a "conservation plan" for the property, and it described the activities within the easement areas that the applicant was undertaking. So, the main thing is the preservation and protection of the 57 archeological sites within a 74-acre portion of the easement area. Protocols for protection of native seabirds, protocols for protection of the Nene, guidelines for native plant restoration. And at the time, the conservation firm that was created through the proposal to do an enclosed fence to protect the Nene on the property.

That takes us to the first amendment in 2016. So, in 2016, the Planning Commission approved an application filed by the applicant for the construction of additional improvements within the built envelope area and these included the barn and accessory improvements, including driveways to connect the barn to Kahili Quarry Road. A manager's house, which would have been the second barn dwelling unit on the property and would have been used for the ranch manager for his accommodations. The application included the request for the construction of the fence enclosure, the Nene fence, and the approval for the after the fact permit for an existing equipment tent on the property. This was approved on April 26, 2016, and sixteen (16) additional Conditions of approval were added to this approval.

I want to make clear something, even though we call this an amendment, throughout this process there has always been intervention in the proceedings. So, the initial proceedings from the master permit and then the second proceedings (inaudible) called the first amendment, in both cases there where intervening parties. And, in both cases a full SMA Hearing process was used to arrive at the Commission's decisions. So, that means everybody got adjacent to the property, received notice of the proceedings, people could intervene, and we held a full-scale Planning Commission Hearing. Now, included in the first amendment...so after the first amendment was approved one of the things that the applicant needed to do to keep current with all the Conditions was to complete the maintenance of Kahili Quarry Road.

There was a request by the community, that those improvements include the portion of the road located not on the actual Kahili Quarry Road Property, which is owned, by the applicant, but also improvement to portions of the property located on U.S Fish and Wildlife Service Quarry Lot, at the bottom of the road adjacent to the Kahili Beach. It took a while for that to happen and eventually it was done, that portion of the road was so badly deteriorated that it was impossible to use...to get access to the beach area in a regular non-four-wheel drive car. So, the applicant took care of that, improved the road so that there was access all the way down to the beach. But by the time the applicant finished with all that work, and by the way, the applicant needed to get a Use Permit from the U.S Fish and Wildlife Service, in order to do that. By the time the applicant did that, the timeline to undertake work on the barn and managers house-the additional single dwelling had expired.

I expected to go back and ask for...appear before the Planning Commission and just ask that the timelines be extended, but instead, the process is changing in terms of SMA Permits apparently, I was told by the Planning Department what I should do. I suggested it, we just go through the

same process we always have, which is the formal process. I would give notice to everyone; we would have filed a new application for an SMA permit, so that is what I did. However, this time around, instead of asking for permission to build a mangers house we deleted that from the application. So, the application is pretty much only for the new barn, but we are not asking for the mangers house, we are asking for a re-designed barn. In the meantime, we had decided that the Nene fence did not make sense for several reasons that I will outline them in my memo to the Commission.

Let us just briefly say, first, in the meantime, the Nene have been downgraded and no longer an endangered species. We realized we did not have the expertise to take care of Nene in the first place. When they were endangered, it would have required, I think, a Habitat Conservation Plan and a (inaudible) license to be obtained to undertake such a project and we would have had to apply to the Department of Fish and Wildlife and Department of Natural Resources for such permits, which fall under the Endangered Species Act. Anyways, it just did not seem that it made sense to do the Nene Project, and especially since, we are located directly adjacent to the Federal Wildlife...the Kilauea Point Wildlife Refuge. The Fish and Wildlife Services has the ability and the expertise to care for Nene, and so, any Nene protection was more than adequately available through the U.S. Fish and Wildlife Services operation of the Kilauea Point Wildlife Refuge.

For those reasons, we did not ask to do a Nene fence when we refiled this action. That has been taken off the table. Then we advised HLT that we no longer wanted part of the Conservation Plan to undertake the Nene fence operation. I only got this letter yesterday, and I apologize for this, but that has been forwarded to you and it does...it is from HLT. Which suggest they agreed. They suggested that instead of doing a Nene fence, we take the money that it would have cost to build the fence, which was $11,500.00 and donated it to them. They will use the money to make improvements to the Kilauea Stream Mouth Area and the Kahili Beach. I should mention this, that HLT owns two (2) parcels right there at the river mouth and so they already have activities to maintain these areas. They prefer to receive it as a grant and use it for their purposes.

And so, that brings us to where we are today. We are asking for a barn and now, we are not asking for a ranch manager's house. The reason we need a larger barn, and as the Chair, has correctly identified the additional aspects of the new barn. The idea is that we need an area for the ranch manager to meet with employees and used as an office. Because the ranch manager will no longer be operating out of the ranch managers house, because that is not on the table, and we are not asking for that. So, there was an upper floor which originally had been and deleted. The fire application has been added to the plans, and the upper floor has a meeting area that has a sink, it does not have a full kitchen so it does not qualify as a kitchen, but it does have a sink.

In comparison to the original barn that was approved, and remember that permit is no longer good, that is expired. We have a new permit, and the original barn was something like 4269 square feet in size, and the new barn with the additional upper floor would be 6784 square feet in size. So, it is a little bit larger, and on the other hand, we do not have another farm dwelling building being constructed. The barn itself is located below the level of the house and, it is kind of tucked away and not visible, and it will be landscaped. So, it will not provide visual impact

once it is constructed this time. And one other thing I wanted to mention. The applicant was required to make annual reports and the applicant filed up until 2016. Let us see...a seven (7) and do a report and then there was a period of two (2) years there when none was filed. That is my fault. I thought that after we got the last permit that we pretty much satisfied all the Conditions. But what I did was I did file a seventh (7th) Status Report in 2019, which was approved by this Commission at its February 11th, Meeting of this year. So, we are back on track with the annual reports and we do have a current annual report.

So what we are asking is permission to build a barn as designed and as proposed. There will be some additional driveways connecting to the internal driveway system to get the Kahili Quarry Road. And we are asking that the requirement on the Nene fence be eliminated because quite frankly, no one seems to think that is a good idea and that includes HLT. I met with the Kilauea Neighborhood Association on this matter, and they seem to agree, also, and were not in favor of having a Nene fence on the Property. In lieu of a doing the Nene fence though, I have submitted a proposed replacement amendment that provides that the applicant will donate the sum of $11,500.00. And we are representing, that the applicant is willing to do this, and to the Hawaiian Island Land Trust, to protect and support its efforts to protect and preserve the environmental qualities and ecosystem of the Kilauea Stream and Kahili Beach including; but not limited to removal of evasive species, replacement of native species, erosion control, clean-up of Kahili Beach, and the empowerment of community stewardship of the area. All as requested by HLT and I think that will be a better use of the funds as opposed doing a Nene fence as originally proposed. So, sorry I took so long, but that is the status of the application.

Chair Nogami Streufert: Are there any questions from any of the Commissioners? Let me ask a question. In 2016, I believe the Commission accepted the Status Report, not approved it. I think we only accept status reports, we do not approve. Is that Correct?

Mr. Graham: I think if I said it, I misspoke. When we file status reports and the Commission receives them, you do not take any formal approval or action on it, you just receive it.

Chair Nogami Streufert: Correct. So, let us make that correction to the record. In the 2016, there were a lot of these Conditions, and they were stated at the time, as I recall. And the applicant had agreed to all the Conditions to be completed by 2019. One plus two: one year to get the permits and two years for all the construction or the additions improvements to be made, is that correct?

Mr. Graham: Correct. They were timelines.

Chair Nogami Streufert: And one of the Conditions was the Nene Fence, is that correct?

Mr. Graham: The Nene fence had to be constructed prior to the construction of the barn. The barn never was constructed.

Chair Nogami Streufert: But the timeline was for three years?

Mr. Graham: The timeline on the Nene fence would have been the SMA Timeline. The Nene fence is an improvement. It was an SMA improvement. So, it was caught in the same problem with the SMA timeline that prohibited the applicant from constructing the barn and the manager's house. The manager's house, barn, and Nene fence, were not constructed prior to the exploration of the SMA Timeline. So, that means that now you do not have a valid SMA permit. If you want a valid SMA permit, you either, need to get the time extended, which apparently, we are no longer doing, or you need to re-file for new SMA permits for those developments. What we chose to do was to file for a new SMA permit for the barns and that is what is before you now.

Mr. Hull: Just a point of correction Max. The petition is to amend the SMA 2008 permits; it is not a brand-new permit.

Mr. Graham: What is not brand-new permit?

Mr. Hull: The petition before the Commission right now for this barn is to amend the 2008 permits. It is not a brand-new permit.

Mr. Graham: Well, I did it both ways. I did an application for an amendment for and an amendment to, just to make sure we are consistent with whatever the applicable law is, but if you look at the application itself, it satisfies all the provisions and conditions of a filing of a separate new SMA permit application. We have followed the SMA process in filing this application. In a sense, it is called an amendment. Because we keep hearing this application under the original designations for the Master permit, the original SMA Zoning permit and Use permit numbers are the same. And that makes sense, it is a good way to do it. However, the process we are using is the same as if we were filing for a brand new SMA permit.

Mr. Hull: Yes. And I just want to be clear here that, that was at the applicant's own determination and it is not what the Department had required for the final.

Mr. Graham: Correct. So, because we have had intervention in this case, by the way we have no interventions this time around. I just thought, every time I do something in this case, I just do it complete and formally according to the SMA process. So, maybe it is a little bit over kill, but that is what I have been doing.

Mr. Ho: Max if I could ask you to clarify. The SMA permit that you filed for is just for the barn. Not the Nene fence?

Mr. Graham: Correct.

Mr. Ho: Thank you.

Mr. Hull: Well hold on for clarification Max. The SMA permit amendment that the Commissioner are reviewing is for the barn, but in it, they are also requesting that you amend the Condition requiring the Nene fence out so you no longer have to do the Nene fence.

Mr. Graham: Correct.

Ms. Apisa: It sounds reasonable that there is no Nene fence and especially that money is being donated to HLT.

Chair Nogami Streufert: Yes, I agree with that part of it. The thing I guess, everything was supposed to be completed by 2019. At the time, that it should have been completed, would it have made sense? In other words, if you wait it out long enough, is that a reasonable way to do it, if you do not like something, and you wait long enough, maybe it will go away? That is just a question. So, in 2019, when this was supposed to be completed was that something that would have been reasonable? Since we just got this yesterday late afternoon, or I guess the Planning Department got this yesterday late afternoon, it seems late to get all this information.

Mr. Graham: I am sorry Chair; did you have a question for me?

Chair Nogami Streufert: No. I guess I am speaking to the other Commissioners.

Ms. Apisa: To my understanding is that, the only thing that came late yesterday was the letter from HLT. Is that correct, Kaaina?

Mr. Hull: Yes. So, the letter did come from HLT, but in the same manner that we are applying to public testimony, it was too late given the circumstances on how we transmit now. With the report, and how you guys get delivered paper applications so you can see it before you while you interact on the teleconferencing video system. It has not been transmitted to you officially. So ultimately, the Department will be asking for a deferral to be able to transmit the information to you folks for your review as well as for us to touch bases with HLT. I believe from previous discussions earlier, the desire for another status report on those Conditions. If that, is still what the Commission wants? And for the applicant to provide that, and the Department would verify as well once that's provided with those Conditions, because a lot of them have to do with other jurisdictions of other agencies and we would have to verify them with the other agencies. So, the Department would be requesting a deferral to one; transfer the letter to your folks from HLT, as well as to allow the applicant to get together another status report for your review.

Chair Nogami Streufert: Are there any other questions or any questions for the applicant, Commissioners?

Ms. Cox: First, can you hear me? Can you hear me?

Chair Nogami Streufert: Yes. Now we can.

Ms. Cox: [Inaudible talking]

Chair Nogami Streufert: Now I cannot hear you.

Mr. Hull: Helen if you could stand back from your microphone a little bit.

Ms. Cox: [Inaudible talking]

Chair Nogami Streufert: No, I cannot hear you.

Ms. Cox: It goes in and out.

Mr. Hull: Yes.

Chair Nogami Streufert: No. Sorry. Let me change my phone.

Ms. Cox: Can you hear me now?

Mr. Hull: Yes. You are breaking in and out, Helen. I am sorry.

Ms. Cox: [Inaudible talking]

Mr. Hull: Helen, you may want to call in to the public line and then there is a code, and once we see you in the waiting room, we will let you in. You can still us on your video monitoring so you can see the interactions. But if you call into the public line, then we will be able to gauge with your questions that way.

Mr. Graham: Kaaina? Kaaina?

Mr. Hull: I am here.

Mr. Graham: Just on a technical note, we have had problems with the video/audio portion using this system, which is why I called in on the phone. Apparently, works better if you call in on the phone and then have the visual video on screen.

Mr. Hull: Yes, that is what Helen is doing right now. She is calling in and she is going to leave her video up and calling in on the public format phone. Sorry, I am trying to check on Helen to try to make sure she gets on. There we go. Jodi, would you let Helen in, please.

Ms. Cox: Okay. So, I had two questions.

Mr. Hull: Hold on a second Helen. You might want to put your phone down and mute your screen, I think we are picking up the feedback from your screen.

Ms. Jodi Higuchi Sayegusa: I guess try turning down the volume of the computer monitor [inaudible]. How is that?

Mr. Hull: There we go.

Ms. Cox: Okay. I love the system. Can't we use Zoom? It works. Anyway, so my questions are two-fold. One, I do not think I heard you talk about the...Max, the parking, the fifteen spaces of parking. In addition, the other, I am a little confused because you said in the upstairs

of the barn, it is not a kitchen. Yet, the amendment or document we have, it is called a kitchen. So, I am just confused. Thanks.

Chair Nogami Streufert: Max, are you there?

Mr. Graham: I am sorry. Everyone was on mute. On the parking, I am a little bit confused about where that appears in the application. I guess, let me put it this way. Within that twelve (12) acre building envelope, there is plenty of parking available for anyone or any employees and there is plenty of off-street parking available in and around the barn area and the main house. Regarding the kitchen, if it was referred to as a kitchen again, I do not recall where that would have been. It is possible that was earlier. The aspects of the improvements that would have made it a kitchen has been removed so that we do not run into that problem with the barn. It is not intended to be a kitchen, it is a sink to wash off and I hope that clarifies.

Chair Nogami Streufert: There is also a bathroom in the loft. Is that Correct?

Mr. Graham: Yes. There is a bathroom. The original barn and new redesigned barn both had bathrooms and called a half-bath, a toilet, and no shower. Right adjacent to the half- bath is an outdoor shower. So together, it is a full bathroom.

Ms. Apisa: Max, I have a question. Because the caretaker house has been eliminated and the barn has been increased. It is sort of an easy conclusion to think that, there will there be someone living in the barn.

Mr. Graham: That is not the intention. Let me just raise a point, that is a problem as we know in the agricultural areas. Which is people use up farm dwelling unit density on parcels, then they build barns, then they let people live in the barns, and then put kitchens in barns and such. They create violations because they have additional structures that people can use as dwelling units. In this case, we do not intend to use this as a dwelling unit, but we do have two dwelling unit density on the property within the building envelope. So, if we wanted to transform the barn into a dwelling unit by putting in a bedroom and a kitchen. We could come back to the Planning Department and if necessary, the Commission and we would have density to do it. There is not a problem here that we might exceed the permitted dwelling unit density on the property. I think it is less of a concern in this situation then it might be in other situations. Presently, there is no intention to do that, the ranch manager lives off-site.

Ms. Apisa: Thank you for clarifying. It just clears the air with that.

Chair Nogami Streufert: Is there any other questions for Mr. Graham?

Mr. Graham: And Chair, I just wanted to mention in the supplemental report, that we have no objection to the manner in which Condition [inaudible] concerning how the timelines has been modified by the Planning Department.

Chair Nogami Streufert: So, that would be the one plus two; one-year for the permits and two-years to complete the project.

Mr. Graham: Right. They had a hard date, they put in June 30, 2023, to complete and that is fine.

Ms. Apisa: Max. You have no objections to any of the other Conditions? You accept them.

Chair Nogami Streufert: Well let us get that from the Planning Department to see what their recommendations are, which also include recommendations for Conditions. Is that correct?

Ms. Apisa: I think today we are just going to defer it?

Chair Nogami Streufert: Well, we have not had a motion yet to defer, but that is one possibility that we can do.

Mr. Hull: Yes. I can turn it over to Dale. If you do not have any more questions for Max or the Department at this time, I can turn it over to Dale to go over the recommended Conditions. However, given some of the information that has come up within the past 24-hours, as well as at this meeting, like I said earlier, we will be looking at a recommendation to defer.

Staff Planner Dale Cua: Okay. Chair, what I will be doing is reading the Departments recommendation and of course, this recommendation was made prior to a lot of the information that was shared to you and those recommendations that will be shared to you. The recommendation in the supplemental to the Director's Report reads as follows.

> Mr. Cua read the Summary, Project Description and Use, and Applicant's Reasons/Justification sections of the Director's Report for the record (on file with the Planning Department).

Mr. Cua: This concludes the Departments recommendations.

Chair Nogami Streufert: So, Dale, if they came in with an amendment to make any changes to their barn. Would that mean that the time would also move?

Mr. Cua: No. That date…the Department proposing is steadfast and will remain.

Chair Nogami Streufert: So, at this point, could you tell us what our options are. I think I know them, but I would just like to hear it from the Planning Department. What are our options?

Mr. Hull: So, you can either vote to approve as requested by the applicant, vote to approve as amended either as say the Department is recommending it or say as the Commission may see fit, or to deny their request. Those are the three actionable items. The Department is… like I was saying earlier though, that was our preliminary recommendation. As far as the Nene fencing is concerned, I think if…and the Land Trust, we have seen the letter and is open to it, then the Department is open to removing that Condition. But I feel that it is only appropriate to transmit that communication at to you folks. As well as for us as a Department to have a discussion with Hawaii Island Land Trust, to determine what they are recommending, as well as to allow another

status report to be transmitted. So ultimately, the Department is recommending a deferral and I think, given the information, it is necessary for a two (2) month deferrals that would be appropriate. So, a deferral to July 14, 2020, that is our recommendation at this date at this time. One again, you could either approve the request, deny the request, approve with mitigating Conditions of approval, or defer.

Chair Nogami Streufert: And if we wanted also, a status report, can we get that separate from this? Or is it part of this whole process?

Mr. Hull: That would be part of this whole process. Another status report is supposed to be coming annually, the next one is supposed to be February 20, 2021. But I think you folks were talking about earlier, for you folks to go through those Conditions again as part of this application, a status report as part of the amended proposal would be appropriate. At least in the Departments consideration.

Chair Nogami Streufert: So, we have at least four (4) options. As I understand it one is to approve the application, one is to approve it based on...with the amendments and Conditions set by the Planning Commission, one is to deny it, and that is the third, and the fourth, is to defer. Is that correct?

Mr. Hull: Correct.

Chair Nogami Streufert: The Chair will entertain a motion.

Ms. Apisa: I move that we defer this matter to July 14, 2020.

Ms. Otsuka: I second.

Chair Nogami Streufert: It has been moved and seconded that we defer this matter until July 14, 2020 Meeting.

Mr. Ho: I would like to say that we also add with the deferral, we also receive the status report at that time.

Chair Nogami Streufert: Or prior to that, you mean?

Mr. Ho: Prior to us meeting on July 14, we will have a status report.

Mr. Hull: Commissioner Ho. Part of that recommendation from the Department is for the applicant to transmit a status report according at timeline. With the agencies the status of those Conditions as well so you will be getting it. Not foreseeing anything that would hold it up, that is the second part needing attention as part of the deferral.

Mr. Ho: Thank you.

Ms. Apisa: Kaaina, your talk was blurred out. So we would have it before the July meeting.

Mr. Hull: Correct. That is a question that, I think you would have to ask Mr. Graham, if he is able to get that information at that time. I think it is an appropriate time. But you may want to check with Mr. Graham first.

Chair Nogami Streufert: Mr. Graham, would you like to comment on that? Would that be possible to get a status report? Or would it be possible to get a status report before the July Meeting?

Mr. Graham: By the way, we have no objections to the deferral. We are happy to meet with the Department to try to resolve all these issues. We did a status report in February, so I will just update that status report and get it into Planning as soon as possible to give plenty of time before the meeting to review it.

Chair Nogami Streufert: So, we have a motion to defer.

Mr. Hull: Can I also ask one question of the applicant Chair?

Chair Nogami Streufert: Yes, please.

Mr. Hull: Max. Considering the fact, that this is an amendment and there are no timelines requirements on amendments. In addition, that you folks have availed yourselves to a full-blown public hearing and application process. I'll just ask, are you fine with the waiver of any Chapter [inaudible] and its associate rules and Chapter [inaudible] County Code and its associated timelines concerning Use permits and Class IV zoning permits to accommodate this deferral?

Mr. Graham: Yes, sir.

Mr. Hull: Thank you.

Chair Nogami Streufert: Is there any discussion? Are we ready for the vote? We have a roll call vote please to defer this request and consideration Amendment to a Special Management Area Use Permit SMA (U)-2008-5, Class IV Zoning Permit Z-IV-2008-6.

Mr. Hull: Roll call. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

Chair Nogami Streufert: Motion passes with a unanimous vote. It has been deferred to the July 14, 2020, meeting.

Continued Public Hearing

Zoning Amendment ZA-2020 7:
DEVELOPMENT PLAN AMENDMENTS: Hanapepe-' Ele' ele Development Plan and Waimea-Kekaha Development Plan.
ZONING MAP AMENDMENTS: ZM-K 100 Kekaha, ZM-W 100 Waimea, and ZMH200 Hanapepe-Port Allen-' Ele'ele.
This bill for an ordinance proposes to adopt and implement the West Kauai Community Plan, which is an update to the Hanapepe-'Ele'ele Development Plan and the Waimea-Kekaha Development Plan, and includes the communities of Kekaha, Waimea, Hanapepe, ' Ele' ele, and Kaumakani. The proposed ordinance will amend Chapter 10, Articles 3 and 4 of the Kauai County Code to adopt the West Kauai Community Plan and establish special planning areas for the town centers of Kekaha, Waimea, Hanapepe, and ' Ele'ele-Port Allen. The special planning areas will use form-based code to provide development standards and guidelines to further the goals and objectives for the West Kauai Community Plan that were created through a public planning process. The following special planning areas are proposed:

- Special Planning Area "K", also known as the "Kekaha Town Walkable Mixed-Use District".
- Special Planning Area "L", also known as the "Waimea Town Walkable Mixed-Use District".
- Special Planning Area "M", also known as the "Hanapepe Town Walkable Mixed-Use District".
- Special Planning Area "N", also known as the '" Ele'ele-Port Allen Walkable Mixed-Use District"= *County of Kauai, Planning Department.*

Mr. Hull: Moving on to G.3., Continued Public Hearing for a. Zoning Amendment ZA-2020 7: Development Plan Amendments: Hanapepe-' Ele' ele Development Plan and Waimea-Kekaha

Development Plan. Zoning Map Amendments: *ZM-K* 100 Kekaha, ZM-W 100 Waimea, and ZMH200 Hanapepe-Port Allen-' Ele'ele. This bill for an ordinance proposes to adopt and implement the West Kauai Community Plan, which is an update to the Hanapepe-'Ele'ele Development Plan and the Waimea-Kekaha Development Plan, and includes the communities of Kekaha, Waimea, Hanapepe, ' Ele' ele, and Kaumakani. The proposed Ordinance will amend Chapter 10, Articles 3 and 4 of the Kauai County Code to adopt the West Kauai Community Plan and Establish Special Planning Areas for the town centers of Kekaha, Waimea, Hanapepe, and ' Ele'ele-Port Allen. The special planning areas will use form-based code to provide development standards and guidelines to further the goals and objectives for the West Kauai Community Plan that were created through a public planning process. The following special planning areas are proposed: Special Planning Area "K", also known as the "Kekaha Town Walkable Mixed-Use District". Special Planning Area "L", also known as the "Waimea Town Walkable Mixed-Use District". Special Planning Area "M", also known as the "Hanapepe Town Walkable Mixed-Use District". Special Planning Area "N", also known as the '" Ele' ele-Port Allen Walkable Mixed-Use District," and the County of Kauai, is the applicant and we also have supplements No.2, No. 3, No. 4, and No. 5 to the update.

Just to go over briefly folks, this is essentially, the West Kauai Community Plan that you folks have been reviewing for some time before the Planning Commission. We were looking at very close to an actual date before the COVID-19 crisis closed the island and the world down. We have this here before you folks just as a refresher, but we will be asking for another deferral on this agenda item as well as all the associated West Kauai Community Plan Amendments, which is the bulk of the agenda items to May 26, 2020. We have the final draft being put together for you folks right now. As far as the final Departmental Draft Amendments, it did not seem as least in previous discussions with the Commission, that there were any more amendments the Commission wanted. But when we transmit to you on May 26th, ultimately that will be our final, but it is still available for you folks to make any amendments and changes that you want at that time. You are also able to make amendments and changes today, but that is in a nutshell as far as the process.

Just as I will attempt to give a two to three-minute summary because all of you have reviewed this, multiple time or we have gone through it with you folks. But just a brief primer. The West Kauai Community Plan update started about two years ago. Just within the realm of how community plan works, you have the General Plan that sets the policies for the island at the 50,000. Foot level. We completed the General Plan update back in 2018. The Community Plan you have before you are beneath the General Plans of hierarchy of plans and is a regional plan for West Kauai. This is on the communities between Kekaha and Port Allen 'Ele ele so that also includes Waimea and Hanapepe. The Department started the process about two years ago by doing public outreach and we started taking input from the public just about two years ago to get what the issues and topics for the community and where it wanted to see its built environment, its conservation polices, it's programs go in the next ten to twenty years. Ultimately, we have set the plans up into six regional policies; those have to do with community design or town design. It has to do with resiliency; it has to do with economic development, heritage resources, shared spaces, and transportation. The way it was set up is regional policies are broken into those six areas. As well as looking at each of the unique towns and the policies for those specific towns, also broken up into those six policy areas or issue areas. And it has been a two-year process of

robust community outreach, as well as dialogue with community youth groups. We look forward to getting you that final draft, but what is here for you folks is we are trying play catch up in the current COVID-19 crisis. Marie Williams is on the meeting so if you have any detailed questions our in-house West Kauai Community guru is on to answer any of them. I will just turn it over to the Commission to see if you folks have any questions for us.

Chair Nogami Streufert: I think there were some concerns about grandfathering and some people were concerned about whether their property rights will be grandfathered. That came up in every single one of these.

Mr. Hull: Yes, I will be touching on that. I think Chair, what you are referring to is the proposed Zoning District Special Treatment Coastal Edge, which is looking at coastal properties that have or is being propose with overlays placed...am I right? Is that what your concern was? Or are you talking about something else?

Chair Nogami Streufert: Well, I think it came up...there was at least one concern expressed at almost every single one of these zoning amendments. Just as an overall and I cannot think of all of them, and it does not need to be addressed here. But if some of these concerns...because it does seem to be coming up, if some of these concerns can be addressed for the people who have these concerns and to clarify or whatever the issues they might have on it. It seems to keep coming up when we have these meetings.

Mr. Hull: Yes. Again, it just depends on what zoning amendment is pertinent to the property. I can say for the Form-base code, which is part of this specific zoning amendment 2020-7. The Form-base code was created in a manner that looks at the existing farming character of these towns. And the fact of the matter is, in many of the situations under the existing comprehensive zoning ordinance, these historic structures like a lot of the structures in Hanapepe or in Waimea Town that are historic and pre-date the code. Currently, those structures are non-conforming, meaning they are not supposed to be repaired beyond fifty percent. If they are, they are supposed to be moved further back from the street line in some scenarios. Those are non-conforming right now and Form-based code is an attempt to normalize and bring them into conformance. Because what the Form-based code as being proposed in this section does in this section is, it looks at existing form and character of the town. Not only that we should preserve this, but we should allow it to continue in perpetuity and normalize it in our codes and also in a manner that celebrate it as what keeps the cohesive character and feel of the town. The Form-based code addresses non-conforming situations more than it does create non-conforming situations.

Chair Nogami Streufert: Okay. Any questions?

Mr. Ho: Kaaina, regarding Glenda's question about grandfathering. Grandfathering, here, would be granted as an entitlement that would stay with the plan or the deed forever. Or once the possessor of the land passes or sells it, the grandfathering drops?

Mr. Hull: No. So, grandfathering does not...an entitlement of a land use right runs with he lands, it doesn't run with the property owner. So, any entitlement a property has regardless of it

being sold. It runs with the land. When it comes to grandfathering, what grandfathering means specifically, is when you have a new code that prohibits a type of activity or structure that existed pre-code? So, let us say, Waimea Town, we adopted the Comprehensive Zoning ordinance from 1972, and it requires a ten-foot front yard setback. Some of those properties in Waimea town some of those structure was built before 1972 and they were built right up to the property line. So, when the 1972 ordinance was adopted it prohibited that active, but the structure existed prior to the new set-back then it can be grandfathered in because it is considered non-conforming status. It does not conform but it's legally non-conforming.

Those property rights run with the property itself, right. You have in Waimea, property that is are street frontage property that violates the ten-foot setback. Whoever buys that property can still maintain that non-conforming structure in perpetuity. The flip is what is going on with the proposals we have going on right now. We are recognizing in our Form-based code that we should not prohibit street-frontage design even just from a fairness standpoint. Even from a Planning perspective, street-frontage in the commercial areas is far more conducive to synergistic economic activity and revitalization. So, we are saying no, what they built in the 1940's and 1950's actually are very appropriate fort town cores, so let us go back and change the code to actually say these things are legal. Does that make sense? Or am I just talking in the air?

Chair Nogami Streufert: It makes sense. But it seems that is one case I could easily agree with right now. I cannot think of any that I would not agree with right now. Is there another alternative to this for these structures to ask for permission for non-conforming structure as opposed to doing a blanket thing when we do not know about what other kinds of non-conforming would fit under this? I mean, this is a blanket over everything, right. If they came in separately and asked for non-conforming, they would do the same thing and it would be more work for everybody as I understand.

Mr. Hull: You do not have to get permission for a non-conforming structure. Whenever a law is adopted and it puts an existing structure into non-conformity, just by the date that structure was constructed, it is legally allowed to exist. Does that make sense?

Chair Nogami Streufert: Yes. Any other questions? Are you asking for a deferral?

Mr. Hull: I am asking for a deferral, but Chair, just to double check, I will ask if anybody who has called in, we have three or four numbers who have called in. Is there anybody online who called in that would like to testify on this agenda item? Seeing none. If the Commission has no further questions, the Department is asking for a deferral of the agenda item and public hearing to May 26, 2020.

Ms. Apisa: I move that we defer this to May 26, 2020 Meeting.

Ms. Cox: I seconded.

Chair Nogami Streufert: It's been moved and seconded that this deferred of the Zoning Amendment ZA-2020-7, to the May 26, 2020 Meeting. Any discussion? Let us do a roll call on this one.

Mr. Hull: Roll call. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

Chair Nogami Streufert: This has been deferred to the May 26, 2020, Meeting.

> Zoning Amendment ZA-2020-12: ZONING MAP AMENDMENTS: ZM 200 Hanapepe. A bill for an ordinance to rezone portions of ZM 200 Hanapepe from "Agriculture District" to "General Industrial District." The district will ensure that the historic industrial uses in the area that supports agricultural processing and product development are able to continue in perpetuity = *County of Kauai, Planning Department.*

Mr. Hull: Next we have Agenda Item 3.b., Zoning Amendment ZA-2020-12: Zoning Map Amendments: ZM 200 Hanapepe. A bill for an ordinance to rezone portions of ZM 200 Hanapepe from "Agriculture District" to "General Industrial District." The district will ensure that the historic industrial uses in the area that supports agricultural processing and product development are able to continue in perpetuity. The County of Kauai is the applicant. We have a supplement for this agenda item as well Supplement No. 1., and a Director's Report.

Again, this is something we will be asking for a deferral. Quite honestly, we don't anticipate any changes

to this proposal and in a nutshell just looking at the industrial mill uses currently occurring at this property, and recognizing that it be zoned "industrial" to reflect the appropriate uses as well as to ensure the continued use of industrial activities out there. While we are asking for a deferral at this point, we do not have any recommended changes. If you have any questions, the Department is available to you.

Ms. Apisa: What would be the purpose of the deferral? You have nothing to add.

Mr. Hull: The only reason and if you folks wanted to take action on it, that is appropriate as well. It was just the thinking that when the West Kauai Community Plan is packaged, we packaged it as a whole group and transmited it to Council. So, for the most part all the zoning amendments that are accompanying legislation as part of the policies being recommended on the West Kauai Community Plan. At this time, we are not looking at any amendments on the Departments side, but we think it may be prudent to act as a whole with all the amendments and the West Kauai Community Plan. That is what we are recommending, but it's not a hold that is hard and fast. If you folks are ready to move and get it off the docket, that is fine as well.

Ms. Apisa: It makes sense to submit it all as one package, I agree.

Chair Nogami Streufert: When it says, "General Industrial District." What kind of industry is allowed? Or not allowed? [Inaudible]... any kind of industrial activity is approved.

Mr. Hull: No. It essentially aligns with the Comprehensive Zoning Ordinances General Industrial District, which has specific types of uses that are out right permissible [inaudible] that require a use permit [inaudible], the property.

Chair Nogami Streufert: You were breaking up so. I understood and what I heard was that anything over one acre would still have to come in for approval. Is that correct?

Mr. Hull: [Inaudible] Planning Commission. Am I breaking up?

Chair Nogami Streufert: Yes. There was some breaking up at least on my end there was some breaking up. I do not know about others.

Mr. Hull: I am going to call in on a separate phone [inaudible]—

Chair Nogami Streufert: Is there anyone else having a problem? If it is only me than—

Ms. Cox: Yes, he is breaking up.

Chair Nogami Streufert: Do we need to take a break for anyone or recording or new tape or anything like that?

Ms. Otsuka: Maybe we can make this motion first.

Chair Nogami Streufert: Okay. We will take a break after this for about ten minutes. Does that work for everyone?

Ms. Otsuka: Yes.

Ms. Cox: Yes.

Chair Nogami Streufert: A break is a good idea.

Mr. Hull: Hello. This is Kaaina. Hey folks, it is Kaaina checking in. Can you folks hear me?

Ms. Cox: Yes. We can hear you or at least I can.

Chair Nogami Streufert: Yes. Everyone else? Roy can you hear?

Mr. Hull: Hi folks, this is Kaaina. Can you hear me?

Mr. Chiba: This is Mel. Yes, I can.

Mr. Hull: Okay. Let me get my agenda back. So, what I was saying about the Hanapepe bill, hold on folks I am going to try to set my computer so you can still see me. If you want to see me, click on the participants and you pin my video you can see me talking on the computer, but the voice is going through the phone system. Chair, I am just going to continue if that is okay with you.

Chair Nogami Streufert: I muted myself. Yes, please.

Mr. Hull: Okay. I believe we are in the "General Industrial District" section. So, what I was saying was it was just aligning the General Industrial District from the Comprehensive Zoning Ordinance to have that Zoning District overlaid on the expanded mill site where the existing industrial operations are occurring, and have for decades. The purpose of that is to get to allow these Uses to continue in perpetuity. There are series of uses listed and are outright permissible, such as warehousing or telecommunications facilities, there are other uses that require a Use Permit. As I was saying, this property is over one acre in size and one of the General Industrial Requirements is any new structures or uses of a substantial size, must go before the Planning Commission for review. The Commission would still be reviewing the vast majority of new uses being proposed there.

Chair Nogami Streufert: Are there any other questions?

Ms. Cox: So, Kaaina. Yes, I have a question. Does that mean if you have some real high tech but dirty industry, but it did not need an acre; it would just automatically be allowed in this district?

Mr. Hull: No. There is certain...hold on a second and let me see if can pull up...there are certain uses that are outright permissible. Like a nuclear power plant or any power facility, requires a Use permit even in the Industrial District to ensure compatibility. The General Industrial District are created, for those types of noxious and offensive uses that can be a nuisance when located within or directly adjacent to say, a residential or commercial zoning

district. However, it is not a carte blanche do what you want. There are still several uses that are listed that require Use permits and if it is not explicitly listed as generally permissible, and then it has to get a Use permit.

Ms. Cox: Okay, thanks.

Chair Nogami Streufert: Are there any other questions for the Planning Department or for Kaaina? If not, Chair will accept a motion to defer or to accept.

Ms. Apisa: I move that we defer Zoning amendment ZA-2020-12, Zoning Map Amendments to our May 26, 2020, Meeting.

Ms. Cox: I second the motion.

Chair Nogami Streufert: It has been moved and seconded that we defer Zoning amendment 2020-12, to the May 26, Meeting. Any discussion? If not, could we have a roll call vote, please?

Mr. Hull: Roll call. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

Let me just ask for transparency sake. Is there anybody on the line that is from the member of the public that would like to testify on this agenda item? Seeing none.

> Zoning Amendment ZA-2020-10: ZONING MAP AMENDMENTS: ZM 200 Hanapepe. A bill for an ordinance to establish a zoning district called "Plantation Camp" under Kaua'i County Code Chapter 8, known as the County of Kaua'i Comprehensive Zoning Ordinance. The district will ensure that the use of these historic plantation camps can continue in perpetuity by allowing the continued use, maintenance, repair, and rebuild of existing structures to occur. Portions of ZM 200 Hanapepe will be amended to "Plantation Camp" = *County of Kauai, Planning Department.*

Mr. Hull: I think it is appropriate to move on to the next Agenda Item, Madame Chair. Which is Zoning Amendment ZA-2020-10: Zoning Map Amendments: ZM 200 Hanapepe. A bill for an ordinance to establish a zoning district called "Plantation Camp" under Kaua'i County Code Chapter 8, known as the County of Kaua'i Comprehensive Zoning Ordinance. The district will ensure that the use of these Historic Plantation Camps can continue in perpetuity by allowing the continued use, maintenance, repair, and rebuild of existing structures to occur. Portions of ZM 200 Hanapepe will be amended to "Plantation Camp." The County of Kauai Planning Department is acting as the applicant. On this agenda item you have a Supplement No. 1 to the Director' Report pertaining to this matter.

Chair Nogami Streufert: Before we get into this, we thought we would take a 10-minute break.

Mr. Hull: Absolutely.

Chair Nogami Streufert: Let us take a (10) minute break and we will be back her at 10-after 11:00 o'clock. Does that work for everyone? Perhaps you could stretch your legs and get something to drink if you want to?

Ms. Cox: Yes.

Ms. Otsuka: Yes.

The Commission recessed this portion of the meeting at 11:01 a.m.

The Commission reconvened this portion of the meeting at 11:21 a.m.

Chair Nogami Streufert: The meeting back to order. We are now on ZA-2020-10.

Mr. Hull: For technical purposes, we will do the roll call again. Commissioner Apisa.

Ms. Apisa: Here.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Here.

Mr. Hull: Commissioner Cox.

Ms. Cox: Here.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Here.

Mr. Hull: Commissioner Ho.

Mr. Ho: Here.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Here.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Here. So, we are discussing Zoning amendment ZA-2020-12

Ms. Otsuka: No. 10.

Mr. Hull: We are on ZA-2020-10 now for the Plantation Camp.

Chair Nogami Streufert: Okay. Got it. We have already deferred ZA-2020-12.

Ms. Otsuka: I feel it makes perfect sense to package these Amendments together and present it to the Council as one package. It makes sense to me.

Chair Nogami Streufert: Are you talking about all of them or are you talking about ZA-2020-12 or ZA-2020-?

Ms. Otsuka: I believe ZA-2020-12, ZA-2020-10, ZA-2020-09, and ZA-2020-11…I think the Westside Kauai, is that correct Kaaina.

Ms. Apisa: There is No. ZA-2020-08, also.

Ms. Otsuka: No. ZA-2020-08, Yes.

Ms. Apisa: ZA-2020-13 and ZA-202-15.

Ms. Apisa: ZA-2020-14 and ZA-2020-15 are New Public Hearings. Can they be mixed in with the Continued Public Hearings?

Ms. Otsuka: Deferral?

Mr. Hull: We can go for a deferral on ZA-2020-14 and ZA-2020-15 as well. ZA-2020-14, we need a deferral because we still are working on the Shore Line Setback Ordinance. However, ZA-2020-15 is another issue.

Chair Nogami Streufert: Can we discuss them all at the same time? Or do you want us to discuss them separately?

Mr. Hull: If there is discussion for the purposes of Roberts Rule and still maintaining a record, I think it would be appropriate to still do it by each agenda item. But after each agenda item if there is no desire to discuss it. I do not want to belabor this longer than it must be.

Chair Nogami Streufert: All right, let us just do ZA-2020-10, right now, which is the Plantation Camp.

Mr. Hull: I had given a presentation on the Plantation Camp multiple times. Again, it is just to preserve the ability for these homes to be re-constructed or repaired because right now, they are all non-conforming structures that need to be repaired up to fifty (50) percent. So, that is the purpose of it is to preserve the camps as they have been and exist today. If you have any questions, I am open other than that we will be asking for a deferral.

Chair Nogami Streufert: Are there any questions for the Planning Department. I still have one concern right now. I like the concept of a Plantation Camp, but what happens to the current residence? More than fifty (50) percent of repairs must be done for getting this, they may be displaced. Is there any way to ensure that we do not displace these people permanently? I do not know how many there are, but it does not matter whether it is five (5) or fifty (50), it is still more people that will be displaced if we did that. Or is there some way to ensure that they do not get displaced?

Mr. Hull: Yes. I think Chair, that, that is an absolute valid concern. Jodi was looking into that before we fell into the COVID-19 crisis. So, I will say unfortunately that kind of analysis had gotten put on the back burner. I do not have an answer. We do not have answer for you today, but we will have one come May 26.

Chair Nogami Streufert: Thank you. Anyone else with a questions or comments or discussions? If not—

Ms. Otsuka: I would like to make a motion.

Chair Nogami Streufert: Please.

Ms. Otsuka: I move to defer Zoning Amendment ZA-2020-10, to the May 26, Meeting.

Ms. Cox: I will second that.

Chair Nogami Streufert: It has been moved and seconded to defer Zoning Amendment ZA-2020-10 to the May 26, Meeting. Is there any discussion?

Mr. Hull: Before you go into that mode, Madame Chair. I would ask that maybe you suspend the rules being that we have a new caller that called in to see if that caller or any of the callers would like to testify on this agenda item.

Chair Nogami Streufert: Okay.

Mr. Hull: So, Ms. Diamond as well as anybody else that has called in on the public phone line. We are currently on agenda item G.3.c. which is a Zoning Amendment ZA-2020-10, concerning the creation of the Plantation Camp Zoning District. Does anybody that called in desire or want to speak on this agenda item? Seeing none. I think it would be appropriate to move forward for a deferral, Madame Chair.

Chair Nogami Streufert: Okay. It has been moved and seconded that we defer Zoning Amendment ZA-2020-10, to the May 26, Meeting. Any discussion? If not, could we have a roll call vote, please?

Mr. Hull: Roll call. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

Zoning Amendment ZA-2020-9: ZONING MAP AMENDMENTS: ZM-K 100 Kekaha, ZM-W 100 Waimea, ZM-H 200 Hanapepe-Port Allen-'Ele'ele, and ZM 200 Hanapepe. A bill for an ordinance to establish a special treatment district called "Special Treatment - Coastal Edge" under Kaua'i County Code Chapter 8, known as County of Kaua'i's Comprehensive Zoning Ordinance. The district will ensure that development within applicable areas is constructed in a manner that safely mitigates impacts from coastal hazards, including but not limited to sea level rise, coastal erosion, high wave run-up, passive flooding, and an increased frequency and intensity of storms. Portions of ZM-K100 Kekaha, ZM-W 100 Waimea, ZM-H 200 Hanapepe-Port Allen-'Ele'ele, and ZM 200 Hanapepe will be overlaid with "Special Treatment - Coastal Edge" = *County of Kauai, Planning Department*

Mr. Hull: The next Agenda Item is Zoning Amendment ZA-2020-9: Zoning Map Amendments: ZM-K 100 Kekaha, ZM-W 100 Waimea, ZM-H 200 Hanapepe-Port Allen-'Ele'ele, and ZM 200 Hanapepe. A bill for an ordinance to establish a special treatment district called "Special Treatment - Coastal Edge" under Kaua'i County Code Chapter 8, known as County of Kaua'i's Comprehensive Zoning Ordinance. The district will ensure that development within applicable areas constructed in a manner that safely mitigates impacts from coastal hazards, including but not limited to sea level rise, coastal erosion, high wave run-up, passive flooding, and an increased frequency and intensity of storms. Portions of ZM-K 100 Kekaha, ZM-W 100 Waimea, ZM-H 200 Hanapepe-Port Allen-'Ele'ele, and ZM 200 Hanapepe will be overlaid with "Special Treatment - Coastal Edge," The applicant is the Countyof Kauai. There are two (2) Supplement to the Director's Report pertaining to this matter.

In brief, another zoning amendment we have discussed and presented to this body a number of times, in a nutshell, the Department was originally looking at this coastal hazard area that lies between the ocean and some public infrastructure and recognizing the hazards that it is subjected to. Looked at down zoning all these properties to the Open Zoning District. After discussing with property owners, community members, and policy makers the Department pulled back from a full down zone to the Open District to just putting an overlay saying that, any construction of new structures shall be able to address and or mitigate the hazards that the property is subject to. The hazards that the property is subjected to, as well as going through a public hearing process before the Planning Commission to ensure that the structure does not negatively impact with other properties when [inaudible] in the hazard mitigation. The Planning Commission has received several testimonies concerning this Zoning Amendment, with some property owners objecting to the proposal. The Department has met several times with those property owners, as well as with those that testified. Ultimately, the Department is still holding to its recommendation to adopt this Special Treatment Coastal Edge District.

Chair Nogami Streufert: Are there questions for the Director, Planning Director?

Mr. Ho: One, Glenda.

Chair Nogami Streufert: Yes.

Mr. Ho: Kaaina. This bill will not affect salt makers of Hanapepe in anyway, they are still protected?

Mr. Hull: This bill does not create any zoning layer across the salt beds of Hanapepe. It does look at some properties in the Hanapepe Bay that maybe affected by hazards, but no the salt beds themselves.

Mr. Ho: Thank you.

Ms. Apisa: Just a comment. It seems to make sense because I cannot imagine building in an area that is likely to be destroyed by global warming or rising tides.

Ms. Cox: I agree.

Chair Nogami Streufert: The only problem about this is there are a couple of people apparently owns some land there and they were planning on building. They are aware [inaudible] of these issues and they are willing to mitigate. Are they grandfathered in? Or do they still have the right to do that? Or are they subject to the new rules?

Mr. Hull: Yes. So, some of the real strong objections that came from property owners was in the original proposal that the Department had. Which was to down zone properties to say, you can only build one residential structure, if you have one it will be grandfathered in, but you cannot build no more. So, in that scenario, indeed, if they are already had a residential structure there, they could not build another one. Therefore, there was some strong consternation and objection to that. Jodi, herself, dealt with many of those phone calls. Ultimately, though, we did not move forward with that proposal. The proposal before you folks is not to take away any ability to build or to take advantage of density. So, say if a property enjoys a right to four dwelling units and they only constructed one of them, they can still construct the other three. In constructing them, they need to be able to address the various hazards that the property is subjected to.

So, when you look at say, for example, the Sea Level Rise Exposure Area Map there is three data points on that map. One, being the erosion line, being passive flooding, and one being high wave run-up. The erosion line as one data says, within this century and really within fifty or sixty years, the ocean will be here, that is where the ocean will be in perpetuity. And so, if somebody's proposing to build a structure that is makai of that line, that is where this ordinance will say no, no, no you must move it outside of that line. The life span of a building is between 70 and 100 years, so it is within the horizon of the Sea Level Rise Exposure Area Map timeline. So, it just saying move it out of there, but you can still construct it. The other side is, perhaps there is no erosion line that is affecting a property, but the Sea Level Rise Exposure Area Map says within the next 50 or 60 years, your property will be subject to passive flooding or high wave run-up.

The analysis that those maps do can provide depths for either the wave run-up for passive flooding. So, the ordinance essentially says, you can still build in these places subject to high wave run-up, but we need to construct it in a manner that the structure can accommodate that high wave run-up. So, if you are looking at in the next 30 or 40 years, of once a year on average

2 to 3-foot-deep wave running up into your property it does not take away your development rights. However, it says, you are going to have to construct at let us say 5- or 6-feet elevation propped up to accommodate for that high wave run-up.

Mr. Ho: Question, please. If you are a property owner that is there presently, and you are within that area, and you want to bunker up. Can you begin construction on probably a seawall? Alternatively, if you are in that area, could the County say if you are in that area and you do not comply, you would build at your own risk?

Mr. Hull: So right now, under the existing Shoreline Setback Ordinance, you really cannot build a seawall. There is a prohibition on private construction of seawalls on Kauai. Primarily Commissioner Ho, it goes to the fact that it has been demonstrated wholly that when you construct a seawall to stop erosion on one beach, all that it will do to the littoral drift and the currents is create erosion on somebody else's beach. Therefore,, that is way that prohibition has been put in place. As far as constructing at your own risk, there is a Shoreline Setback Ordinance proposal that is on this agenda that actual is looking at putting that in there and saying, indeed, amongst other things that you will be aware of these hazards [inaudible] but also here is the regulations. Moreover, I will be honest. To a certain degree, these construct at your own risk clauses help, and maybe Nick and Jodi can chime in. However, they kind of help in some legal scenarios where we might be sued for permitting them. They still sue us though, and on top of which the language is embedded within hundreds if not thousands of documents that the buyer has to go through.

Whether or not they see it, we are not sure. However, what we find in many cases, with coastal properties, is there are some coastal properties admittedly so, on west Kauai that are still within the hands of local families and serve a housing inventory propose. The vast majority, of coastal properties on Kauai now, turned into the speculative market. Whereby, the closer you can get to the ocean, the more money you can get on a global speculative market because that is where the most money turns. And so, a lot of times because of the demand and the way the global speculative market works to the shoreline, the County gets stuck in having to deal with these issues and new nuisances and hazards as the ocean gets closer to these structures. Does that make sense? Sorry.

Chair Nogami Streufert: Yes. Is there any way to prevent any liability to the County?

County Deputy Attorney Nicholas Courson: There is no absolute way. We have deep pockets, so people are inclined to sue us, I mean relatively deep pockets compared to your average person. We can always take that step to try to mitigate it. Build at your own risk is better than nothing. Not allowing things in some cases, maybe better than nothing, but we might be sued for that, that is considered a [inaudible] as well. It is just a nuanced approach. I agree with what Kaaina said, and yes, we take each situation individually and make our best decision. You do not have to worry about finding some alternate way because it does not exist.

Chair Nogami Streufert: Thank you. Okay are there any other questions or discussion? If not, are you seeking defer this also to the—

Mr. Hull: Yes. And I will also ask being there is no further questions for the Department if there is anybody that has called in from the public that are on the phone line. Is there anybody from the public that would like to testify on this agenda item?

Ms. Karen Diamond: Aloha. This is Karen Diamond. I just have a few comments on the discussion if I may.

Chair Nogami Streufert: Please.

Mr. Hull: And Karen. This is Kaaina. We are keeping to the Commission rule so, we are still going to limit testimony to three minutes just so that you are aware.

Ms. Diamond: That is fine; I will not be that long. I just want to say I do support this and just want to highlight how important it is to make the regulations be strong. You know we have coastal hazards are not new, but they are increasing. It is the job of the County to make the regulations and protect not only the current homeowner, it is not about allowing or making somebody build. But having the proper regulations in place so that homeowners who are building, who then become developers and sell it right away to some other unsuspecting person, does not get stuck with these structures that are poorly located. So that is where I see the County's ability come in and make regulations that make sense. Being closer to the ocean on Kauai especially in many of our high wave dynamic areas have never been a smart thing to do. Moreover, after the tsunamis in 1946 and 1957, people all knew and it did not have to be a law, but people knew that it was incumbent on them to build as far back as they can and not as close to the ocean. And so, only people who have not been here very long endeavor to build closer to the ocean. I do encourage the County to put in waivers, not waivers but liability things that people must sign so that the County is not liable for people's decisions to build to close. Thank you and I look forward to working on the coastal issues. Thank you.

Mr. Hull: Thanks, Karen. Does any Commissioners have any questions for Ms. Diamond?

Chair Nogami Streufert: No. But, that brings up a good point, Kaaina. This Coastal Edge Overlay is only for Hanapepe and the West side. This is an island wide issue. Are there plans to increase this so that the entire island is covered by this?

Mr. Hull: Yes.

Chair Nogami Streufert: I am talking about the west side plan right now, but in terms of a consolidated plan for all of Kauai.

Mr. Hull: Yes. So, the proposal while it was an initiated because of resiliency discussions with the community concerning west Kauai. The actual Amendment is not to Chapter 10, the West Kauai Community Plan. The Amendment is to Chapter 8, of the Kauai County Code, which is the Comprehensive Zoning Ordinance and applies island wide. So, it is a district that can be applied to other Coastal Areas. We have not gone through the public vetting process and outreach process as well as analysis for the other beaches and coastal areas. But the Draft Ordinance before you is twofold, It creates the district as a whole for the whole island, but then

it also identifies these specific lots in Kekaha, Waimea, and Hanapepe that are vulnerable to these hazards and recommends approvals. So, if you and Council approve it. It one, creates the district and two, it designates certain properties into that district. But in the future should it be determined that there are other properties where it will be appropriate to put this newly created district over them, the County could do so.

Moreover, quite honestly, many things are up in the air as far as what the County will be focusing on in the next few or several years. A lot of it is going to be on the economic rebuilding of our island once the COVID-19 crisis it over. Right now, the focus is very much on the COVID-19 crisis, but once that it over, it is going to be several years of focusing on economic revitalization. What I can say, we had already cued up to anticipate still being a part of the process in the next year or two spinning up an island wide resiliency plan and that, it would be appropriate to begin looking at other properties that might be appropriate to put in this Coastal Edge Zoning District.

Ms. Cox: Kaaina. Just a comment that in my head those two are not mutually exclusive. In other words, the economic recovery should be inclusive of the fact that we need to deal with new realities of resiliency.

Mr. Hull: Yes. I would take that very much to heart Commissioner Cox, in that Marie and her team where almost...pretty much ready to move on the scope of work as resiliency was concerned, which much of the focus being on sea level rise and climate change. Not the only focus as there are other issues be it tsunamis and what have you. But that was the bulk of the focus. Marie and her team have begun taking a step back, looking at the new crisis we are in and actually having to make readjustments to the scope of work to the Resiliency Plan to encapsulate a Post-Covid-19 world that deals with pandemics at the forefront. As well as [inaudible].

Ms. Cox: Yes. Good.

Mr. Hull: Thank you.

Chair Nogami Streufert: Are there any other questions or comments?

Mr. Ho: Kaaina.

Mr. Hull: I would just ask to [inaudible] is there any other member of the public who has called in that would also like to speak on this agenda item. Seeing none. Madame Chair, is there any further discussion? If not, the Department would recommend deferring.

Chair Nogami Streufert: Do I hear a motion?

Ms. Apisa: I move that we defer Zoning Amendment ZA-2020-9 to our May 26, Meeting.

Ms. Cox: Seconded.

Chair Nogami Streufert: Okay. It has been moved and seconded that we defer Zoning Amendment ZA-2020-9 to the May 26, Meeting. Any discussion? If not, could we have a roll call vote, please?

Mr. Hull: Roll call. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

> Zoning Amendment ZA-2020-11: ZONING MAP AMENDMENTS: ZM-H 200 Hanapepe-Port Allen-'Ele'ele. A bill for an ordinance to overlay a portion of ZM 200 Hanapepe-Port Allen-'Ele'ele to "Special Treatment-Public." The District will recognize the Port Allen Airport as a unique public facility used for the public and quasi-public airport use at a significant location. The District will require additional performance and procedural requirements to ensure. Critical or valuable social or aesthetic characteristics of the environment or community that exist in the same area are addressed and protected= *County of Kauai, Planning Department*

Mr. Hull: The next Agenda Item is G.3e. Zoning Amendment ZA-2020-11: Zoning Map Amendments: ZM-H 200 Hanapepe-Port Allen-'Ele'ele. A bill for an ordinance to overlay a portion of ZM 200 Hanapepe-Port Allen-'Ele'ele to "Special Treatment-Public." The District

will recognize the Port Allen Airport as a unique public facility used for the public and quasi-public airport use at a significant location. The District will require additional performance and procedural requirements to ensure critical or valuable social or aesthetic characteristics of the environment or community that exist in the same area addressed and protected. The County of Kauai, Planning Department is the applicant.

Concisely, this looks at the public facility, the Burns Field Air Strip located near Hanapepe and Port Allen that is currently under the purview of the Department of Transportation airports Division. It is standard to have public facilities in this district. To ensure any proposals that are done on that public facility are done so in a manner that is compatible with its adjacent neighbors or surrounding properties. So, the Department is recognizing that it is appropriate to have this overlay on this property and we have notice from Department of Transportation Airports of this draft. However, we have not received any comments.

Chair Nogami Streufert: So, does this apply to any future development that might be happening in that area? It may not be with airports but it maybe something else, how does that work? Or is this just strictly for the airport?

Mr. Hull: It is primarily for the airstrip area. And so, any future development that the Department of Transportation Airport will have to put in there...it does not stop it, it does not outright permit it. It just says it must go through a public hearing process.

Chair Nogami Streufert: Is there any other land within the area we are looking at here that is not covered by the airstrip?

Mr. Hull: No. This is focused on the airstrip area.

Ms. Cox: This is acknowledging than that that airstrip is going to stay and continue to be used. Correct. I thought that there was some question about that.

Mr. Hull: Yes and no. It does not acknowledge that it is going to be there in perpetuity, I think that Department of Transportation Airport made that public statement. However, if they chose to remove their airstrip, the Department would be completely amenable to removing the overlay for public facilities being that the public facility would not be there anymore. But if it is there, we do feel it is appropriate that they have that overlay to ensure compatibility with their neighbors.

Ms. Cox: Okay, thank you.

Chair Nogami Streufert: Are there any other questions? Is there anyone from the public who would like to say anything?

Mr. Hull: Is there anyone that has called in from the public that would like to testify on this agenda item? Hearing none. Madame Chair, the Department would recommend deferring the agenda item and public hearing to May 26, 2020.

Ms. Apisa: I move that we defer Zoning Amendment ZA-2020-11 to our May 26, Meeting.

Ms. Otsuka: Seconded.

Chair Nogami Streufert: Okay. It has been moved and seconded that we defer Zoning Amendment ZA-2020-11, to the May 26th, Meeting. Any discussion? If not, could we have a roll call vote, please?

Mr. Hull: Roll call, Madame Chair. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

> Zoning Amendment ZA-2020-8: A bill for an ordinance to implement the West Kauai Community Plan, which is an update to the Hanapepe-'Ele'ele Development Plan and the Waimea-Kekaha Development Plan, and includes the communities of Kekaha, Waimea, Hanapepe, 'Ele'ele, and Kaumakani. The proposed ordinance will amend the General Plan, Chapter 7 of the Kauai County Code, to establish region-specific guidance and land use map changes for the West Kauai region including the Hanapepe-'Ele'ele Planning District and the Waimea-Kekaha Planning District. Amendments include changes to provisional agriculture, provisional resort, plantation camps, and other policies as they pertain to the West Kauai Community

Plan. The amendment also updates the preliminary community planning guidance for the Waimea-Kekaha and Hanapepe-'Ele'ele planning districts = *County of Kauai, Planning Department.*

Mr. Hull: The next Agenda Item is G.3f. Zoning Amendment ZA-2020-8: A bill for an ordinance to implement the West Kauai Community Plan, which is an update to the Hanapepe-'Ele'ele Development Plan and the Waimea-Kekaha Development Plan, and includes the communities of Kekaha, Waimea, Hanapepe, 'Ele'ele, and Kaumakani. The proposed ordinance will amend the General Plan, Chapter 7 of the Kauai County Code, to establish region- specific guidance and land use map changes for the West Kauai region including the Hanapepe-'Ele'ele Planning District and the Waimea-Kekaha Planning District. Amendments include changes to provisional agriculture, provisional resort, plantation camps, and other policies as they pertain to the West Kauai Community Plan. The amendment also updates the preliminary community planning guidance for the Waimea-Kekaha and Hanapepe-'Ele'ele Planning Districts. The County of Kauai, the Planning Department is applicant and there is one Supplement to the Director's Report.

In a nutshell, when the General Plan was updated in 2018, there were two very controversial issues that arouse. One was the lands east of Part Allen and the potential for it to go on to residential and some commercial uses. As well as lands west for the Kekaha side of the Waimea Plantation Cottages and whether the resort designation be expanded. In the General Plan, it deferred to the West Kauai Community Plan to make that determination. We have worked with the community and the recommendation is that the Provisional Agricultural not be converted to residential and that it be maintained in agriculture. And that the provisional resort be indeed, converted to resort designation with the stipulation that any expand at resort development will be keeping with the farm and character of the Plantation Cottages, existing plantation cottages. There is also a recommendation to include the Plantation Camp designation in the General Plan as well to reflect the Plantation Camp Zoning Amendment was reviewed earlier.

Chair Nogami Streufert: Does anyone have any questions or the Planning Department? Donna, I cannot hear you. Do you have it muted?

Ms. Apisa: Yes, I have unmuted now. Kaaina, remind me, I know Provisional are a new thing. Could you remind me, and some of the members, what "Provisional" means?

Mr. Hull: Yes. Why don't I defer... she has been a little quiet and just of watching? Why do not I just defer that to Marie to answer? If I could, Marie?

Lead Staff Planner Marie Williams: Hello.

Chair Nogami Streufert: It is good to see you.

Ms. Williams: Chair and Commission. Just to take you back to the General Plan process. It was adopted 2018. So, about three years ago, the Commission undertook the review of the General Plan Update, and if you can recall there were several areas of great concern. On the future Land Use Map for the General Plan and what and what that map is, it is not a zoning map. It is basically, a higher-level conceptual plan for where new growth, new development, and new change could occur. So, there was areas where there was not agreement. We realized that we might have to wait for a community process to determine whether it was appropriate to amend

the General Plan to support growth and change in these areas. And those two areas were the Provisional Agricultural Area 1200 acres going east [inaudible] and east of Port Allen. Also, the 60 acres resort directly adjacent to the Plantation Cottages in Waimea are, and so the General Plan set up a process saying, we are not making a call one way or the other right now. It will be left to the West Kauai Community process. So, we feel that we were able to go out and do our process, make a call and just as Kaaina said, one, is for the Provisional Agriculture Area, remove that Provisional designation and [inaudible] in the Ag. District. Meaning no growth, no development there, and again, for the resort area that it would be appropriate to consider resort as long as they are in keeping with the existing character and scale that the Plantation Cottages property. So, what this amendment would do is go back to the General Plan and amend it to remove any confusion. Because we do not want to keep having a General Plan that talks about a process that has already been completed.

Chair Nogami Streufert: Are there anyone questions for Ms. Williams? Okay. The Department is asking for a deferral on this. Or is this asking for an action?

Ms. Williams: A deferral.

Ms. Apisa: Thank you Marie for your explanation and I move that we defer Zoning Amendment ZA-2020-8 to our May 26, Meeting.

Ms. Otsuka: Seconded.

Chair Nogami Streufert: Okay. It has been moved and seconded that we defer Zoning Amendment ZA-2020-8, to the May 26th, Meeting. Any discussion? If not, could we have a roll call vote, please?

Mr. Hull: Roll call, Madame Chair. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

New Public Hearing

Zoning Amendment ZA-2020-14: A bill for an ordinance amending Chapter 8, Kauai County Code 1987, as amended, relating to Comprehensive Zoning Ordinance (CZ). The proposal amends Section 8-27 of the CZO relating to Shoreline Setback and Coastal Protection = *County of Kauai, Planning Department.*

Mr. Hull: Next agenda item is 4.a., New Public Hearing Zoning Amendment ZA-2020-14: A bill for an ordinance amending Chapter 8, Kauai County Code 1987, as amended, relating to Comprehensive Zoning Ordinance (CZ). The proposal amends Section 8-27 of the CZO relating to Shoreline Setback and Coastal Protection. The County of Kauai, Planning Department.

In a nutshell, the several years ago, the County of Kauai adopted what is one of the most robust Shoreline Setback Ordinances in the Nation, that is based off of Historical Erosion Data. Which looks at the erosion dates of a given property, and formulary set-up a setback to ensure that erosion does not affect the lifespan of a structure. Every few years, the Planning Department is takes with updating the Erosion Rate Data, and in being more fine-tuned on the on the science, and then coming back to the Planning Commission and ultimately, to the County Council to adopt the new study. So, we had the study updated in 2018, it took some time to get it formatted, but the primary propose of the proposal is to get that study up dated by the legislative body by the act of Council.

There is also another series of amendments in here, where we are looking at fine-tuning some of our administrative requirements. As well as, looking at...we have noticed that there sometimes can be issues with property owners when they repair a structure and the repair goes through an analysis at the Public Works Division to ensure that it does not exceed fifty (50) percent of the assessed value of the structure. Which is the FEMA definition of repair. And seeing that sometimes those numbers would often be manipulated or sometimes fibbed, where we would come across it. Fifty (50) thousand and later it can be well beyond fifty (fifty) thousand dollars or value being put into a structure. So, reducing that analysis to fifty (50) percent thresholds to the thirty (30) percent thresholds. Those are the two biggest changes, essentially adopting the updated study. Sorry. As well as, looking at that repair threshold. We are still working with some community members to find tune other areas of the Draft Ordinance that Ms. Diamond is here calling in. The Department is amenable to some of the changes that she has recommended, and are working with her to get some of those amendments in. Some of them quite honestly, and Karen might testify that disagrees with where we are coming on some areas as well. And so, there are some things we agree on, and some things we disagree on. Ultimately, we are asking for a little more time to be able to work with Karen and some others to bring in a few more amendments. I am available for questions.

Chair Nogami Streufert: Okay, this looks at lands that are eroding, potentially eroding. What about the lands that are accreting? Does the line stay where they are? Or does that move? And if it moves. What happened to the land in between?

Mr. Hull: The study looks at both land that are eroding and as well as accreting. So, under State Law, if your beach erodes, your property line moves with that shoreline mauka. Under State Law, not the County Law, but the according to State Law. If the shoreline moves makai, your property does not grow, that is, the State is still saying No that is our land if your shoreline was here in 1991 and in 2020, it has moved twenty (20) feet makai. The State will still assert no, no, that is still State Land. So, in a nutshell, that is how accretion and erosion are under State Law. As far as what the bill looks at, the formula that it sets up on the erosion base line.

Indeed, the more erosion you have the more robust of a setback you will have based on that formula. Because the formula is seventy (70) which is a lifespan of a structure, seventy (70) years multiplied by the erosion rate. So, if you have a foot of erosion a year, you have a seventy (70) foot setbacks. But then it adds on an additional forty (40) feet, which is the minimum State Law requirement, and then an additional twenty (20) feet, to accommodate for sea level rise. So, if you have one (1) foot of erosion rate, that is one times seventy (70) plus forty (40), which is hundred and ten (110), plus twenty(20) which is hundred and thirty (130), and that is the way that works on the erosion side.

On the accretion side, it will come out as sixty feet (60). [Inaudible] with some caveat, that there is a secondary formula in the bill that, if you have a deeper lot, more setback will be established based on your lot depth formulas. That is in line to a certain degree, with what we are talking about with the Coastal Edge, which is how we are handling dealing with coastal hazards in that: if your property can accommodate your structures being built further back from this hazardous area from the beach line, than that is where you should place your structure.

Mr. Ho: Kaaina, this ordinance that you are looking at, it applies to residential as well as commercial.

Mr. Hull: Correct.

Mr. Ho: I thought commercial was a little more stringent? Or stricter?

Mr. Hull: As for as this ordinance is concerned. It treats all structures residential, resort, or commercial the same. In that they will be impacted by those hazards. There are some flood laws that allow a little more resort development in flood areas then residential development, but that is not pertaining to this law.

Mr. Ho: Thank you.

Chair Nogami Streufert: Are there any other questions or discussions? If not, is there anyone from the public who would like to say anything else?

Mr. Hull: Just to reiterate what the Chair was asking. Is there any member of the public that called in to meeting and would like to testify on this agenda item concerning the Shoreline

Setback Ordinance?

Ms. Diamond: Aloha. This is Karen Diamond. I would like to testify, thank you.

Chair Nogami Streufert: Go ahead.

Ms. Diamond: Thank you. First, I want to say I support Kaaina's hard work on this Shoreline Setback Ordinance. It is difficult, and it has nuances that have s to be evaluated, and Kaaina has done a good job, but there is more work to do. So, I hope I can explain just a little bit. You know, the County's jurisdiction is with setback. You have the legal jurisdiction to set the setbacks, but the State has the jurisdiction ahead of you, which is the shoreline. Before you can set a setback. It has to setback from where? From where is the shoreline? And, that is where accretion and things like that come in.

For the State, accretion is a twenty (20) year build up, and so, after you have reached that you can apply for this State for accretion and things. But because the beaches are incredibly dynamic, you cannot find accretion based on one or two years. In the study, what is sometimes called accretion is not really accretion on the ground, and you can see that in places like Wailua Beach, where it was stated that it was accreting and a bike paths was put there. Of course, the long-term data, always said it was not accreting. It was eroding and accreting. Again, it is dynamic. And so, because our shorelines are so incredibly dynamic, it is really important that we actually have robust setback laws.

Kauai has some of the highest wave energy beaches in the world and you know, it is in our ordinances and it is in our best interest to make the ordinance clearer. Because we have some of the most beautiful beaches ever to protect. And what I think this ordinance still needs to do, is address not just coastal erosion, because we have so many other coastal hazards. The bill never used to only address erosion. I think it should go back addressing all the overlapping coastal hazards where we do not have separate ways to do a setback for a lots that we studied, and lots that were not studied, and lots that are on this shoreline or that shoreline; that we make it one paradigm. I so I hope that can happen.

There is still more work that needs to be done on the repairs. Because as Kaaina was saying, we have had several structures totally rebuilt where they built brand new houses. At least one of the cases, the ocean washes under that brand-new house and the improvements were $396,000.00, which is what passes for a repair. Although, we have the strictest most robust bill probably in the country, predominantly, it runs by exceptions. So, all most everybody gets an exemption, and the way this bill is written again, it even starts with an exemption. I think if we are going to do good legal construction, we are not going to start with an exemption. We are going to start with what the requirements are. I recognize there will be exemptions in it, but it does not have to be based on those exemptions. With that, I do look forward to working more to improve it, and to help make it more understandable, because I think everybody should be able to read the bill and understand it. And at the moment, it is really complicated and in places and ways where it does not need to be. I will thank you all for your attention our beaches are so important, even though I know you know that. Thank you.

Chair Nogami Streufert: Thank you, Karen. Any other discussion?

Mr. Hull: Sorry. Does any of the Commissioners have questions for Ms. Diamond?

Chair Nogami Streufert: I do not think I heard any.

Mr. Hull: Seeing no questions. I will double check, is there anybody else that has called in from the public that would like to testify on this agenda item? Madame Chair, the Department will be recommending a deferral to June 9th, 2020.

Chair Nogami Streufert: Do I hear a motion to defer to June 9th, 2020, or to take any other action?

Ms. Otsuka: I make motion to defer Zoning Amendment ZA-2020-14, to the June 9th, 2020 Meeting.

Mr. Ho: Second.

Chair Nogami Streufert: Okay. It has been moved and seconded that we defer Zoning Amendment ZA-2020-14, to the June 9th, Meeting. Any discussion? If not, could we have a roll call vote, please?

Mr. Hull: Roll call, Madame Chair. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

> Zoning Amendment ZA- 2020-15: A bill for an ordinance relating to Enforcement Legal Procedures and Penalties. The proposed bill clarifies the enforcement, Legal procedures, and penalties for violations of Kauai County Code 10 = *County of Kauai, Planning Department.*

Mr. Hull: And for the last hearing of the Agenda 4.b., Zoning Amendment ZA- 2020-15: A bill for an ordinance relating to Enforcement Legal Procedures, and Penalties. The proposed bill Clarifies the enforcement, Legal procedures, and penalties for violations of Kauai County Code Chapter 10. The County of Kauai, Planning Department Director's Report pertaining to this matter and we have a Supplement No. 1 to the Director's Report pertaining to this matter.

Ultimately, this does have some nexus with the West Kauai Community Plan. However, it also has nexus to other community plans and development plans that are currently in play. As we are all aware, Chapter 8, the Comprehensive Zoning Ordinance is the all-encompassing Zoning Ordinance Island wide it has island wide standards. Beyond Chapter 8, of the Kauai County Code the CZO, you have the development or the community plans that have additional standards.

Over the years, our Department has gotten I will say, particularly attuned and well a depth to enforcing mechanisms. Before, there was a lot of accusations and consternation towards the Planning Department for not enforcing upon the rules under our jurisdiction. A lot of that, took several years of working with the County's Attorney's Office and fine tuning our Enforcement bill where notices of violations are sent out, fines are levied, at times we go to court on these cases, and much credit is to our enforcement team who has been to bring it up to a whole other level over these past few years.

What we realized is that, while the laws are very clear on enforcement of the Comprehensive Zoning Ordinance. They are a little nebulous and not as thorough in detail for our Community Plan Standards. So, all this bill is doing is aligning our Enforcement Standard with Chapter 10. So, that when our enforcement team goes out there to regulate on the Community Plan Regulations, they have the same exact mechanism and teeth that they have in the Comprehensive Zoning Ordinance. That is, it in a nutshell. Jodi is our Planner on this if you have any discussion. I will ultimately, be asking for approval on this item. Like I said, it does have nexus with the West Kauai Community Plan, but it also just connects to a broader area. Therefore, if you folks are not comfortable, we would like to defer, that is fine as well. Ultimately, our recommendation is to approve. I am here for any questions or concerns.

Ms. Otsuka: This make sense to me.

Chair Nogami Streufert: A question. Should plans have the same force as regulations?

Mr. Hull: So, the plans themselves? No. When we look at the way, our various planning regimes are setup. You have the General, Plan that is those fifty thousand-foot policies and those are general guiding principles. With these, it is not our position that it should ever be that enforced with the two-fold of regulatory law. You cannot have the Community Plans which also are at a higher level…they are not at the fifty thousand, they are about at the twenty thousand

and they set guiding policies. Therefore, for the West Kauai Community Plan, there are a series of guiding policies concerning resiliency and community design, and economic development and all these things.

Indeed, those policies as well, should not be regulated to the full effect of law. However, what we are finding though is that, in the community planning process, towns and communities do not just want the full island wide treatment of regulations codified in the Comprehensive Zoning Ordinance. They have also asked for specific regulations that do have the teeth of law for their design and uses of their town core areas. So, South Kauai Community Plan has the Form Based Code, which are hard and fast regulations, that the community has asked for so that it does not necessarily get the cookie cutter CZO like the other parts of the island might get. So, in South Kauai, you have its Form Based Code that were intended to have the hard and fast rule of law.

In the West Kauai Community Plan, there is also a Form Based Code section, that has specific design parameters that there is a desire for those to have the hard and fast rule of law. At the same time, while we are saying we are saying we are doing some of these things. In a new response to a Community Plan Update process, Chapter 10 also has the North Shore Development Plan and East Kauai Development Plan Standards. East Kauai might actually be the most robust standards historically, and in that, it requires things like street frontage and awnings. Which is why Kapaa Town looks the way Kapaa Town looks. But those are Hard and Fast Standard, that we can get called upon, that we have to enforce and hold as a regulatory frame work, but we don't have the exact enforcement mechanisms should somebody chose to disobey that section of the law. Sorry, that was a long-winded response, but I hope...does that make sense?

Chair Nogami Streufert: Yes, it does. I just have concern with the different levels. The plan is still just a plan. It is not something that should really be enforced without considering how things change overtime. So, I'm just concern because this is based upon a plan and not upon regulations that we are trying to enforce, it may be counterproductive in the long run, because it is a plan, it is not something that was voted on by the Council necessarily. Not the specifics of that.

Mr. Hull: No. Ultimately, yes. Generally that is the way a plan works, but attached to that plan is going to be the Form Based Code, and so you, this body will vote on whether or not these design parameters and the Form Based Code, as well as the Council will determine whether or note that Form Based Code is specific regulations. The plan...if you break it down to the plan and its policies and the plan and its regulations. When the plans have generally, been adopted, they are at the policy level. Those policies say you should adopt these standards. What we have done [inaudible] update processes, is put the two together. Instead of just adopting the plan policies and then spending the next, two or three years trying to implement the regulations tied to those policies. We have come up with working with the community the policies, and because we have a captive audience saying, "Off those policies that we have done from you guys, are these the right design regulations as well?" Therefore, working with the community on that, is where we come up with Form Based Code. So, it shortens the implementation time, where a plan, you just adopt policies and spend the next several years implementing it piece meal. We have the implementation as connected to the plan as well. Does that make sense?

Chair Nogami Streufert: It does, but it also leads to less flexibility for the plan to be implemented I think. I am just a little concern about the plans. I understand what the perspective is that this shortens the whole thing from planning up to implementations and it puts certain kinds of enforcement standards in here. So, that is good, I like that, and I think that is useful. However,

when it decreases the flexibility of planners where different things can come up. Like right now, with the economic problems that we are having. Is this right to implement this? It is just a question.

Mr. Hull: I think that is a question I think Madame Chair, for when you are looking at the Form Based Code, which you will get the new updated version tomorrow, as Commissioners. That is a question for West Kauai, right. Whether or not you want to adopt a hard and fast set of regulations that comes as a companion to the policies. However, to the other community plans that have been adopted, right? You have South Kauai Community Plan; you also have the North Shore Development Plan, as well as the Kapaa Development Plan. Each one came with their own companion regulations that were vetted as hard and fast laws and regulations that we must apply to. Some of them have been in effect for thirty (30) some odd years, and there was desire for them to be regulations, but there is no teeth to actually enforce them as well as the makers that adopted them intended them to be.

Chair Nogami Streufert: Now, should these enforcement standards be put on the regulations as opposed to the plans?

Mr. Hull: It is not being placed on the plan; it is being adopted directly into Chapter 10, which is where the actual regulations are established for some of them.

Deputy Planning Director Jodi Higuchi Sayegusa: So, if I could jump in, this is Jodi. Currently, the regulations that are currently in place by way of for instance, South Shore Kauai Plan, the Form Based Code, and other community plans that had regulations that seemed more like a CZO type of regulation there. They are already being enforced. Using Chapter 8-3.5 that section, currently, it is being enforced. There was an amendment that was already codified into the Kauai County Code that incorporated by reference 8.3-5, that was part of one of a previous clean-up that we did to make sure that there was no ambiguity. But I think being that there is more and more of these types of regulations being incorporated into community development plans. We thought it would be a lot clearer and try in an attempt to eliminate ambiguity by incorporating...so basically, cutting and pasting verbatim the sections under 8-3.5., into Chapter 10. Therefore, Chapter 10 would have its own enforcement section. Therefore, any violations would site the text, which again, comes from Chapter 8, but the text would have a citation under Chapter 10. So, it would be their own, Chapter 10, would have its own enforcement section. Again, it is the same text as that, under the CZO right now, and it is not that it has not been enforced, and it is enforceable right now and it has been. This is more of an attempt to alleviate any ambiguity and to clarify that, yes, Chapter 10, has its own enforcement section.

Chair Nogami Streufert: Okay. Thank you. Any other questions or discussions? Is there anyone in the public still here? I will entertain a motion. I will entertain a motion to accept the Zoning Amendment ZA-2020-15.

Ms. Otsuka: I make motion to accept Zoning Amendment ZA-2020-15.

Ms. Cox: Second.

Mr. Hull: Sorry, Commissioner Otsuka, just for clarification and just to reduce ambiguity in the motion.

Ms. Otsuka: I apologize.

Mr. Hull: No, no. It is perfect. So, for Status Reports we look at acceptance. However, for a zoning amendment or a project the more appropriate motion is either motion to defer, motion to deny, or a motion to approve or approve as amended.

Ms. Otsuka: Am I supposed to approve as amended?

Mr. Hull: We do not have any amendments; it would be as amended if you intend to make an amendment yourself as a Commissioner. If you have amendments, you would like to make then what you agree with the motion than—

Ms. Otsuka: I agree with the motion.

Ms. Cox: Then you approve.

Ms. Otsuka: I approve the motion.

Mr. Hull: You would make a motion to approve.

Ms. Otsuka: I make motion to approve.

Ms. Cox: And I second that.

Chair Nogami Streufert: It has been moved and seconded that we approve Zoning Amendment ZA-2020-15. Any discussion? If not, could we have a roll call vote, please?

Mr. Hull: Roll call, Madame Chair. Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

All remaining public testimony pursuant to HRS 92 (Sunshine Law)

CONSENT CALENDAR

Mr. Hull: That rounds out our public hearings. Thank you for bearing with us on those. Moving on to the next agenda items. There is Consent Calendar was approved and adopted by the agenda.

Status Reports

Director's Report(s) for Project(s) Scheduled for Agency Hearing

Mr. Hull: There is no Status Report and No Director's Reports.

EXECUTIVE SESSION

Mr. Hull: There is no Executive Session.

GENERAL BUSINESS MATTERS

Hearing Officer's Report and Recommendation of Contested Case re Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation use for Property Situated in Haena, Kauai, Hawaii, Identified by Kauai Tax Map Key (4)58005005 containing 26,092 sq. ft. = *Patricia D. McConnell*, Petitioner.

Petitioner's Exceptions to Hearing Officer's Report and Recommendation of Contested Case; Request for Oral Argument; Certificate of Service for Case No. CC-2017-4, TMK (4) 5-8-005:005 = *Patricia D. McConnell*, Petitioner.

Mr. Hull: Moving on to General Business Matters. I will turn it over to the County Attorney.

Deputy County Attorney Nicholas Courson: Aloha. We are on Item J. 1. Hearing Officer's Report and Recommendation of Contested Case re Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation use for Property Situated in Haena, Kauai, Hawaii, Identified by Kauai Tax Map Key (4) 58005005 containing 26,092 sq. ft. Patricia D. McConnell is the Petitioner. I believe the Commission is in Receipt of a Stipulation from the Planning Department and the Petitioner asking for—

Mr. Ho: Excuse me. I would like to have the Commission go an Executive Session. Nick could you brief us on our responsibilities, and what is legal for us read.

Mr. Courson: Sure. We can do that. Earlier in the day, I set up a Team myself for Executive Session. My plan was to...if everyone hung up out of this, was to invite you folks with that. We did not practice that, so hopefully that technique will work well. Because for these unanticipated Executive Sessions I could not create a Calendar item or that would be the alternate. If it does not work, I will create a Calendar item and send an invite to all of you, but I am hoping that we call out on Team but I did add all of you so it should work, and I used everyone Kauai email address so hopefully that would work. Commissioner Cox, are you on phone right now?

Ms. Cox: I am on the phone, yes.

Mr. Courson: I think I would have the option to call you from that meeting. I will probably get all the other get all the other six (6) Commissioners in and then call you.

Ms. Cox: I will just hang up and just wait too be called.

Mr. Courson: Okay, and Kaaina, I suppose I will text you and we can restart this meeting out of the Calendar invite?

Ms. Higuchi Sayegusa: Maybe text me too, Nick. So that...unless for the public sake so if they wanted to be able to call in for this portion of the meeting. Did you want to set a time that maybe 1:00 'o clock we will re-engage on this meeting?

Mr. Courson: Yes. That seems very prudent, although I do not know how long this might take so why don't we set that time, and if it goes over I will text you guys and we can just set the time...we can kick it 15 minutes or something.

Mr. Hull: Nick, so we can keep the meeting moving. Right now, I have only one member of the public still called in. So, will the individual public phone number 320-****?

Ms. Diamond: That is I. That is Karen.

Mr. Hull: Do you want us to call you back in, so we do not have to set a specific time. I can just call you back in when we start to reconvene.

Ms. Diamond: Sure, that would be great.

Mr. Hull: So, Nick. I think all of us will log out of this meeting, so we all are not caught in limbo again as we did on the last break. If we all just log out. Nick, you, and the Commissioners will go into Executive Session and then when it is done, if you just text Jodi and me. Then all of you will hang-up on your lines to log back into the main Planning Commission Meeting.

Mr. Courson: Okay, that sounds fine.

Chair Nogami Streufert: So, I can understand it, we are getting out of this. We are going to hang up and then how are we getting into the Executive Session?

Mr. Courson: I am going to send you an invite. I hope that will work.

Chair Nogami Streufert: Okay. Thank you.

Ms. Diamond: Will I be able to testify?

Mr. Hull: Karen, did you want to testify right now, so that you don't have to come back?

Ms. Diamond: I will come back. I did not know if you were going address this item when you come back.

Mr. Hull: Yes, they are going into Executive Session to consult with the Attorney, but I will leave it up to the Chair, if you would like to take testimony right now? Or wait until you come back from Executive Session?

Chair Nogami Streufert: Karen. If you do not mind? I think...I do not know what we are going to be discussing accept that we are going to be consulting with our Attorney. I would like to if possible, bring you in after our Executive meeting. Would that work?

Ms. Diamond: Absolutely.

Chair Nogami Streufert: Okay, I will sign off and look for another invite. Is that correct?

Ms. Otsuka: Should we worry? Nick said if it works. So, do we need plan b, if it does not work? Okay. Let us be positive, it is going to work.

Mr. Courson: Okay. Yes.

Ms. Otsuka: We will wait for Nick's invitation.

Ms. Higuchi Sayegusa: Otherwise, I am not sure if Board and Commissions have any...maybe boards and Commissions have that special license Nick, for the Conferencing Bridge. Therefore, when in doubt, maybe you can coordinate with Ellen or Arleen. When in doubt, but I am sure it will work. It will be fine.

Mr. Courson: Okay, maybe we say if we cannot figure this out by 12:55 p.m. We will rejoin this meeting and—

Chair Nogami Streufert: Rejoin this meeting?

Mr. Courson: Yes. We will have to figure something else out. That will be plan b.

Ms. Cox: Nick, you are going to call me, right? This is Helen.

Mr. Courson: Yes, Commissioner Cox. Because you are not using an app there still an option to dial a phone number and I have your number so we will talk from that.

Chair Nogami Streufert: So, we are going to get back on to Teams after this. The invite is going to come on Teams.

Ms. Higuchi Sayegusa: Good luck to you, we will see you in a bit.

EXECUTIVE SESSION

> The Commission may go into an executive session on an agenda item for one of the permitted purposes listed in Section 92-5 (a) Hawaii Revised Statutes ("H.R.S."), without noticing the executive session on the agenda where the executive session was not anticipated in advance. HRS Section 92-7(a). The executive session may only be held, however, upon an affirmative vote of two-thirds of the members present, which must also be the majority of the members to which the board is entitled. HRS Section 92-4. The reason for holding the executive session shall be publicly announced.

The Commission recessed this portion of the meeting at 12:48 p.m.

The Commission reconvened this portion of the meeting at 1:39 p.m.

Chair Nogami Streufert: Call the meeting back to order.

Mr. Courson: Okay. We are still on Item J. 1. I believe we were going to check for public testimony.

Chair Nogami Streufert: Is there anyone from the public who will be testifying?

Ms. Diamond: Yes. I would like to... this is Karen. Thank you. Especially, for the new members, I know all the TVR stuff might get confusing. As a resident of Wainiha, and for the Wainiha/Haena community, it is incredibly important that the enforcement continue and that the Planning Commission support the enforcement efforts, and really help us get tourism back in the visitor destination areas. In Wainiha and Haena it is a health safety and welfare issue. This particular project...Haena and Wainiha has the most [inaudible] sorry, Haena and Wainiha has the most amount of TVR's on the island of anywhere. More than half of the TVR's that exist on Kauai, and even though you must get across one-way bridges, and of course, you know, we had the big floods.

So, this project never applied for a permit, never got a permit, but then operated three (3) different distinct units. And so, Ananalu Road, is one of the most local roads you could get, it is also along the river and so it is one of the more dangerous roads you could get, and it is a County road and it is a one lane road at best. It is absolutely one of the worst places; it is where the Wainiha Store is at the back of that road that this project exists. It really is one of the worst places. You would never locate tourist in the back there, you would never send visitors back there. It is incredibly dangerous and after the flood, the visitors that stayed in these units had to

be airlifted out by the County and Military and their helicopters, as that was the only way they could get out of there.

So, these are three (3) units that are distinctly advertised, there is three (30) different [inaudible] standalone cottages, one portion of the house another portion of the house, and it is really important that our neighborhoods have a chance to be neighborhoods. In that we do not have people who buy these properties and decide that, they want to start building extra cottages and renting them out and renting out their homes, instead of being a home for visitors. That is happening in really the most inappropriate dangerous places. It poses a grave liability to the County to turn a blind eye to tourist staying and people having illegal rentals along river roads where there's hazardous conditions for people to these as well as having outdoor bathrooms, and cesspool issues, and things that are highly bad for the land and river.

So, I just wanted to highlight the importance of your enforcement. In addition, the Commission, somehow finding a way to effectively end these illegal Uses that are happening in our neighborhood. I thank you for your efforts to that and hope you will continue to help put tourism back where it should be so that everybody can benefit, and it is a health safety and welfare issue. Again, with the Corona virus, it highlights the health issue, all of a sudden you have all these visitors staying in neighborhoods because one person wants to make money off of it. Because of health safety and welfare, we need effective enforcement. Thank you.

Chair Nogami Streufert: Thank you for your input on this. Is there anyone else?

Mr. Courson: So, if there is no further public testimonies I was saying, before we went into the Executive session that the parties have stipulated to ask for a continuance. They say in their stipulation that they are waiving any applicable timelines, and they further say that they would like to work out a date amongst themselves, such as to your folk's approval. So, my suggestion would be to set a Status Date sometime in the future so that you don't lose track of this, and at that time, they could inform us by writing or make a call and appearance [inaudible] as to what date they find amiable. To be very clear, the purpose of that Status Conference would not be for argument on the merits. However, it would be strictly to notify the Commission, as to what dates you would like to have oral argument on.

Chair Nogami Streufert: So, this Status would just be to determine at that point, when we would hear and when they would be presenting their case to us.

Mr. Courson: Yes, Chair. Alternatively, I think you set a hearing date now that would work equally as well.

Chair Nogami Streufert: But they do want to be here for an oral hearing, is that correct? So, that they can present themselves orally, is that correct? [Inaudible]—

Mr. Courson: If you want—

Ms. Cox: Point of clarification that we asked earlier. So, does that mean that they would be running their vacation rental between now and whenever the that oral hearing is? Assuming that they get opened up.

Mr. Courson: Kaaina or Jodi, do you want to jump in on that? I now the Governor or there is a rule prohibiting them or a proclamation in effect, but I do not know—

Ms. Cox: Yes, right. Right now, they cannot, I do not think.

Mr. Courson: If that were lifted. I am not sure what the Department's position on this would be.

Mr. Hull: Yes, I will just jump in quick. Chair and Nick. During the effective proclamation both by Mayor Kawakami earlier, and Governor Ige currently, TVR's are not considered an essential business and are hereby prohibit from operating right now. So, if they are operating or if any TVR's are operating right now. Our enforcement staff is notifying them that they should not be operating, and if they continue to operate in defiance of that order, then they are subject to Kauai Police Department issuing a fine and possible jail time. Outside of that, any appeal generally, these folks continue to operate unless we go for injunctive relief. We have just begun asking for injunctive relief on a few cases. This is not one of them quite honestly, and you know, as we have seen historically on other...and please fill free to stop me if you think I am going a little too far.

However, on other appeals the Planning Departments Notice of Forfeiture is just the beginning, as is the Planning Commission more often than not, after the Commission takes action, in previous ones not saying in doing this one. But previous ones, where you have sided with the Planning Department to forfeit the Non-conforming Use Certificate, then they just appeal it to the courts and continue to operate until instructed by the courts not to.

Ms. Cox: I see. So, I would say that if we do a continuance and if we want a Status Report to decide when they come in. Then we probably do not want to put it too far out.

Chair Nogami Streufert: That is correct. But we want to have...we want to be reasonable in what we think is going to happen in terms of opening up and how much it is going to open up. So, putting it to close is not the most reasonable thing to do. I would think—

Ms. Cox: Right.

Chair Nogami Streufert: Would just two and a half (2 1/2) months sound right, to the end of July, would that work? Does that sound like a reasonable time? Is that to long? Too soon?

Ms. Cox: I would say we might want it slightly sooner than that because that will be just finding out the Status and then coming up with a date when they would come in to see us. Right? So, maybe by earlier in July we would at least know when it would be appropriate for them to come.

Chair Nogami Streufert: [Inaudible] that would be about middle of July. Because if we are talking about the Fourth of July, I am not quite sure if things open up people might have different plans.

Mr. Courson: That would be July 14 would be the second Tuesday.

Chair Nogami Streufert: Would that work?

Ms. Cox: Yes, maybe that is the one.

Chair Nogami Streufert: So, continuance until July 14th, 2020. I am sorry. An open-ended continuance but a Status Report by July 14th. Is that what we are saying?

Mr. Courson: I think that in the Stipulation the parties said they want to figure out a date to come back to you. So, my suggestion would be yes, tell them on July 14th, tell us what your suggested date is you and maybe the Commission prefers sooner rather than later after the 14th. Because the thing to is we usually try to be accommodating of the Councils schedule. So as things come up due and they...people will have trails and so to let them know upfront that the temperature of the Commission is not to let this go on to long.

Ms. Apisa: Should we do it sooner than July 14?

Mr. Courson: The thing about a Status in my opinion is, if someone comes with a very good reason you can always kick it farther down the line. I like the idea of a Status because it simply keeps on your radar, it does not mandate that somehow at the next Status conference, [inaudible] Commission, things are still really uncertain with this whole Covid-19 thing, that you couldn't go, we agree. We will set another Status in another six weeks. I think Status conferences are a good way of being fair but keeping momentum.

Chair Nogami Streufert: Well I am not sure that everything will open up by the end of May and if it does, I am not sure that [inaudible].

Ms. Apisa: I think TVR'S will not open up. I would be very surprised. I mean, we do rental's ourselves and we have already blocked our June calendar.

Chair Nogami Streufert: So, how about July 14th that is not too far ahead, that is just two (2) months and gives everybody some leeway for Status. To keep asking for status reports every time something changes is also counterproductive.

Ms. Apisa: I am good with July 14. Do you want a motion to continue this until July 14?

Chair Nogami Streufert: It would be a status report on July 14.

Ms. Apisa: I am sorry, you are right. It is a status report on July 14.

Chair Nogami Streufert: If that were what you would like to do. Do I hear a motion for a date for Status Report?

Ms. Apisa: Nick. Don't we have to do more than just ask for a Status Report? Is that all the motion we need to do?

Mr. Courson: Instructing the parties to provide their agreed upon dated for their oral hearing. That gives them an idea of what the Status is about. I do not want them to think we want some argument on this case on the merits. All we want at this next...on the next time we hear about this is a date, and that date, that is when you will get to the oral arguments on the Hearing

Officer's Recommendation. So, a motion to set a Status Conference for July 14 2020, whereby the parties will communicate to the Commission their preferred date.

Ms. Apisa: Just go a little bit slower so it is a...Status confirmation report, right? By July 14 for the parties to provide an agreed upon date?

Mr. Courson: For oral argument and action on the Hearing Officer's Recommendation.

Ms. Apisa: For oral argument and action—

Mr. Courson: On the Hearing Officer's Recommendation.

Ms. Apisa: I think I got it. I move that we request a Status Conference Report by July 14, from the parties to provide us agreed upon action on the Hearings Officer's Recommendation. Is that smooth? Fill in any missing parts there.

Mr. Courson: No. I believe that does it. On July 14, they should come and say...they should have a second or fourth Tuesday, in mind thereafter, where they think they can accomplish this oral argument on the Hearings Officer's Recommendation that they have. Or the Covid-19 situation is such that they don't think they can have that date, and they can say so and ask for what they think is appropriate. And you folks can pick it up at that time.

Chair Nogami Streufert: Is there a second to that motion?

Ms. Otsuka: Second.

Chair Nogami Streufert: It has been moved and seconded and I am not going to try to repeat it but Status Report, an oral argument case and oral argument date. Any discussion? If not, could we have a roll call vote, please? An affirmative would mean that on July 14, 2020, the parties would have decided upon when we would have...there would be a status report, but it would also be decided upon a date for an oral hearing. Is that right?

Mr. Courson: Right, and to be clear. The only thing in the status report, it would not be a status report the way you get on [inaudible] the status would just be the date they are saying. How would ever they accomplish that out of a Stipulation could be a letter? Given to you right now, they have said, we want to set a future date together that we agree on and we will schedule it through you. So, this motion is just to give them back the only status update would be literally picking a day. So, with that clarification in mind. Commissioner Ho.

Mr. Ho: Aye.

Mr. Courson: Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Courson: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Courson: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Courson: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Courson: Commissioner Cox.

Ms. Cox: Aye.

Mr. Courson: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Courson: Motion passes 7 Ayes: 0 Nays.

> Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Notice of Violation & Order to Pay Fines for the continued operation of an unpermitted transient vacation rental outside of the Visitor Destination Area, Tax Map Key (4) 45006005, Kapaa, Kauai, received on April 6, 2020, for referral to Board and Co0mmissions as Contested Case File No. CC-2020-5= *Michelle Hulme.*

Mr. Courson: The next Item on the agenda is Item J. 2. Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Notice of Violation & Order to Pay Fines for the continued operation of an unpermitted transient vacation rental outside of the Visitor Destination Area, Tax Map Key (4) 45006005, Kapaa, Kauai, received on April 6, 2020, for referral to Board and Commissions as Contested Case File No. CC-2020-5, Michael Hulme.

So, in essence this is just the Department is recommending that the Commission send this to a Hearings Officer the way it has sent many other items. The other choice would be for the Commission to hear the Contested Case itself.

Ms. Apisa: I think it should go to the Hearings Officer as we have done in the pass.

Ms. Cox: Yes.

Ms. Otsuka: So, a motion needs to be made.

Chair Nogami Streufert: Yes. This is the start of where we are ending up on the [inaudible].

Ms. Cox: Right. So I would like a motion to refer the Appeal of the Planning Director's Notice of Violation for a continued operation of an unpermitted transient vacation rental outside of the

Visitor Destination Area, Tax Map Key (4)45006005, Kapaa, Kauai, received on April 6, 2020, for a referral to the Hearing Officer.

Chair Nogami Streufert: Is there a second?

Mr. Ho: Seconded.

Chair Nogami Streufert: It has been moved and seconded. Is there any discussion? If none. Could we have a roll call vote, please? Is there anyone in the public? Do you have to ask?

Mr. Courson: Oh yes, we should. I am sorry I was remiss by not asking.

Chair Nogami Streufert: Is there anyone in the public out there who would like to say anything?

Ms. Diamond: I am fine, thank you.

Chair Nogami Streufert: Then if not, let us have a roll call vote, please.

Mr. Ho: Aye.

Mr. Courson: Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Courson: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Courson: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Courson: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Courson: Commissioner Cox.

Ms. Cox: Aye.

Mr. Courson: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Courson: Motion passes 7 Ayes: 0 Nays.

With that, I think that concludes the matters that the Clerk stepped down for so I will turn it back over to Kaaina.

COMMUNICATIONS (For Action)

Mr. Hull: Thank you, Nick. Moving on to agenda Item K. there are no new Communications.

COMMITTEE REPORTS

Subdivision

Mr. Hull: Moving on 2.L. Committee Reports. Subdivision Committee Reports I will turn it over to Commissioner Ho.

Mr. Ho: Before I give my report, I would like to welcome Francis DeGracia to my Committee here, and we had to Items of Business. Final Subdivision Map Approval for Kukui'ula Development, a 10-lot subdivision, and we granted a Final Map approval. Kukui'ula Development, Kainani Village a 7-lot subdivision, also granted Final Map approval. That was our meeting today.

Mr. Hull: I will just give a small bit of clarification for the rest of the Commission. This was a...these two Subdivisions were set up for approval back in March. When we had to go into the COVID-19 crisis and shut, the Planning Commission down. The applicant expressed some concerns about internal deadlines that they had. So, in consultation with the with the County Attorney's Office, myself, and Jodi we worked with the Planning Commission Chair Streufert and Subdivision Committee Chair Ho, to look at a manner in which we could utilize the proclamation that Governor Ige put in place concerning Waiver of Chapter 46. Which is one of our authorities to look at approving this Final Subdivision Map during the crisis.

That action was taken with the Department's Recommendation and ultimately, Chair Streufert and Subdivision Committee Chair Ho, signing off on that approval. What is here before us and before the Subdivision Committee today, was a Notice to the Committee that this had happened and ask for a Ratification of that previous action back in April. The Subdivision Committee did approve that Ratification and so what is before the Commission now, is not necessarily the official Subdivision Final Approval, because it already did happen. Just a Ratification and Memorialization of what has already happened with the authority of the Chair and Subdivision Committee Chair.

Chair Nogami Streufert: Do I have a motion to accept? Or is there any discussion? Do I have any motion to accept the Subcommittee and the Subdivision Committee Report, please?

Ms. Apisa: I move we accept the Subdivision Committee Report as presented.
Ms. Otsuka: I second.

Chair Nogami Streufert: It has been moved and seconded to accept the Subdivision Committee Report. Any discussion? If not, let us do a roll call vote, please.

Mr. Hull: Roll call, Commissioner Apisa.

Ms. Apisa: Aye.

Mr. Hull: Commissioner Chiba.

Mr. Chiba: Aye.

Mr. Hull: Commissioner Cox.

Ms. Cox: Aye.

Mr. Hull: Commissioner DeGracia.

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ho.

Mr. Ho: Aye.

Mr. Hull: Commissioner Otsuka.

Ms. Otsuka: Aye.

Mr. Hull: Chair Streufert.

Chair Nogami Streufert: Aye.

Mr. Hull: Motion passes 7 Ayes: 0 Nays. Madame Chair.

UNFINISIHED BUSINESS (For Action)

NEW BUSINESS

Mr. Hull: There is no Unfinished Business as we handled that. As well as New Business with the respective agency public hearings.

For Action - See Agenda F for Project Descriptions

ANNOUNCEMENTS

Topics for Future Meetings

The following regularly scheduled Planning Commission meeting will be held at 9:00 a.m., or shortly thereafter on May 26, 2020. The Planning Commission anticipates meeting via teleconference but will announce its intended meeting method via agenda electronically posted at least six days prior to the meeting date.

Mr. Hull: On to Announcements and Topics for Future Meetings. The next meeting is going to be identical to this meeting except for the Somer's and Contested Case Hearings. It will be

pretty much all the West Kauai Community Plan. There is no other agenda items, so it will be West Kauai Community Plan dedicated agenda. Then there are future meetings and some other hearings when the Somer's Case will be coming up and so on and so forth. But for the May 26th, hearing it will be all the West Kauai. You will be receiving as we try to get you these packets a little bit earlier then we have in general, just given the nature of...Well, one, the content is very large as well as the time it takes to go over some of these issues [inaudible]. You will be getting your packets for the West Kauai Community Plan tomorrow as Commissioners, and it will be posted up on the website with the agenda within a few days of that. If you folks have any questions or concerns, our staff is available to meet and discuss.

Chair Nogami Streufert: Will we have an update on the Coco Palms at some point [inaudible]?

Mr. Hull: I can look. I believe it is in July, but I can double check on that.

Chair Nogami Streufert: Is that it? Chair entertains a motion to adjourn.

ADJOURNMENT

Chair Nogami Streufert: Chair entertains a motion to adjourn.

Ms. Otsuka: I move to adjourn today's meeting.

Mr. Ho: Second.

Chair Nogami Streufert: It has been moved and seconded to adjourn today's meeting. All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0. Meeting adjourned.

Chair Nogami Streufert adjourned the meeting 2:08 p.m.

Respectfully submitted by:

Arleen Kuwamura,
Commission Support Clerk

( ) Approved as circulated (add date of meeting approval)

( ) Approved as amended. See minutes of _____ meeting.

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Attorney for Applicants,
CHARLES SOMERS, as Trustee of the Charles Somers
Living Trust dated November 12, 2002 and
WEST SUNSET 32 PHASE 1, LLC,
a California limited liability company

BEFORE THE PLANNING COMMISSION

OF THE

COUNTY OF KAUAI

In The Matter Of The Application Of CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, a California limited liability company, for a Special Management Area Use Permit, a Use Permit, and a Class IV Zoning Permit for real property situated at Kilauea, Kauai, Hawaii, identified by Kauai Tax Map Key No. (4) 5-2-012:035.	SPECIAL MANAGEMENT AREA USE PERMIT SMA(U)-2008-5 USE PERMIT NO. U-2008-4 CLASS IV ZONING PERMIT NO. Z-IV-2008-6 **APPLICATION AND MOTION FOR SECOND AMENDMENT TO MASTER PERMIT; EXHIBITS "A" – "D"** **(BARN)**

APPLICATION AND MOTION FOR SECOND AMENDMENT TO MASTER PERMIT (BARN)

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APPLICATION AND MOTION FOR SECOND AMENDMENT TO MASTER PERMIT

Come now, CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, a California limited liability company, Applicants in the above-captioned proceedings, by and through their undersigned attorney, and hereby requests the Planning Commission of the County of Kauai ("Planning Commission") pursuant to this Application And Motion For Second Amendment To Master Permit ("Second Amendment") to amend Special Management Area Use Permit SMA(U)-2008-5, as amended ("SMA Permit"), Use Permit U-2008-4, as amended ("Use Permit"), and Class IV Zoning Permit Z-IV-2008-6, as amended ("Zoning Permit") (collectively, the "Master Permit"), as set forth herein. This request is made pursuant to Sections 7.0 and 8.0 of the Special Management Area Rules And Regulations Of The County Of Kauai ("SMA Rules") and Chapters 6 and 12 of the Rules Of Practice And Procedures Of The County Of Kauai Planning Commission ("PC Rules").

SUMMARY

On or about October 25, 2007, the Applicant filed an Application for a Special Management Area Use Permit, a Use Permit, and a Class IV Zoning Permit to develop the Subject Property (the "Initial Application"). By Planning Commission's Findings Of Fact, Conclusions Of Law, Decision And Order dated October 2, 2008 ("Master Permit Approval"), the Planning Commission approved Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 (collectively, the "Master Permit"), which allowed: the development on the Subject Property of a single family dwelling ("Main House"), driveway, and landscaping; the grading, preservation of historic sites, and installation of

utilities (including a well and tank) on the Subject Property; and the construction of improvements to Kahili Quarry Road. A copy of the Decision And Order portion of the Master Permit Approval is attached hereto as ***Exhibit "C-1"***. The Master Permit Approval was subject to eighteen (18) Conditions of Approval ("Initial Conditions"), as described in the Index Of Initial Conditions (Master Permit) attached hereto as ***Exhibit "C-2"***.

On or about February 4, 2013, the Applicant filed an Application (Caretaker House & Barn) for an amendment to the Master Permit allowing additional development on the Subject Property ("First Amendment"). By action taken on April 26, 2016 as set forth in a letter from the Planning Commission dated April 28, 2016, attached hereto as ***Exhibit "C-3"***, the Planning Commission amended the Master Permit ("First Amendment Approval") to allow: the further development on the Subject Property of a second single family dwelling ("Manager's House"), a maintenance building ("Barn"), a temporary equipment tent ("Equipment Tent"), a wildlife enclosure ("Nene Fence"), driveways, and landscaping; further grading; and further utility installations. The First Amendment Approval was subject to sixteen (16) Conditions of Approval ("Additional Conditions"), as described in the Index Of Additional Conditions (First Amendment) attached hereto as ***Exhibit "C-4"***.

By this Second Amendment, the Applicants are requesting that the Master Permit, as amended, be further amended to allow the following:

A. <u>Barn</u>. The Barn will be redesigned as a two-story building. The lower floor of the Barn will be increased in area from 2,832 square feet to 4,000 square feet and a new upper floor area containing 1,384 square feet will be added, all as shown on the Barn Plans attached hereto as ***Exhibit "B-2"***.

B. Accessory Improvements. The utilities, driveways, landscaping and site grading for the Barn ("Accessory Improvements") will be developed and located in the areas shown on the Barn Site Plans attached hereto as ***Exhibit "B-1"***. *[Note: The development of the Barn and Accessory Improvements will be referred to as the "Project".]*

C. Manager's House. The Manager's House and associated driveway, landscaping, and utilities accessory thereto will be eliminated.

D. Nene Fence. The Nene Fence will be eliminated.

E. Equipment Tent. The use of the equipment tent will be allowed to continue on a temporary basis as approved by the First Amendment.

F. Additional Conditions. The Applicants are requesting that Additional Condition A15 (relating to the Nene Fence) be eliminated, and that Additional Condition A13 be revised to read as follows:

> "A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [~~residence and~~] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development within two (2) years of the date of approval of the building permit."

SECTION 1. APPLICANT/SUBJECT PROPERTY/OWNERS.

1.1 Applicants. The Applicants are Charles Somers as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company. The Applicants have authorized Max W. J. Graham, Jr. of

Belles Graham LLP to file this Second Amendment pursuant to the Applicants' Authorization attached as Exhibit "A-1" to the Application For First Amendment.[1]

1.2 Subject Property. The property which is the subject matter of this Application ("Subject Property") is described as Lot 2, located in Kilauea, Kauai, Hawaii, identified by Kauai Tax Map Key No. (4) 5-2-012:035. A legal description of the Subject Property is contained in the Status Report on title identified as FA Exhibit "B-1". The Subject Property contains approximately 161.88 acres.

1.3 Ownership. The Applicants are the owners of the Subject Property, as shown in the Status Report on title identified as FA Exhibit "B-1".

SECTION 2. LOCATION AND LAND USE DESIGNATIONS OF PROPERTY.

2.1 Location. The Subject Property is located in Kilauea, Kauai, Hawaii, and is shown on the Location Map attached hereto as ***Exhibit "A-1"*** and on the Tax Map attached hereto as ***Exhibit "A-2"***.

2.2 Land Use Designations. The respective State Land Use Commission ("SLUC"), Kaua'i General Plan, County of Kauai Comprehensive Zoning Ordinance ("CZO"), and other relevant land use designations for the Subject Property are as follows:

a. SLUC. As shown on the Land Use District Boundary map attached hereto as ***Exhibit "A-3"***, the area of the Subject Property in which the Project development will occur is located in the SLUC Agricultural District. A small portion of the Subject Property is also located within the SLUC Urban District. The Subject Property has been located in the SLUC Agricultural District since the inception of the SLUC Districts.

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1 Exhibits attached to the Application for the Master Permit will be identified as "MP Exhibit "___"". Exhibits attached to the Application For First Amendment will be identified as "FA Exhibit "___"".

b. Kaua'i General Plan. As shown on the General Plan Land Use Map attached hereto as ***Exhibit "A-4"***, the area of the Subject Property in which the Project development will occur is located in the Kaua'i General Plan Natural Land Use Designation. A small portion of the Subject Property is also located within the Kaua'i General Plan Residential Community Land Use Designation. Except as noted, the Subject Property has been consistently located in an Open designation or classification under prior General Plans.

c. CZO. As shown on the Zoning Map attached hereto as ***Exhibit "A-5"***, the area of the Subject Property in which the Project development will occur is located in the CZO Open District and Special Treatment District (Scenic/Ecologic Resources). A small portion of the Subject Property is also located in the CZO Residential District (R-6). The Subject Property has been located in the CZO Open District since the adoption of the CZO. The Subject Property was placed in the Special Treatment District as part of the North Shore Development Plan Update (Ordinance No. 476, adopted June 27, 1985).

d. Development Plan Area. The Subject Property is located within the North Shore Development Plan Area. The Subject Property has always been located within the North Shore Development Plan Area since the original adoption of the North Shore Development Plan (December 27, 1974).

e. Special Management Area. As shown on the SMA Map (attached hereto as ***Exhibit "A-6"***), substantially all of the Subject Property is located within the Special Management Area ("SMA") of the County of Kauai. The Subject Property has been located within the SMA since the adoption of the SMA Rules (December 17, 1979).

f. Shoreline/Shoreline Setback Area. The Subject Property is not located along the Shoreline as defined in HRS Chapter 205A, Part III. The Barn and Accessory

Improvements will be located approximately 1,200 feet or more from the Shoreline. At its closest point, the northern end of the Subject Property is located 500 or more feet from the Shoreline. As a result, the proposed Project development is not subject to provisions of the Shoreline Setback Ordinance as contained in CZO Article 27.

g. Heritage Resources. The Subject Property is shown on the North Shore Heritage Resource Map (Kaua'i General Plan, November 2018), attached hereto as ***Exhibit "A-7"***, as containing a wetland but no other cultural features or resources. However, as noted in Section 6.2, below, there are historic sites located within the Subject Property. None of these sites will be affected by the proposed Development.

h. Sea Level Rise. Portions of the Subject Property (along the Kilauea Stream) are located in the Sea Level Rise Exposure Area (3.2 ft. scenario) shown on the Projected Sea Level Rise Model Map attached hereto as ***Exhibit "A-8"***. The proposed Project is not included in this area.

i. VDA. As shown on the Zoning Map ZM-KI600, the Project is not located in the CZO Visitor Destination Area ("VDA").

2.3 Workforce Housing Requirements. The Housing Policy for the County of Kauai (County of Kauai Ordinance No. 860) is not applicable in connection with building or zoning permits for residential development of ten (10) or fewer residential dwelling unit. As a result, no workforce housing assessment is triggered by this Second Amendment.

2.4 Permit History.

a. Subdivision S-89-80. The Subject Property (Lot 2) was created by Planning Commission Subdivision No. S-89-80, which involved the subdivision of Lot 8-W-9-A into Lot 1 and Lot 2. As set forth in the Tentative Approval letter dated October 13, 1989

(FA Exhibit "G-4"), the Planning Commission granted Tentative Approval on October 12, 1989, subject to the conditions of Tentative Approval. As set forth in the Final Approval letter dated March 29, 1993 (FA Exhibit "G-5"), the Planning Commission granted Final Approval on March 25, 1993, subject to the condition that the Subject Property could not be further subdivided. The only other condition of Tentative Approval that survived Final Approval was Condition 3, which prevented direct access onto Kahili Quarry Road until such time as additional paving (16' in width) was constructed from the then existing paved portion of Kahili Quarry Road to the Subject Property. That work was subsequently completed, and Condition 3 was modified by the Planning Commission on January 22, 2002, as set forth in the Planning Department Staff Report dated January 16, 2002 (FA Exhibit "G-6"), and the Planning Department letter dated January 22, 2002 (FA Exhibit "G-7").

b. Master Permit (SMA(U)-2008-5/U-2008-4/Z-IV-2008-6). Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4 and Class IV Zoning Permit Z-IV-2008-6 ("Master Permit") for the Subject Property was approved by the Planning Commission pursuant to the Planning Commission's Findings Of Fact, Conclusions Of Law, Decision And Order dated October 2, 2008 ("Master Permit Approval"). A copy of the Decision And Order portion of the Master Permit Approval is attached hereto ***[Exhibit "C-1"]***. The Master Permit was subject to eighteen (18) conditions of approval ("Initial Conditions"), as shown on the Index of Initial Conditions ***[Exhibit "C-2"]***. The status of compliance with the Initial Conditions is contained in the Seventh Status Report attached hereto as ***Exhibit "C-5"***. Pursuant to the Master Permit, the Applicants have constructed: the Main House, together with driveways, landscaping, utilities, water well, and water tank on the Subject Property; and improvements to Kahili Quarry Road.

c. First Amendment. On April 26, 2016, the Planning Commission approved a first amendment to the Master Permit, as set forth in a letter from the Planning Department dated April 28, 2016 ("First Amendment") ***[Exhibit "C-3"]***. The First Amendment was subject to sixteen (16) Conditions as shown in the First Amendment approval letter and on the Index of Additional Conditions attached hereto ***[Exhibit "C-4"]***. The First Amendment allowed: the construction of a Barn and a Manager's House, together with associated driveways, utilities, landscaping and grading; the installation of a temporary Equipment Tent; and the construction of a wildlife enclosure ("Nene Fence").

SECTION 3. EXISTING AND PROPOSED USES OF SUBJECT PROPERTY.

3.1 Existing Improvements And Uses. Pursuant to the Master Permit, the Applicants were allowed to develop a farm dwelling unit (the "Main House"), together with driveways, utilities, landscaping and grading, within an approximately 12.48 acre portion of the Subject Property known as the "Building Envelope". The remainder of the Subject Property was encumbered with two conservation easements described as follows: a Grant Of Conservation Easement recorded in the Bureau of Conveyances of the State of Hawaii ("Bureau") on December 23, 2008, as Document No. 2008-191932 ("Conservation Easement C-1") covering 80.1 acres (as shown on the Conservation Easement C-1 Map attached hereto as ***Exhibit "A-9"***); and a Grant Of Conservation Easement recorded in the Bureau on December 24, 2008, as Document No. 2008-192741 covering 69.3 acres (as shown on the Conservation Easement C-2 Map attached hereto as ***Exhibit "A-10"***). The Building Envelope is shown colored in yellow on the two Conservation Easement maps. The Conservation Easements prohibit the development of any further dwelling units within the area that they cover. By the terms of the Conservation Easements and the Master Permit, the Applicants have the right to develop no more than two (2)

dwelling units on the Subject Property, both of which must be located within the Building Envelope. Both the Conservation Easements and the Master Permit allowed the development of a water well, water tank, and related utilities outside of the Building Area, and this work has also been completed. As part of this development, the Applicant is utilizing approximately seven (7) acres for fruit tree cultivation and flower farming. This area is located to the east of the Main House. All of the improvements constructed pursuant to the Master Permit will be referred to as the "Existing Improvements".

3.2 First Amendment. By the terms of the First Amendment, the Applicants were permitted to construct the following additional improvements:

a. A second single family dwelling to be used by the manager of the Subject Property ("Manager's House").

b. A maintenance building ("Barn").

c. Driveways, utilities, landscaping and grading associated with the Manager's House and Barn.

d. A temporary tent for the storage of maintenance equipment ("Equipment Tent").

e. A predator fence surrounding a proposed nature area for avifaunal ("Nene Fence").

3.3 Second Amendment. By this Second Amendment, the Applicants are requesting that the Master Permit, as amended by the First Amendment, be further amended to allow the following changes:

a. Barn. The Barn will be redesigned as a two-story building. The lower floor of the Barn will be increased in area from 2,832 square feet to 4,000 square feet and a

new upper floor with an area containing 1,384 square feet will be added, as shown on the Barn Plans ***[Exhibit "B-2"]***.

b. Accessory Improvements. The utilities, driveways, landscaping and site grading for the Barn ("Accessory Improvements") will be developed and located in the areas shown on the Barn Site Plans ***[Exhibit "B-1"]***.

c. Manager's House. The Manager's House and associated driveway, landscaping, and utility improvements accessory thereto will be eliminated.

d. Nene Fence. The Nene Fence will be eliminated.

e. Equipment Tent. The use of the equipment tent will be allowed to continue on a temporary basis as approved by the First Amendment until completion of the Barn.

f. Additional Conditions. The Applicants are requesting: that Additional Condition A15 (relating to the Nene Fence) be eliminated; and that Additional Condition A13 be revised to read as follows:

> "A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [~~residence and~~] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development within two (2) years of the date of approval of the building permit."

3.4 Redesigned Improvements. As a result of the changes requested in this Second Amendment, the Barn and Accessory Improvements will be redesigned as follows:

3.4.1 Barn. The redesigned Barn is shown on the attached Barn Plans ***[Exhibit "B-2"]*** and Barn Site Plans ***[Exhibit "B-1"]*** and will have the following characteristics:

a. General Description. As shown on the Barn Plans, the Barn will be a two-story agricultural building. It will contain an office, together with maintenance, work and storage areas. The lower floor will contain 4,000 square feet of work, storage and maintenance area. The upper floor will contain 1,384 square feet of office area.

b. Location. The Barn will be located to the south of the Main House and within the Building Envelope as shown on the Barn Site Plan.

c. Use. The lower floor will be used to repair, maintain and store equipment and materials related to activities on the Subject Property. The upper floor will be used for office purposes by the Applicants and their employees related to the activities on the Subject Property.

d. Land Coverage. The Barn and Accessory Improvements will cover an area of approximately 6,888 square feet.

e. Barn Exterior Materials. The Barn will have a shake roof and bleached cedar sidings, as shown on the Barn Exterior Material Plans attached hereto ***[Exhibit "B-4"]***.

3.4.2 Driveways. The Barn will be connected to Kahili Quarry Road by the extension of an existing driveway system ("Driveway Extension") as shown on the Barn Site Plan. The Driveway Extension will be constructed of concrete.

3.4.3 Landscaping. In order to mitigate visual impacts, landscaping will be installed around the Barn as shown on the Barn Landscape Plan ***[Exhibit "B-3"]***. The Applicants will utilize the plant material (including native species) as shown on the Barn Landscape Plan.

3.4.4 Site Grading. The site for the Barn and the Driveway Extension will be graded as necessary to construct the improvements. The Applicants will apply for grading permits as required.

3.4.5 Utilities. The Applicants intend to install underground utilities for water, electric and electrical communications purposes from existing facilities in the Subject Property to the Barn.

3.5 Land Coverage. After completion of the Project, the total land coverage on the Subject Property will be approximately 39,810 square feet, or one-half of one percent (1/2%) of the total area of the Subject Property.

SECTION 4. DESCRIPTION OF SUBJECT PROPERTY AND IDENTIFICATION OF SURROUNDING LANDS.

4.1 Adjacent Property. The Subject Property is located adjacent to, or within 300 feet of, the properties identified on the Adjacent Property Index attached hereto as ***Exhibit "D-1"***, and shown on the Tax Maps attached hereto as ***Exhibits "D-2"*** through ***"D-8"***.

4.2 Natural Environment.

a. General Description. The Subject Property is relatively long and narrow, encompassing portions of the north bank of the Kilauea Stream (aka Kahili Stream) in an area generally lying northeast of Kilauea Town. The Subject Property slopes from approximately 280 feet above mean sea level ("msl") at its south (mauka) end to sea level at the northeast (makai) boundary. At its closest point, the makai end of the Subject Property is located approximately 500 feet southwest of the shoreline along Kilauea Bay (aka Kahili Beach). The Kilauea Stream runs through the mauka half on the Subject Property and along the eastern boundary of its makai half on its way to the ocean. The 203-acre Kilauea National Wildlife Refuge lies adjacent to the

north (makai) corner of the Subject Property. The Refuge contains the Kilauea Lighthouse and serves as a preserve for various seabird species.

b. Soils. The soils within the project area are relatively varied, as shown on the Soil Survey Map identified as FA Exhibit "C-7". Extensive exposures of Rough Broken Land (rRR) lie on steep slopes of both banks of Kilauea Stream within the project area. Rough Broken Land:

> Consists of very steep land broken by numerous intermittent drainage channels. In most places it is not stony...Runoff is rapid and geologic erosion is active. These soils are variable. They are 20 to more than 60 inches deep over soft, weathered rock. In most places some weathered rock fragments are mixed with the soil material. Small areas of rock outcrop, stones, and soil slips are common. Included in mapping were some areas of colluvium and alluvium along gulch bottoms.

The next most extensive soil type appears to be Hanalei Silty Clay, Deep Water Table (HrB) in the central portion of the project area north of Kilauea Stream. Found on stream bottoms and flood plains, Hanalei Silty Clay soils are described as having moderate permeability, very slow run-off and an erosion hazard no more than slight. Small areas of Lihue Silty Clay (LhD), Mokuleia Clay Loam, Poorly Drained Variant (MtA), and Mokuleia Fine Sandy Loam (Mr) lie at the northeast end of the project area. Soils of the Lihue Series are described as "well-drained soils on uplands on the island of Kauai...developed in material weathered from basic igneous rock". Soils of the Mokuleia Series are described as "well-drained soils along the coastal plains...formed in recent alluvium deposited over coral sand". Small areas of Puhi Silty Clay Loam (PnE) and Makapili Silty Clay (MeB and MeC) lie at the southwest edge of the project area. Soils of the Puhi Series are described as "well-drained soils on uplands on the island of

Kauai...developed in material derived from basic igneous rock", where "runoff is rapid and the erosion hazard is severe" in Puhi Silty Clay Loam (PnE). Soils of the Makapili Series are described as "well-drained soils on uplands on the island of Kauai...developed in material weathered from basic igneous rock".

As shown on the Detailed Land Classification Map (Island of Kauai) (Land Study Bureau, University of Hawaii) identified as FA Exhibit "C-8", the Over-all Productivity Ratings for lands within the Subject Property are Class D and Class E.

c. Rainfall. The Subject Property is indicated to receive approximately 59-71 inches of annual rainfall, with increased rainfall at higher elevations. This is more than sufficient for most non-irrigated agriculture, and supports luxuriant and diverse vegetation.

d. Botanical Resources. The vegetation within the Subject Property is almost entirely exotic. Near the stream are extensive areas of exotic grasses, hau (Hibiscus tiliatus), ironwood (Cassuarina equisetifolia), Christmas berry (Schinus terebinthifolius), false kamani (Terminalia catappa) and Java plum (Syzgium cumini). Vegetation in the upper valley includes Java plum, extensive areas of hau, hala (Pandanus sp.), ironwood, bamboo, Christmas berry, lantana (Lantana sp.), banana (Musa sp.), African tulip (Spathodea campanulata), mango (Mangifera indica), and ti (Cordyline fruticosa). There are also extensive areas of thorny exotic vegetation including cat's claw (Caesalpinia decapetala) and other quite thorny plants. The only native plant observed was hala.

e. Tsunami Hazard. The Kauai County Tsunami Evacuation Kauai Map 2 Kauapea Beach to Anahola Bay shows the tsunami evacuation boundary extending up Kilauea Stream approximately 3/4 the length of the project area to the hairpin turn just seaward of Kilauea Falls. A description of the action of the tsunami of April 1, 1946 in the vicinity follows:

> The zone from Kilauea Point to a mile southeast of Moloaa is in general one in which the waves dashed on shore to great heights. In the small cove just east of Kilauea Point the water rose on the cliffs to about 45 feet above sea level. On Mokolea Point, 1.5 miles further east, the water rose about 30 feet. A mile farther southeast rose 29 feet on the cliffs although a ringing reef 150 feet wide lay in the path off shore...

f. Wetlands. As shown on the Wetland Map identified as FA Exhibit "C-9", the lower part of the Subject Property located inside the horseshoe meander of the Kilauea Stream includes wetlands along the stream to the north and south. These are dominated by California grass and/or elephant grass with lesser amounts of wetland sedges and rushes, the latter mostly growing right along open water margin. These wetlands occupy low-lying, level ground directly along the river. [Note: As used in this Application, the term "wetlands" does not mean jurisdictional wetlands as determined by the U.S. Army Corps of Engineers, as no jurisdictional wetlands have been so designated on the Subject Property. Rather, it refers to areas that are soggy, swampy, and/or subject to occasional flooding.]

4.3 Present Uses And Built Environment. Although the Subject Property lies adjacent to Kilauea Town, it is relatively undeveloped. Other than the Main House and other Existing Improvements, there are no other existing buildings or structures on the Subject Property. As discussed in the Archaeological Report (identified as FA Exhibit "F-1"), the old Kilauea Rice Mill may have been located on the Subject Property. Past agricultural activities on the Subject Property have included cattle raising and possibly taro or sweet potato cultivation. The Kahili Quarry Road provides access to the coast along the north edge of the Subject Property. There is a service road located within the Subject Property that connects to Kahili Quarry Road and runs from mauka to makai within the Subject Property. The area surrounding the

Subject Property is primarily rural, dominated by a mixture of agricultural uses and luxury house lot development.

4.4 Potential Future Uses. The Applicants have no present plans to develop the remainder of the Subject Property, except as described herein. The Applicants intend to preserve and enhance the conservation values of the Subject Property pursuant to and consistent with the Conservation Easements. The Applicants will undertake agricultural activities on the Subject Property as necessary to satisfy applicable governmental requirements.

SECTION 5. PERMITS REQUESTED AND REQUIRED.

5.1 Required Approval. This proposed Second Amendment to the Master Permit and the First Amendment requires the approval of the Planning Commission in accordance with Sections 1-6-16 and 1-12-9 of the PC Rules and Sections 7.0 and 8.0 of the SMA Rules.

5.2 Official Notice/Commission Records. Pursuant to Rule 1-6-17(j) and (k) of the PC Rules, the Applicants request the Planning Commission to take Official Notice of, and to incorporate into the record of this Second Amendment, all of the materials, records, files, exhibits, documents, and evidence taken in the matter of the Master Permit and the First Amendment.

SECTION 6. IMPACTS OF DEVELOPMENT.

6.1 Botanical Resources and Wildlife. The existing state of botanical resources and wildlife is addressed in A Survey Of Botanical, Avian And Terrestrial Mammalian Species, Kilauea Falls Ranch, Hanalei District, Island of Kauai ("Botanical Survey"), prepared by Dr. Reginald E. David and Dr. Eric Guinther identified as FA Exhibit "F-2". The Applicants will implement the conclusions and recommendations contained in the Botanical Survey. A summary

of the findings, conclusions and recommendations contained in the Botanical Survey are as follows:

a. General Site Description. The Subject Property is bound to the north by Kahili Quarry Road and lies astride Kilauea Stream, above the left (west) bank extending from just upstream of the first meander to the second break or waterfall some 920 feet downstream of the old highway bridge in Kilauea. Much of the terrain is steep, especially that along the narrow canyon from the upper end of the property and the upper falls to below the first break, known as Kilauea Falls. The steeper terrain is covered by forest, that extends down to the river. However, some 2,600 feet downstream of Kilauea Falls, the river bottom broadens out and the riparian areas are either a narrow hau forest or grassland. The river is a broad estuary in this segment of deeper water and sluggish flowing meanders. Above the river and bottom lands, the terrain rises abruptly but not as steeply as upstream along the narrow canyon. Here again, there are areas of forest intermixed with grasslands, presumably reflecting past use patterns.

b. Mammalian Resources. With the exception of the endangered Hawaiian hoary bat, or 'ōpe'ape'a as it is known locally, all terrestrial mammals currently found on the Island of Kauai are alien species. Most are ubiquitous. Two mammalian species were detected during the course of this survey. Scat, tracks, and sign of dog, and pig were encountered at several locations within the study site. Both species recorded are considered to be alien to the Hawaiian Islands. No Hawaiian hoary bats were detected during the course of this survey. Hawaiian hoary bats have been seen within the general area, as well as within most of the lowland areas on the Island of Kauai. It is to be expected that bats do use resources present within the project site on a seasonal basis. No rodents were detected during the course of this survey. It is to be expected that all four of the established rodents present on the Island of Kauai (roof rats, Norway rats, Polynesian

rats, and European house mice) use resources within the general project area. All of these introduced rodents are deleterious to remaining native ecosystems and the native floral and faunal species that are dependant on them for their survival.

c. Avian Resources. The following findings of the avian survey are consistent with the results of several other recent faunal surveys conducted in the lowland areas between Lihue and Kilauea.

(i) Avian Species. A total of 19 avian species were recorded. An additional seven species, representing an additional three families were recorded as incidental observations. One of the species detected, Hawaiian Goose, is an endemic endangered species. In addition to the 19 species recorded during station counts, another seven species were seen either flying over the Kilauea River, or at the mouth of the river where it enters the ocean. Six of the additional seven species, Laysan Albatross, White-tailed Tropicbird, Red-tailed Tropicbird, Brown Booby, Red-footed Booby, and Great Frigatebird, are indigenous seabirds that nest in the Hawaiian Islands. All can be readily seen at the Kilauea Point National Wildlife Refuge, located just to the north of the site. The other incidental observation was of a lone Black-crowned Night-Heron, which is an indigenous resident breeding species. Black-crowned Night-Herons are commonly found close to streams, rivers, ponds, reservoirs and just about any standing water body on the island. The remaining 18 species are considered to be alien to the Hawaiian Islands.

(ii) Migratory Species. No indigenous migratory species were recorded during the course of this survey. It is likely that several migratory shorebird species are present on the site between late July and late April each year. The most likely species to expect are Pacific Golden-Plover, Ruddy Turnstone, Wandering Tattler, and Sanderling. All of these species are commonly encountered in Hawaii during the fall and winter months. They all nest in

the high Arctic, and spend the winter months in lower latitudes, including Hawaii and the Tropical Pacific.

(iii) Endangered Species. Although not detected during this survey, both the endangered Hawaiian Petrel and the threatened endemic sub-species of the Newell's Shearwater over-fly the project area between April and the end of November each year. Both species have been well documented crossing the northern, eastern and southern coastline of Kauai across a broad front and in relatively large numbers during the breeding season. Newell's Shearwaters nest on Kauai, on Hawaii, and on Molokai in extremely small numbers. Newell's Shearwater populations have dropped precipitously since the 1880's. This pelagic species nests high in the mountains in burrows excavated under thick vegetation, especially uluhe fern.

(iv) Avian Mortality. The primary cause of mortality in both Hawaiian Petrels and Newell's Shearwaters is thought to be predation by alien mammalian species at the nesting colonies. Collision with man-made structures is considered to be the second most significant cause of mortality of these seabird species in Hawaii. Nocturnally flying seabirds, especially fledglings on their way to sea in the summer and fall, can become disoriented by exterior lighting. When disoriented, seabirds often collide with man-made structures, and if they are not killed outright, the dazed or injured birds are easy targets of opportunity for feral mammals. Both Hawaiian Petrels and Newell's Shearwaters have been grounded immediately adjacent to the project site on an annual basis over the past 28 years.

(v) Nesting Habitat. There are neither nesting colonies nor suitable nesting habitat for either seabird species within or close to the project site. The closest Newell's Shearwater colonies are located in the Anahola Mountains some three miles north of the property, and within the Moalepe drainage located some five miles west-southwest of the property.

Currently, the only known Hawaiian Petrel colonies are located in several north shore valleys, many miles away from the study area.

d. Botanical Resources. The Subject Property contains the following Botanical Resources:

(i) Botanical Species. There are no listed or protected species of plants found or reported from the Subject Property. However, certain wetland environments on the Subject Property, notably those associated with bottomlands along the sluggish lower reach of Kilauea Stream, would be considered jurisdictional waters protected by the Federal Clean Water Act. Wetlands protections at the Federal level are handled jointly by the Department of the Army (Army Corps of Engineers) and the Environmental Protection Agency.

(ii) Flora. The most interesting part of the Subject Property from the standpoint of the flora is that upstream of the estuarine or sluggish reach of Kilauea. The terrain here is quite steep and development plans for the ranch exclude this area. The middle and lower parts of the Subject Property harbor forest and grasslands of but a few dominant, non-native species, alteration of which should yield no concerns from a floristic point of view. More than 100 species of ferns and flowering plants are listed for the Subject Property. Not included is one unidentified forest shrub. The Subject Property is a large piece of property encompassing a moderately wide range of potential lowland plant habitats. An additional survey of areas not visited would no doubt yield additional species, especially by including the steeper cliff areas of the river canyon. Of the listed plants, 8 species (8%) are native plants (indigenous or endemic species) and another 8 (8%) are generally regarded as early introductions (before 1778) made by Polynesian migrants (so-called "canoe plants"). These are species widespread in the

Central Pacific and associated with early human habitation. The single endemic plant, kulu'ī, was reported by United States Fish & Wildlife Service (2007), but not seen during this survey.

(iii) Wetlands. As shown on the Wetlands Map identified as FA Exhibit "C-9", the lower part of the Subject Property located inside the horseshoe meander of Kilauea Stream includes wetlands along the stream to the north and south (See, Note Re: Wetlands in Section 4.2(f)). These are dominated by California grass and/or elephant grass with lesser amounts of wetland sedges and rushes, the latter mostly growing right along open water margin. These wetlands occupy low-lying, level ground directly along the river. The Subject Property consists of two other broad categories of vegetation: forest and grassland. The forest changes significantly in its composition from the north (low-lying riverine forest) to the south on the Subject Property, no doubt reflecting a general shift in the vegetation along a mauka-makai axis all along the windward coast of Kauai. The forest of the lowland (on the property, the forested area inside the horseshoe bend) is dominated by hau, closest to the river, Christmas berry, Java plum, and is being heavily invaded by satin leaf. Koa haole forms a dense scrub border where this forest lies adjacent to grassland. Several herbaceous plants, notably Guinea grass and the vine, are associated with this forest in the lowest parts of the property.

(iv) Upstream. Above the riverine forest at the north end of the Subject Property, much of the ground is clear of trees and supports dense grasslands or mixed grass/shrub lands. The dominant grass is California grass, with Guinea grass prominent in some areas. Below the entrance road, Maunaloa vine and Spanish clover are common, with the grasses, the vine extending into the koa haole scrub forest. Above the entrance road, the sub-scrub, Lantana camara, is common on the hillside. Upstream, the forest is broken in a few places by grassy areas near or just along the river, and by an extensive area of bamboo forest. The forest margin right

along the river in the broad sluggish estuary is mostly hau, with some hala present, but above the long property access road, Java plum and satin leaf predominate, with African tulip tree and Christmas berry common in some areas. Above the sluggish estuary, Kilauea Stream tumbles over a moderately wide boulder bed through an increasingly narrow and steep-sided canyon. Here, the diversity of plants increases sharply, with a rapid multiplication of habitats (including seeps coming from the cliff side) and lessening of the dominance of Java plum and satin leaf. Floristically, this area is the most interesting of any part of the property.

e. Potential Impacts to Protected Species.

(i) Hawaiian Hoary Bat. It is likely that Hawaiian hoary bats use resources in the Subject Property on a seasonal basis. Bats are regularly seen foraging above streams and over the near-shore waters on the windward side of Kauai. Recent research on this species completed on the Island of Hawaii has shown that the species reach some of their highest densities in agroforest areas. These studies also indicate that the species is a human commensal species, and that exterior lighting in the area may increase the presence of prey items for this insectivorous bat, and thus may in fact enhance foraging resources for this species in the general project area.

(ii) Nene. It is almost a certainty that if portions of the Subject Property are cleared, the Nene will start using resources on the site. There are now something on the order of 1,000 birds on Kauai with a major portion of the population centered between Kilauea and Papaa Bay. Three birds were seen foraging on the lawn of the house directly north of the Subject Property, as well as another eight birds flying over the site while conducting the surveys. It is also likely, following construction of the proposed structures (if human and pet disturbance is fairly low) that this species may attempt to nest on the Subject Property, as they have on several

other properties in the area. The principal threat that the development of the Subject Property poses to the Nene is likely from household pets, and commensal rodents that may be attracted to the site.

(iii) Hawaiian Petrel and Newell's Shearwater. The principal potential impact that the development of this site poses to Hawaiian Petrels and Newell's Shearwaters is the increased threat that birds will be downed after becoming disoriented by exterior lighting associated with structures on the site.

(iv) Laysan Albatross. Although Laysan Albatross are not protected under either the Federal or State of Hawaii endangered species statutes, it is a species protected under the Migratory Bird Treaty Act, and both the United States Fish & Wildlife Service and the Division of Forestry and Wildlife have a strong interest in supporting its current nesting range expansion around the state. It is currently estimated that there may be as many as 600 birds nesting on Kauai. Just as with the Nene, albatross are attracted to short grass and lawns, as can readily witnessed at Kilauea Point National Wildlife Refuge, the Princeville Development and on several private parcels of lands located to the south of this site. The principal threat that the development of the Subject Property poses to Laysan Albatross is likely from household pets, and commensal rodents that may be attracted to the site, should this species attempt to nest on the property.

f. Conclusions Re: Faunal Resources. It is likely that Nene and possible Laysan Albatross may start to use resources on the Subject Property if the rank grass is removed from the site. As a result, natural resource management strategies should be developed to make the sites where the Existing Improvements are located and where the new Project is to occur less attractive to both species. The Applicants will allow these species to use other portions

of the Subject Property. The potential threats posed by outdoor lighting on the endangered Hawaiian Petrel and the threatened Newell's Shearwater will be addressed by shielding all such lights.

g. Conclusions Re: Botanical Resources. No plant species currently listed as endangered, threatened, or proposed for listing under either the federal or the State of Hawaii's endangered species programs were recorded within or close to the proposed Project site. Further, the property lacks any coherent semblance of native plant ecosystems potentially deserving of preservation or restoration.

h. Recommendations.

(i) A Conservation Plan has been developed and implemented to ensure that activities on the property do not result in deleterious impacts to any listed or rare avian and mammalian species that may be attracted onto the property. The Conservation Plan was attached as Exhibit "6" to Applicants' Memorandum In Support Of Amendment dated January 25, 2016 previously filed in this matter. The Applicant has been implementing the provision of the Conservation Plan with the exception of the provisions contained in Sections 2.1.7 and 2.1.8 regarding the construction of a Nene Enclosure ("Nene Fence"). The Applicants have determined that the construction and maintenance of a Nene Fence at this time would not be practicable or effective, given the nature and rapid growth of the vegetation in this area. In addition, the Applicants are concerned with the potential State and Federal regulatory oversight that might accompany the creation of a designated refuge area for endangered and/or protected avian species.

(ii) If exterior lighting is installed in conjunction with the Project, such lights should will be shielded to reduce the potential for interactions of nocturnally flying Hawaiian Petrels and Newell's Shearwaters with external lights and man-made structures.

6.2 Historical Resources. The Applicants are not aware of any archaeological, cultural or historical resources on the surface of the Subject Property in which the Project will take place which will be affected by the Project. An Archaeological Inventory Survey dated March 2008 (prepared by Dr. Hallett H. Hammatt, David W. Shideler, and Trevor Yucha of Cultural Surveys Hawaii, Inc.) identified as FA Exhibit "F-1" ("Archaeological Report") was prepared for the Subject Property. Thereafter, a Preservation Plan for State Inventory of Historic Places (SIHP) 50-30-04-0579 through -0583 dated January 2014 (prepared by Dr. Hallett H. Hammatt, Nancine "Missy" Kamai, and Tanya L. Lee-Greig) was prepared for the Subject Property ("Preservation Plan"). The Archaeological Report and the Preservation Plan are both attached as exhibits to the Conservation Plan. No sites were identified within the Building Envelope. The Applicants will follow and implement the recommendations contained in the Archaeological Report in order that the proposed Development will have no impact on any of the sites identified in the Archaeological Report. In the event of inadvertent historic site or burial discovery in the future, the Applicants will immediately contact the Historic Preservation Division of the Department of Land and Natural Resources. A summary of the Archaeological Report is as follows:

a. Summary and Interpretation. No historic sites were identified on the Subject Property that are in the vicinity (within approximately 425 feet) of the Building Envelope. A total of 62 features were identified within a total of five historic sites in the proposed Conservation Easement areas. Four of these five sites (SIHP # 50-30-04-579, -580, -582 and -583) are primarily or exclusively agricultural terraces. The only exception at these four sites is SIHP # 50-30-04-580 features L and MM that are interpreted as temporary habitation features related to the agricultural terraces. One site (SIHP # 50-30-04-581) is understood as primarily

post-contact and either a permanent habitation or work area. The approximately 60-70 inches of annual rainfall within the Subject Property made cultivation possible without irrigation. While it is believed that there may well have been pre-contact ponded field (*lo'i*) taro cultivation along the stream flood plain, the vagaries of hurricane, tsunami, and flood may have made such planting down by the stream precarious. Cultivation up on the steep slope may have been more secure. The evidence from the *māhele* records indicates that there was little or no pre-contact permanent habitation within the Subject Property per se although there was a community on the southeast side of the stream mouth from the 1840s well into the twentieth century. The propensity of the Kahili/Kilauea Stream to flood may have encouraged development on the steep slope.

b. Project Effect. No sites were identified on the Subject Property that are in the vicinity (within approximately 425 feet) of the Building Envelope. The proposed Project will have no effect on identified sites within the Subject Property or any other historic properties.

c. Mitigation Recommendations. The Applicants are willing to preserve all of the sites (SIHP # 50-30-04-580 through -583) as recommended in the Preservation Plan. These form an area of relatively dense agricultural endeavor forming a cultural landscape within which is imbedded a post-contact permanent habitation or work area.

6.3 Air Quality/Noise. The Project will have little or no impact on the air quality and ambient noise levels in the area. Air quality and ambient noise levels may be affected at a very minimal level during the Project construction activities. All vehicles or equipment used by the Applicants during construction will be properly muffled, housed and maintained to reduce any noise impacts or emission impacts. The Environmental Protection Agency (EPA) and State of Hawaii air quality standards will not be exceeded.

6.4 Flooding and Drainage. Portions of the Subject Property are situated within Flood Zone X (Areas outside of 500 year flood plain), Flood Zone AE (Floodway) (E1.18), and Flood Zone VE (E1.18), as shown on the County of Kauai's flood insurance rate map (Flood Insurance Rate Map 150002-0060E) identified as FA Exhibit "C-10". The Project will be located within Flood Zone X and will meet all of the requirements of the Flood Plain Management Ordinance of the County of Kauai, as contained in Chapter 15, Article 1, of the Kauai County Code, 1987. The Project will have no impact on flooding on or around the Subject Property. All drainage resulting from construction activities and from the increase in land coverage will be retained on site and subject to best management practices. No additional drainage will be allowed to significantly or negatively impact the Kilauea Stream and the wetland areas adjacent thereto.

6.5 Utilities.

a. Potable Water. The Subject Property currently obtains water service from the Department of Water of the County of Kauai ("DOW"). As set forth in the letter from DOW dated March 5, 2007 (FA Exhibit "G-3"), the Subject Property is currently served by a water meter located on the Subject Property, adjacent to the Waipua Street cul-de-sac. As noted by DOW, although the DOW's Kilauea Water System is operating at capacity, the Subject Property is nevertheless entitled to a total of five (5) water meters. The existing water meter is set aside for the Main House. In order to provide potable water to the Barn, the Applicants will probably have one, and perhaps two, additional water meters installed adjacent to Kahili Quarry Road.

b. Electric/Communications. The Subject Property obtains electric service from Kauai Island Utility Cooperative, and communication services from Hawaiian Telcom, Inc. and Time Warner Entertainment Company, L.P. (dba Spectrum). Existing

electric and communications facilities are presently adequate to provide the demand for such services that will be generated by the proposed Project.

6.6 Wastewater Treatment and Disposal. The Project will utilize an Individual Wastewater Systems ("IWS") approved by the State Department of Health. The IWS will utilize septic tanks with leach fields. The IWS will be located at least two hundred (200) feet away from the Kilauea Stream, which is well beyond the fifty (50) foot minimum established by Hawaii Administrative Rules Section 11-62-32. The construction of the IWS on the Subject Property (161.88 acres) will not create a risk of seepage into and damage to the Kilauea Stream environment.

6.7 Solid Waste Disposal. Solid waste collection will be provided by the County of Kauai and by private means. Solid waste will be taken to the County's Transfer Stations for disposal in the County Landfill.

6.8 Governmental Services. The Project will have the following impacts on governmental services:

a. Fire and Police Services. Fire and police services in the vicinity are located in Princeville, approximately seven (7) miles from the Subject Property. The Project will not significantly increase the need for existing fire and police services.

b. Schools. The closest schools are Kilauea Elementary School located in Kilauea, and Kapaa Intermediate School and Kapaa High School, which are located in Kapaa. The Project will not generate any significant additional enrollment.

6.9 Economics. The Project will have the following economic impacts:

a. Jobs. The development of the Subject Property, including the Project, has resulted in the need for a Manager job position. In addition, two to five jobs (on a

full-time and/or temporary basis) will be generated by the maintenance operations on the Subject Property.

b. Housing. The Project will not result in the need for additional worker housing. All employees will be Kauai residents who are already living on Kauai.

c. Property Values. Since the fair market value of real property is based on the value of the land and physical improvements, the completion of the Project will increase the value of the Subject Property. This will result in increased real property taxes on the Subject Property. However, it will not, in and of itself, have a material impact on the value of, or real property taxes assessed against, surrounding properties.

6.10 Population. The Project will not result in a significant increase in population, other than the fact that the Applicant, Charles Somers and his family, will occupy the Main House on a part-time basis. The Manager and all employees to be hired will be Kauai residents.

6.11 Traffic Circulation. The major roads which service the Subject Property are Kahili Quarry Road, Kilauea Lighthouse Road, Kolo Road, and Kuhio Highway. The Project , in and of itself, will not significantly increase traffic on these roads.

6.12 Heritage Resources. As shown on the North Shore Heritage Resource Map (Figure 5-14 of the Kauai General Plan), there are wetlands located on the Subject Property. There are no other resources noted on this map.

The proposed Barn will be located on a relatively level portion of the Subject Property, at a sufficiently distant from any slopes and from the Kilauea Stream to reduce the risk of erosion. The public view of the Barn will be from parts of Kahili Quarry Road, the Kilauea Stream rivermouth area, the public beach access easement within the Kahili Makai

Subdivision on the east side of the Kilauea Stream, and the Kilauea Stream itself (collectively, the "Vantage Points"). The Barn will be sited well below Quarry Road and as far from the Kilauea Stream as practicable. All structures will be designed to blend harmoniously into the surrounding environment. Building materials and exterior colors will be compatible with the surrounding environment. All of the structures will be landscaped so as to minimize visual impacts. Numerous other residences and structures in the area are visible from the Vantage Points. The proposed Barn will be less intrusive than any of these other visible structures.

SECTION 7. SLUC CONSIDERATIONS/STATE PLAN.

7.1 SLUC Agricultural District. The area of the Subject Property in which the development of the Project will occur is located within the SLUC Agricultural District. Permitted uses in the SLUC Agricultural District are set forth in HRS Section 205-4.5(a), which provides in relevant part as follows:

> **"§205-4.5 Permissible uses within the agricultural districts.**
>
> (a) Within the agricultural district all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:
>
> (1) Cultivation of crops, including but not limited to, flowers, vegetables, foliage, fruits, forage, and timber;
>
> . . .
>
> (7) Public, private, and quasi-public utility lines and roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, or treatment plants, or corporation yards, or other like structures;

(8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest;

. . .

(10) Buildings and uses, including but not limited to, mills, storage, and processing facilities, maintenance facilities, and vehicle and equipment storage areas that are normally considered directly accessory to the abovementioned uses and are permitted under Section 205-2(d);

. . ."

7.2 Development's Compliance with SLUC Agricultural District Standards. The proposed uses include the development of: one accessory building (the Barn); a driveway; landscaping; and utilities. All of these proposed uses are recognized as permissible uses under HRS Section 205-4.5(a).

7.3 State Planning Act. The State Planning Act contains Objectives and Policies to assist the State in attaining its long-range planning Goals. Included in the Objectives and Policies are the following:

a. §226-6 Objectives and policies for the economy--in general.

b. §226-11 Objectives and policies for the physical environment--land-based, shoreline, and marine.

c. §226-13 Objectives and policies for the physical environment--land, air, and water quality.

d. §226-25 Objective and policies for socio-cultural advancement--culture.

7.4 Compliance with State Plan. The proposed Project will comply with the State Planning Act as follows:

a. Economy in General. The Project will: provide increased and diversified employment opportunities for Kaua'i residents; strive to achieve a level of construction activity responsive to, and consistent with, state growth objectives; encourage labor-intensive activities that are economically satisfying and which offer opportunities for upward mobility; stimulate the development and expansion of economic activities which will benefit areas with substantial or expected employment problems; maintain acceptable working conditions and standards for Hawaii's workers; provide equal employment opportunities for all segments of Hawaii's population through affirmative action and nondiscrimination measures; and promote and protect intangible resources in Hawaii, such as scenic beauty and the aloha spirit, which are vital to a healthy economy.

b. Physical environment--land-based, shoreline and marine resources. The Project will: exercise an overall conservation ethic in the use of Hawaii's natural resources; ensure compatibility between land-based and water-based activities and natural resources and ecological systems; take into account the physical attributes of areas when planning and designing activities and facilities; manage natural resources and environs to encourage their beneficial and multiple use without generating costly or irreparable environmental damage; encourage the protection of rare or endangered plant and animal species and habitats native to Hawaii; and pursue compatible relationships among activities, facilities, and natural resources.

c. Physical environment--scenic, natural beauty and historic resources. The Project will: promote the preservation and restoration of significant natural and historic resources; promote the preservation of views and vistas to enhance the visual and aesthetic enjoyment of mountains, ocean, scenic landscapes, and other natural features; protect those special areas, structures,

and elements that are an integral and functional part of Hawaii's ethnic and cultural heritage; and encourage the design of developments and activities that complement the natural beauty of the islands.

d. Physical environment--land, air, and water quality. The Project will: promote the proper management of Hawaii's land and water resources; encourage actions to maintain or improve aural and air quality levels to enhance the health and well-being of Hawaii's people; encourage design and construction practices that enhance the physical qualities of Hawaii's communities; and foster recognition of the importance and value of the land, air and water resources to Hawaii's people, their cultures and visitors.

e. Socio-cultural advancement--culture. The Project will: foster increased knowledge and understanding of Hawaii's ethnic and cultural heritages and the history of Hawaii; and support activities and conditions that promote cultural values, customs, and arts that enrich the lifestyles of Hawaii's people and which are sensitive and responsive to family and community needs.

SECTION 8. GENERAL PLAN CONSIDERATIONS.

8.1 Kaua'i General Plan Land Use Designation. As shown on the North Shore Land Use Map (which is contained in the Kaua'i General Plan as Figure 5-7), the Subject Property is located primarily in the Natural Land Use Designation. *[Note: A small portion of the Subject Property at its mauka (south-west) end is located in the Residential Community Land Use Designation, but the Project will not be located in this area and therefore it will not be discussed.]*

Land uses in the Natural Designation are described in Section 2.2.1 of the General Plan as follows:

"1. Natural

Areas designated as Natural have either limited development capacity or are not suitable for development due to topography, hazards vulnerability, sensitive resources, and other constraints. They include all State Land Use Conservation District lands and some County Open Zoning District land. These areas include the many ridges, waterfalls, river valleys, and rugged coastlines of the island that comprise its open spaces and scenic views. Very few residential uses are found in the Natural designation and are generally not encouraged.

. . .

Changes from the Previous General Plan Land Use Map

Natural replaces the Open Designation in the previous General Plan. The Open Designation included undeveloped natural areas as well as some areas that are vegetated but developed and actively managed, such as golf courses."

8.2 Goals. The overall Goals contained in Section 1.3 of the Kaua'i General Plan, and the Project's compliance therewith, are as follows:

a. Goal 1 – A Sustainable Island. The Project is an example of responsible growth in an area designated for open space uses. The Applicants will implement a number of green (environmentally enhancing) initiatives.

b. Goal 2 – A Unique and Beautiful Place. The Project will compliment the natural, cultural, social and built environmental assets of the Kilauea Community. It will provide uses that are compatible with similar uses in the area. The Applicants will design the exterior of the Barn with earth tone colors, vegetation screens, and landscaping.

c. Goal 3 – A Healthy and Resilient People. The Project will have minimal visual impacts and will have no significant negative impacts on the Historic Sites or Hawaiian cultural practices.

d. Goal 4 – An Equitable Place, with Opportunity for All. The Project will support and enhance economic and business opportunities and jobs on Kaua'i.

8.3 Policies. The Project will comply with the Policies contained in Section 1.4 of the Kaua'i General Plan as follows:

a. Manage Growth to Preserve Rural Character. The Project will not detract from the rural characteristics of Kaua'i. The Conservation Easements will preserve the rural nature of this area.

b. Provide Local Housing. The Project will not have any negative effects on affordable housing opportunities for Kaua'i residents.

c. Recognize the Identity of Kaua'i's Individual Towns and Districts. The Project will help preserve the conservation values of the Subject Property consistent with the planning goals for the North Shore area.

d. Design Healthy and Complete Neighborhoods. The Project will be a compliment to healthy and complete neighborhoods by providing close, vehicular and walkable access to the Kilauea Quarry and the ocean.

e. Make Strategic Infrastructure Investments. The Applicants have provided the necessary infrastructure (including public access to the Shoreline via Kahili Quarry Road) to offset any negative impacts it may have on public facilities.

f. Reduce the Cost of Living. The Project will have no negative impact on the cost of living for the Kaua'i community.

g. Build a Balanced Transportation System. The Project will not substantially increase traffic or congestion problems.

h. Protect Kaua'i's Scenic Beauty. The Project will have no substantial negative impacts on the visual resources in the Kilauea area. The color scheme and landscaping for the Project will help mitigate any visual impacts of the Barn.

i. Uphold Kaua'i as a Unique Visitor Destination. The Project will preserve the rural characteristics of this area and will not cause any expansion of visitor facilities outside of designated areas.

j. Help Business Thrive. The Project will provide employment opportunities which in turn will generate increased revenues for business and commercial activities in the Kilauea area.

k. Help Agricultural Lands Be Productive. The Project will have no negative impact on surrounding agricultural uses.

l. Protect Our Watersheds. As discussed in Section 4.2f. above and Section 6.1 above, the Project will have no negative impacts on the Kilauea Stream watershed area.

m. Complete Kaua'i's Shift to Clean Energy. The Project will have no negative impact on Kaua'i's shift to clean sources of energy. The Applicants will utilize environmentally sustainable materials and designs throughout the Project.

n. Prepare for Climate Change. Portions of the Subject Property located along the Kilauea Stream will be subject to sea level rise as shown on the Projected Sea Level Rise Model Map. Neither the Project nor the Accessory Improvements will be located in this area.

o. Respect Native Hawaiian Rights and Wahi Pana. As discussed in Sections 6.2 and 15 herein, the Project will have no substantial impacts on any of the Historic Sites,

Hawaiian traditional and cultural practices, or access to streams, shorelines, or areas associated with Hawaiian religious, traditional or cultural practices.

p. Protect Access to Kaua'i's Treasured Places. As discussed in Section 12.1 below, the Project will have no negative impacts on the public's access to the shoreline, or to public recreational areas.

q. Nurture Our Keiki. The Project will help provide job opportunities that will allow Kaua'i's young people to grow and flourish.

r. Honor Our Kūpuna. The Project will provide access opportunities along Kahili Quarry Road for the Kūpuna to the Shoreline area.

s. Communicate with Aloha. The scheduling of this Second Amendment before the Planning Commission will allow the public to participate in the planning and decision-making process for the Project.

8.4 Objectives & Actions by Sectors. The ten (10) Sectors contained in Section 3.0 of the Kaua'i General Plan (which represent the areas that must be considered in policy implementation), and the Project's compliance therewith, are as follows:

a. The Watershed. The Project is located in the Kilauea Valley watershed, adjacent to the Kilauea Stream which runs through the east side of the Subject Property. As discussed in Section 6.1 above, the Project will have no negative impact on the flow of water through the Kilauea Stream. As a result of the Conservation efforts on the Subject Property, the Applicants have restricted the density of development and potential of uses in this area, which is identified in the General Plan as the Kahawai (middle watershed/freshwater) and Kahakai (coastal) sections of the watershed. The overall use of the Subject Property will have no significant negative

impacts on the natural, historic, cultural, or environmental qualities of, or resources within, the watershed areas.

b. Housing. The Project will not increase the demand for residential uses and needs in the Kilauea area.

c. Transportation. The Project will not result in a substantial increase in traffic and will have no significant negative impact on Kaua'i's transportation infrastructure.

d. Infrastructure & Services. The Project will be served by existing utility (water/sewer/electric/cable) systems, none of which will require upgrades to meet Project demands.

e. Shared Spaces. The Project will not overburden the use and enjoyment of public resources and Shared Spaces in the Kilauea area. As a result of the Applicants' improvements to Kahili Quarry Road, community access to Kahili Quarry and the Shoreline has been improved.

f. Economy. The Project will provide additional employment opportunities for residents in support of Kaua'i's economy.

g. Heritage Resources. The Project will have no substantial visual impacts on surrounding lands, and no substantial impacts on the Historic Sites, on Hawaiian cultural or traditional practices, or on access to streams, shorelines, areas associated with Hawaiian cultural or traditional practices, recreational areas or other special places. The Project will not negatively impact any special features or resources that are shown on the North Shore Heritage Resource Map (Kaua'i General Plan Figure 5-14).

h. Energy Sustainability. The Project will have no negative impacts on Kaua'i's energy sustainability goals. It will incorporate energy efficient features in its development.

i. Public Safety & Hazards Resiliency. The existing Project improvements are located at higher elevations along the Kilauea Stream that will protect them from sea level rise. The Barn and any other new improvements will be constructed in areas outside of future seal level rise.

j. Opportunity & Health For All. The Project, through its conservation efforts as set forth in the Conservation Plan, will promote the knowledge and preservation of Historic Sites and Hawaiian cultural and traditional practices.

SECTION 9. CZO OPEN DISTRICT CONSIDERATIONS.

9.1 CZO Open District. Almost all of the Subject Property, including the Project area, is located within the CZO Open District. The purposes of the CZO Open District are set forth in CZO Article 9, which provides in relevant part as follows:

> **"Sec. 8-9.1 Purpose.**
>
> The Open District is established and regulated to create and maintain an adequate and functional amount of predominantly open land to provide for the recreational and aesthetic needs of the community or to provide for the effective functioning of land, air, water, plant and animal systems or communities.
>
> (a) To preserve, maintain or improve the essential characteristics of land and water areas that are:
>
> (1) of significant value to the public as scenic or recreational sources;
>
> (2) important to the overall structure and organization of urban areas and which provide accessible and usable open areas for recreational and aesthetic purposes;
>
> (3) necessary to insulate or buffer the public and places of residence from undesirable environmental factors caused by, or related to, particular uses such as noise, dust, and visually offensive elements.
>
> (b) To preserve, maintain or improve the essential functions of physical and ecological systems, forms or forces which significantly affect the general health, safety and welfare.

(c) To define and regulate use and development within areas which may be potentially hazardous.

(d) To include areas indicated on the County General Plan as open or as parks."

9.2 Permitted Uses And Structures In CZO Open District. CZO Section 2.4(s) contains the Uses and Structures permitted in the CZO Open District, which include the following:

"(1) Accessory uses and structures
(2) Day-use areas
(3) Diversified agriculture
(4) Livestock and grazing
(5) Outdoor recreation
(6) Parks and monuments
(7) Private recreation areas
(8) Resource management
(9) Single family detached dwellings
(10) Undeveloped campgrounds"

9.3 Uses And Structures Permitted In CZO Open District With A Use Permit. CZO Section 8-2.4(t) contains the Uses And Structures Permitted With A Use Permit within the CZO Open District, which includes the following:

"(2) Day care centers
(3) Developed campgrounds
(4) Home businesses
(5) Intensive agriculture
(6) Livestock and grazing within the Urban District as established by the State Land Use Commission
(7) Organized recreation camps
(8) Outdoor recreation concessions
(9) Police and fire facilities
(10) Quarries
(11) Recreation vehicle parks
(12) Religious facilities
(13) Utility installations
(14) Any other use or structure which the Planning Director finds to be similar in nature to those listed in this Section and appropriate to the District"

9.4 Standards For Construction And Use Within An Open District. CZO Section 8-9.2 regulates land coverage in the CZO Open District and provides as follows:

> **"Sec. 8-9.2 Open District Development Standards.**
>
> (a) Land Coverage:
>
> (1) The amount of land coverage created, including buildings and pavement, shall not exceed ten percent (10%) of the lot or parcel area."

9.5 Development's Compliance with CZO Open District Standards. The proposed uses include the development of: the Barn; driveway; landscaping; and utilities. As such, the Project complies with the Generally Permitted Uses And Structures allowed in the CZO Open District pursuant to CZO Section 8-2.4(s)(1), (3), (5, (7), (8). The total land coverage of all of the Project on the Subject Property (i.e., the Existing Improvements and the Project, collectively referred to as the "Development") will be approximately 1/2 of 1% (1/2%). This is approximately 20 times less than the permitted land coverage allowed pursuant to CZO Section 8-9.4 in the CZO Open District, which is 10%. The remaining 99½% of the Subject Property will be free of land coverage. As a result of the Applicants' dedication of the Conservation Easements, the residential (farm dwelling) density on the Subject Property has been reduced to two dwelling units, which is 1/16 of the maximum density of 32 dwelling units previously allowed by CZO Section 8-9.2(b). *[Note: At the time of the initial development of the Subject Property, CZO Section 8-8.5 would have allowed density for 32 farm dwelling units. The Applicants gave up the density potential for 30 farm dwelling units when they consented to the grant of the Conservation Easements.]* The Project itself will have no significant impact on the surrounding environment. As such, the Project complies with CZO Section 8-9.1 in that it: will help to preserve, maintain and improve the natural characteristics of the area; will allow

the area to remain predominantly free of development; and will be incidental to the use and open character of the surrounding lands.

SECTION 10. SPECIAL TREATMENT DISTRICT CONSIDERATIONS.

10.1 Special Treatment District. The Subject Property is located within the Special Treatment District (Scenic/Ecologic Resources), as described in CZO Sections 8-9.1(e), 8-11.1, and 8-11.2(a)(3). As such, the Subject Property is subject to the provisions contained in CZO Sections 8-11.3, 8-11.4, and 8-11.5.

10.2 Uses. Pursuant to CZO Sections 8-11.3 and 8-11.4, the Applicants have applied for a Use Permit (which was granted as part of the Master Permit approval) for the proposed Project. Consistent with CZO Section 8-9.4(a), the proposed uses and structures are Generally Permitted Uses And Structures within the Open District as contained in CZO Section 8-2.4(s).

10.3 Confirmation Letter. Pursuant to CZO Section 8-11.5(b), by letter dated August 3, 2007 prepared by the Applicants and signed and agreed to by the (then) Planning Director of the County of Kauai ("Planning Director") identified as FA Exhibit "G-1", the Applicants were informed of the particular reasons for the establishment of the Special Treatment District in which the Subject Property is located.

10.4 Plans. Pursuant to CZO Section 8-11.5, certain plans and three-dimensional drawings (collectively, the "Plans") as described below have been submitted, which Plans (together with the other exhibits attached hereto) collectively and clearly indicated:

a. The relation of the proposed overall Development to other uses and structures within the Special Treatment District.

b. The ways in which the overall Development is consistent with the reasons for the establishment of the Special Treatment District.

c. The location within the Subject Property of all existing and proposed: (i) topography; (ii) buildings; (iii) walks; (iv) driveways; (v) utilities; and (vi) plant materials.

d. The location on adjacent lands ("Adjacent Lands") (within an area that is: within 200 feet of the common boundary of the Subject Property and such Adjacent Lands that are a public thoroughfare, park or facility; and within 100 feet of the common boundary of the Subject Property and such Adjacent Lands which are privately owned) of existing or proposed: (i) streets; (ii) sidewalks; (iii) driveways; (iv) trees; (v) buildings; and (vi) topography.

10.5 Aerial Photographs. The Applicants submitted the Topographic Overlay and Aerial Photograph identified as FA Exhibit "H-1" and FA Exhibit "H-2", respectively, to meet the requirements of CZO Section 8-11.5(c).

10.6 Additional Information. Pursuant to CZO Section 8-11.5(d), the Applicants submitted a Sample showing the color, form, mass and shape of the Barn, identified as FA Exhibit "J-1". As set forth in the letter from the Planning Department identified as FA Exhibit "G-2", the Application was determined to be complete.

10.7 Supporting Materials. Pursuant to CZO Section 8-11.5(c) and the requirements and decision of the Planning Director, the Applicants submitted the following Plans:

a. FA Exhibit "H-1" (Topographic Overlay for Aerial Photograph). This shows topography of the Subject Property and the surrounding properties.

b. FA Exhibit "H-2" (Aerial Photograph [color]). This shows: an aerial view of the Subject Property in relation to surrounding properties; a 100 foot setback line from the

boundary of the Subject Property onto adjacent private properties; a 200 foot setback line from the boundary of the Subject Property onto adjacent public properties; improvements and vegetation within the 100 foot setback line and 200 foot setback line on adjacent properties; and the location of the proposed Development.

c. FA Exhibit "J-1" (Photograph [Kilauea Falls Ranch Exterior Materials List]). This is a photograph showing the roofing material, construction material, trim material, and colors for the Barn. FA Exhibit "J-1" has been further supplemented with the Barn Exterior Material Plans attached hereto as ***Exhibit "B-4"***.

10.8 Compatibility With Surrounding Uses. The Subject Property is surrounded by properties located within the SLUC Urban District, the SLUC Agricultural District, the CZO Residential District, the CZO Open District, and the Special Treatment District (Scenic/Ecologic Resources). Uses on the surrounding lands include commercial uses, residential uses, farm dwelling uses, and agricultural uses. The Subject Property is similar in topography, character and nature with adjacent and surrounding properties, and the Project activities will be consistent with such surrounding uses.

10.9 Compliance with Special Treatment District Standards. The development of the Project on the Subject Property will have no negative impact on the Special Treatment District. The Project is and will be compatible with existing uses in areas on or around the Subject Property. The Project will not impact scenic or open space resources within the Special Treatment District. The Project will not increase runoff or otherwise endanger the coastal ecosystem. The Project will not be located in a coastal hazard area. The Project will have no detrimental impact on recreational, historic, economic or resources. The Project will not have detrimental impacts on beach or marine resources. Approval of the Project will not result in the

foreclosure of future management options for development in the area. The design, siting, and landscaping of the Project as proposed will ensure that the proposed Project recognizes, preserves, maintains and contributes to the characteristics of the surrounding lands (which lands are recognized to be of particular significance or value to the general public). In particular, the Project will be compatible with, and will protect, the unique natural forms of, biologic systems contained within, and aesthetic characteristic of, the Special Treatment Area.

SECTION 11. NORTH SHORE DEVELOPMENT PLAN CONSIDERATIONS.

11.1 Development Plan Goals and Objectives. The goals and objectives of the North Shore Update, as adopted by the North Shore Development Plan Ordinance, include the following:

Goal A: To preserve the unique natural beauty of the North Shore Planning Area.

Goal B: To preserve the special rural charm of the North Shore Planning Area.

Goal C: To provide for the safety and welfare of the people of their property of the North Shore Planning Area.

Goal D: To provide for economic development of the North Shore Planning Area.

Goal E: To preserve the wildlife and flora and the North Shore, recognizing man's dependence upon this preservation for his own health and welfare.

Goal F: To insure the preservation of historic-archaeological sites in the North Shore Planning Area.

Goal G: To create a development for evolutionary growth that depends upon a planning process whereby conflicts can be resolved through the establishment of priorities and community participation.

Goal H: To provide for recreational opportunities that are compatible with unique qualities and natural features of the North Shore.

11.2 Development's Compliance with Development Plan Standards. The proposed use of the Subject Property will not conflict with any of the Goals contained in the North Shore DPO. The design, layout and outside appearance of the Development in general and the Barn in particular is and will be compatible with the natural beauty of the area. As such, the proposed use will not conflict with Goals A or B. The proposed use will provide economic opportunity for Kauai residents and as such will promote Goal D. The proposed use will have no negative impact on the public safety or welfare, on any endangered species of plants or animals, on archaeologic or historic sites, or on recreational opportunities on or around the Subject Property. As such, it will not conflict with Goals C, E, F or H. The process of filing this Second Amendment is consistent with the purposes of Goal G.

SECTION 12. SMA CONSIDERATIONS.

12.1 Recreational Resources. The Subject Property is located adjacent to Kahili Quarry Road, which is used by the public to gain access to Kahili Beach and the Kilauea Stream. Kahili Beach is used for recreational purposes, including surfing, swimming, fishing, camping, and other beach activities. The Kilauea Stream is used for fishing, swimming, kayaking, and other recreational activities. Portions of the Kilauea Stream are located on or adjacent to the Subject Property. There is a public pedestrian access trail ("Trail") which runs from Kahili Quarry Road to the west bank of the Kilauea Stream (near the Kilauea Stream rivermouth) and then in a mauka direction for approximately 2,500 feet along the west bank of the Kilauea Stream. The Trail is shown colored in red on the Lot 2 Site Plan identified as FA Exhibit "C-13". Kahili Quarry Road has been repaired and upgraded by the Applicants and

now provides normal vehicular access to the Trail, Kilauea Quarry, Kilauea Stream, and Kahili Beach. The Project will not have any negative impact on the public's right to use and access these public resources, or to exercise public rights in the navigable portions of the Kilauea Stream. The Project will not have any negative impact on any public recreational opportunities located on or near the Subject Property. The Project will not overburden the use of, nor restrict access to, the shoreline in the vicinity of the Subject Property. The Project, although not located in the vicinity of a State or County Park, is located near the Kilauea National Wildlife Reserve.

12.2 Historic Resources. The Project will have no impact on any known historic, cultural or archaeological resources located on the Subject Property. The development of the Barn will be an integral part of the Applicants' ongoing efforts on the Subject Property to: preserve archaeological sites; preserve and protect wetlands; preserve and protect avian and mammalian species; and preserve, protect and plant native vegetation. The Applicants will protect and preserve any historic resources that may be found during construction of the Barn and the Accessory Improvements.

12.3 Scenic and Open Space Resources. The Project will have no negative impact on the scenic and open space resources on and around the Subject Property. The Project will be compatible with and blend into the surrounding area. The Project will not interfere with any views to or along the shoreline.

12.4 Coastal Ecosystems. The Subject Property is located on, along, and down Kilauea Valley and the Kilauea Stream, at the fringe of the coastal ecosystem of that area. As shown on the Barn Site Plan, at its closest point the Barn will be located over 200 feet from the Kilauea Stream. Best Management Practices will be implemented to ensure that the construction of the Project: will have no significant impact on this ecosystem; will not cause any erosion or

increased runoff into the Kilauea Stream; and will not endanger the coastal ecosystem or have any negative impacts on it.

12.5 Economic Uses. As discussed above, the Project will create both short-term and long-term economic benefits associated with the construction activities. The Project will not have any negative impacts on the economy.

12.6 Coastal Hazards. As shown on the County of Kauai's flood insurance rate map (Flood Insurance Rate Map 150002-0060E), portions of the Subject Property are located in Flood Zone AE (Floodway) (E1.18), Flood Zone VE (E1.18), and Flood Zone X. The Barn will be located in Flood Zone X. The Project will have no contributory impact on flooding on or around the Subject Property.

12.7 Managing Development/Public Participation. The Project activities on the Subject Property are complimentary to, and consistent with, present and future coastal zone development in this area of Kauai.

12.8 Beach Protection/Marine Resources. The Subject Property is not located on the Shoreline and the Project will have no impact on any shoreline or beach areas, or an any open space areas along the shoreline. The Project will not involve any development within the beach or coastal area which would have any negative impact on marine or coastal resources. The Applicants are not aware of any existing seawalls or revetments in the vicinity of the Subject Property.

12.9 Value of Development. The Project involves activities with a value greater than $500,000.00.

12.10 Compatibility With Surrounding Uses. The Subject Property is located in the vicinity of properties located within the SLUC Urban District, the SLUC Agricultural District,

the CZO Residential District, the CZO Open District, the CZO Neighborhood Commercial District, and the Special Treatment District (Scenic/Ecologic Resources). Uses on the surrounding lands include commercial uses, residential uses, farm dwelling uses, and agricultural uses. The Subject Property is similar in topography, character and nature with adjacent and surrounding properties, and the Project activities are consistent with such surrounding uses.

12.11 Impacts Within SMA. The Project will have no significant negative impact on the SMA. The Project is and will be compatible with existing uses in areas on or around the Subject Property. The Project will not negatively impact scenic or open space resources within the SMA. The Project will not increase runoff or otherwise endanger the coastal ecosystem. The Project will not be located in a coastal hazard area. The Project will have no detrimental impact on recreational, historic, economic or resources. The Project will not have detrimental impacts on beach or marine resources. Approval of the Project will not result in the foreclosure of future management options for development in the area. The design, siting, and landscaping of the Project as proposed will ensure that the proposed Project recognizes, preserves, maintains and contributes to the characteristics of the surrounding lands (which lands are recognized to be of particular significance or value to the general public). In particular, the Project will be compatible with, and will protect, the unique natural forms of, biologic systems contained within, and aesthetic characteristic of, the SMA.

12.12 Compliance with SMA Standards. The Project activities on the portions of the Subject Property within the SMA fulfill the provisions of the SMA Rules in that:

a. The Project will have no affect on public access to publicly owned or used beaches and recreational areas.

b. The Project will not detrimentally effect any wildlife or endangered plant or animal species which may be located at this site.

c. Provisions for solid and liquid waste treatment, disposition and management will be developed in order to minimize adverse effects on the Special Management Area.

d. Alteration to existing land forms or vegetation and the construction of structures will cause minimum adverse effects to water resources and scenic and recreational amenities, and will minimize danger of floods, wind damage, storm surge, landslides, erosion, siltation, or failure in the event of earthquake.

e. The Project will not require dredging, filling, or altering any bay, estuary, salt marsh, river mouth, slough or lagoon.

f. The Project will not reduce the size of any beach or other area useable for public recreation.

g. The Project will not reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions or rivers or streams within the Special Management Area and the mean high tide line where there is no beach.

h. The Project will not substantially interfere with or detract from the line of sight toward the sea from the State highway nearest the coast;

i. The Project will not adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agriculture uses of land.

j. The Project will not have any substantial environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests.

k. The Project is consistent with the objectives, policies, and guidelines set forth in HRS Chapter 205A and Sections 3.0 and 4.0 of the SMA Rules.

l. The Project is consistent with permitted uses in the SLUC Agricultural District, the Kaua'i General Plan, the North Shore Development Plan, and the CZO.

SECTION 13. USE PERMIT AND ZONING PERMIT CONSIDERATIONS.

13.1 Use Permit. The Applicants are applying for an amendment to the Use Permit contained in the Master Permit and in the First Amendment.

13.2 Compatibility With Surrounding Uses. The Subject Property is surrounded by parcels that are located within the SLUC Agricultural District, the SLUC Urban District, the CZO Agriculture District, the CZO Neighborhood Commercial District, the CZO Residential District, the CZO Open District, and the CZO Special Treatment (Scenic/Ecologic Resources) District. Uses in the vicinity include transient vacation rental uses, agricultural uses, commercial uses, and residential uses. The Applicants' uses on and development of the Subject Property, if allowed, is not expected to cause problems for its neighbors and, to that extent, is compatible.

13.3 Compliance with Use Permit Standards. The proposed Project activities on the Subject Property are in compliance with the standards for Use Permits as contained in CZO Section 8-3.2, in that the Project will be:

a. A compatible use. The Barn and its accessory uses are allowed in the CZO Open District as long as impacts to the area are mitigated. These uses are, and will continue to be, compatible and similar to other uses in the area.

b. Not detrimental to health of persons residing or working in the neighborhood. The Project will not be detrimental to the health of persons residing and working in the neighborhood given the types of surrounding commercial, residential, and agricultural activities ("Surrounding Activities") in the area.

c. Not detrimental to safety of persons residing or working in the neighborhood. The Project will not have any substantial impacts on the environment, including noise generation, pollution, the discharge of odors, the discharge of fluid or gaseous materials, or visual impacts ("Environmental Impacts") that will be detrimental to the safety of persons residing and working in the neighborhood. The Project will be similar to and compatible with the types of Surrounding Activities in the area.

d. Not detrimental to peace of persons residing or working in the neighborhood. The Project will not create any Environmental Impacts that will be detrimental to the safety of persons residing and working in the neighborhood.

e. Not detrimental to morals of persons residing or working in the neighborhood. The Project will not involve activities that will be detrimental to the morals of persons residing and working in the neighborhood.

f. Not detrimental to comfort and general welfare of persons residing or working in the neighborhood. The Project will not create any Environmental Impacts that will be detrimental to the general welfare of persons residing and working in the neighborhood. It will be similar to Surrounding Activities and only operate during reasonable hours.

g. Not detrimental or injurious to property or improvements in the neighborhood. The Project will not create any Environmental Impacts that will be detrimental to the health of persons residing and working in the neighborhood.

h. Not detrimental to the general welfare of the community. The Project will not create any Environmental Impacts that will be detrimental to the general welfare of the community.

i. Not a cause of substantial harmful environmental consequences to the Subject Property, or to other lands or waters. The Project will not generate Environmental Impacts or negative by-products which would affect the surrounding area.

j. Not inconsistent with the intent of the CZO. As discussed herein, the Project activities are compatible with uses and structures within the CZO Open District.

k. Not inconsistent with the General Plan. As discussed herein, the Project activities will be consistent with the Goals, Policies, and Objectives & Actions (Sectors) of the Kauai General Plan.

13.4 Development's Compliance with CZO Class IV Zoning Permit Standards. The Applicants have complied with the procedural provisions for a Class IV Zoning Permit by their filing and processing of this Second Amendment.

SECTION 14. HRS CHAPTER 343 (ENVIRONMENTAL IMPACT STATEMENTS) CONSIDERATIONS.

14.1 HRS Chapter 343. The Development is not subject to the provisions of Hawaii Revised Statutes Chapter 343. HRS Chapter 343 requires the preparation of an Environmental Assessment and/or an Environmental Impact Statement for certain activities as specified in HRS Section 343-5. The proposed Development does not fall within such specified activities, in that the Development does not:

a. Propose the use of state or county lands or the use of state or county funds;

b. Propose any use within any land classified as conservation district by the State Land Use Commission under HRS Chapter 205;

c. Propose any use within the shoreline area as defined in HRS Section 205A-41;

d. Propose any use within any historic site as designated in the National Register or Hawaii Register as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or HRS Chapter 6E;

e. Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District";

f. Propose any amendments to existing county general plans where such amendment would result in designations other than agriculture, conservation, or preservation;

g. Propose any reclassification of any land classified as conservation district by the State land Use Commission under HRS Chapter 205;

h. Propose the construction of new, or the expansion or modification of existing, helicopter facilities within the state; or

i. Propose the construction of a wastewater treatment unit, waste-to-energy facility, oil refinery, or power generating facility.

SECTION 15. NATIVE HAWAIIAN ISSUES.

15.1 Impacts on Traditional or Cultural Practices. As discussed in Section 6.2, the Project will have no impact on any known traditional or customary practices of native Hawaiians.

a. The only known traditional and customary practice associated with the Subject Property was for fishing and gathering within the lower portions of the Kilauea Stream. The Project will have no impact on the continued use of the Kilauea Stream for this purpose. There are no other known traditional or customary practices of native Hawaiians that are presently occurring within the Subject Property.

b. Except as noted, there are no special gathering practices taking place within any other portions of the Subject Property.

c. The Project will not detrimentally affect: access to the lower portion of the Kilauea Stream; access to the shoreline or shoreline areas; or fishing and gathering along the lower portion of the Kilauea Stream.

d. There are no known religious practices taking place within the Subject Property.

e. The known cultural and historic sites and resources located within the Subject Property are being preserved in place.

f. There are no known burials within the Subject Property.

SECTION 16. COMMUNITY CONTACTS.

16.1 Contact with Community Groups. The Applicants have met with the Kilauea Neighborhood Association ("KNA") in the past concerning the overall development on the Subject Property and will provide the KNA with a copy of this Second Amendment.

SECTION 17. CONCLUSION.

The Applicant respectfully requests that the Planning Commission:

1. Find that the Project will not have any substantial environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interest.

2. Find that the Project is consistent with the objectives, policies, and guidelines set forth in Hawaii Revised Statutes Chapter 205A and Sections 3.0 and 4.0 of the SMA Rules.

3. Find that the Project is consistent with permitted uses in the SLUC Agricultural District, the Kauai General Plan, the North Shore Development Plan, and the CZO.

4. Find that the Project will be in compliance with the provisions of HRS Chapter 6E and Title 13, Subtitle 13, Chapter 284 of the Hawaii Administrative Rules.

5. Find that the Project will be consistent with the provisions of HRS Sections 1-1 and 7-1 and Article 12, Section 7 of the Hawaii State Constitution.

6. Find that the Applicant has satisfied the minimum requirements of Ka Pa'akai O Ka'aina v. Land Use Commission to protect customary and traditional native Hawaiian rights.

7. Approve the Application And Motion For Second Amendment To Master Permit and the First Amendment for the Project on the Subject Property as described herein, subject to such reasonable conditions as the Planning Commission shall impose.

DATED: Lihue, Kauai, Hawaii, December 27, 2019.

BELLES GRAHAM LLP

By _____

MAX W. J. GRAHAM, JR.
Attorney for Applicants,
CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002 and WEST SUNSET 32 PHASE 1, LLC, a California limited liability company

EXHIBIT LIST

(Somers Trust/West Sunset 32 Phase 1, LLC; Application And Motion For Second Amendment To Master Permit; Exhibits "A" - "D") (Barn)

EXHIBIT

A. MAPS

Location Map A-1
Tax Map (5-2-12) A-2
Land Use District Boundary Map A-3
General Plan Map A-4
Zoning Map A-5
SMA Map A-6
North Shore Heritage Resource Map A-7
Sea Level Rise Map A-8
Conservation Easement C-1 Map A-9
Conservation Easement C-2 Map A-10

B. BUILDING/LANDSCAPING PLANS

Barn Site Plan B-1
Barn Plans B-2
Barn Landscape Plan B-3
Barn Exterior Material Plans B-4

C. GOVERNMENTAL AGENCY MATERIALS

Decision And Order (Master Permit) C-1
Initial Conditions (Master Permit) C-2
First Amendment Approval Letter C-3
Additional Conditions (First Amendment) C-4
Seventh Status Report C-5

D. ADJACENT PROPERTIES

Adjacent Property Index D-1
Tax Map 5-1-5 ..... D-2
Tax Map 5-2-4 ..... D-3
Tax Map 5-2-11 ..... D-4
Tax Map 5-2-12 ..... D-5
Tax Map 5-2-15 ..... D-6
Tax Map 5-2-20 ..... D-7
Tax Map 5-2-21 ..... D-8

EXHIBIT "A-1"

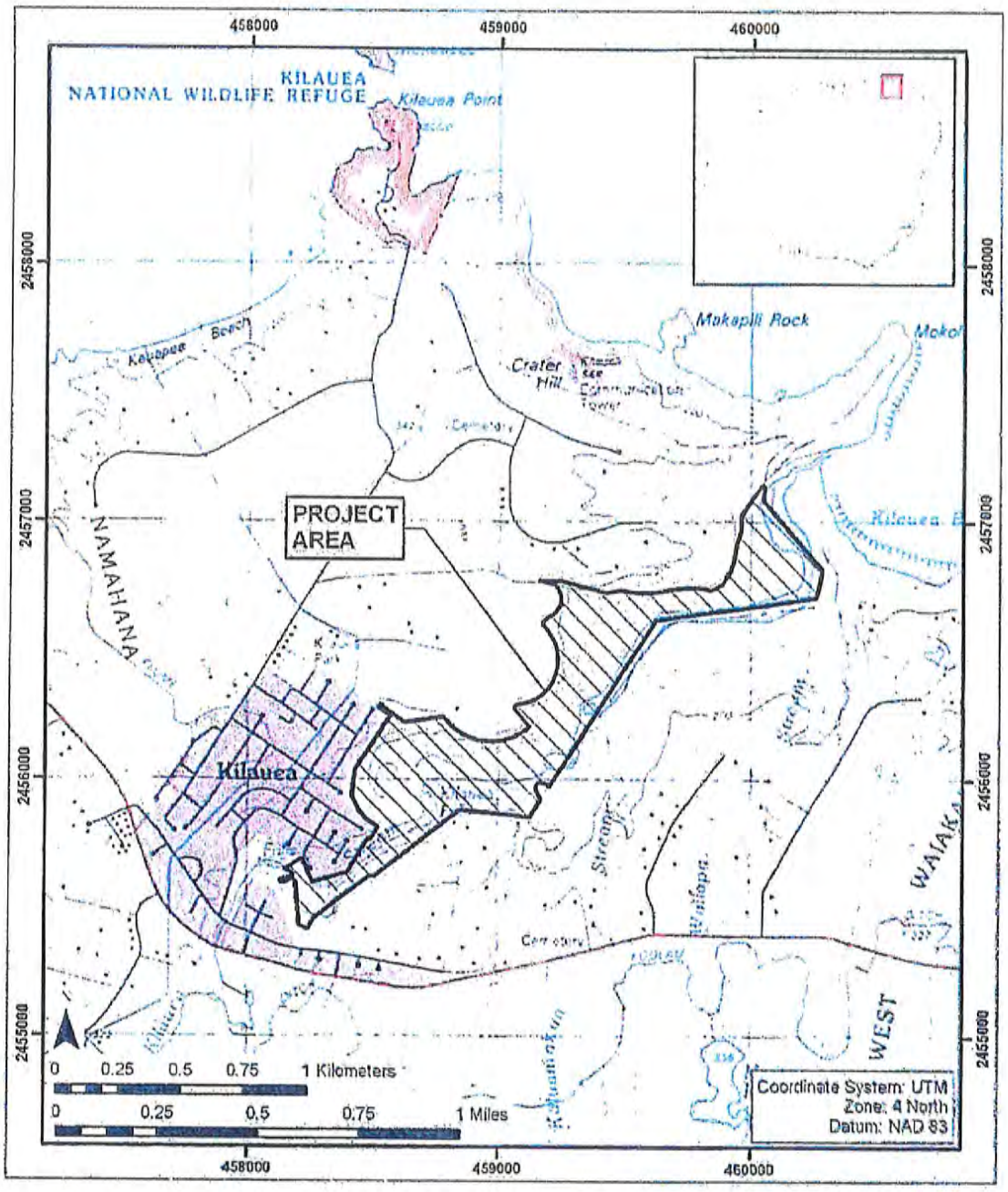


Figure 1. U.S. Geological Survey 7.5 Minute Series Topographic Map, Anahola Quadrangle (1996), showing the location of the project area

EXHIBIT "A-1"

EXHIBIT "A-2"

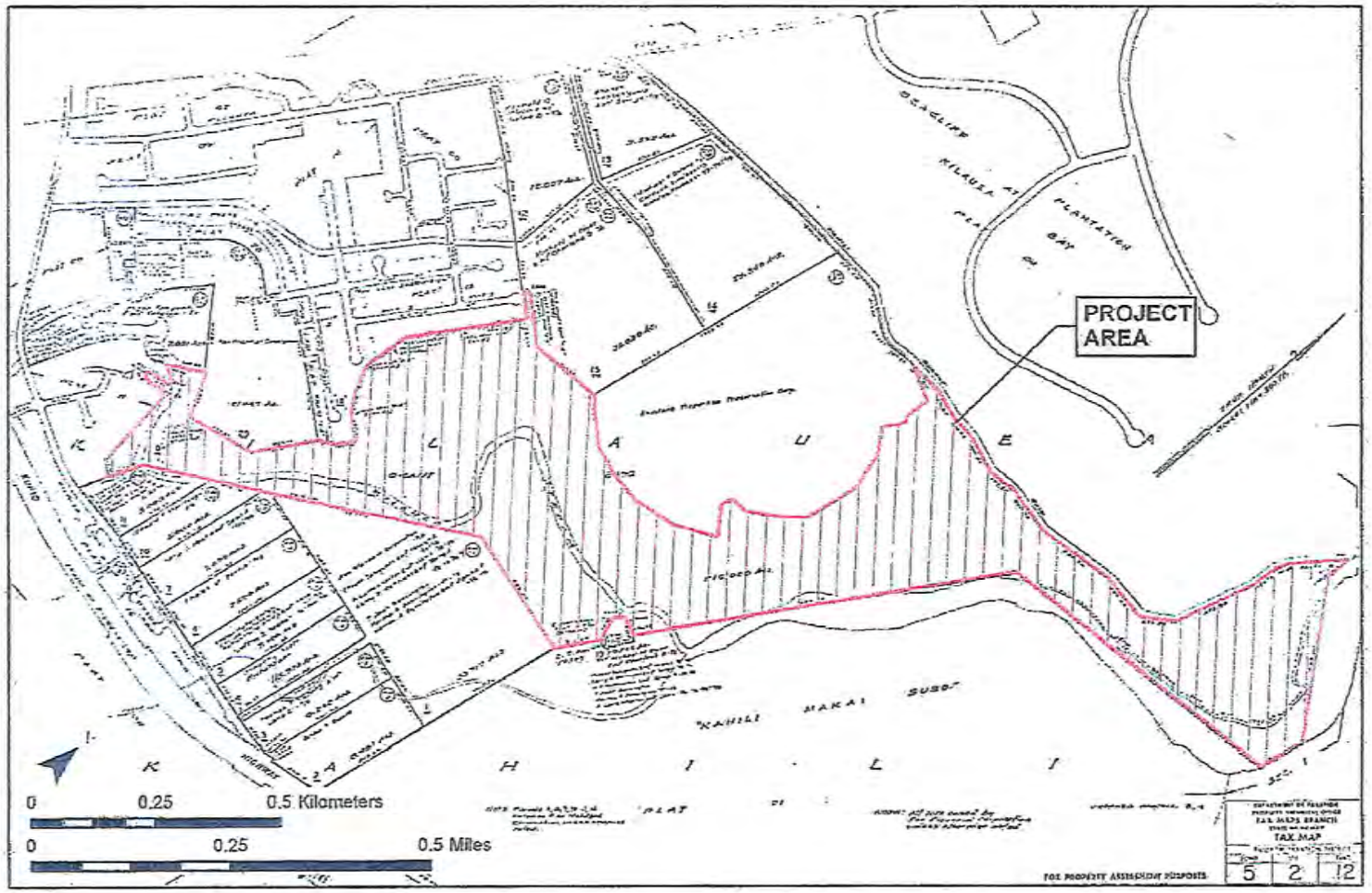
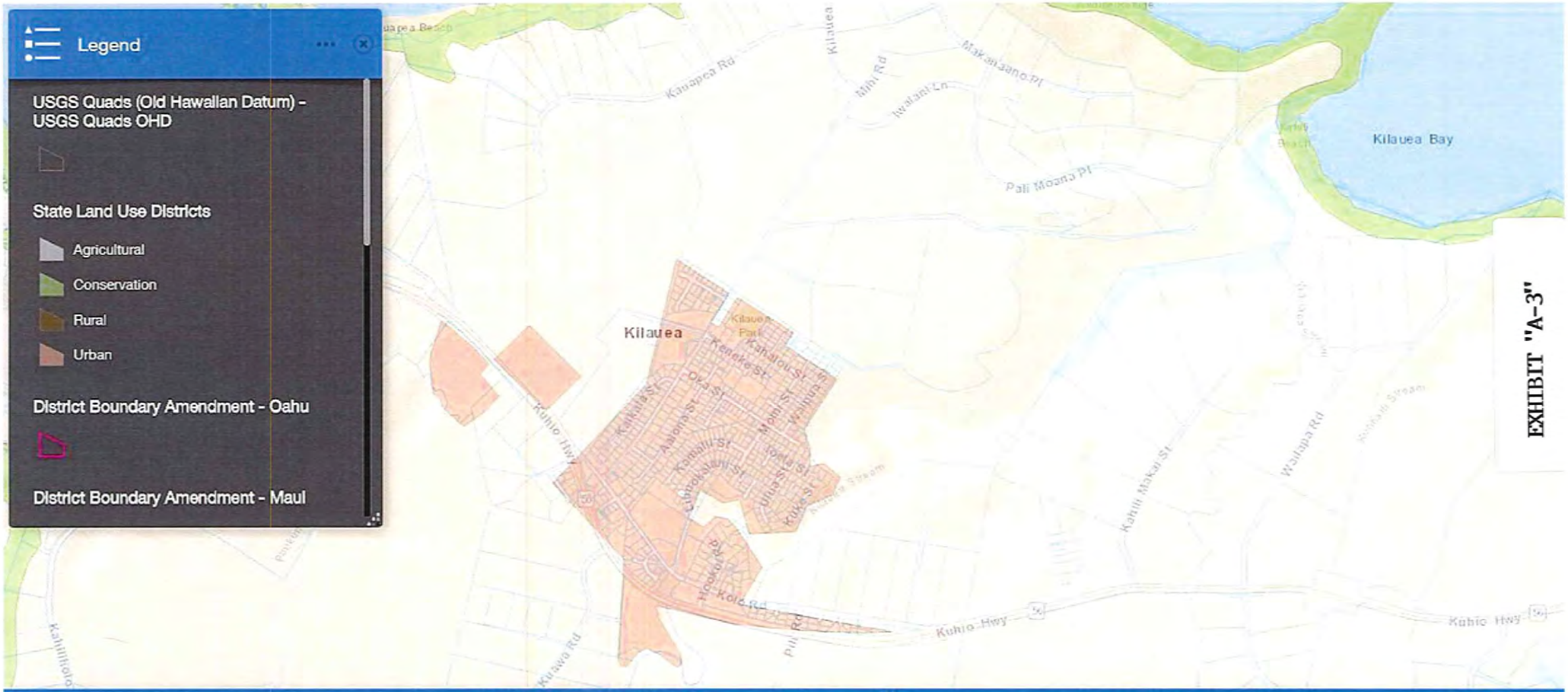


Figure 2. Tax Map Key (TMK) 5-2-12, showing the location of the project area

EXHIBIT "A-2"

EXHIBIT "A-3"



State of Hawaii Land Use District Boundaries Map - January 2018

EXHIBIT "A-3"

EXHIBIT "A-4"

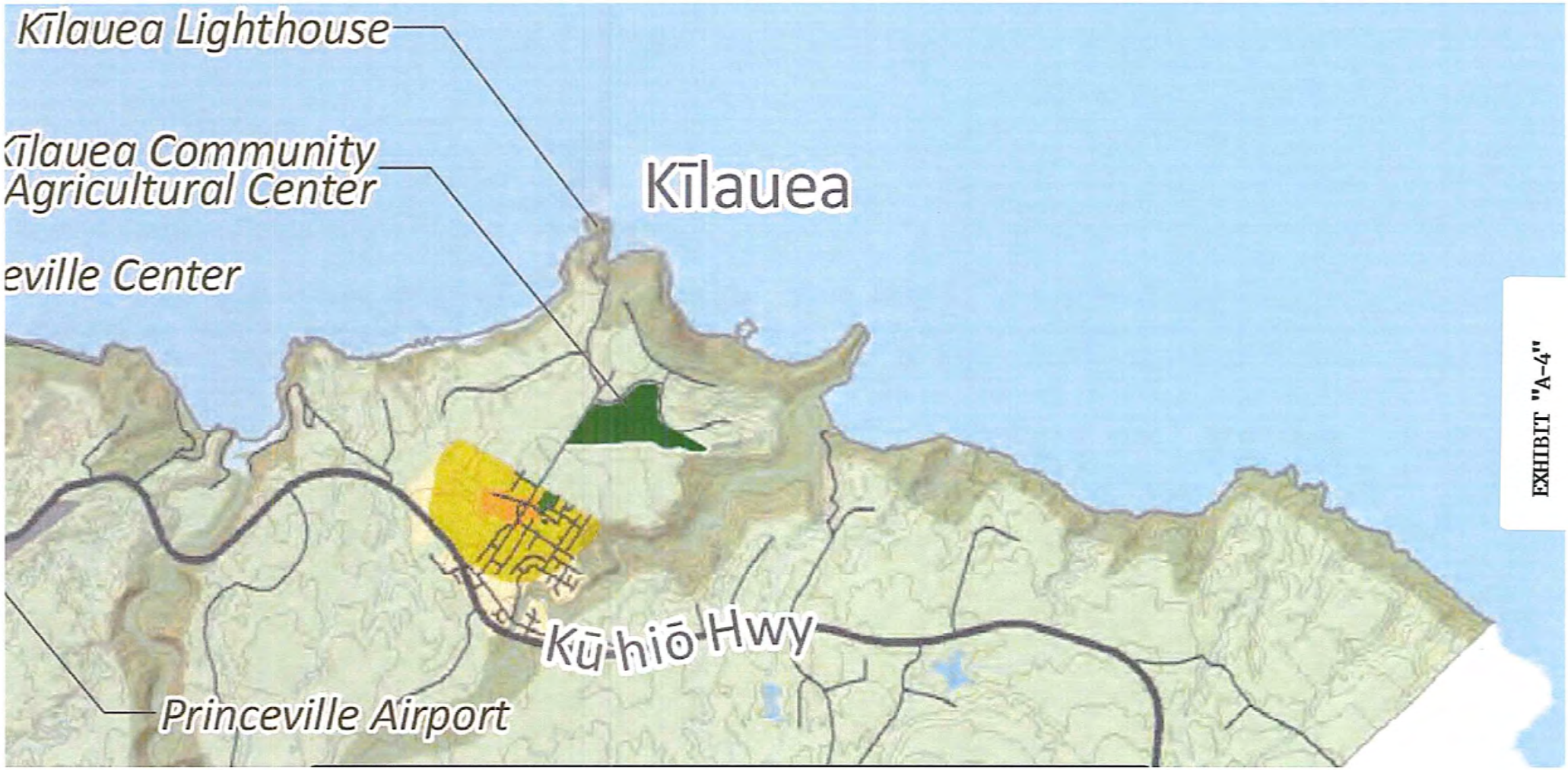

Kīlauea Lighthouse
Kīlauea Community
Agricultural Center
eville Center
Kīlauea
Kū-hiō-Hwy
Princeville Airport

EXHIBIT "A-4"

EXHIBIT "A-5"

MATCH LINE
HANALEI
600-R
600-I
COAST GUARD RESERVATION
Mokuaeae
Kilauea Point
Kalihiwai Beach
MAHANA
600-B
Kilauea
Kilauea Park
600-A
600-H
Makapili Rock
600-J
Kilauea Bay
SITE
NR-1
WAIAKALUA
Kalihiwai
LAWRENCE

EXHIBIT "A-5"

EXHIBIT "A-6"

SMA Kilauea

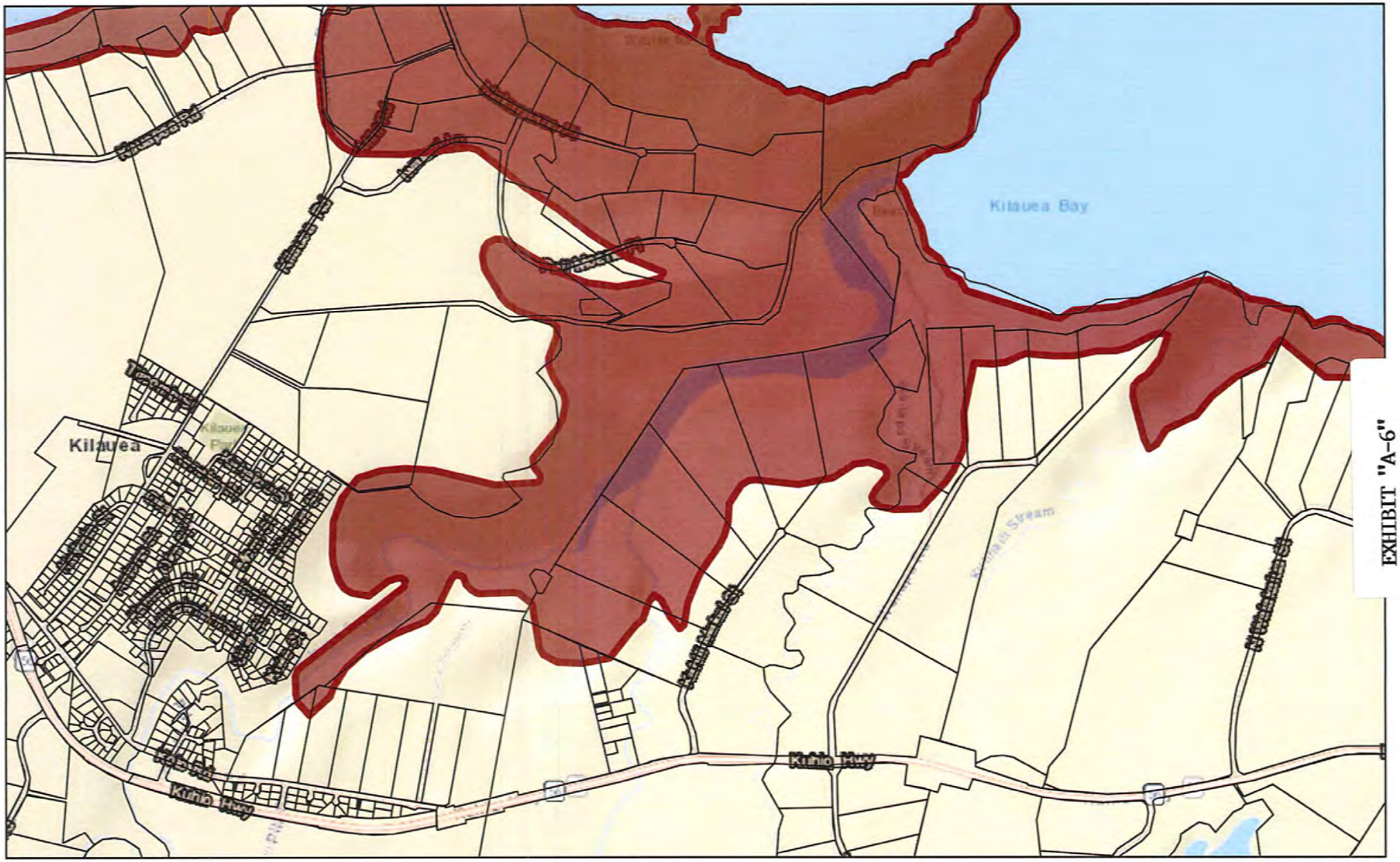


EXHIBIT "A-6"

November 26, 2019

TMK - Neighbor Islands

Special Management Area (SMA)

1:18,056

0 0.13 0.25 0.5 mi

0 0.23 0.45 0.9 km

Esri, HERE, Garmin, NGA, USGS, Esri, HERE

EXHIBIT "A-7"

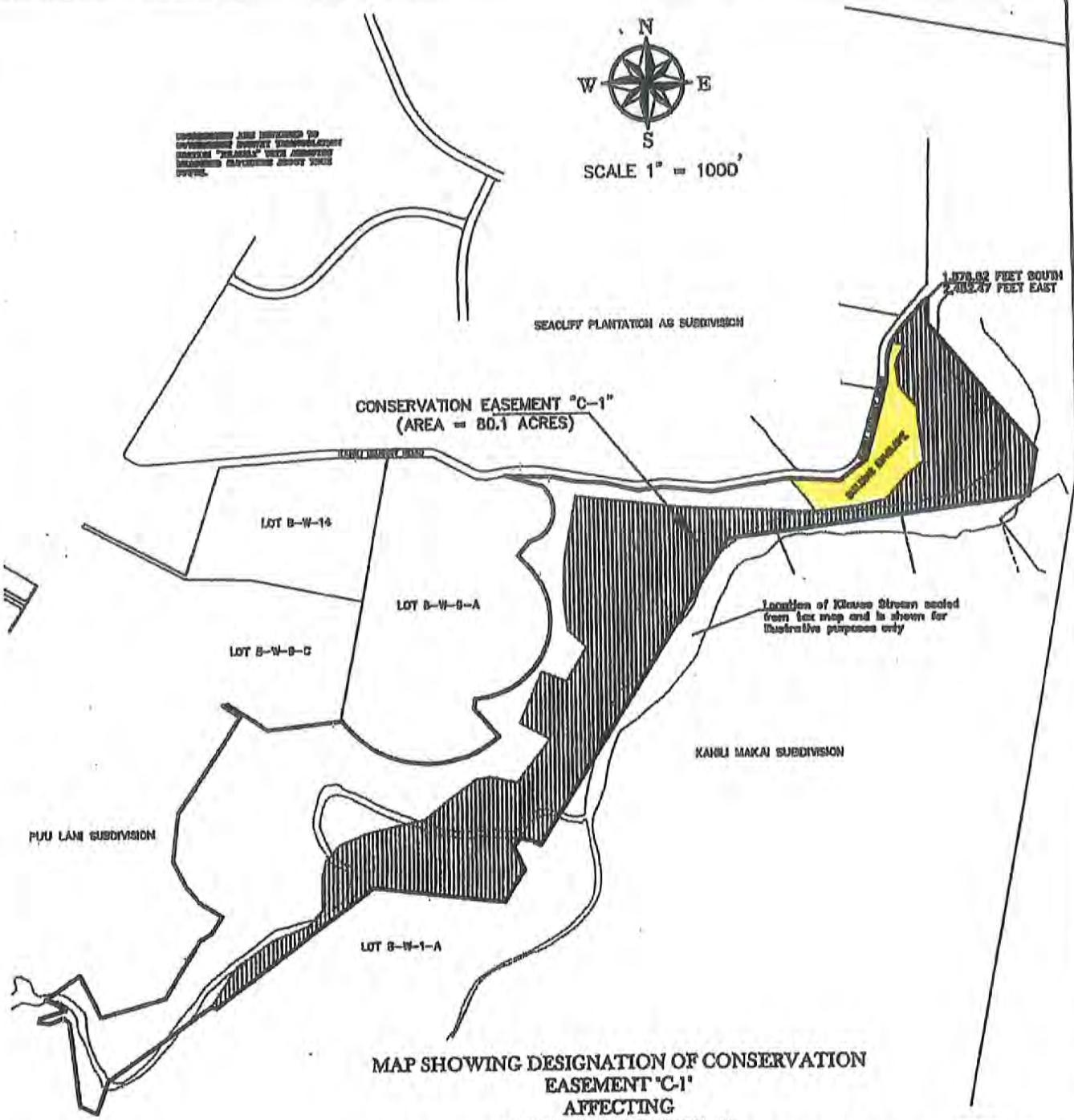
Kīlauea Lighthouse
Namahana
Kīlauea
Kīlauea
West Waiakalua
East Waiakalua
Waipake
Lepeuli
Kūhiō Hwy
Kāhili

EXHIBIT "A-7"

EXHIBIT "A-8"

EXHIBIT "A-8"

EXHIBIT "A-9"



MAP SHOWING DESIGNATION OF CONSERVATION EASEMENT "C-1"
AFFECTING
TMK(4) 5-2-012 PARCEL 35
BEING A PORTION OF GRANT 2896 TO CHARLES TITCOMB
BEING ALSO A PORTION OF LOT 8-W-9-A-1 " PUU LANI SUBDIVISION"

KILAUEA, KAUAI, HAWAII

ANTHONY D. CROOK
LICENSED PROFESSIONAL LAND SURVEYOR
No. 12094
HAWAII, U.S.A.

THIS MAP WAS PREPARED BY ME OR UNDER MY SUPERVISION.
SIGNATURE DATE: DECEMBER 09, 2008

ANTHONY D. CROOK
LICENSED PROFESSIONAL LAND SURVEYOR
CERTIFICATE No. 12094

AILANA SURVEYING & GEOMATICS LLC
PHONE (808)346-1818
FAX 1-800-855-6297
INFO@AILANASURVEYING.COM

EXHIBIT "A-9"

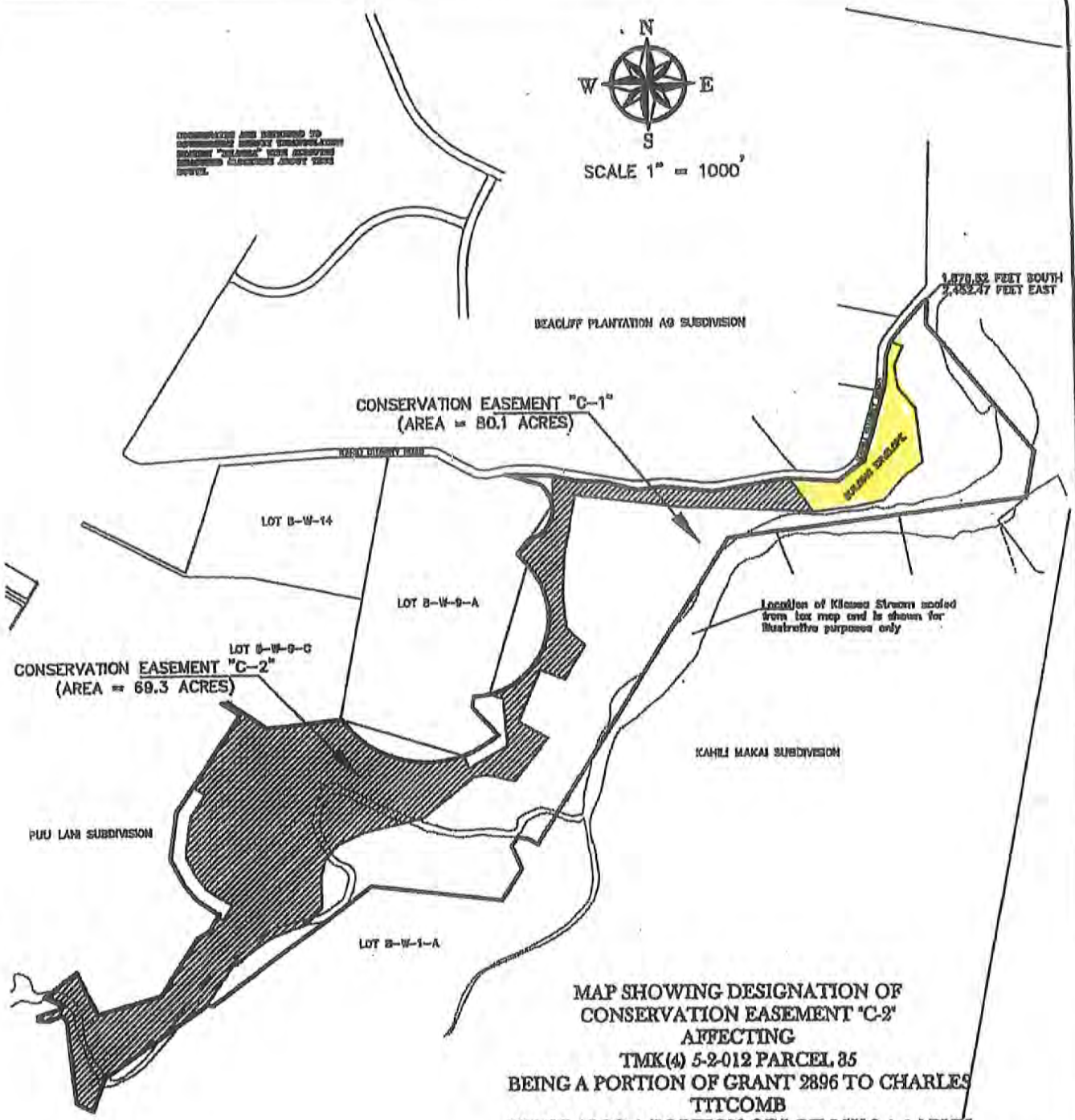
MAP DATED: October 14, 2008

C:\Projects\2008\Somers Charles\Somers LeLing

PROJECT#125-08

TMK(4)5-2-012-035

EXHIBIT "A-10"



MAP SHOWING DESIGNATION OF
CONSERVATION EASEMENT "C-2"
AFFECTING
TMK(4) 5-2-012 PARCEL 35
BEING A PORTION OF GRANT 2896 TO CHARLES TITCOMB
BEING ALSO A PORTION OF LOT 8-W-9-A-1 " PUU LANI SUBDIVISION"

KILAUEA, KAUAI, HAWAII

ANTHONY D. CROOK
LICENSED PROFESSIONAL LAND SURVEYOR
No. 12094
HAWAII, USA

THIS MAP WAS PREPARED BY ME OR UNDER MY SUPERVISION.
DATED: December 16, 2008
ANTHONY D. CROOK
LICENSED PROFESSIONAL LAND SURVEYOR
CERTIFICATE No. 12094

'AILANA SURVEYING & GEOMATICS LLC
PHONE (808)346-1818
FAX 1-800-655-6297
INFO@AILANASURVEYING.COM

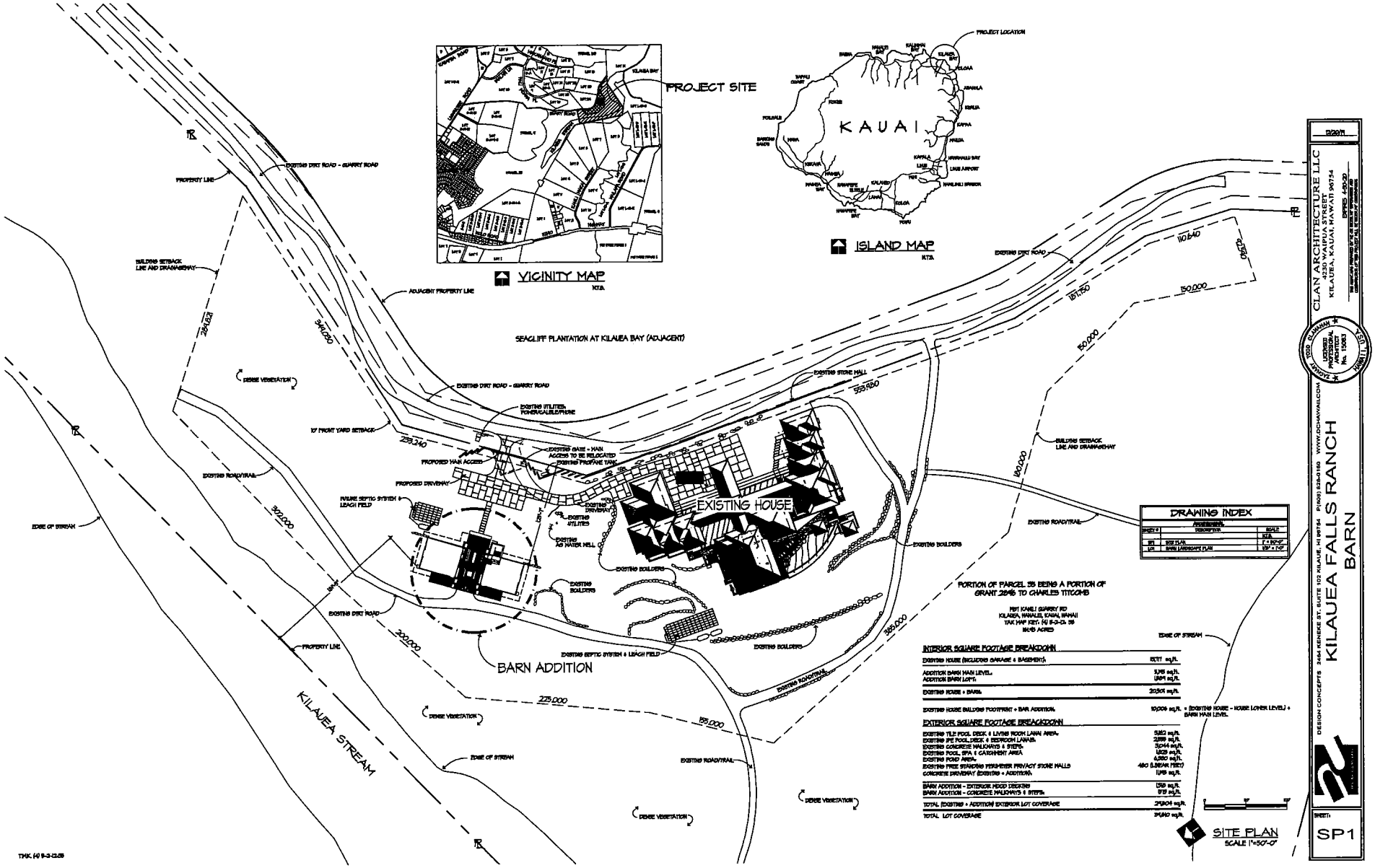
EXHIBIT "A-10"

MAP DATED: December 16, 2008

PROJECT#125-08

TMK(4)5-2-012-035

EXHIBIT "B-1"


PROJECT SITE
VICINITY MAP
N.T.S.
PROJECT LOCATION
KAUAI
ISLAND MAP
N.T.S.
SEAGLIFF PLANTATION AT KILAUEA BAY (ADJACENT)
EXISTING HOUSE
BARN ADDITION
KILAUEA STREAM
EXISTING DIRT ROAD - QUARRY ROAD
PROPERTY LINE
BUILDING SETBACK LINE AND DRAINAGEWAY
ADJACENT PROPERTY LINE
EXISTING DIRT ROAD
EXISTING ROAD/TRAIL
EDGE OF STREAM
DENSE VEGETATION
EXISTING STONE WALL
EXISTING BOULDERS
EXISTING SEPTIC SYSTEM & LEACH FIELD
PROPOSED DRIVEWAY
PROPOSED HAN ACCESS
EXISTING GATE - HAN ACCESS TO BE RELOCATED
EXISTING PROPANE TANK
EXISTING UTILITIES
EXISTING AG WATER WELL
10' FRONT YARD SETBACK
DRAWING INDEX
SITE PLAN
SCALE 1"=50'-0"
PORTION OF PARCEL 35 BEING A PORTION OF GRANT 2846 TO CHARLES TITCOMB
INTERIOR SQUARE FOOTAGE BREAKDOWN
EXTERIOR SQUARE FOOTAGE BREAKDOWN
CLAN ARCHITECTURE LLC
4230 WAIPUA STREET
KILAUEA, KAUAI, HAWAII 96754
KILAUEA FALLS RANCH
BARN
SHEET:
SP1
EXHIBIT "B-1"
(1 of 2)

PORTION OF PARCEL 35 BEING A PORTION OF
GRANT 2896 TO CHARLES TITCOMB

1457 KAHILI QUARRY RD
KILAUEA, HANALEI, KAUAI, HAWAII
TAX MAP KEY: (4) 5-2-12: 35
161.93 ACRES

EDGE OF STREAM

EXHIBIT "B-1"
(2 of 2)

INTERIOR SQUARE FOOTAGE BREAKDOWN

EXISTING HOUSE (INCLUDING GARAGE & BASEMENT):	13,717 sq.ft.
ADDITION BARN MAIN LEVEL:	5,145 sq.ft.
ADDITION BARN LOFT:	1,589 sq.ft.
EXISTING HOUSE + BARN:	20,501 sq.ft.
EXISTING HOUSE BUILDING FOOTPRINT + BAR ADDITION:	10,006 sq.ft. = (EXISTING HOUSE - HOUSE LOWER LEVEL) + BARN MAIN LEVEL

EXTERIOR SQUARE FOOTAGE BREACKDOWN

EXISTING TILE POOL DECK & LIVING ROOM LANAI AREA:	3,162 sq.ft.
EXISTING IPE POOL DECK & BEDROOM LANAIS:	2,555 sq.ft.
EXISTING CONCRETE WALKWAYS & STEPS:	3,044 sq.ft.
EXISTING POOL, SPA & CATCHMENT AREA	1,825 sq.ft.
EXISTING POND AREA:	6,330 sq.ft.
EXISTING FREE STANDING PERIMETER PRIVACY STONE WALLS	480 (LINEAR FEET)
CONCRETE DRIVEWAY (EXISTING + ADDITION):	11,145 sq.ft.
BARN ADDITION - EXTERIOR WOOD DECKING	1,318 sq.ft.
BARN ADDITION - CONCRETE WALKWAYS & STEPS:	375 sq.ft.
TOTAL (EXISTING + ADDITION) EXTERIOR LOT COVERAGE	29,804 sq.ft.
TOTAL LOT COVERAGE	39,810 sq.ft.

0 50' 100'

SITE PLAN

SCALE 1"=50'-0"

EXHIBIT "B-2"

EXHIBIT "B-2"
(1 of 11)

EXHIBIT "B-2"
(2 of 11)

DIL 0033

EXHIBIT "B-2"
(3 of 11)

EXHIBIT "B-2"
(4 of 11)

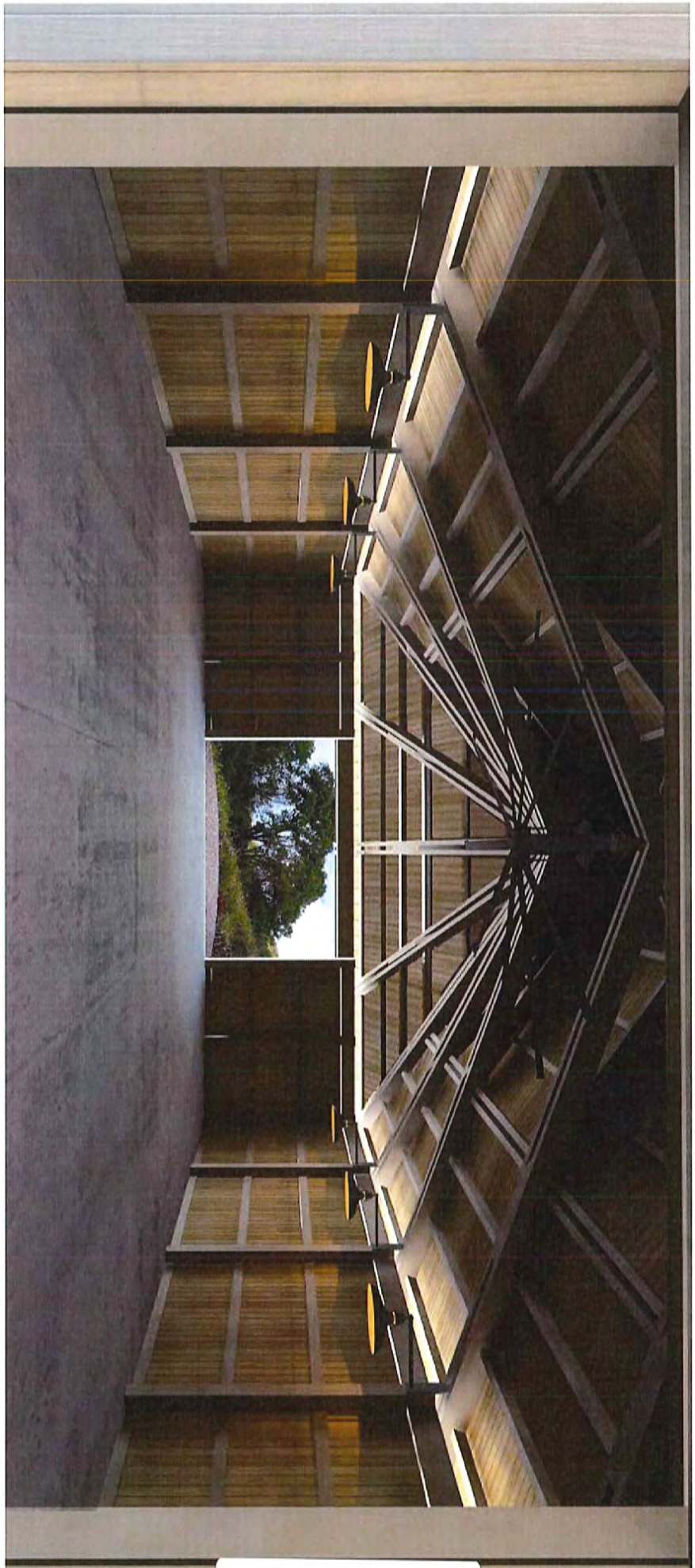
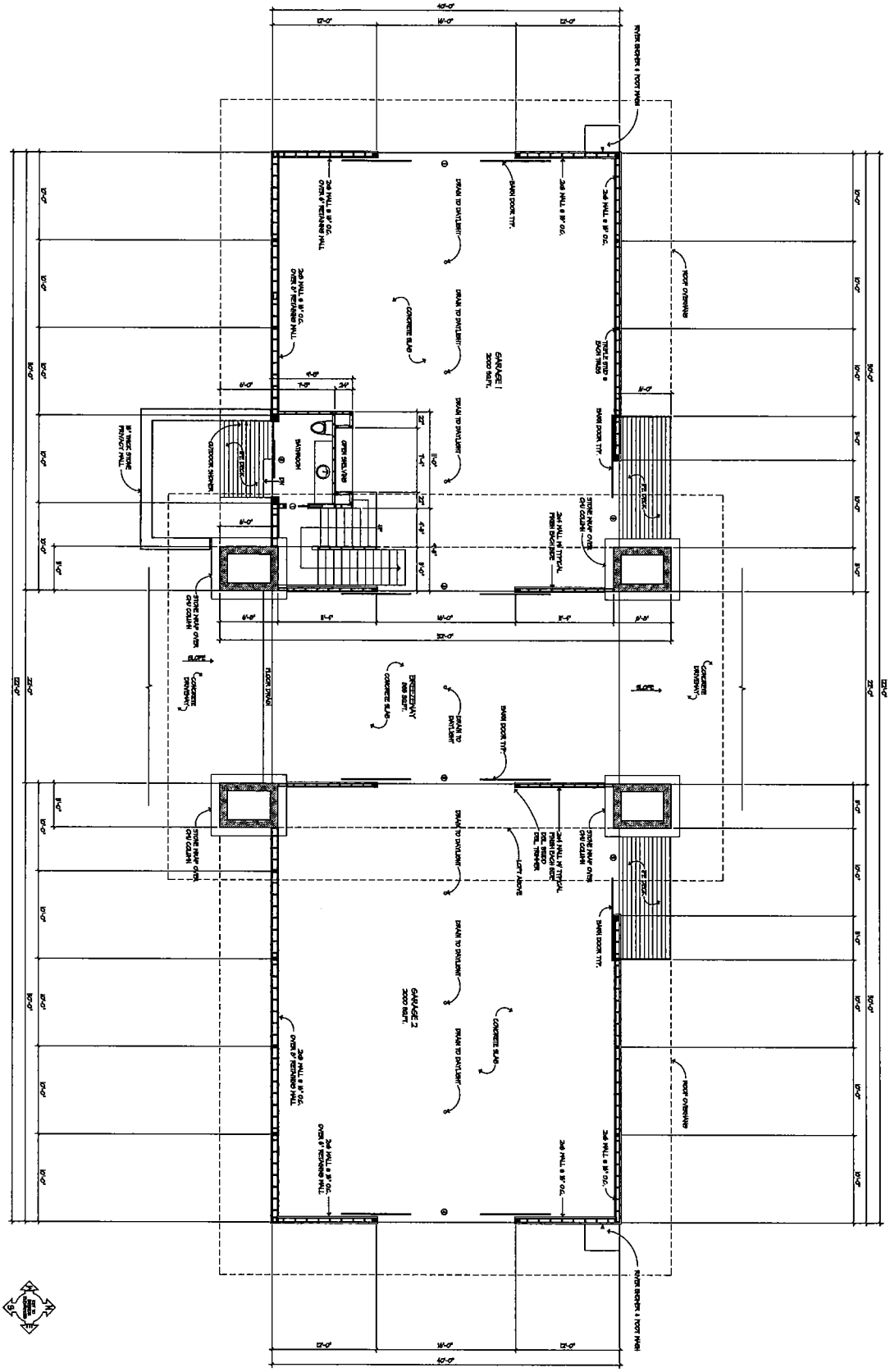


EXHIBIT "B-2"
(5 of 11)

EXHIBIT "B-2"
(6 of 11)



MAIN LEVEL FLOOR PLAN

SCALE: 3/16" = 1'-0"

SHEET A01

DESIGN CONCEPTS 2454 KENEKE ST, SUITE 102 KILAUE, HI 96754 P(808) 828-0150 WWW.DCHAWAII.COM

KILAUEA FALLS RANCH
BARN

LICENSED PROFESSIONAL ARCHITECT No. 15063

CLAN ARCHITECTURE LLC
4230 WAIPUA STREET
KILAUEA, KAUAI HAWAII 96754

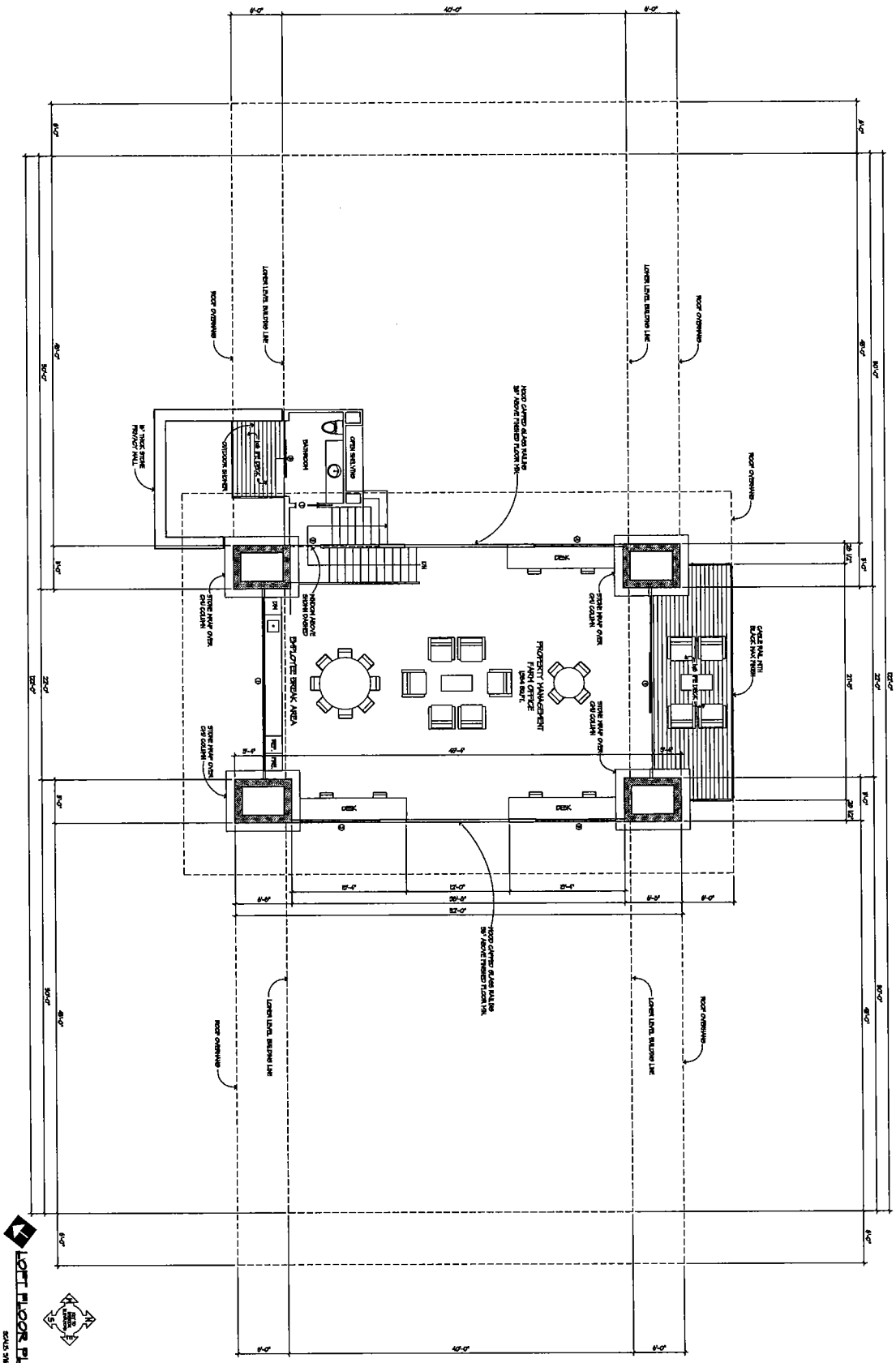
EXPIRES 4-30-20

THE SUBJECT WORK WAS PREPARED BY ME OR UNDER MY SUPERVISION AND CONSTITUTES OF THE PROJECT AS I AM VERSED IN ARCHITECTURE

8/7/19

EXHIBIT "B-2"

(7 of 11)



DESIGN CONCEPTS 2464 KENEKE ST, SUITE 102 KILAUE, HI 96754 P(808) 826-0160 WWW.DCHAWAII.COM

KILAUEA FALLS RANCH
BARN

LICENSED PROFESSIONAL ARCHITECT No. 15063

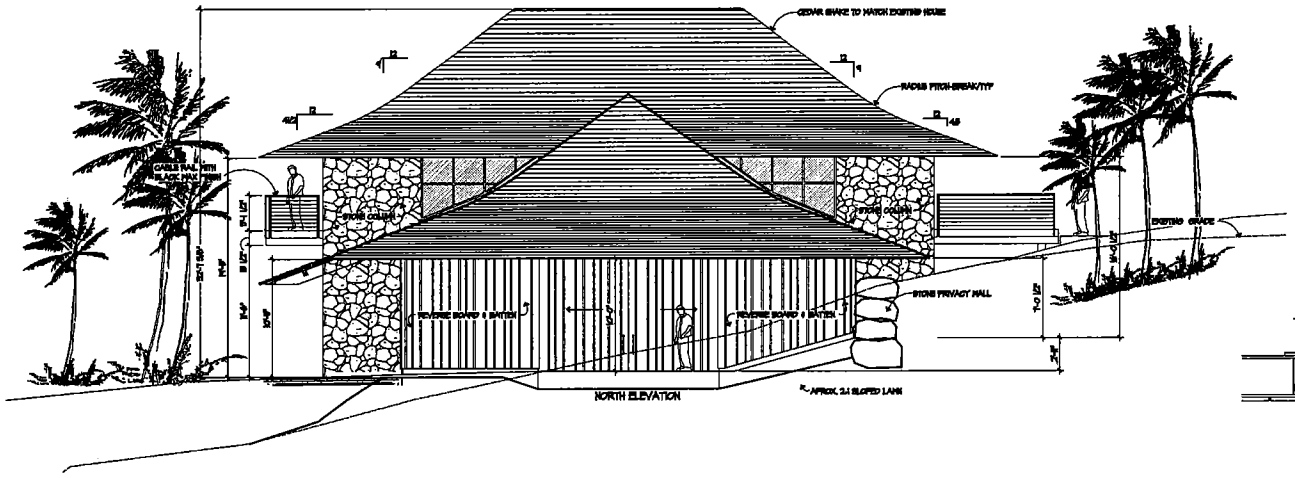
CLAN ARCHITECTURE LLC
4230 WAIPUA STREET
KILAUEA, KAUAI HAWAII 96754

EXPIRES 4-30-20

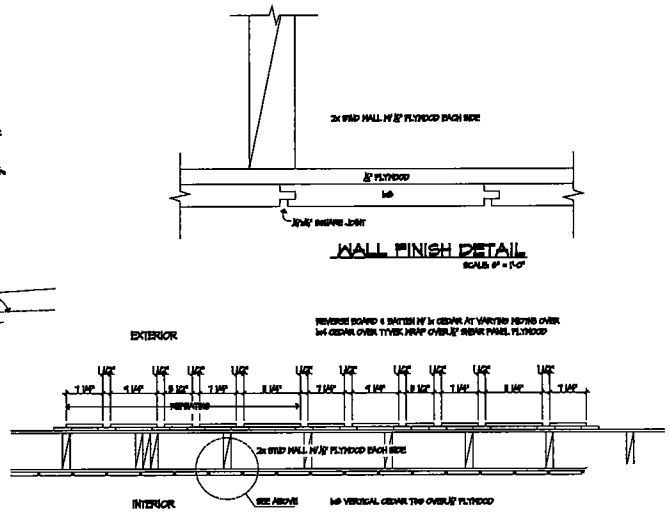
SHEET: A02

DATE

EXHIBIT "B-2"
(8 of 11)



NORTH ELEVATION

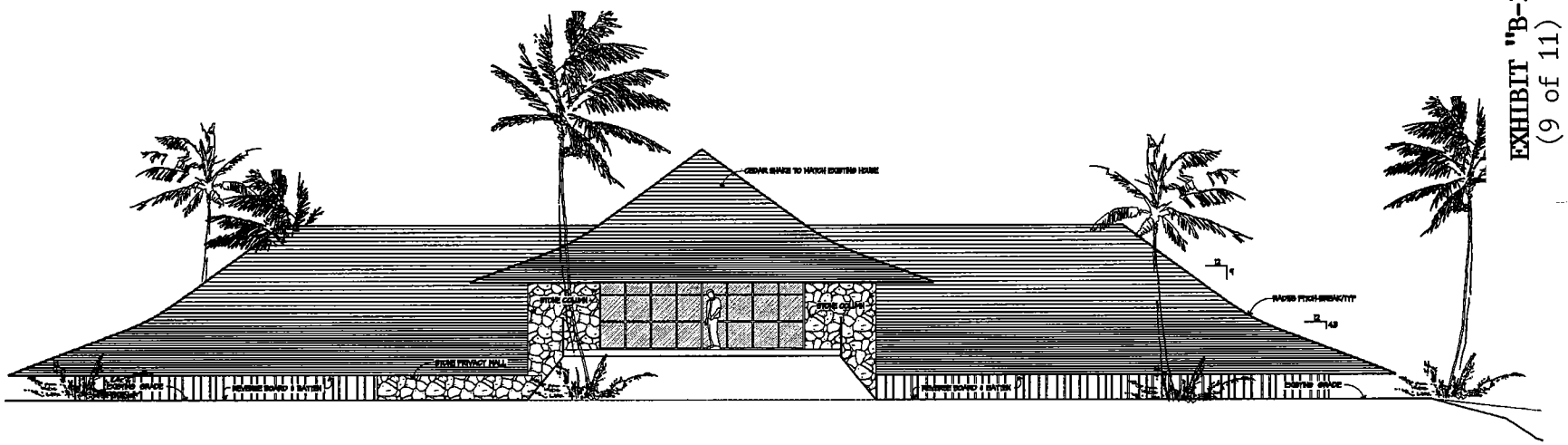


WALL FINISH DETAIL

SCALE: 6" = 1'-0"

EXTERIOR WALL FINISH DETAIL

SCALE: 1" = 1'-0"



NOTE
STONE FOR COLUMNS AND PRIVACY WALLS TO MATCH EXISTING HOUSE

WEST ELEVATION

EXHIBIT "B-2"
(9 of 11)

EXTERIOR ELEVATIONS

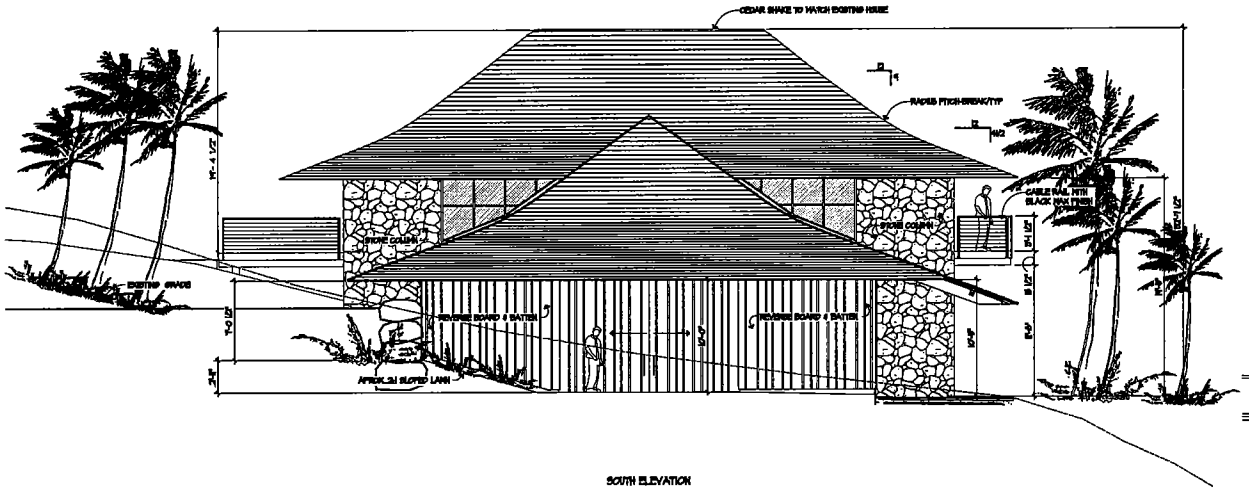
SCALE: 3/16" = 1'-0"

DESIGN CONCEPTS 2464 KENEKE ST., SUITE 102 KILAUE, HI 96754 P(808) 828-0180 WWW.OCHAWAII.COM
CLAN ARCHITECTURE LLC
4320 WAIPUA STREET
KILAUEA, KAUAI, HAWAII 96754
EXPIRES 4/30/20
LICENSED PROFESSIONAL ARCHITECT No. 15083

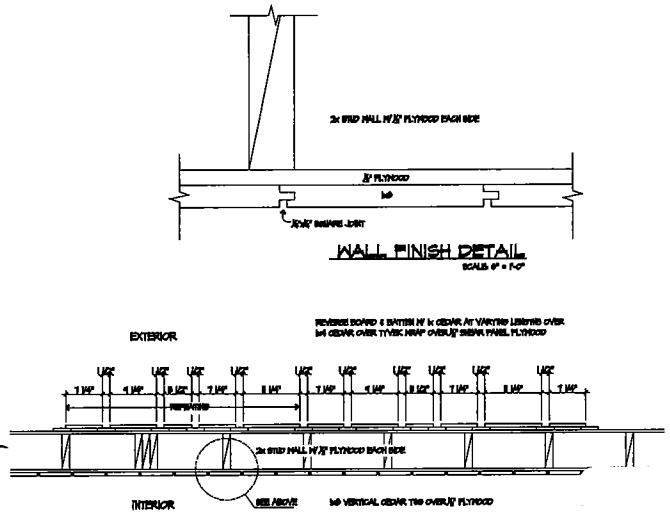
KILAUEA FALLS RANCH
BARN

SHEET
A04

TMK: (4) 5-3-2:28



SOUTH ELEVATION

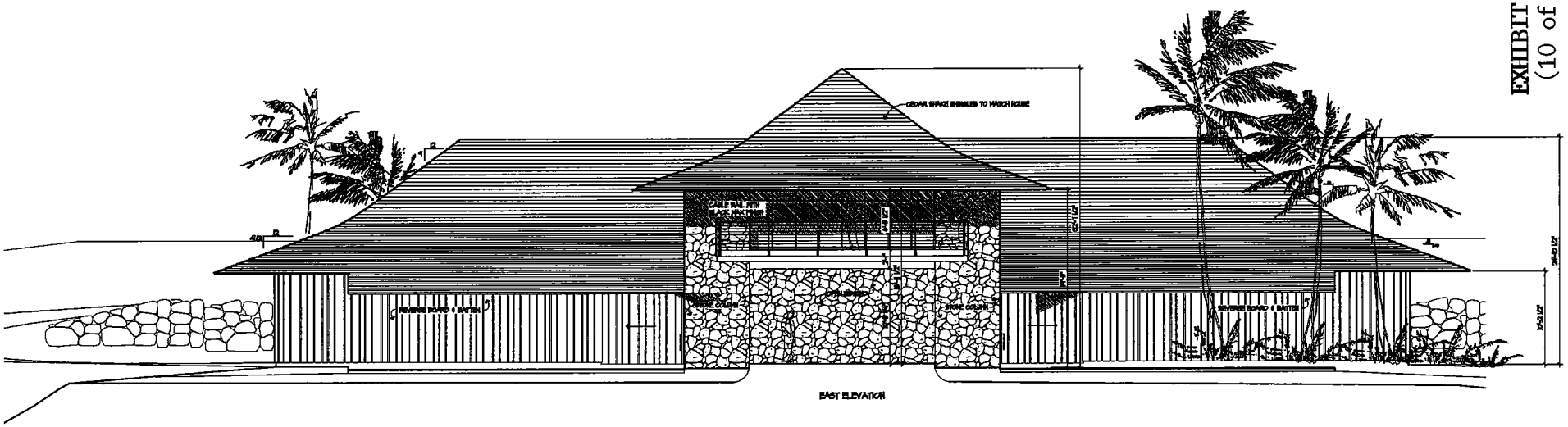


WALL FINISH DETAIL

SCALE: 6" = 1'-0"

EXTERIOR WALL FINISH DETAIL

SCALE: 1" = 1'-0"



EAST ELEVATION

EXHIBIT "B-2"
(10 of 11)

EXTERIOR ELEVATIONS

SCALE: 1/8" = 1'-0"

TMK: (4) 5-2-2:09

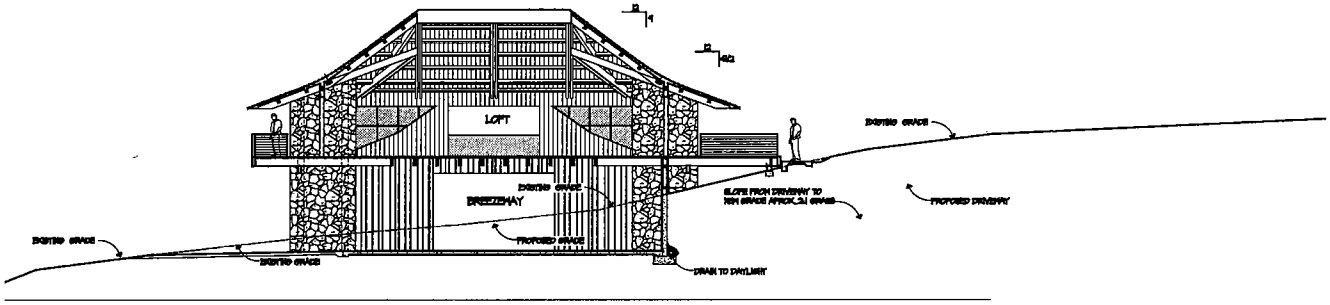
DESIGN CONCEPTS 2484 KENEKE ST., SUITE 102 KILAUE, HI 96754 P(808) 828-0160 WWW.DCHAWAII.COM

CLAN ARCHITECTURE LLC
ROY T. CLAN, ARCHITECT
4230 KAPAA, KAPAA, HAWAII 96754
EXPIRES 4-30-20

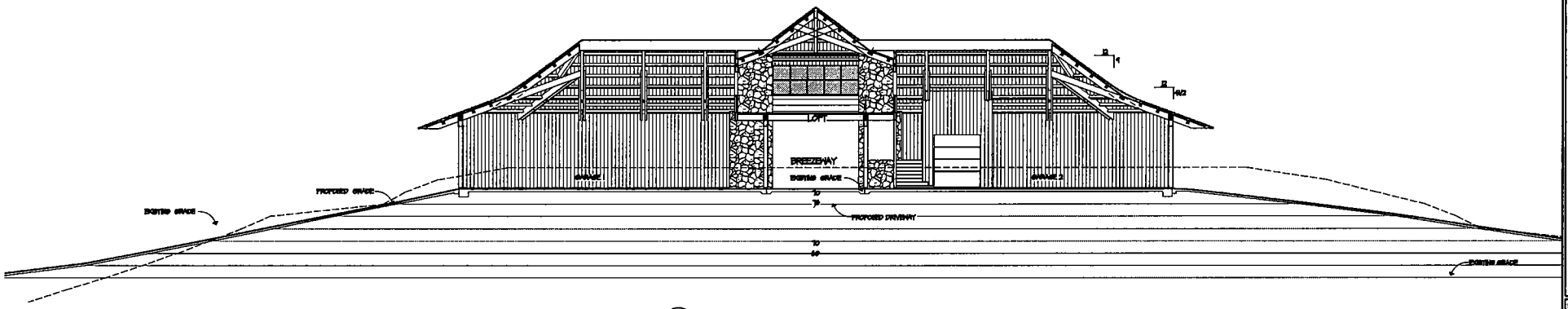
KILAUEA FALLS RANCH
BARN

6/24/14

SHEET:
A05



1/A-4 SHORT SECTION THRU BREEZEWAY



2/A-4 LONG SECTION THRU BREEZEWAY

SITE SECTIONS

SCALE: 1/8" = 1'-0"

EXHIBIT "B-2"
(11 of 11)

DESIGN CONCEPTS 2484 KENEKE ST. SUITE 102 KILAUE, HI 96754 P(808) 828-0190 WWW.DCHAWAII.COM

KILAUEA FALLS RANCH
BARN

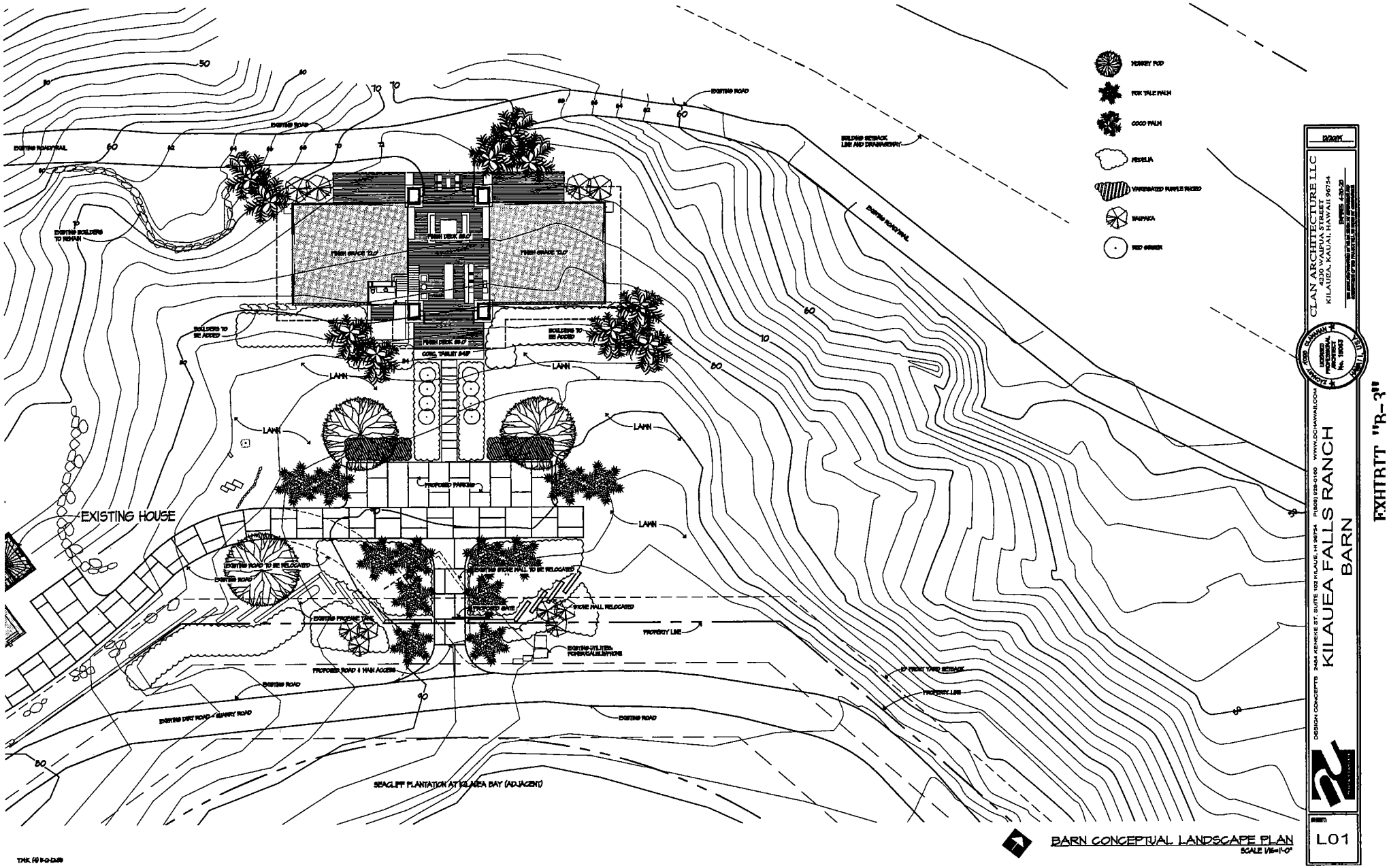
CLAN ARCHITECTURE LLC
4230 WAIPUA STREET
KILAUEA, KAUAI, HAWAII 96754

EXPIRES 4-30-20

TODD GLANNAN LICENSED PROFESSIONAL ARCHITECT No. 18063 HAWAII, USA

SHEET
A06

EXHIBIT "B-3"



BARN CONCEPTUAL LANDSCAPE PLAN
SCALE 1/16=1'-0"

EXHIBIT "R-3"

EXHIBIT "B-4"

EXHIBIT "B-4"
(1 of 2)

EXHIBIT "B-4"
(2 of 2)

EXHIBIT "C-1"

THE PLANNING COMMISSION OF THE COUNTY OF KAUAI

STATE OF HAWAII

IN THE MATTER OF APPLICATION OF CHARLES M. SOMERS and WEST SUNSET 32 PHASE 1, LLC	))))))))	FOR Special Management Area Use Permit SMA(U)-2008-5 Use Permit U-2008-4 Class IV Zoning Permit Z-V-2008-6

PLANNING COMMISSION'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
DECISION AND ORDER

INTRODUCTION

The Application is for a Special Management Area Use Permit, Use Permit, and Class IV Zoning Permit to be issued pursuant to the Comprehensive Zoning Ordinance (hereinafter "CZO") and Special Management Area Rules and Regulations of the County of Kauai (hereinafter "SMA Rules"). The Planning Commission of the County of Kauai (hereinafter "Commission"), having heard the testimony and examined the evidence presented at the hearings held herein and having considered the total record, hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

PARTIES:

1. Charles M. Somers and West Sunset 32 Phase 1 LLC, a California limited liability company (hereinafter "Applicant") is the Applicant for the permits sought herein. The Applicant was also represented in this matter by Max W.J. Graham, Jr. and Lorna A. Nishimitsu of Belles Graham Proudfoot & Wilson, and William M. Tam of Alston Hunt Floyd & Ing to file the application pursuant to the Applicant's authorization.

2. The Planning Department of the County of Kauai (hereinafter "Department") is the agency responsible for coordinating the review of applications for the types of permits discussed herein, and for preparing reports for the Planning Commission's consideration concerning the approval, denial, revocation, amendment or modification of such permits.

EXHIBIT "C-1"

7. The Applicant has complied with the procedural provisions for a Class IV Zoning Permit as contained in KCC Sections 8-7.7(4)(A), 8-8.7, and 8-19.6.

8. The development complies with and/or will not conflict with any of the Goals contained in the North Shore Development Plan Ordinance contained in KCC Chapter 10, Article 2.

DECISION AND ORDER

BY ORDER OF THE PLANNING COMMISSION, the application by Charles M. Somers and West Sunset 32 Phase 1, LLC for a Special Management Area Use Permit, Project Development Use Permit, Use Permit, and Class IV Zoning Permit to undertake development on two lots located within the Special Management Area (SMA) and within the Open/Special Treatment-Resource District (O/ST-R), further identified as Tax Map Key 5-2-12: 35 ("Lot 2") and 5-02-4: 47, CPR #2 ("Kahili Quarry Road"), Kilauea, Kauai, be approved, subject to the following conditions:

1. As represented by the Applicant, the development subject to this permit approval shall be limited to: the single family residence/farm dwelling unit referred to in the Application as the "Main House'; the Driveway accessory to the Main House; Landscaping; Site Grading for the Main House and Driveways; Preservation of Historic Sites; utilities; Well and Tank; and improvements to Kahili Quarry Road.

2. Applicant shall provide annual status reports to the Planning Commission beginning from one year from the date of this approval. The reports shall be submitted to the Department no later than 30 days prior to the annual anniversary date of approval of this project. The report shall provide project status and progress towards project completion and compliance with conditions of approval. Annual reports shall be provided until completion of the project, and compliance with all conditions of approval.

3. Applicant shall substantially commence construction of the project development within one (1) year from the date of full approval, and shall complete construction of the project development within 5 years from the date of approval of the subject permits.

4. Subject permits approved herein cannot be sold and are not transferable to other than Applicant, its subsidiaries and affiliated corporations and legal entities prior to the completion of the project and issuance of the occupancy permit.

5. Filling of the property with material obtained from off-premises shall not be permitted. This prohibition of imported fill material shall not apply to top soil used for landscaping purposes in accordance with the approved landscaped plans. Mass pad filling to increase the heights of the proposed structures shall not be permitted.

6. The Applicant shall apply for Leadership in Energy and Environmental Design (LEED) registration.

7. The Applicant shall comply with the requirements and recommendations of applicable County, State and Federal Agencies, including the County Fire, Water, Engineering and Building Divisions of the Department of Public Works, the State Department of Health, and State Department of Land and Natural Resources, Historic Preservation Division, as reflected in Findings #41-47 above.

8. The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or revoke the subject permits through proper procedures should the Applicant fail to comply with the conditions of approval, or should unforeseen circumstances occur or result.

9. In view of the various conditions and recommendations imposed by the various government agencies as referenced to herein, building permit application or preconstruction work for any phase of the project or portion of the property shall not be accepted until the Applicant submits a status report of all permit conditions that are either required to be complied with prior to or at time of building permit application.

10. Should the applicant be unable to comply with the development time line in condition #3 above and request an extension of time, applicant is advised that any new laws, ordinances, or regulations that have been implemented within this time frame may become applicable to the project.

11. Prior to building permit review, the applicant shall:

    a. Redesign the project to reduce the proposed grading area and volume, while still retaining the benching and proposed architectural design concept. A soil study/report and proposed grading plan shall be submitted to the Department of Public Works for review and approval. Such grading plans should include all off-site improvements.

    b. In order to help screen the structures from public views as seen from public areas, and to blend the structures with its surroundings, external colors shall be of earth tones, complementary to and compatible with the surrounding natural background. In addition, the Applicant shall prepare a landscape plan to further soften the existing building mass. The landscape plan shall reflect the use of native plants that are common to the area, endemic, indigenous, or Polynesian-introduced. Use of herbicides, pesticides and non-organic fertilizers shall be kept to a minimum. The proposed color scheme and landscape plan shall be submitted to the Planning Director for review and approval prior to building permit review.

c. Record all of the conditions imposed under the subject permits with the deed(s) to the subject property(ies). A copy of this recordation shall be provided to the Planning Department.

d. As represented by the Applicant, prior to the issuance of any building permits, the Applicant agrees to transfer a perpetual Conservation Easement over an approximately eighty (80) acre portion of Lot 2 ("Conservation Easement Area"). The Conservation Easement shall comply with the applicable terms, conditions, and definitions contained in Chapter 198 (Conservation Easements) of the Hawai'i Revised Statutes, subject to the following terms and conditions:

   i. The Applicant shall convey the Conservation Easement to a governmental entity or 501C(3) organization of Applicant's choice, provided such organization constitutes a "qualified organization" as defined in 170(h)(3) of the Internal Revenue Code of 1986 (the Code). Said entity or organization shall have the capability of developing and maintaining threatened and endangered species habitat consistent with the Kīlauea Point National Wildlife Refuge Land Conservation Plan and Environmental Assessment (May 2007) prepared by the U.S. Fish and Wildlife Service.

      Prior to recordation, the Conservation Easement shall be submitted to the Planning Department to review its compliance with this condition. The Planning Department shall solicit comments from the U.S. Fish & Wildlife Service. The Planning Department shall have 45 days to provide written comments to the Applicant, in the absence of which the Conservation Easement shall be deemed acceptable. The Planning Commission shall resolve any disagreements concerning the language of the Conservation Easement.

   ii. The delineation and determination of the Conservation Easement's boundaries and the content of the restrictive terms of the Conservation Easement document shall be as negotiated and agreed upon between the Applicant and the qualified organization provided:

      1. That the Conservation Easement shall encumber approximately 80 acres of Lot 2

      2. That the Conservation Easement shall expressly extinguish density for sixteen (16) of the dwelling units permitted within Lot 2. It is Applicant's intention that any dwelling unit density attributable to and arising out of the Conservation Easement Area shall be extinguished, and shall not be transferred to any other portion of Lot 2.

3. That the lands encumbered by the Conservation Easement and the terms set forth in the Conservation Easement fulfill a "conservation purpose", as defined in 170(h)(4) of the Code.

4. That except as restricted in the Conservation Easement document, the Applicant shall have the right to the use, possession and enjoyment of the Conservation Easement Area.

5. That no dwelling units (including single family residences and farm dwelling units) shall be allowed to be located within the Conservation Easement Area.

6. That to the extent reasonably possible, and subject negotiations with the qualified organization, the Conservation Easement Area will include: areas adjacent to the Kīlauea Stream; and the archaeological sites identified as SIHP #50-30-04-580 and 581 in the Archaeological Inventory Study of an Approximately 74-Acre Portion of Kīlauea Falls Ranch property (Applicant's Exhibit "F-5").

e. Evidence shall be provided that reflects resolution or compliance to the comments and recommendations of the government agency(ies) reflected in Condition #7 above.

12. Applicant shall provide roadway improvements to the entire length of Kahili Quarry Road as may be authorized by its present owners. Said roadway improvements should include clearing and drainage improvements as may be permitted by the present road right-of-way width. The use of crushed coral would be acceptable to retain a rural ambience. The use of gravel and chemical sealant shall not be permitted. As represented, Applicant shall maintain this road right-of-way. Said improvements shall implement and utilize best management practices as recommended by the Department of Public Works. No weekend or holiday work shall be permitted.

13. The proposed residence(s) shall not be used for vacation rental or bed and breakfast purposes.

14. The Applicant is advised that prior to and/or during construction and use, additional government agency conditions may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agency(ies).

15. In order to minimize adverse impacts on Federally Listed Threatened Species, such as Newell's Shearwater and other seabirds, if external lighting is to be used in connection with

the proposed project, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, signage or hotel features within the project site shall be prohibited.

16. As represented, Applicant shall contribute no less than $5,000 towards the conduct of a water quality baseline study of Kīlauea River.

17. Customary and traditional rights and practices including without limitation those exercised for subsistence, culture, religious, access or gathering purposes, as provided for in the Hawai'i Constitution or Hawai'i Revised Statutes, shall be permitted.

18. Access to the waterfall shall be permitted at the Applicant's discretion.

Amended and approved by the Planning Commission on September 23, 2008 by a 6-0 vote.

By Steven B. Weinstein
Chairperson, County of Kaua'i,
Planning Commission

Date 10-2-08

EXHIBIT "C-2"

INDEX OF INITIAL CONDITIONS (MASTER PERMIT)

CONDITION NO.	CONDITION	STATUS
1	Permitted Development includes:	
	a. Main House	a. Completed
	b. Main Driveway	b. Completed
	c. Landscaping	c. Completed
	d. Site Grading	d. Completed
	e. Preservation of Historic Sites	e. Ongoing
	f. Utilities	f. Completed
	g. Well/Tank	g. Completed
	h. Kahili Quarry Road Improvements	h. Completed (ongoing maintenance continues)
2	Annual Status Reports Re: Project Status; Compliance with Conditions to be submitted until completion of Project and compliance with conditions of approval.	Seven Annual Reports filed from 9/1/09 to 12/1/19
3	a. Substantial Commencement of Project within 1 year of complete approval.	a. Completed/Compliance
	b. Substantial Completion within 5 years of approval.	b. Completed (Certificate of Occupancy issued 2/26/14)/Compliance

EXHIBIT "C-2"

CONDITION NO.	CONDITION	STATUS
4	SMA Master Permit may not be transferred prior to completion of Project.	Agreed/Compliance
5	a. No off-premises fill to be allowed.	a. Agreed/Compliance
	b. Top soil for landscaping may be imported.	b. Agreed/Compliance
	c. Mass pad filling not permitted.	c. Agreed/Compliance
6	Applicant shall utilize Leadership in Energy and Environmental Design (LEED) concepts.	Agreed/Compliance
7	Applicant shall comply with Governmental Agency (Gov't Agency) comments, including:	
	a. Kauai Fire Department (KFD)	a. Agreed/Compliance
	b. Department of Water (DOW)	b. Agreed/Compliance
	c. Department of Public Works (DPW)	c. Agreed/Compliance
	d. Department of Health (DOH)	d. Agreed/Compliance
	e. State Historic Preservation Division (SHPD)	e. Agreed/Compliance
8	Planning Commission reserves right to add, modify or delete conditions.	Agreed
9	Prior to Building Permit application, Applicant shall submit Status Report regarding Conditions to be fulfilled to Building Permit application.	Agreed/Compliance

CONDITION NO.	CONDITION	STATUS
10	Any extensions to timelines in Condition 3 shall be subject to new laws, ordinances or regulations.	Agreed
11	Prior to Building Permit review, Applicant shall:	
	a. Reduce graded area and volume and submit Soil Study to DPW.	a. Agreed/Compliance
	b. Submit external color scheme and Landscape Plan to Planning Director for review and approval.	b. Agreed/Compliance
	c. Record Declaration of Conditions.	c. Declaration dated 8/4/10 recorded as Document No. 2010-115969
	d. Applicant shall grant Conservation Easement (CE) (80 acres):	d. Completed/Grant of Conservation Easement (Easement "C-1") dated 12/23/08 recorded as Document No. 2008-191932
	(i) Conveyance to 501c(3) or Gov't Agency subject to prior review by Planning Department and U.S. Fish & Wildlife Service (FWS).	
	(ii) CE to be subject to following Conditions: 1. Encumber 80 acres; 2. Extinguish density for 16 dwelling units; 3. Shall fulfill a Conservation Purpose; 4. Applicant shall have remaining uses of CE area; 5. No dwelling units within CE area; and	

CONDITION NO.	CONDITION	STATUS
	6. CE to include areas adjacent to Kilauea Stream and archaeological sites.	
	e. Provide evidence of compliance with Gov't Agency comments.	e. Completed/Compliance
12	a. Applicant shall improve and maintain Kahili Quarry Road (including clearing and drainage improvements).	a. Kahili Quarry Road is a private road located on Unit B of the Seacliff Gardens Condominium ("Unit B") located on Lot 26-B of the Seacliff Plantation At Kilauea Bay Subdivision, Kauai Tax Map Key No. (4) 5-2-004:047. The upper section of Kahili Quarry Road (starting at Kilauea Lighthouse Road) is presently paved with asphalt. The lower section (running to the makai end) is unimproved. Adjacent to Kahili Quarry Road is Lot 8-BB, which is a 13-foot wide strip of land that is owned by the County of Kauai. The County of Kauai has been granted an easement for public access purposes over Kahili Quarry Road. The Applicant has been granted an easement in favor of the Property for access and utility purposes over Kahili Quarry Road. Kahili Quarry Road, on its makai side, ends at the Fish & Wildlife Service Refuge located on Lot 19 (Kauai Tax Map Key No. (4) 5-2-004:043) ("FWS Lot"). The FWS Lot is owned by the United States of America and is part of the Kilauea Point Wildlife Refuge

CONDITION NO.	CONDITION	STATUS
		operated by the U.S. Fish & Wildlife Service. The old Rock Quarry is located on the FWS Lot. The FWS Lot is subject to an easement ("Lot 19 Easement") for access and parking. The Lot 19 Easement runs in favor of Lots 1-25 of the Seacliff Plantation At Kilauea Bay Subdivision. The FWS Lot is not subject to any other recorded easements or rights in favor of the County, the general public, or the Property. The access used by the public to get to the shoreline at the Rock Quarry runs over: Kahili Quarry Road; and a portion of the FWS Lot ("FWS Lot Road"). By Special Use Permit (#125-19-053) dated March 15, 2019, from Michael Mitchell, Acting Project Leader, Kilauea Point Natural Wildlife Refuge, FWS agreed to allow the Applicant to undertake remedial work on the FWS Lot. The work was completed in May, 2019. The FWS Lot Road is now usable for normal vehicular traffic.
	b. Crushed coral surface (no gravel or chemical sealant) to be used.	b. Agreed
	c. Best Management Practices (BMPs) to be utilized.	c. Agreed
	d. No weekend/holiday work.	d. Agreed

CONDITION NO.	CONDITION	STATUS
13	The Main House may not be used for Transient Vacation Rental or Homestay (Bed & Breakfast) purposes.	Agreed
14	Additional Gov't Agency Conditions may be imposed.	Agreed
15	External Lighting to be: shielded lights; cut-off luminaries; or indirect lighting.	Agreed/Compliance
16	Applicant to contribute $5,000.00 for water quality baseline study of Kilauea Stream.	$5,000.00 contributed to Hanalei River Hui per MOA dated 11/9/10
17	Customary and traditional rights and practices of native Hawaiians per HRS and Hawaii Constitution shall be permitted.	Agreed/Compliance
18	Access to Kilauea Falls shall be at the Applicant's discretion.	Agreed

EXHIBIT "C-3"

Sean Mahoney
Chair

Louie Abrams
Vice-Chair

Roy Ho
Wayne Katayama
Kimo M. Keawe
Members

PLANNING COMMISSION
County of Kaua'i, State of Hawai'i
4444 Rice Street
Kapule Building, Suite A-473
Līhu'e, Hawai'i 96766-1326
TEL (808) 241-4050 FAX (808) 241-6699

Michael A. Dahilig
Clerk of the Commission

APR 28 2016

RECEIVED
MAY - 1 2016
BELLES GRAHAM PROUDFOOT
WILSON & CHUN, LLP

Max Graham
Belles Graham Proudfoot Wilson & Chun LLP
4334 Rice Street, Suite 202
Lihue, HI 96766

Subject: Amendment to Special Management Area Use Permit SMA(U)-2008-5
Use Permit U-2008-4
Class IV Zoning Permit Z-IV-2008-6
Tax Map Key: (4) 5-2-012:035
Kilauea, Kauai
Charles Somers, as Trustee of the Charles Somers Living Trust
Dated November 12, 2002, and West Sunset 32 Phase 1 LLC, Applicant

Dear Mr. Graham,

This letter memorializes the action taken by the Kaua'i Planning Commission effective APRIL 26, 2016 concerning approval of the above subject permits. The approval by the Planning Commission, per your consent, is subject to the following conditions:

A1. The conservation manager's house and garage shall be sunken approximately five feet below grade and shielded, by way of dense shrubbery and tall tree landscaping in order to alleviate view plain impacts of the proposed new structures from Kahili Beach as well as looking westward across Kilauea Stream. The conservation maintenance building and conservation manager's house shall be constructed as revised. The structures shall also be operated as represented. Any changes to said structures shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.

A2. The applicant shall comply with the requirements of the State of Land and Natural Resources, Historic Preservation Division, County's Department of Public Works, as well as any other applicable government agencies.

A3. The applicant shall develop and utilize Best Management Practices (BMPs) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.

A4. In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, or the ocean shall be prohibited.

A5. To the extent possible within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors, and shall seek to employ residents of Kauai in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-Kauai residents for particular skilled jobs where no qualified Kauai resident possesses such skills. For the purposes of this condition, the Commission shall relieve the applicant of this requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.

A6. The applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environment Design (LEED) standards or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.

A7. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may create, or to revoke the permits through the proper procedures should conditions or approval not be complied with or be violated.

A8. The applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the applicant shall contact the State Department of Land and Natural Resources – Historic Preservation Division at (808) 692-8015 and the Planning Department at (808) 241-4050.

A9. The applicant shall not use this residence for vacation rental purposes. This restriction shall be incorporated into the deed restrictions of the subject parcel, draft copies of which shall be submitted to the Planning Department prior to building permit approval.

A10. Applicant is on notice that the property is "Agricultural" under State Land Use designations. Applicant must comply with all requirements pursuant to Hawaii Revised Statutes Chapter 205 including the submission and approval of a farm plan to the director prior to building permit approval.

A11. The applicant shall submit for review and approval by the Planning Department a landscape plan composed of native species, or species common to the area, to help screen the proposed structures, and integrate the site with its surroundings.

A12. Exterior colors and finishes of all structures, including roof colors, shall be limited to medium or dark earth tones such as brown, green, or grey, or other colors compatible with the area's natural surroundings. Use of reflective materials or colors shall be prohibited. The proposed color scheme and samples shall be submitted to the Planning Department for design review and approval prior to building permit application.

A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5 prior to the issuance of building permits for the residence and maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application and complete the proposed development within two (2) years of the date of approval of the building permit.

A14. The applicant shall pay a $500 fine for the "After-the-Fact" permit for the temporary maintenance structure. The structure shall be removed once the conservation maintenance building is constructed.

A15. The Nene fencing shall be constructed as stated, including landscaping as recommended. The fencing and landscaping shall be completed prior to construction of the conservation manager's house and maintenance building.

A16. Given Finding 18 of the 2008 Decision and Order, applicant shall provide director contact information should a member of the public wish to seek access to the falls understanding access is at the landowner's discretion.

Sincerely,

MICHAEL A. DAHILIG
Clerk, Kaua'i Planning Commission

Cc: County- Public Works, Fire, Water, Real Property Division, Housing, Transportation, State- Health, Historic Preservation

EXHIBIT "C-4"

INDEX OF ADDITIONAL CONDITIONS (FIRST AMENDMENT)

CONDITION NO.	CONDITION	STATUS
A.1	a. Manager's House to be sunken five (5) feet.	a. Manager's House will not be developed.
	b. Manager's House to be landscaped.	b. Manager's House will not be developed.
	c. Barn to be constructed as revised. Any change to Barn to be reviewed by Planning Department to determine if Planning Commission review is warranted.	c. New design plans for Barn will be submitted (Second Amendment).
	d. Barn to be operated as represented.	d. Agreed
A.2	Applicant to comply with requirements of:	
	a. State Historic Preservation Division ("SHPD")	a. Agreed
	b. Department of Public Works ("DPW")	b. Agreed
	c. Other Agencies	c. Agreed
A.3	Applicant to develop and utilize Best Management Practices ("BMPs") during all phases of development.	Agreed
A.4	All external lighting shall be: shielded lights; cut-off luminaries; or indirect lighting.	Agreed
A.5	Applicant shall hire Kauai contractors and employees to the extent possible.	Agreed

EXHIBIT "C-4"

CONDITION NO.	CONDITION	STATUS
A.6	Applicant shall implement to the extent possible Leadership in Energy and Environmental Design ("LEED") standards (e.g., recycling, natural lighting, landscaping, solar panels, low energy lighting).	Agreed
A.7	Planning Commission reserves the right to: revise, add or delete conditions; or to revoke the permit for non-compliance.	Agreed
A.8	Applicant shall stop work and contact SHPD if any archaeological sites or burials are discovered.	Agreed
A.9	Applicant shall record a Declaration prohibiting the use of the Barn or Manager's House for TVR uses.	Completed (1/29/19)
A.10	a. Applicant shall comply with HRS Chapter 205 re: uses in the SLUC Agricultural District.	a. Agreed
	b. Applicant shall submit a Farm Plan to Planning Director for review and approval prior to Building Permit Approval.	b. Farm Plan submitted 4/4/19
A.11	Applicant shall submit a Landscape Plan (native species or species common to the area) to screen the Barn.	Pending. The Landscape Plan needs to be completed and submitted to the Planning Department.
A.12	a. Exterior colors and finishes for Barn shall be limited to medium or dark earth tones.	a. Agreed.
	b. Proposed color scheme and samples to be submitted to Planning Department for design review and approval prior to Building Permit Application.	b. Pending. Samples of the exterior color schemes and materials need to be submitted to the Planning Department.

CONDITION NO.	CONDITION	STATUS
A.13	a. Applicant shall comply with Conditions of Master Permit prior to issuance of Building Permit for Barn.	a. Completed.
	b. Applicant shall apply for Building Permit within one (1) year of Approval of Amendment (4/28/16) and complete development within two (2) years.	b. The Second Amendment contains a request for time extension allowing Building Permit application within one year of approval of Second Amendment.
A.14	a. Applicant shall pay $500.00 Fine for after-the-fact permit for temporary maintenance structure.	a. Completed (4/4/19)
	b. The temporary maintenance structure shall be removed once the Barn is constructed.	b. Agreed
A.15	a. The Nene fencing shall be constructed as stated, including landscaping.	a. The request to construct a Nene Fence has been withdrawn.
	b. The Nene fencing and landscaping shall be completed prior to construction of the Barn.	b. The request to construct a Nene Fence has been withdrawn.
A.16	Applicant shall provide Planning Director with contact information for person designated to receive requests from the public for permission to access Kilauea Falls.	Completed (4/5/19).

EXHIBIT "C-5"

SEVENTH STATUS REPORT

Re: SEVENTH STATUS REPORT
Special Management Area Use Permit SMA(U)-2008-5,
Use Permit No. U-2008-4; and Class IV Zoning
Permit No. Z-IV-2008-6
In the Matter of the Application of Charles Somers, as
Trustee of the Charles Somers Living Trust dated
November 12, 2002, and West Sunset 32 Phase 1 LLC for
a Use Permit, Special Management Area Permit and Class IV
Zoning Permit For Real Property Situated at Kilauea, Kauai, Hawaii
and Identified by Kauai Tax Map Key No. (4) 5-2-012:035

Property: Lot 2
Kilauea, Kauai, Hawaii
Kauai TMK No. (4) 5-2-012:035

Kahili Quarry Road
Unit B, Seacliff Gardens Condominium
Lot 26-B
Kilauea, Kauai, Hawaii
Kauai TMK No. (4) 5-2-004:047 (CPR No. 2)

Owners: Lot 2: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company

Kahili Quarry Road: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002

This Seventh Status Report ("Report") is submitted by Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC (jointly, the "Applicant"). This Report is intended to provide a report on the status of the Project as of December 1, 2019.

A. COMPLIANCE WITH INITIAL CONDITIONS.

The Planning Commission of the County of Kauai ("Planning Commission") approved the above described permits("Master Permit") pursuant to the Planning Commission's Findings Of Fact, Conclusions Of Law, Decision And Order entered on October 2, 2008. The portion of this approval entitled "Decision And Order" contains eighteen (18) conditions of approval ("Conditions"). The Applicant is providing the Planning Commission with this Report on each Condition.

1. Condition 1. *As represented by the Applicant, the development subject to this permit approval shall be limited to: the single family residence/farm dwelling unit referred to in the Application as the "Main House", the Driveway accessory to the Main House; Landscaping; Site Grading for the Main House and Driveways; Preservation of Historic Sites; utilities; Well and Tank; and improvements to Kahili Quarry Road.*

Status. The Applicant continues to acknowledge this limitation concerning the initial scope of the project ("Project").

2. Condition 2. *Applicant shall provide annual status reports to the Planning Commission beginning from one year from the date of this approval. The reports shall be submitted to the Department no later than 30 days prior to the annual anniversary date of approval of this project. The report shall provide project status and progress towards project completion and compliance with conditions of approval. Annual reports shall be provided until completion of the project, and compliance with all conditions of approval.*

Status. This Report is being submitted in fulfillment of this provision. The Applicant initially filed a preliminary status report on September 1, 2009, a Second Annual Status Report on August 18, 2010, a Third Annual Status Report on September 30, 2011, a Fourth Annual Status Report on September 12, 2012, a Fifth Annual Status Report on October 1, 2013, a Sixth Annual Status Report on October 1, 2014, and an Update To Sixth Annual Status Report on October 27, 2015.

3. Condition 3. *Applicant shall substantially commence construction of the project development within one (1) year from the date of full approval, and shall complete construction of the project development within 5 years from the date of approval of the subject permits.*

Status. The status of construction is as follows:

a. Main House. The Applicant submitted its Building Permit Application for the Project in October, 2010. A Certificate of Occupancy for the Main House was issued on February 26, 2014.

b. Well/Tank. The Well has been drilled, the pump has been installed, and the water tank has been completed.

c. Landscaping. The landscaping has been completed as shown on the original Landscape Master Plan (including large palm trees, ground cover, ornamentals, and smaller vegetation).

4. Condition 4. *Subject permits approved herein cannot be sold and are not transferable to other than Applicant, its subsidiaries and affiliated corporations and legal entities prior to the completion of the project and issuance of the occupancy permit.*

Status. The Applicant continues to be the sole owner of the Subject Property. As permitted by the Master Permit, Applicant, Charles M. Somers, transferred his personal interest to himself as Trustee of the Charles Somers Living Trust dated November 12, 2002.

5. Condition 5. *Filling of the property with material obtained from off-premises shall not be permitted. This prohibition of imported fill material shall not apply to top soil used for landscaping purposes in accordance with the approved landscaped plans. Mass pad filling to increase the heights of the proposed structures shall not be permitted.*

Status. The Applicant acknowledges these limitations. In the construction of the Main House, the Applicant did not import fill material or undertake mass pad filling. However, the Applicant did allow the County to deposit rocks and materials from the dredging of Kilauea Stream on the Property.

6. Condition 6. *The Applicant shall apply for Leadership in Energy and Environmental Design (LEED) registration.*

Status. The Applicant, through its consultant, Gary Tobey of Design Concepts has registered a LEED For Homes Single Family with the U. S. Green Building Council.

7. Condition 7. *The Applicant shall comply with the requirements and recommendations of applicable County, State and Federal Agencies, including the County Fire, Water, Engineering and Building Divisions of the Department of Public Works, the State Department of Health, and State Department of Land and Natural Resources, Historic Preservation Division, as reflected in Findings #41-47 (sic) above.*

Status. As part of the Building Permit Approval process, the Applicant complied with the requirements and recommendations of the applicable County, State and Federal Agencies, as set forth in Findings of Fact 40 through 47 (a copy of which is attached as Exhibit "2") as follows:

a. Fire Department (FOF 40). The Applicant has resolved the Fire Department issues sufficiently to obtain its approval for the construction of the Main House.

b. DLNR. The Applicant retained Cultural Surveys Hawaii, Inc. to prepare an Archaeological Inventory Survey and a Preservation Plan. Both reports were submitted to and approved by the State Historic Preservation Division ("SHPD") of DLNR. By letter dated May 12, 2008, from SHPD to the Applicant's archaeologist, SHPD approved the Archaeological Inventory Survey prepared by Cultural Surveys Hawaii, Inc. ("CSH"). By letter

dated May 16, 2014, from SHPD to CSH, SHPD approved the Archaeological Preservation Plan prepared by CSH.

c. Department of Public Works ("DPW") (Wastewater). The Applicant installed an Individual Wastewater System ("IWS") for the Main House in compliance with the State Department of Health ("DOH") requirements.

d. Department of Water. The Applicant has obtained water issued by DOW and constructed the water facilities necessary to provide potable water to the Main House. The Well is used only for agricultural needs and is not connected to the DOW's potable water system.

e. DOH. As noted, the Applicant has installed an IWS in compliance with DOH requirements. All other DOH requirements have been met.

f. DPW (Engineering Division). The Applicant obtained all DPW approvals necessary to construct the Main House.

g. DPW (Building Division). The Applicant obtained all DPW approvals necessary to obtain a Building Permit for, and to construct, the Main House.

8. Condition 8. The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or revoke the subject permits through proper procedures should the Applicant fail to comply with the conditions of approval, or should unforeseen circumstances occur or result.

Status. The Applicant acknowledges the Planning Commission's reservation of authority in this matter.

9. Condition 9. In view of the various conditions and recommendations imposed by the various government agencies as reference to herein, building permit application or preconstruction work for any phase of the project or portion of the property shall not be accepted until the Applicant submits a status report of all permit conditions that are either required to be complied with prior to or at time of building permit application.

Status. The Applicant has been submitting annual Status Reports in compliance with this Condition.

10. Condition 10. Should the applicant be unable to comply with the development time line in condition #3 above and request an extension of time, applicant is advised that any new laws, ordinances, or regulations that have been implemented within this time frame may become applicable to the project.

Status. The Applicant acknowledges that new legal laws, ordinances and regulations may apply to the Project should an extension of the development time be requested.

11. Condition 11. Prior to building permit review, the applicant shall:

a. Redesign the project to reduce the proposed grading area and volume, while still retaining the benching and proposed architectural design concept. A soil study/report and proposed grading plan shall be submitted to the Department of Public Works for review and approval. Such grading plans should include all off-site improvements.

Status. Grading plans for the Project and a soils report were submitted and approved as part of the Building Permit Application process.

b. In order to help screen the structures from public views as seen from public areas, and to blend the structures with its surroundings, external colors shall be of earth tones, complementary to and compatible with the surrounding natural background. In addition, the Applicant shall prepare a landscape plan to further soften the existing building mass. The landscape plan shall reflect the use of native plants that are common to the area, endemic, indigenous, or Polynesian-introduced. Use of herbicides, pesticides and non-organic fertilizers shall be kept to a minimum. The proposed color scheme and landscape plan shall be submitted to the Planning Director for review and approval prior to building permit review.

Status. The Applicant has utilized the earth tone external colors previously submitted to the Planning Commission and the Planning Department. The Applicant has installed landscaping as set forth in the Landscape Master Plan.

c. Record all of the conditions imposed under the subject permits with the deed(s) to the subject property(ies). A copy of this recordation shall be provided to the Planning Department.

Status. The Declaration Incorporating Conditions Of Approval Into Instruments Of Conveyance ("Restrictive Covenants") was recorded at the Bureau of Conveyances of the State of Hawaii ("Bureau") as Document No. 2010-115969.

d. As represented by the Applicant, prior to the issuance of any building permits, the Applicant agrees to transfer a perpetual Conservation Easement over an approximately eighty (80) acre portion of Lot 2 ("Conservation Easement Area"). The Conservation Easement shall comply with the applicable terms, conditions, and definitions contained in Chapter 198 (Conservation Easements) of the Hawai'i Revised Statutes, subject to the following terms and conditions:

i. The Applicant shall convey the Conservation Easement to a governmental entity or 501C(3) organization of Applicant's choice, provided such organization constitutes a "qualified organization" as defined in 170(h)(3) of the Internal Revenue Code of 1986 (the Code). Said entity or organization shall have the capability of developing and maintaining threatened and endangered species habitat consistent with the Kilauea Point

National Wildlife Refuge Land Conservation Plan and Environmental Assessment (May 2007) prepared by the U. S. Fish and Wildlife Service.

Prior to recordation, the Conservation Easement shall be submitted to the Planning Department to review its compliance with this condition. The Planning Department shall solicit comments from the U.S. Fish & Wildlife Service. The Planning Department shall have 45 days to provide written comments to the Applicant, in the absence of which the Conservation Easement shall be deemed acceptable. The Planning Commission shall resolve any disagreements concerning the language of the Conservation Easement.

ii. The delineation and determination of the Conservation Easement's boundaries and the content of the restrictive terms of the Conservation Easement document shall be negotiated and agreed upon between the Applicant and the qualified organization provided:

1. That the Conservation Easement shall encumber approximately 80 acres of Lot 2.

2. That the Conservation Easement shall expressly extinguish density for sixteen (16) of the dwelling units permitted within Lot 2. It is Applicant's intention that any dwelling unit density attributable to and arising out of the Conservation Easement Area shall be extinguished, and shall not be transferred to any other portion of Lot 2.

3. That the lands encumbered by the Conservation Easement and the terms set forth in the Conservation Easement fulfill a "conservation purpose", as defined in 170(h)(4) of the Code.

4. That except as restricted in the Conservation Easement document, the Applicant shall have the right to use, possession and enjoyment of the Conservation Easement Area.

5. That no dwelling units (including single family residences and farm dwelling units) shall be allowed to be located within the Conservation Easement Area.

6. That to the extent reasonably possible, and subject negotiations with the qualified organization, the Conservation Easement Area will include: areas adjacent to the Kilauea Stream; and the archaeological sites identified as SIHP #50-30-04-580 and 581 in the Archaeological Inventory Study of an Approximately 74-Acre Portion of Kilauea Falls Ranch property (Applicant's Exhibit "F-5").

Status. By Grant Of Conservation Easement recorded on December 23, 2008, in the Bureau as Document No. 2008-191932, the Applicant granted the Kauai Public Land Trust, a Hawaii nonprofit corporation ("KPLT"), an easement for conservation purposes

(designated as Easement "C-1") over an 80.1 acre portion of the Subject Property. By Grant Of Conservation Easement recorded on December 24, 2008, in the Bureau as Document No. 2008-192741, the Applicant granted KPLT an easement for conservation purposes (designated as Easement "C-2") over a 69.3 acre portion of the Subject Property. As a result, a total of 149.4 acres of the approximately 161.88 acres contained within the Subject Property are covered by the two Conservation Easements. Included within the Conservation Easements are the Archaeological Sites, the wetlands, and the areas adjacent to the Kilauea Stream.

e. Evidence shall be provided that reflects resolution or compliance to the comments and recommendations of the government agency(ies) reflected in Condition #7 above.

Status. As discussed in Paragraph 7, the Applicant has to date complied with the comments and recommendations of governmental agencies.

12. Condition 12. Applicant shall provide roadway improvements to the entire length of Kahili Quarry Road as may be authorized by its present owners. Said roadway improvements should include clearing and drainage improvements as may be permitted by the present road right-of-way width. The use of crushed coral would be acceptable to retain a rural ambience. The use of gravel and chemical sealant shall not be permitted. As represented, Applicant shall maintain this road right-of-way. Said improvements shall implement and utilize best management practices as recommended by the Department of Public Works. No weekend or holiday work shall be permitted.

Status. The Applicant is the owner of Kahili Quarry Road which is a private road located on Unit B of the Seacliff Gardens Condominium ("Unit B") located on Lot 26-B (Seacliff Plantation At Kilauea Bay Subdivision, Kauai Tax Map Key No. (4) 5-2-004:047). The County of Kauai has been granted an easement for public access purposes over Kahili Quarry Road.

Unit B, on its makai side, ends at the Fish & Wildlife Service Refuge located on Lot 19 (Kauai Tax Map Key No. (4) 5-2-004:043) ("FWS Lot"). The FWS Lot is owned by the United States of America and is part of the Kilauea Point Wildlife Refuge operated by the U.S. Fish & Wildlife Service ("FWS"). The FWS Lot is subject to an easement for access and parking. The Lot 19 Easement runs in favor of Lots 1-25 of the Seacliff Plantation At Kilauea Bay Subdivision. The FWS Lot is not subject to any recorded easements or rights in favor of the County, the general public, or the Property.

The access used by the public to get to the shoreline at the Rock Quarry runs over Kahili Quarry Road and a portion of the FWS Lot. The Applicant has maintained Kahili Quarry Road so that it is passable. However, FWS does not maintain the road on the FWS Lot ("FWS Lot Road"). The Applicant, by letter dated January 16, 2015, to FWS, offered to make improvements to the FWS Lot Road. By email dated October 23, 2015, from Michael Mitchell, Acting Project Leader, FWS agreed to allow the Applicant to undertake such

work, subject to FWS approval of construction plans. The Applicant filed a Special Use Permit Application with FWS for permission to undertake the work on November 28, 2018. FWS approved the application and issued a Special Use Permit dated March 15, 2019, allowing the work to progress. The improvements were completed in May, 2019. As a result, Kahili Quarry Road is now open to vehicular traffic from Kilauea Lighthouse Road to the parking area on the FWS Lot.

13. Condition 13. The proposed residence(s) shall not be used for vacation rental or bed and breakfast purposes.

Status. This Condition prohibiting vacation rental and/or bed and breakfast uses is incorporated in the Restrictive Covenants which were recorded and which encumber the title to the Subject Property.

14. Condition 14. The Applicant is advised that prior to and/or during construction and use, additional government agency conditions may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agency(ies).

Status. The Applicant acknowledges that it will need to resolve any additional agency conditions with the applicable governmental agency.

15. Condition 15. In order to minimize adverse impacts on Federally Listed Threatened Species, such as Newell's Shearwater and other seabirds, if external lighting is to be used in connection with the proposed project, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, signage or hotel features within the project site shall be prohibited.

Status. The Applicant has incorporated shielded and indirect lighting as part of the lighting scheme for the Project as shown on its Building and Construction Plans.

16. Condition 16. As represented, Applicant shall contribute no less than $5,000 towards the conduct of a water quality baseline study of Kilauea River.

Status. The Applicant contributed $5,000.00 to the Hanalei Watershed Hui toward the conduct of a water quality baseline study of the Kilauea Stream.

17. Condition 17. Customary and traditional rights and practices including without limitation those exercised for subsistence, culture, religious, access or gathering purposes, as provided for in the Hawai'i Constitution or Hawai'i Revised Statutes, shall be permitted.

Status. This requirement was included in the Restrictive Covenants that were recorded. To date, the Applicant has received no special requests from native Hawaiian individuals or groups regarding the use of or access to the Subject Property.

18. Condition 18. Access to the waterfall shall be permitted at the Applicant's discretion.

Status. The Applicant acknowledges this Condition and permits access, in Applicant's sole discretion, on a case-by-case basis.

B. COMPLIANCE WITH ADDITIONAL CONDITIONS.

On February 4, 2013, the Applicant filed a new Application To Amend the Master Permit (SMA(U)-2008-5, U-2008-4, and Z-IV-2008-6) ("First Amendment") which was approved by the Planning Commission on April 26, 2016. The approval of the First Amendment was subject to sixteen (16) conditions ("Additional Conditions"). The status of the Additional Conditions is as follows:

1. Condition A1. The conservation manager's house and garage shall be sunken approximately five feet below grade and shielded, by way of dense shrubbery and tall tree landscaping in order to alleviate view plain impacts of the proposed new structures from Kahili Beach as well as looking westward across Kilauea Stream. The conservation maintenance building and conservation manager's house shall be constructed as revised. The structures shall also be operated as represented. Any changes to said structures shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.

Status. The request to construct a conservation manager's house ("Manager's House") has been withdrawn. Instead, the conservation maintenance building ("Barn") will be redesigned as described in Applicant's Motion For Second Amendment To Master Permit ("Second Amendment") and submitted to the Planning Commission for approval.

2. Condition A2. The applicant shall comply with the requirements of the State of Land and Natural Resources, Historic Preservation Division, County's Department of Public Works, as well as any other applicable government agencies.

Status. The Applicant will comply with all requirements applicable to the construction of the Barn as maybe imposed by the State Historic Preservation Division ("SHPD"), the County Department of Public Works ("DPW"), and any other governmental agencies.

3. Condition A3. The applicant shall develop and utilize Best Management Practices (BMPs) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.

Status. The Applicant will develop and utilize Best Management Practices ("BMP") as required.

4. Condition A4. In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, or the ocean shall be prohibited.

Status. The Applicant agrees that any external lighting that is installed will only be shielded lights, cut-off luminaries, indirect lighting, or other such lighting designed to minimize adverse impacts on endangered or threatened species.

5. Condition A5. To the extent possible within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors, and shall seek to employ residents of Kauai in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-Kauai residents for particular skilled jobs where no qualified Kauai resident possesses such skills. For the purposes of this condition, the Commission shall relive the applicant of this requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.

Status. To the extent possible, the Applicant will hire Kauai contractors and Kauai residents.

6. Condition A6. The applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environmental Design (LEED) standards or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.

Status. The Applicant will employ sustainable building techniques and operational methods, including Leadership in Energy and Environmental Design ("LEED") standards for the Barn construction and operation.

7. Condition A7. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforseen impacts the project create, or to revoke the permits through the proper procedures should conditions or approval not be complied with or be violated.

Status. The Applicant agrees that the Planning Commission has continuing oversight powers concerning the development.

8. Condition A8. *The applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the applicant shall contact the State Department of Land and Natural Resources - Historic Preservation Division at (808) 692-8015 and the Planning Department at (808) 241-4050.*

Status. The Applicant agrees to stop work and contact SHPD and the Planning Department if any archaeological or historic resources are discovered during ground disturbing construction work.

9. Condition A9. *The applicant shall not use this residence for vacation rental purposes. This restriction shall be incorporated into the deed restrictions of the subject parcel, draft copies of which shall be submitted to the Planning Department prior to building permit approval.*

Status. The Applicant agrees that the Barn will not be used for vacation rental purposes. The Applicant has recorded a Declaration Incorporating Condition Of Approval A9. Into Instruments Of Conveyances dated January 2, 2019 in the Bureau of Conveyances of the State of Hawaii as Document No. A-69680580 which incorporates this restriction.

10. Condition A10. *Applicant is on notice that the property is "Agricultural" under State Land Use designations. Applicant must comply with all requirements pursuant to Hawaii Revised Statutes Chapter 205 including the submission and approval of a farm plan to the director prior to building permit approval.*

Status. The Applicant will comply with all applicable provisions of Hawaii Revised Statutes Chapter 205 regarding uses and activities in the State Land Use Commission Agricultural District. Pursuant to this requirement, the Applicant submitted to the Planning Department on April 14, 2019, a Farm Plan Application Form for the Barn, together with a Farm Plan, Barn Floor Plans, and a tax map showing the location of the Barn and the agricultural activities.

11. Condition A11. *The applicant shall submit for review and approval by the Planning Department a landscape plan composed of native species, or species common to the area, to help screen the proposed structures, and integrate the site with its surroundings.*

Status. The Applicant will submit a Barn Landscape Plan to the Planning Department as required.

12. Condition A12. *Exterior colors and finishes of all structures, including roof colors, shall be limited to medium or dark earth tones such as brown, green, or grey, or other colors compatible with the area's natural surroundings. Use of reflective materials or colors shall be prohibited. The proposed color scheme and samples shall be submitted to the Planning Department for design review and approval prior to building permit application.*

Status. The Applicant agrees: that it will utilize medium to dark earth tones for exterior surfaces; that it will not use reflective materials for external surfaces; and that it will submit color schemes and material samples to the Planning Department for its approval prior to Building Permit approval for the Barn.

13. Condition A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5 prior to the issuance of building permits for the residence and maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application and complete the proposed development within two (2) years of the date of approval of the building permit.

Status. As set forth in this Report, the Applicant has complied with all of the Initial Conditions. Pursuant to its Second Amendment, the Applicant is requesting that this Condition A13. be amended to provide that the Applicant will have one (1) year from the approval of the Second Amendment to apply for the Building Permit for the Barn.

14. Condition A14. The applicant shall pay a $500 fine for the "After-the-Fact" permit for the temporary maintenance structure. The structure shall be removed once the conservation maintenance building is constructed.

Status. On April 5, 2019, the Applicant paid a Five Hundred And No/100 Dollar ($500.00) fine for the After-the-Fact Special Management Area Permit for the temporary maintenance structure ("Equipment Tent"). The Equipment Tent will be removed as soon as the Barn is constructed.

15. Condition A15. The Nene fencing shall be constructed as stated, including landscaping as recommended. The fencing and landscaping shall be completed prior to construction of the conservation manager's house and maintenance building.

Status. The request to install a Nene Fence has been withdrawn.

16. Condition A16. Given Finding 18 of the 2008 Decision and Order, applicant shall provide director contact information should a member of the public wish to seek access to the falls understanding access is at the landowner's discretion.

Status. By letter to the Planning Director dated April 5, 2019, the name and contact information for the person designated to receive public requests to access Kilauea Falls was submitted to the Planning Director.

EXHIBIT "D-1"

510050050000
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510050160001
HENDERSON,GARY L
PO BOX 1135
KILAUEA HI 96754

510050160002
SOMERS,CHARLES LIVING TRUST
C/O SOMERS,CHARLES TTEE
5240 ARNOLD AVE
MCCLELLAN AFB CA 95652

510050160004
HAWAIIAN ISLANDS LAND TRUST
126 QUEEN ST STE 306
HONOLULU HI 96813

510050160005
4110 WAILAPA ROAD LLC
1675 BROADWAY 20TH FLOOR
NEW YORK NY 10019

520040470001
SOMERS,CHARLES LIVING TRUST
C/O CHARLES SOMERS, TRUSTEE
5241 ARNOLD AVE
MCCLELLAN AFB CA 95652

520040830001
PLANTATION PROPERTIES LTD
C/O TITIA MACKAY
555 HORTON BAY ROAD

520040830002
LIGHTHOUSES REVOCABLE TRUST
C/O PINANSKY,THOMAS P TTEE
PO BOX 9546
PORTLAND ME 04112

520040830003
LATIF,ALEXANDER E
2460 OKA ST STE 100
KILAUEA HI 96754

520040830003
LATIF,MAGDI
4030 PALI MOANA PL
KILAUEA HI 96754

520040890001
MEIER,JEANNETTE P
34522 N SCOTTSDALE RD SUITE 120 PMI
SCOTTSDALE AZ 85266

520040890002
LIEN,JORGEN S
PO BOX 1131
KILAUEA HI 96754

520040890003
ROSENBLUM,ELLIOTT DEC'D
C/O 2170C MAKANA'ANO PLACE LLC
PO BOX 206
KILAUEA HI 96754

520040960001
FREEMAN,ELIZABETH A TRUST
PO BOX 298
KILAUEA HI 96754

520040960002
FREEMAN,ELIZABETH A TRUST
PO BOX 298
KILAUEA HI 96754

520040970001
CS DEVELOPMENT LLC
5241 ARNOLD AVE
MCCLELLAN AFB CA 95652

520040970002
CAMPOS,RENE TRUST
603 8TH ST
AUSTIN TX 78701

520040980001
CAMPOS,RENE' JR
603 8TH ST
AUSTIN TX 78701

520040980002
LATIF,MAGDI
2460 OKA ST SUITE 100
KILAUEA HI 96754

520040980003
CARRENO-FURGESON,ILEANA S SELF-T
2484 KOLO RD
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520040990000
AINA HO'OKUPU O KILAUEA
PO BOX 1023
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520110010000
GOODMAN,J C
PO BOX 148
KILAUEA HI 96754

520110020000
CHANG,DOUGLAS K/RUTH A U JT REV TI
C/O CHANG,DOUGLAS K & RUTH A U TR
45-540 KAMOOALII STREET
KANEOHE HI 96744

520110030000
RODGERS,HEIDI M TRUST
4365 KUKUI GROVE ST STE 103
LIHUE HI 96766

520110040000
SAINDON,DANIEL E TRUST
PO BOX 1401
KILAUEA HI 96754

520110050000
MM RENTALS KAUAI LLC
PO BOX 1097
KILAUEA HI 96754

520110170000
RIDINO,SAM E
PO BOX 1180
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520110180000
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520110190000
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2257 HOOKUI PL
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520110200000
BURKHART,RONALD MAX
2256 HO'OKUI PL
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520110210000
WAITE,CHRISTOPHER A
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520110220000
BRADBURY,ARTHUR L & TERRI LIVING TI
2262 HOOKUI PL
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520110230000
HOLT,ROBERT H
2276 HOOKUI PL
KILAUEA HI 96754

520110240000
MIRANDA,RUDY
PO BOX 316
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520110250000
NOBLE,GEOFFREY M
PO BOX 330
KILAUEA HI 96754

520110260000
DOMINGO,PRISCA A
PO BOX 915
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520110290000
SEARBY,STEVE TRUST
PO BOX 516
HANALEI HI 96714

520110300000
MCCLERREN,BERYL F II
PO BOX 32
KILAUEA HI 96754

520110310000
NEWTON TRUST
C/O NEWTON,KAREN M & WILLIAM T TTE
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520110320001
ROSS,DANA L
PO BOX 1442
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520110320002
BRIGGS,RON
PO BOX 900
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520110330000
COSBEY,BRUCE & MELINDA F REV LIVIN
PO BOX 1124
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520110390000
BLANCHET,EDWARD C
1640 LOMA ST
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520110400000
BRADBURY,ARTHUR & TERRI LIVING TRU
C/O BRADBURY,ARTHUR & TERRI TTEES
2262 HOOKUI PL
KILAUEA HI 96754

520110410001
BLANCHET,EDWARD C
PO BOX 802
KILAUEA HI 96754

520110410002
BLANCHET,EDWARD C
PO BOX 802
KILAUEA HI 96754

520110420000
NOBLE FAMILY TRUST
PO BOX 330
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520120010001
WHARTON,A LARRY & JAN L TRUST
PO BOX 39
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520120010002
BEISSERT,FAMILY TRUST
C/O BEISSERT NEAL
PO BOX 816
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520120010003
RED LAKE MANAGEMENT S A
C/O NAVIS CAPITAL
17TH FLOOR, AXIATA TOWER , 9 JALAN S

520120010004
FERGUSON,RICHARD D
PO BOX 71
KILAUEA HI 96754

520120010005
FU,LANCE
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520120010005
TANIGUCHI,ROGER REV LIVING TRUST
PO BOX 3994
LIHUE HI 96766

520120010006
JOHNSON,SCOTT
14214 FM 2769
LEANDER TX 78641

520120010007
SPIERLING,VALERIE L
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520120060000
FERRIS,HELEN M TRUSTEE
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520120070000
WEST,ALVA J TR
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520120090001
STEINMANN,DAVID P
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520120090002
NORRIS,CARLOS R
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520120090003
WEISSMAN,PAUL J
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520120090004
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520120090005
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520120100000
MORITSUGU,EDWARD T TRUST
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520120110001
ROCKNEY,ROBERT BYPASS TRUST
C/O ROCKNEY,VIOLET H TTEE
71 SHORE DR
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520120110002
ROCKNEY,ROBERT BYPASS TRUST
C/O ROCKNEY,VIOLET H TTEE
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BARRINGTON RI 02806

520120150001
OTTER CREEK INC
941 ORANGE AVE #301
CORONADO CA 92118

520120150002
CS DEVELOPMENT LLC
5241 ARNOLD AVE
MCCLELLAN AFB CA 95652

520120150003
CS DEVELOPMENT LLC
5241 ARNOLD AVE
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520120150004
OTTER CREEK INC
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520120150005
DYER,CHARLENE G REV TRUST
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520120190000
KAPLAN,MICHAEL A REVOCABLE TRUST
2695 E DOMINGUEZ ST
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520120350000
SOMERS,CHARLES M TRUST
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5241 ARNOLD AVE
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520150040000
KOEHNE,STEPHEN E J
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520150050000
BRODMAN,MARK D
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520150060000
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520150070000
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1201 ELM ST
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520150080000
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520150090000
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520150100000
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520150110000
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4245 HEHI RD APT 4
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520150130000
SNYDER,JOHN S
2276 KAHALOU ST
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520150140000
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520150150000
BANK OF NEW YORK MELLON
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520150160000
SCHRAUDENBACH,COOPER
4164 WAIPUA ST
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520150170000
SMITH,GARY E TRUST
PO BOX 419
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520150180000
GUSHIKEN,ALAN T
4140 WAIPUA ST
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520150180000
GUSHIKEN,JACK N
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520150190000
MARVIN,NICOLAS F
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520150200000
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520150210000
WALTHER,KALANI S
4163 WAIPUA ST
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520150220000
MARTOCCI,RICHARD M
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520150270000
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520150510000
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520150520000
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1258 S RIDGEWOOD
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520150530000
VILLARIN,ORLANDO U
4243 MOMI ST
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520150540000
DUGAY,FELICITAS G
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520150550000
LUM,VERDELLE C TRUST
C/O LUM,BRENT G W SUCCESSOR TTEE
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520150560000
NORRIS,SYLVIANE TRUST
28445 GAMBLE BAY RD NE
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520150570000
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520150580000
ILIC,THEODORE A
4216 WAIPUA ST
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520150590000
LUTZ,RALPH J
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520150600000
NOBLE,SAMUEL C
4230 WAIPUA ST
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520150610000
MORIHISA,HELEN M
PO BOX 51
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CALVAN,ROMEO P
4242 WAIPUA ST
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CALVAN,WILMER M
4242 WAIPUA ST
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HANALEI HI 96714

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ROSA,KIMO G & LAUREN J TRUST
PO BOX 381
ANAHOLA HI 96703

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MIYABUCHI,SANDRA A TRUST
PO BOX 16
KILAUEA HI 96754

520150660000
RAZOS,HENSON C
4280 WAIPUA ST
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520150670000
DUPEE,SHANNEL Y
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SEYMOUR CT 06483

520150680000
CONSTANTINO,ROY A
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520150690000
HILL,TERRY L TRUST
4261 WAIPUA ST
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520150700000
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PO BOX 3383
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520150710000
GAILEY,SUSAN TRUST
PO BOX 737
KILAUEA HI 96754

520150720000
HURST JR,RICHARD E TRUST
PO BOX 904
KILAUEA HI 96754

520150730000
PADRE,DANTE R
PO BOX 250
KILAUEA HI 96754

520150740000
KIMURA,ALAN
PO BOX 795
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520150750000
WINKLER,JAMES L
4217 WAIPUA ST
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520150760000
LAZARIT-SANTACRUZ,JUANA
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KEALIA HI 96751

520150760000
SANTACRUZ,MARIO
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KEALIA HI 96751

520150870000
MADRIAGA FAMILY TRUST
1430 KONIA ST
HONOLULU HI 96817

520150880000
LEAVITT,BRIGITT TRUST
2226 OKA ST
KILAUEA HI 96754

520150890000
MOYES CASTELO OHANA TRUST
C/O MOYES, KATHERINE M TTEE
PO BOX 277
KILAUEA HI 96754

520150900000
TAMURA,LANE
PO BOX 529
KILAUEA HI 96754

520150910000
CAROLLO,STEPHEN E
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HANALEI HI 96714

520150920000
BELMONTE,ERIC
PO BOX 223476
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520150930000
AFALLA,JON & LORRAINE TRUST
2241 OKA ST
KILAUEA HI 96754

520150940000
WIELER,NATHANIEL
4477 PILI RD
KILAUEA HI 96754

520151010000
SAFRANEK,ROBERT H
2248 IOELA ST
KILAUEA HI 96754

520151020000
PACHECO,JAMIE K
2242 IO'ELA ST
KILAUEA HI 96754

520151030000
SCHEMP,BRIAN
2234 IO'ELA ST
KILAUEA HI 96754

520151040000
WAGONER FAMILY TRUST
C/O WAGONER,JEFF L & SUSAN L TTEE:
2579 CHATEAU WAY
LIVERMORE CA 94550

520151050000
KAWAMURA,STEVEN T
C/O KAWAMURA,STEVEN T FAMILY REV
PO BOX 132
KILAUEA HI 96754

520151060000
BERNARD-JOUDON,KELLY L TRUST
2212 IOELA ST
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520151070000
NEWMAN,LORRAINE D REVOCABLE TRU
PO BOX 1000
KILAUEA HI 96754

520151080000
GOMES,TIPPI
6916 W 85TH ST
LOS ANGELES CA 90045

520151090000
ZIETZ,JOANNA K
2190 IOELA ST
KILAUEA HI 96754

520151100000
SESSIONS,PEPPER A
7515 NARROWS AVE
BROOKLYN NY 11209

520151110000
MEYER,MATTHEW L
106 WEST CANADA UNIT A
SAN CLEMENTE CA 92672

520160090000
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520160100000
DAVIS,PHYLO C R
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520160110000
KENNEY,LAUREL E
2231 KOLO RD
KILAUEA HI 96754

520160120000
KNOX,STEPHEN A
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KILAUEA HI 96754

520200070000
VOGEL,P JANE REV TRUST
C/O VOGEL,JANE
PO BOX 1167
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520200080000
STONE,VICKI L
2215 IO'ELA ST
KILAUEA HI 96754

520200090000
JOHNSON,ALLAN S
2207 IOELA ST
KILAUEA HI 96754

520200100000
DARLING,JEANNE M TESTAMENTARY TF
C/O DARLING,JEFF
2201 IO'ELA ST
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520200110000
CONIDI,PETER M & MARY R FAMILY TRU
C/O MARY R CONIDI
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520200120000
HARAGUCHI,RODNEY M/KAROL M LIVIN(
C/O HARAGUCHI,RODNEY M TTEE
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HANALEI HI 96714

520200900000
ABALOS,ANDREW N
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520200910000
DATO,NADINE F
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KILAUEA HI 96754

520200920000
SQUIRE,STEVEN N
4362 LILIUOKALANI PL
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520200930000
JARQUIO,DANILO C
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520200940000
PRIETO FAMILY TRUST
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520200950000
CHANDLER,KALEO
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SCHWARTZ,DONALD A
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520200970000
BACINO,DANNY T
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520200980000
HEIM,KRISTI L
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520200990000
GUYETT,MADELINE M TRUST
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520201000000
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520201010000
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520201020000
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520201030000
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4394 ULUA ST
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44 FORT MASON
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4397 ULUA ST
KILAUEA HI 96754

520201060000
THATCHER,STEVEN T
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520201070000
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520201080000
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520201090000
GARRETT,BARBARA A TRUST
4365 ULUA ST
KILAUEA HI 96754

520201100000
PERDUE,FAMILY TRUST
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520201110001
EYTCHISON,DON M
2215 LILIUOKALANI ST
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520201110002
CONSTANTINO,ARDELINA D
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KILAUEA HI 96754

520201120000
CONSTANTINO,ARDELINA D
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KILAUEA HI 96754

520201130000
KESSNER FAMILY TRUST
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15 FRIENDLY LANE
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520201140000
JURE,DANIELLE N
4356 KAHILI MAKAI ST
KILAUEA HI 96754

520201150000
TULLY,EVELYN A REVOCABLE LIVING TF
4364 KUKE ST
KILAUEA HI 96754

520201160000
MOORE,NICHOLAS F
PO BOX 14121
KILAUEA HI 96754

520201170000
GILLETTE,RICHARD J
PO BOX 120
KILAUEA HI 96754

520201180000
FURGESON,MICHAEL R TRUST
4347 RICE ST 204
LIHUE HI 96766

520201190000
RIDER,JONATHAN R
4345 KUKE ST
KILAUEA HI 96754

520201200000
HILLIARD FAMILY TRUST
PO BOX 1394
KILAUEA HI 96754

520201210000
SCHMIDT,CONRAD C TRUST
PO BOX 48
KILAUEA HI 96754

520201220000
SMITH,GARY E TRUST
PO BOX 419
KILAUEA HI 96754

520201230000
FORES,MARTIN L
PO BOX 573
KILAUEA HI 96754

520201240000
O'CONNELL,PATRICK J JR
4344 KUKE ST
KILAUEA HI 96754

520201250000
LEBIET,JEAN C
4345 IOKUA ST
KILAUEA HI 96754

520201260000
LANDAGORA,MAXIMO P
PO BOX 141
KILAUEA HI 96754

520201270000
DAWBARN,WILLIAM B
PO BOX 218
KILAUEA HI 96754

520201280000
HARAGUCHI,RODNEY M & KAROL M LIVI
PO BOX 427
HANALEI HI 96714

520210010000
UTTERBERG FAMILY REVOCABLE TRUS
C/O UTTERBERG,NAYDA TTEE
2033 1ST AVE APT 4
SEATTLE WA 98121

520210040001
KELSEY,KELLY E
PO BOX 530
KILAUEA HI 96754

520210040002
2007 MACKENZIE LOTSPEICH TRUST
4350 KAHILI MAKAI ST
KILAUEA HI 96754

520210040003
MILLER,JEFFREY F TRUST
PO BOX 733
KILAUEA HI 96754

520210040004
JURE,THERESA A
PO BOX 1101
HANALEI HI 96714

520210040005
WELBORN FAMILY TRUST
PO BOX 915
HANALEI HI 96714

520210050001
ARREOLA,JAIME L
4316 KAHILI MAKAI ST APT A
KILAUEA HI 96754

520210050002
BERKOWITZ,ANTHONY/HAMMOND,KRIST
PO BOX 1009
KILAUEA HI 96754

520210050003
NAKAMURA,WAYNE M TRUST
5197 LOKENE ST
KAPAA HI 96746

520210050004
MORRISON,AMBER 2011 TRUST
2500 ARAPAHOE AVE #220
BOULDER CO 80302

520210050005
MORRISON,AMBER 2011 TRUST
2500 ARAPAHOE AVE #220
BOULDER CO 80302

520210060001
BRADY,KIM D TRUST
C/O SAIN-BRADY, KIM D
312 14TH ST
SANTA MONICA CA 90402

520210060002
DAVOUDIAN FAMILY TRUST
15021 VENTURA BLVD STE 452
SHERMAN OAKS CA 91403

520210060003
RYAN,THOMAS C TRUST
PO BOX 117
BILLINGS MT 59103

520210060004
RED LAKE MANAGEMENT SA
C/O NAVIS CAPITAL
17TH FLOOR, AXIATA TOWER , 9 JALAN S

520210060005
CS DEVELOPMENT LLC
5241 ARNOLD AVE
MCCLELLAN AFB CA 95652

520210070001
JBHKM LLC
PO BOX 616
KILAUEA HI 96754

520210070004
CS DEVELOPMENT LLC
5241 ARNOLD AVE
MCCLELLAN AFB CA 95652

520210070005
KELLS-NEILSON REVOCABLE TRUST
DAVID N KELLS M D & VALERIE M NEILS
4316-Z KAHILI MAKAI ST # E
KILAUEA HI 96754

520210080000
KAHILI MANOA LLC
C/O SUSSMAN & ASSOCIATES
700 12TH AVENUE SOUTH STE 201
NASHVILLE TN 37203

520210410001
KAPLAN,MICHAEL A REVOCABLE TRUST
2695 E DOMINGUEZ ST
CARSON CA 90895

520210410002
KIEN,LINDA
PO BOX 1002
KILAUEA HI 96754

520210410002
SARONI,ELIZABETH A
13000 N CALICO MEADOWS RD
HAYDEN LAKE ID 83835

520210410003
KAHILI MAKAI LAND TRUST
PO BOX 1190
KILAUEA HI 96754

520210410004
KIEN,LINDA
PO BOX 1002
KILAUEA HI 96754

520210410004
SARONI,ELIZABETH A
13000 N CALICO MEADOWS RD
HAYDEN LAKE ID 83835

520210410005
ROOSTERS AND RAINBOWS LLC
C/O PRITZKER, JAMES AND PARTHE,MA
104 S MICHIGAN AVE STE 500
CHICAGO IL 60603

520210410006
KAPLAN,MICHAEL A REVOCABLE TRUST
2695 E DOMINGUEZ ST
CARSON CA 90895

EXHIBIT "D-2"

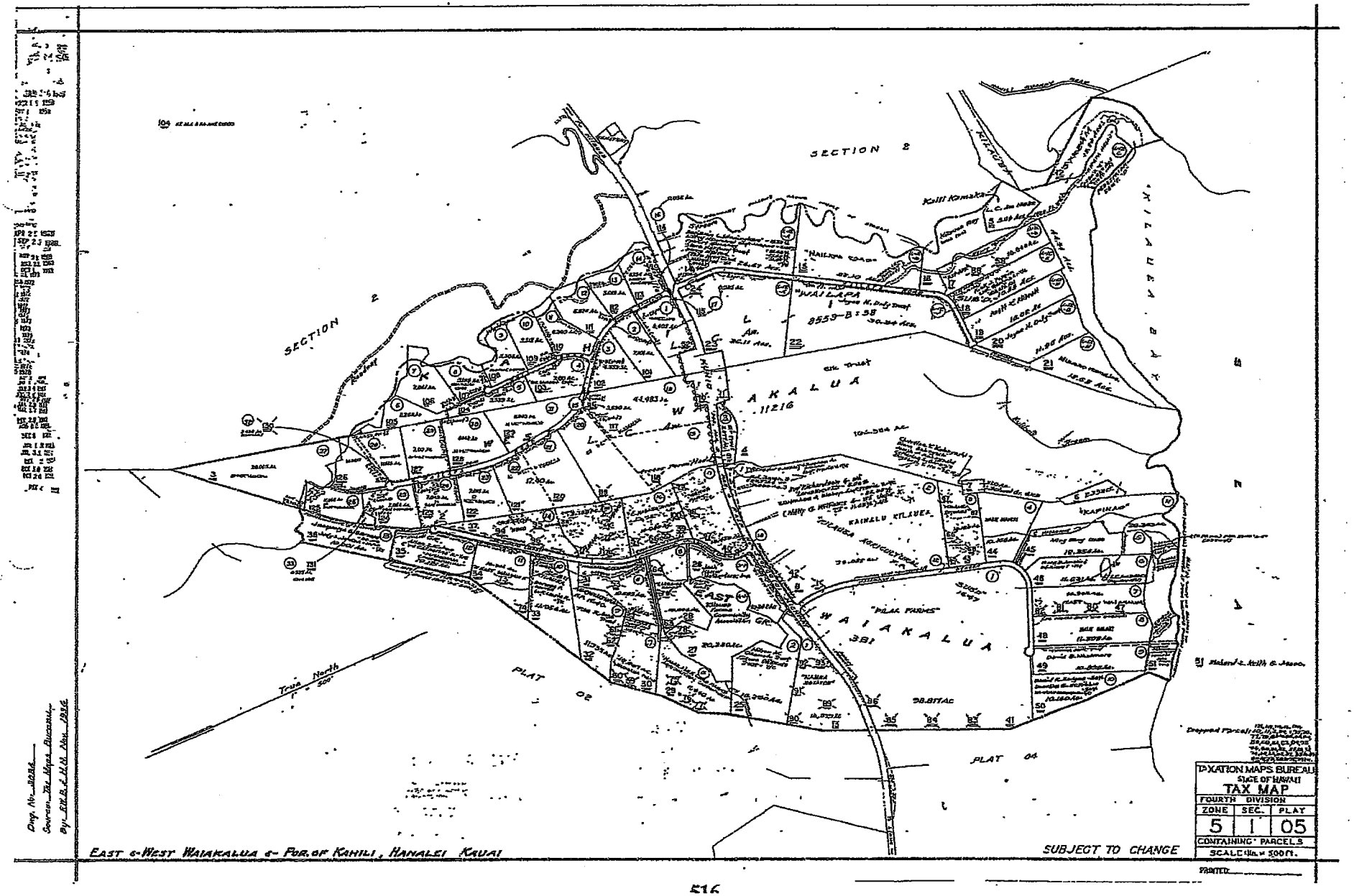
SECTION 2
SECTION 2
WAILAPA
AKALUA
WAIAKALUA
EAST
PLAT 02
PLAT 04
True North
TAXATION MAPS BUREAU
STATE OF HAWAII
TAX MAP
FOURTH DIVISION
ZONE 5
SEC. 1
PLAT 05
CONTAINING PARCELS
SCALE 1in. = 500ft.
EAST & WEST WAIAKALUA & PORT OF KAHILI, HANALEI KAUAI
SUBJECT TO CHANGE

EXHIBIT "D-2"

EXHIBIT "D-3"

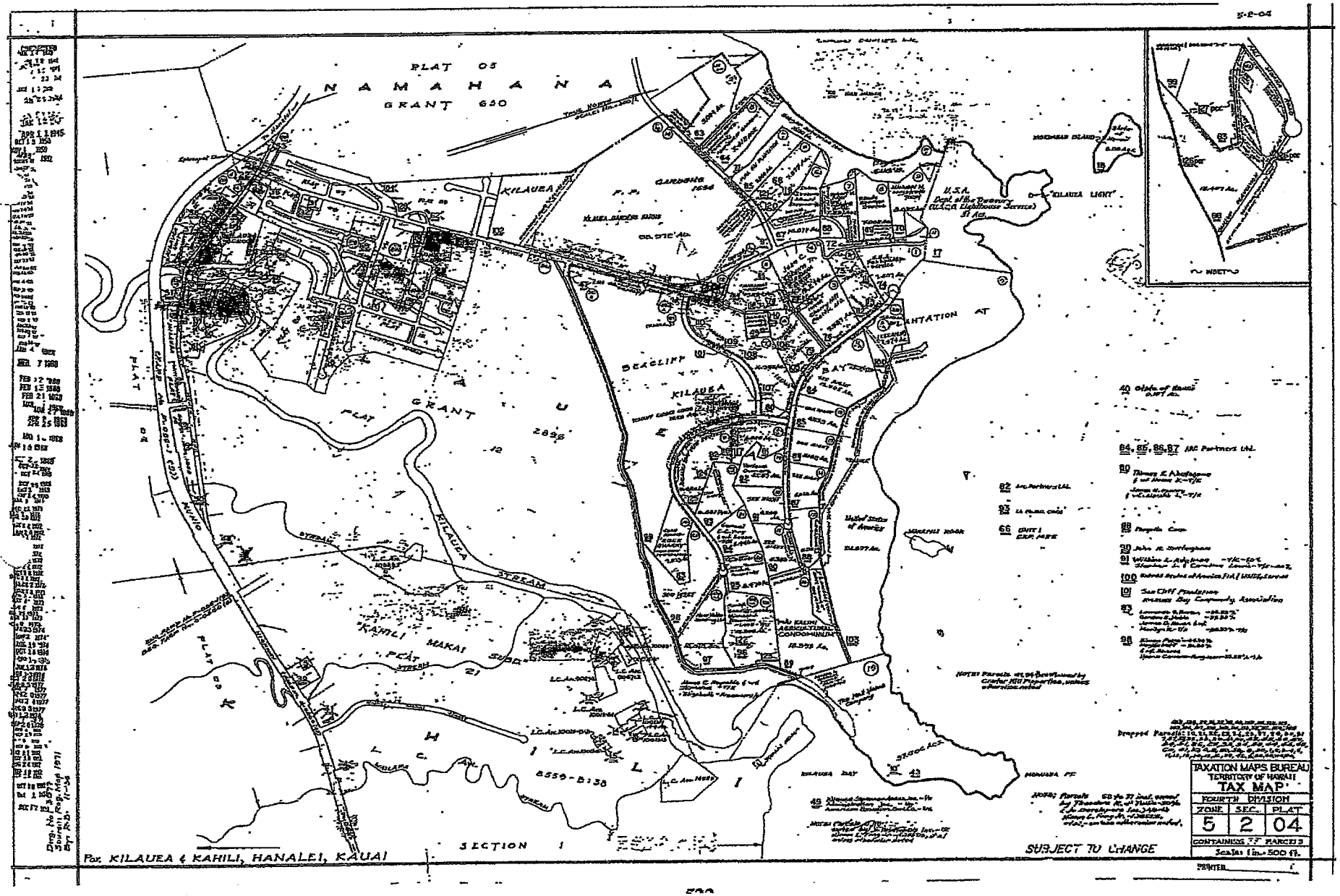
PLAT 05
NAMAHANA
GRANT 630
KILAUEA
KILAUEA LIGHT
U.S.A.
Dept. of the Treasury
(U.S.C.G. Lighthouse Service)
31 Ac.
PLANTATION AT
SEACLIFF
KILAUEA
BAY
PLAT
GRANT
2838
KILAUEA
STREAM
KAHILI
MAKAI
PLAT
SUBD.
PLAT 04
PLAT 03
PLAT 02
H
A
L
E
I
L
I
8559-B138
SECTION 1
Par. KILAUEA & KAHILI, HANALEI, KAUAI
SUBJECT TO CHANGE
TAXATION MAPS BUREAU
TERRITORY OF HAWAII
TAX MAP
FOURTH DIVISION
ZONE 5
SEC. 2
PLAT 04
CONTAINING 77 PARCELS
Scale: 1 in. = 500 ft.
PRINTED

EXHIBIT "D-3"

EXHIBIT "D-4"

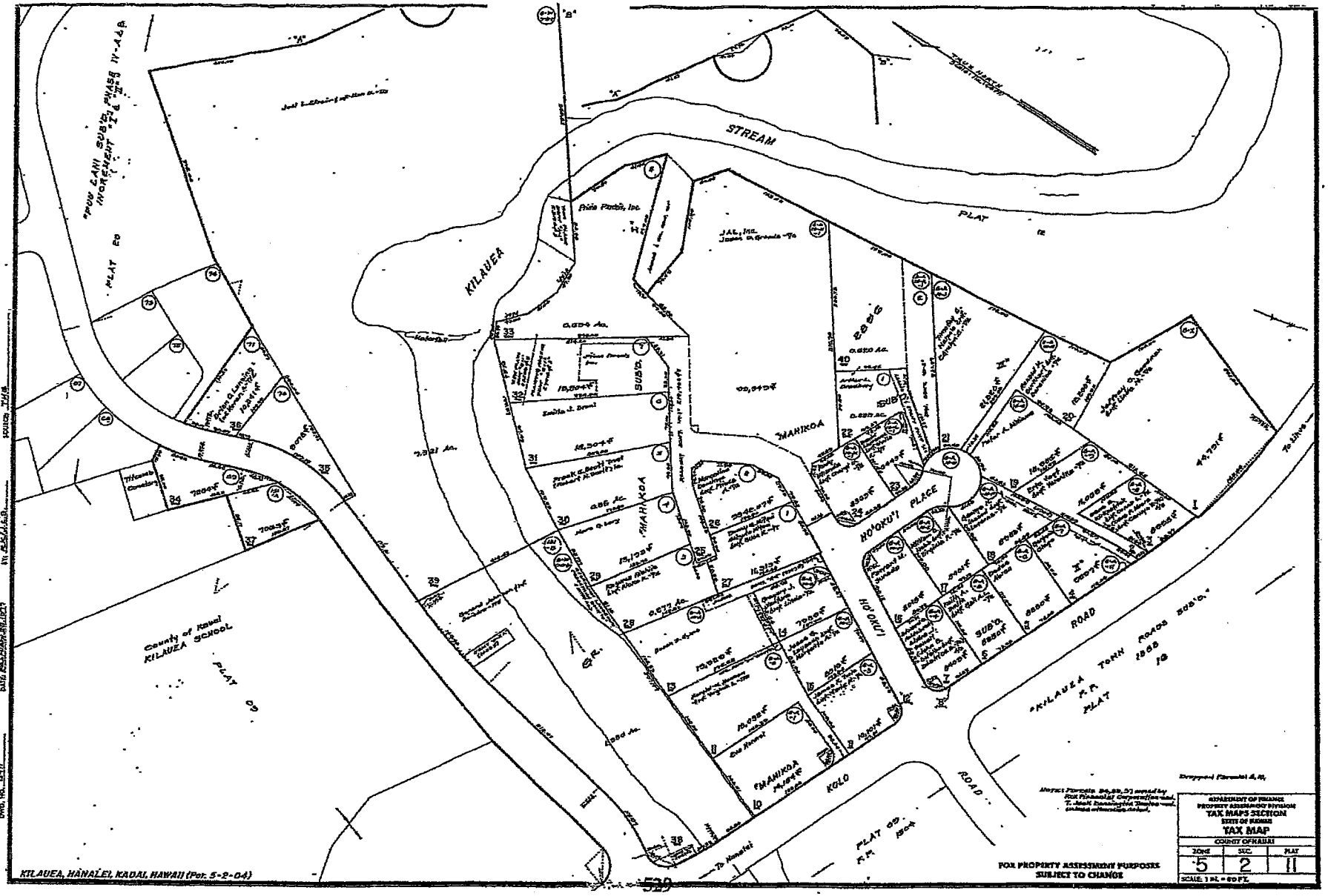
KILAUEA
STREAM
PLAT 12
PLAT 20
PLAT 09
PLAT 09 F.M. 1604
County of Kauai
KILAUEA SCHOOL
MAHIKOA
MAHIKOA PLACE
HO'OKU'I PLACE
HO'OKU'I
KOLO
ROAD
KILAUEA TOWN ROADS SUB'D.
F.M. PLAT 19
To Hanalei
To Lihue
Pride Parts, Inc.
J.A.L. Inc.
Dropped Parcels 4, 5,
Merged Parcels 36, 38, 37 merged by
FOR PROPERTY ASSESSMENT PURPOSES
SUBJECT TO CHANGE
DEPARTMENT OF FINANCE
PROPERTY ASSESSMENT DIVISION
TAX MAPS SECTION
STATE OF HAWAII
TAX MAP
COUNTY OF KAUAI
ZONE 5
SEC. 2
PLAT 11
SCALE: 1 IN. = 60 FT.
KILAUEA, HANALEI, KAUAI, HAWAII (Par. 5-2-04)

EXHIBIT "D-4"

EXHIBIT "D-5"

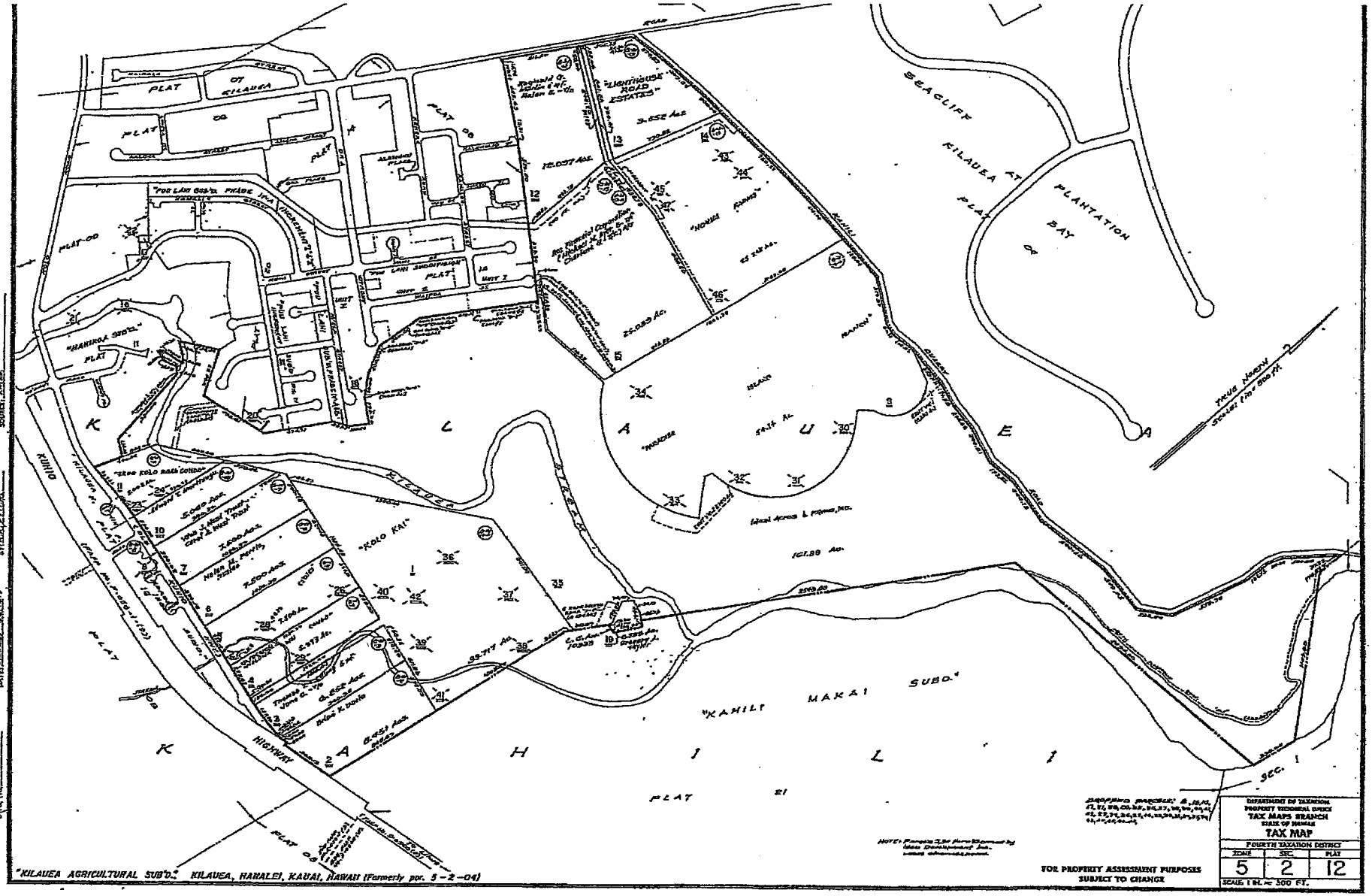
"KILAUEA AGRICULTURAL SUB'D." KILAUEA, HANALEI, KAUAI, HAWAII (Formerly por. 5-2-04)
TOP PROPERTY ASSESSMENT PURPOSES
SUBJECT TO CHANGE
DEPARTMENT OF TAXATION
PROPERTY TECHNICAL OFFICE
TAX MAPS BRANCH
STATE OF HAWAII
TAX MAP
FOURTH TAXATION DISTRICT
ZONE 5
SEC. 2
PLAT 12
SCALE: 1 IN. = 300 FT.
K A H I L I
K I L A U E A
"KAHILI MAKAI SUB'D."
"KOLO KAI"
"LIGHTHOUSE ROAD ESTATES"
SEACLIFF
KILAUEA AT PLANTATION BAY
KUHIO HIGHWAY
PLAT OF KILAUEA
PLAT 21
SEC. 1

EXHIBIT "D-5"

EXHIBIT "D-6"

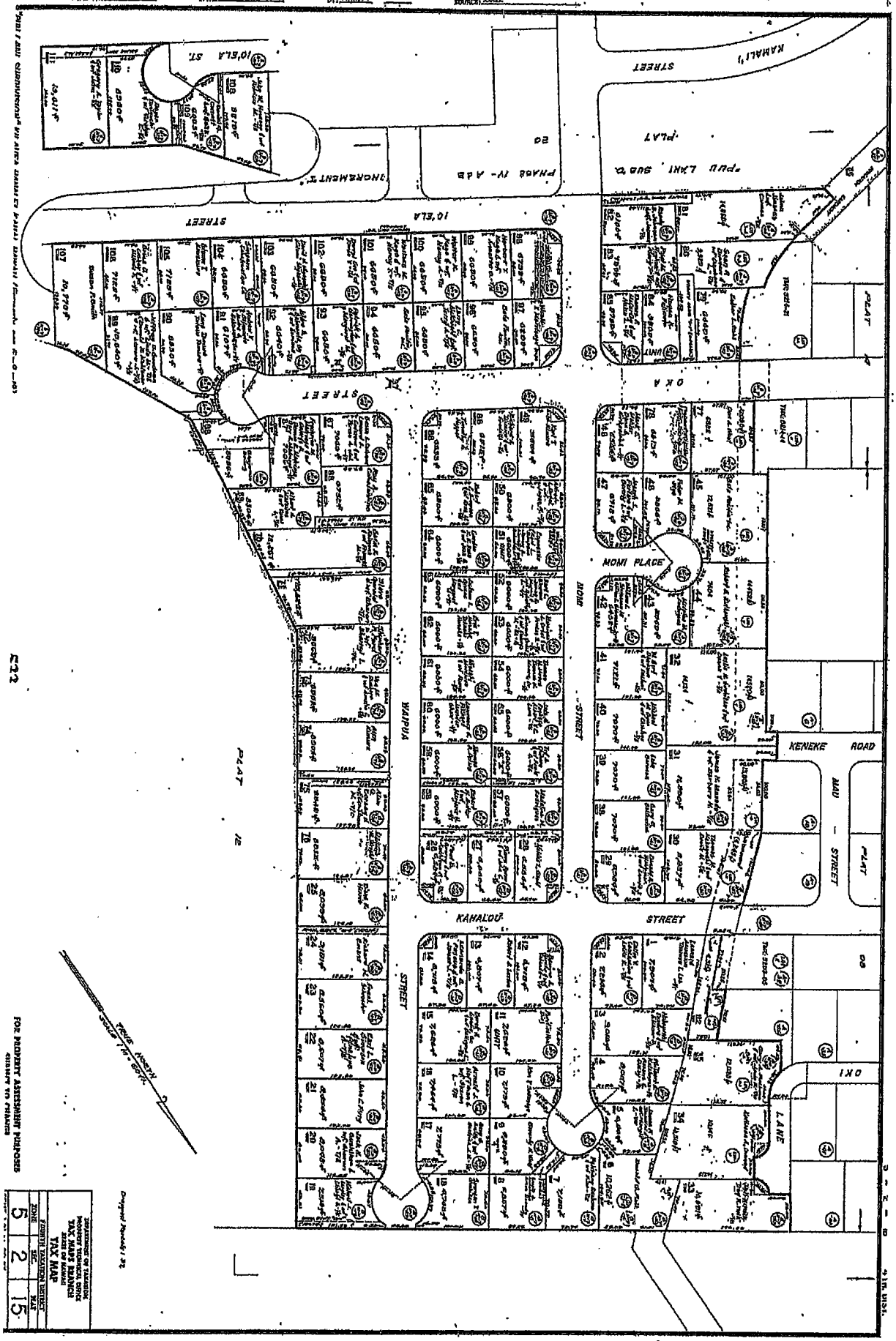
KAHALI'I STREET
PLAT
PHASE IV-A&B
20
10'ELA
STREET
OKA
MOMI PLACE
MOIR STREET
WAIPUA STREET
KENEKE ROAD
MAU STREET
KAHALOU STREET
OKI LANE
TRUE NORTH
FOR PROPERTY ASSESSMENT PURPOSES
ASSUMED TO CHANGE
DEPARTMENT OF TAXATION
PROPERTY TECHNICAL OFFICE
TAX MAPS BRANCH
TAX MAP
ZONE 5
SEC. 2
PLAT 15

EXHIBIT "D-6"

EXHIBIT "D-7"

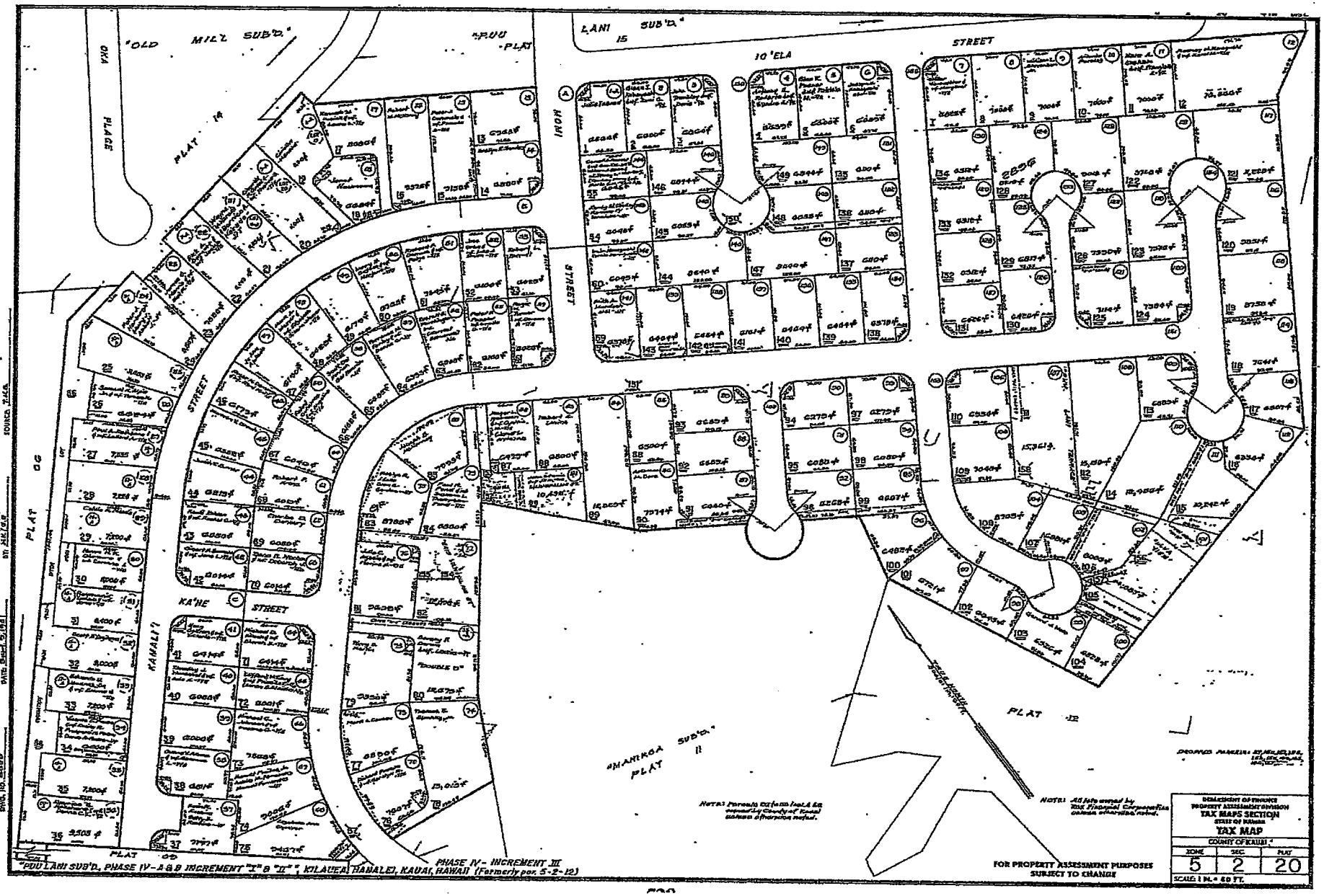
"OLD MILL SUB'D."
"PUU PLAT"
LANI SUB'D."
10 'ELA
STREET
IKON
STREET
PLAT 14
PLAT 16
PLAT 12
KA'HE
STREET
KAMALI'I
STREET
PLAT 06
PLAT 09
PLAT 11
PLAT 12
NOTE: Parcels 82 from lot A 82 owned by County of Kauai subject to Phase II Parcel.
NOTE: All lots owned by First Hawaiian Corporation unless otherwise noted.
DEPARTMENT OF FINANCE
PROPERTY ASSESSMENT DIVISION
TAX MAPS SECTION
STATE OF HAWAII
TAX MAP
COUNTY OF KAUAI
ZONE 5
SEC 2
PLAT 20
SCALE: 1 IN. = 60 FT.
FOR PROPERTY ASSESSMENT PURPOSES
SUBJECT TO CHANGE
PHASE IV - INCREMENT III
"PUU LANI SUB'D, PHASE IV-A & B INCREMENT "I" & "II"", KILAUEA (HANALEI), KAUAI, HAWAII (Formerly por. 5-2-12)

EXHIBIT "D-7"

EXHIBIT "D-8"

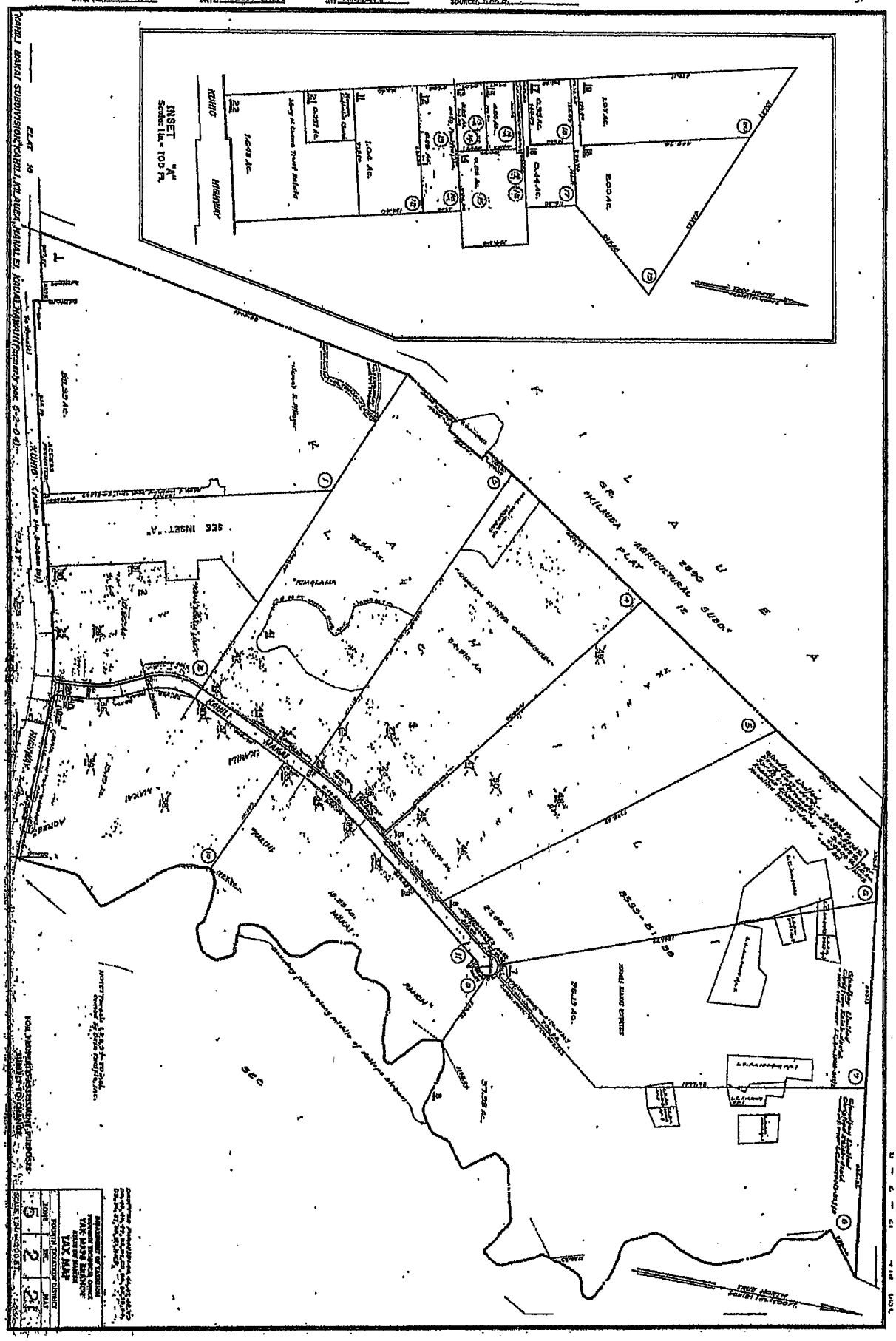
INSET "A"
Scale: 1" = 100 Ft.
KUHIO HIGHWAY
KAHILI MAHAI SUBDIVISION, KAHILI, KILAUEA, HANALEI, KAUAI, HAWAII
FLAT 20
SEE INSET "A"
KILAUEA AGRICULTURAL 12 SUBD.
PLAT
KILAUEA
KIMOLANA
KAHILI
HIGHWAY
ADMIN
MAHAI
TALINE
MAHAI
RANCH
SEC
DRIVE LIMITS
TAX MAP
FOURTH DIVISION DISTRICT
ZONE
SEC
PLAT
5
2
21

EXHIBIT "D-8"

Ka'āina S. Hull
Director of Planning

Jodi A. Higuchi Sayegusa
Deputy Director of Planning

SUBJECT TO CHANGE

COUNTY OF KAUA'I
PLANNING DEPARTMENT

DIRECTOR'S REPORT

I. SUMMARY

Action Required by Planning Commission:	Consideration of a Second Amendment to a Special Management Area Use Permit
Permit Application Nos.	SMA(U)-2008-5, Use Permit U-2008-4 and Class IV Zoning Permit Z-IV-2008-6
Name of Applicant(s)	CHARLES SOMERS, AS TRUSTEE OF THE CHARLES SOMERS LIVING TRUST DATED NOVEMBER 12, 2002, AND WEST SUNSET 32 PHASE 1, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY

II. PERMIT INFORMATION

PERMITS REQUIRED	
☒ **Use Permit**	Pursuant to Section 8-11.3 of the Kauai County Code (KCC) 1987, as amended, a Use Permit is required for all uses, structures and development within the Special Treatment Districts.
☐ **Project Development Use Permit**	
☐ **Variance Permit**	
☐ **Special Permit**	
☒ **Zoning Permit Class** ☐ IV ☐ III	Pursuant to Section 8-3.2 of the KCC, 1987, as amended, a Class IV Zoning Permit is a procedural requirement for obtaining a Use Permit within the Special Treatment District.
☒ **Special Management Area Permit** ☒ Use ☐ Minor	Pursuant to Section 205A of the Hawaii Revised Statutes (HRS) and the Special Management Area Rules and Regulations, the project is considered "Development" since the construction value exceeds $500,000. Therefore, a SMA Use Permit is required as defined in Section 7.3 of the SMA Rules.
AMENDMENTS	
☐ **Zoning Amendment**	
☐ **General Plan Amendment**	

☐ State Land Use District Amendment	

Date of Receipt of Completed Application: January 23, 2020

Date of Director's Report: March 24, 2020
Date of Public Hearing: MARCH 24, 2020
Deadline Date for PC to Take Action (60TH Day): N/A

III. PROJECT DATA

PROJECT INFORMATION			
Parcel Location:	The subject site is located in		
Tax Map Key(s):	5-2-012:035	**Area:**	161.88 acres

ZONING & DEVELOPMENT STANDARDS	
Zoning:	Open (O) and Special Treatment Resources (ST-R)
State Land Use District:	Agricultural (A) and small portion in Urban (U)
General Plan Designation:	Natural
Height Limit:	25 feet or Base Flood Elevation plus 15 feet
Max. Land Coverage:	10%
Parking Requirement:	N/A
Front Setback:	10 feet
Rear Setback:	5 feet OR ½ building plate height whichever is greater.
Side Setback:	5 feet OR ½ building plate height whichever is greater.
Community Plan Area:	North Shore Development Plan (NSDP)
Community Plan Land Use Designation:	Open
Deviations or Variances Requested:	Modification to previously approved permits

IV. PROJECT DESCRIPTION AND BACKGROUND

The original application for a residence, caretaker's residence and barn was submitted in 2007. The application was sent to a contested case hearing and on October 2, 2008, the Decision and Order (Exhibit "A") was issued for the construction of the main residence deleting the barn and caretaker's residence from the approval.

On February 15, 2010, pursuant to the Master Permit, the 6 bedroom, 8 1/2 bath, 11,935 square foot farm dwelling along with a 1,825 square foot swimming pool and 6,223 square feet of waterfalls and ponds received a Certificate of Occupancy.

The Planning Commission heard the request to modify the application to include the barn and caretaker's residence on April 30, 2013. A petition to intervene was filed by the Kilauea Neighborhood Association and Elizabeth Freeman. The intervening parties withdrew their petitions and the contested case hearing was cancelled.

The application was pending at the January 28, 2014 Planning Commission meeting for completion and acceptance of the Conservation Plan to justify the caretaker's residence and size of the barn and modifications requested by the department.

On April 26, 2016, the Planning Commission amended the Master Permit to allow construction of a barn and caretaker's residence subject to 16 conditions (See Exhibit "B"). The loft, bathroom and lanai were deleted from the barn and the Applicant requested to increase the barn from 2,832 square feet to 4,023 square feet due to the deletion of the loft. The approval included an After-the-Fact permit for the 1,800 temporary equipment structure . This temporary structure must be removed if the barn is constructed. The approval also required the conservation manager's residence to be lowered approximately five (5) feet and the Applicant requested to include a six foot high Nene enclosure fence for approximately 3.75 acres as identified in the Conservation Plan submitted to the Planning Commission on January 26, 2016. The Conservation Plan was requested to justify the manager's residence and size of the barn as related to and supportive of the agricultural and conservation activities on the property.

The Applicant submitted a permit for the barn (BP18-1915) on January 18, 2019. These plans differed from the plans approved in the amendment and were not issued. The Applicant submitted the barn plans beyond the timeline identified in the conditions of approval.

On April 4, 2019, the Applicant submitted the Farm Plan, modified barn plans, and the revised site plan (See Exhibit "C"). The Applicant is utilizing approximately seven (7) acres for fruit tree cultivation and flower farming. The soils are classified as Class "D" and "E" with Class "A" being the most productive.

For approximately ten years the Applicant used the temporary 1,800 square foot storage tent to accommodate the maintenance equipment for the agricultural activities.

On April 5, 2019, the Applicant submitted the contact information for public access to Kilauea Falls (See Exhibit "D").

In 2016, a status report was submitted along with a request to amend the permit. Annual status reports were not submitted until November 2019 and this status report was accepted by the Planning Commission at the February 11, 2020 meeting.

The Applicant is requesting to amend the Master Permit to allow the following:

- Barn. The Barn will be redesigned as a two-story building. The Applicant has stated in the description that the lower floor area of the Barn will be increased in area from 2,832 square feet to 4,000 square feet and a new upper floor area containing 1,384 square feet will be added.

  However, in April 2016, the size of the barn was amended by the Planning Commission to a single story barn consisting of 4,023 square feet without any lanais, bathroom or loft. The proposed plans differ than the previously submitted plans with the two sides being separated by a vehicular access and a full bath, lanai, loft and kitchen area added. The lower floor will be used to repair, maintain and store equipment and materials related to activities on the subject property. The upper floor will be used for a management office by the Applicant and his employees related to the activities on the subject property.

  Revised plans were submitted on February 21, 2020 and proposed to delete the shower in the bathroom, kitchen in the loft and showed clear details on the building height and fill at the entrance to the barn. The lanais still remain. (See Exhibit "E")

- Accessory Improvements. The utilities, driveways, landscaping and site grading for the Barn will be developed and located in the areas shown on the plans attached.

- Manager's/Caretaker's House. The Manager's House and associated driveway, landscaping, and utilities accessory thereto will be eliminated.

- Nene Fence. The Applicant proposes to eliminate the Nene Fence. Condition A15 that was imposed as a result of the first permit modification required a Nene Fence be constructed pursuant to the Conservation Plan (See Exhibit "F"). The Planning Commission requested a Conservation Plan when it considered inclusion of the proposed conservation manager's residence and barn. The Applicant states that they have been implementing the provision of the Conservation Plan with the exception of this enclosure. The Applicants had determined that the construction and maintenance of the Nene Fence at this time would not be practicable or effective, given the nature and rapid growth of the vegetation in this area. In addition, the Applicant is concerned with the potential State and Federal regulatory oversight that might accompany the creation of a designated refuge area for endangered and/or protected avian species.

- Equipment Tent. The use of the 1,800 square foot temporary equipment tent will continue until the construction of the Barn is complete.

- Timeline. The Applicant is requesting an amendment to the timeline outline in Condition A-13 as follows:

"A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [residence and] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development within two (2) years of the date of approval of the building permit."

(See attached application and revised plans for further description of the project)

V. APPLICANT'S REASONS/JUSTIFICATION

Please refer to application.

VI. ADDITIONAL FINDINGS

1. The project site is in Kilauea along the northern ridge of the Kilauea Stream. The property is bounded by Sea Cliff Subdivision and Kilauea National Wildlife Refuge along its northern boundary, and there is steep heavily vegetated terrain along the southern and western boundary. The property extends into the valley area below and is adjacent to the Kilauea Stream along its southern boundary.

2. The overall property is 161.88 acres with a building envelope of 12.48 acres. Two Conservation Easements are recorded, one for 80.1 acres and another for 69.3 acres. the Conservation Easement prohibits the development of any further dwelling units within the area that they cover. By the terms of the Conservation Easements and Master Permit, the Applicant has the right to development no more than two (2) dwelling units, both of which must be located within the building envelope.

3. The State Land Use District (SLUD) designation is "Agricultural," which allows for agricultural use and development.

4. The proposed development is located approximately 1,200 feet from the shoreline. This is outside of the 550 feet shoreline setback threshold, pursuant to the County's shoreline setback requirements contained in Chapter 8, Article 27 of the Kaua'i County Code (1987), as amended.

5. The subject property is NOT located within the Visitor Designation Area (VDA).

6. The proposed barn is located within Zone "X" of Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map. FEMA had identified these areas to be outside of the 0.2% floodplain and is far enough inland to be vulnerable to coastal

erosion or impact coastal waters. Additionally, the Applicant states that no additional drainage will be allowed to significantly or negatively impact the Kilauea Stream and the wetland areas adjacent.

7. The subject property is relatively long and narrow, encompassing portions of the north bank of the Kilauea Stream. The property slopes from approximately 280 feet above mean sea level at its south end to sea level at the northeast boundary.

8. The project is situated within the North Shore Planning area and will be subjected to the objectives and goals of the North Shore Development Plan (NSDP).

9. The property is located in the Special Treatment-Scenic/Ecologic Resource District.

10. Special Management Area (SMA)
In addressing the issues of the Special Management Area and its objectives and policies, the following aspects will be considered and evaluated:

    Recreational Resources
    Cultural/ Historic Resources
    Scenic resources
    Coastal Hazard
    Coastal Ecosystem

    Furthermore, the proposal does not:

    - Involve dredging, filling or otherwise altering any bay, salt marsh, river mouth, slough or lagoon;
    - Reduce the size of any beach or other area usable for public recreation;
    - Reduce or impose restrictions upon public access to tidal and submerged lands, beaches, rivers, and streams within the SMA; and
    - Adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, estuarine sanctuaries, potential or existing agriculture uses of land.

11. General Plan - The General Plan designation (GP) is "Natural". According to the General Pan it is designated as such due to topography, hazards, vulnerability, sensitive resources, and other constraints and limits development.

VII. AGENCY COMMENTS

Attached as Exhibit "G".

VIII. PRELIMINARY EVALUATION

In evaluating the Applicant's request to construct a barn and associated improvements, the following are being considered:

1. General Plan

As mentioned earlier, the subject property is the "Natural" Designation. While there are a few residential uses found in the Natural Destination, they are generally not encouraged. In considering this proposal, the barn as proposed could be considered to be a compatible use, if the visual impacts can be mitigated to reduce massing and incorporate earth tone colors and native landscaping.

The proposed development satisfies the following goals and policies of the General Plan:

Goal #1 – A Sustainable Island. The Applicant states that the project is an example of responsible growth in an area designated for open space uses.

Goal #2 – A Unique and Beautiful Place. As submitted, the Applicant states that the project will complement the natural, cultural, social and built environmental assets of the Kilauea Community. It will provide uses that are compatible with similar uses in the area. The exterior of the barn will be earth tone colors with vegetation screens and landscaping.

Goal #3 – A Healthy and Resilient People. The Applicant states that the project will have minimal visual impacts and will have no significant negative impacts on the historic sites or Hawaiian cultural practices.

Goal #4 – An Equitable Place, with Opportunity for All. As proposed, the Applicant states that the project will support and enhance economic and business opportunities and jobs on Kauai.

Policy #1 – Manage Growth to Preserve Rural Character. The Applicant states that the project will not detract from the rural characteristics of Kauai. The conservation easements will preserve the rural nature of this area.

Policy #3 – Recognize the Identity of Kauai's Individual Towns and Districts. The project will help preserve the conservation values of the subject property consistent with the planning goals for the North Shore area.

Policy #4 – Design Healthy and Complete Neighborhoods. The Applicant has provided vehicular and walkable access to the Kilauea Quarry and the ocean.

Policy #5 – Make Strategic Infrastructure Investments. The Applicant has provided the necessary infrastructure by improving Kahili Quarry Road.

Policy #16 – Protect Access to Kauai's Treasured Places. The Applicant has provided contact information to request access to the Kilauea Falls and a pedestrian access along the stream has been recorded.

2. Native Hawaiian Traditional & Cultural Rights
   The only traditional and cultural practices known to the Applicant are for fishing and Gathering within the lower portions of Kilauea Stream. The project will have no impact on the continued use of the stream for this purpose. No information regarding who the Applicant contacted was provided.

3. SMA Rules and Regulations
   The COK SMA Rules and Regulations contain objectives, policies and guidelines designed to protect coastal resources. Within the SMA, special consideration is given to recreational opportunities, cultural and historic resources, scenic qualities and open space, coastal ecosystems, and coastal hazards. In evaluating the proposed development relative to the goals and objectives of the SMA Rules and Regulations, the following aspects are taken into consideration:

   - Public Access and Coastal Recreation – A pedestrian access trail which runs from Kahili Quarry Road to the west bank of the Kilauea Stream near the river moth and then in a mauka direction for approximately 2,500 feet along the west bank of the stream was recorded. Kahili Quarry Road has been repaired and upgraded by the Applicant and now provides normal vehicular access to the trail, Kilauea Quarry, Kilauea Stream, and Kahili Beach. The Applicant has provided contact information for access to Kilauea Waterfalls.

   - Cultural /Historical – An Archaeological Inventory Survey was conducted in 2008. A Preservation Plan was prepared. No historic sites were identified within the building envelope. Proof of compliance with State Historic Preservation Division's requirements must be provided prior to permit issuance.

   - Scenic and Open Space Resources – Due to its location along the ridge above Kilauea Stream, the proposed barn and loft may be visible from public vantage points in Kilauea. Therefore, the Applicant shall implement measures to minimize any visual impacts from scenic and open space resources. Mitigation measures such as landscaping, using dark earth tone colors, and non-reflective windows should be utilized.

   - Coastal Hazards – The proposed barn is located within Zone "X" of Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map. FEMA had identified these areas to be outside of the 0.2% floodplain. The proposed site is not within the Tsunami inundation zone and out of the floodway area which is located south of the property.

   - Coastal Ecosystems – The subject property is within a coastal ecosystem. The Applicant has conducted a survey of botanical, avian and terrestrial mammalian species which identified several species in the area such as Hawaiian Hoary Bat, Nene, Hawaiian Petrel, Newell's Shearwater and Laysan Albatross. A Conservation Plan determined that the construction and maintenance of a Nene

fence would be required. The Applicant wishes to delete this condition as they are concerned with the potential State and Federal regulatory oversight that might accompany the creation of a designated refuge area for endangered and/or protected avian species. The Kauai Public Land Trust (now known as the Hawaiian Island Land Trust) was granted the Conservation Easement. The omission of this condition should be determined through The U.S. Fish and Wildlife Service as it was a condition of the Conservation Plan. Additionally, drainage should be designed to control flows and minimize impacts to the nearshore coastal waters.

Timeline – The Applicant is requesting that the time limit be amended and an additional year be allowed for the applicant to apply for the permit and once issued, the applicant will complete the proposed development within two (2) years of approval of the building permit. This application was originally approved on October 2, 2008. The construction of the barn and manager's residence were deferred at that time. The farm dwelling was completed on February 15, 2010. A modification to allow the barn and caretaker's residence was approved on April 26, 2016. The applicant submitted a permit for the barn on January 18, 2019, which was beyond the time limit. The plans for the barn differed from the plans that were approved in 2016.

Under SMA Rule 10.0, "unless otherwise stated in the permit, once a permit is issued, the applicant must make substantial progress, as determined by the Director, regarding the development or activity within two (2) years, or the permit shall be deemed to have lapsed and be no longer in effect." The Applicant did complete the improvements to Kahili Quarry Road, however, no progress was made on the barn and caretaker's residence.

To date, the State Historic Preservation Division has not submitted comments regarding the Preservation Plan. Additionally, in regards to the Nene Fencing, Hawaiian Island Land Trust, who holds the Conservation Easement, must review and approve any changes to the Conservation Plan prior to determining compliance to the SMA Rules and Regulations as this is their condition of the Conservation Plan as US Fish and Wildlife Services stated it is not their jurisdiction. (See Exhibit "H")

4. CZO Requirements

As represented, the barn contains a kitchen in the loft area and a lanai. Additionally, an enclosed outdoor shower was added to the bathroom. Previously, the loft, lanai and bathroom were deleted from the modification that was approved on April 26, 2016. The CZO allows for a maximum fill from existing grade to finished grade at the entry to be four (4) feet. It is unclear from the plans submitted if this requirement can be met. The Applicant is deleting the request for the manager's residence, however, as proposed, a portion of the barn could easily function as a residence.

The revised plans received February 21, 2020, now show compliance with the CZO requirements. A Use Agreement may be required at time of building permit submittal.

Lot Coverage – The proposed project site is zoned Open (O) District. Open zone lot coverage standards specified in Section 8-9.2(a) of the KCC allows land coverage such as buildings and pavement to not exceed ten percent (10%) of the lot or parcel area. The subject property is a 161.88 acres and the lot coverage consists of 39,810 square feet, or one-half of one percent (1/2%).

Building Height –Based on the plans provided, it is unclear if the barn meets the requirements outlined in Section 8-4.5(b)(1) " No single family detached or single family attached dwelling, or accessory structure shall be more than (2) stories above and one (1) story below from the finished grade at the main entry, over twenty (20) feet measured from the finished grade at the main entry to the highest exterior wall plate line, and over thirty (30) feet to the highest point of the roof measured at each point along the building from the finished grade at the main entry. The finished grade at the main entry shall not be elevated more than a maximum of four (4) feet from the existing grade. *It should be noted that the 25' height requirement for the North Shore supersedes the 30' outlined above. The revised plans show compliance with this requirement.

Kitchen – The proposed barn shows a kitchen area in the loft. Kitchens are not allowed in barn. If a kitchen is requested, the proposal should be amended to convert the barn to a residence. As revised, only a sink and countertop are shown.

Bathroom – The Applicant previously agreed to remove the bathroom from the plans for the barn at the Planning Commission meeting on January 28, 2014. This plan shows a full bath with an enclosed outdoor shower. As revised, the Applicant has removed the shower, the outdoor enclosure still remains.

5. North Shore Development Plan Requirements
As submitted, there were discrepancies with the amount of fill at the entrance to the barn as well as the overall height. The maximum building height allowed is twenty five (25) feet. The revised plans show compliance with the height requirement.

The Applicant states that the proposed use of the subject property will not conflict with any of the goals contained in the North Shore Development Plan outlined below:

Goal A: To preserve the unique natural beauty of the North Shore Planning area.
Goal B: To preserve the special rural charm of the North Shore Planning area.
Goal C: To provide for the safety and welfare of the people, of their property of the North Shore Planning Area.
Goal D: To provide for economic development of the North Shore planning area.
Goal E: To preserve the wildlife and flora and the North Shore, recognizing man's dependence upon this preservation for his own health and welfare.
Goal F: To insure the preservation of historic-archaeological sites in the North Shore Planning Area.

Goal G: To create a development for evolutionary growth that depends upon a planning process whereby conflicts can be resolved through the establishment of priorities and community participation.
Goal: H: To provide for recreational opportunities that are compatible with the unique qualities and natural features of the North.

The Applicant states that the design, layout and outside appearance of the barn will be compatible with the natural beauty of the area. As such, the barn will not conflict with Goals A or B. The proposed use will provide economic opportunity for Kauai residents and as such will promote Goal D. Additionally, the Applicant concludes that the development will not conflict with Goals C, E, F or H and processing this amendment is consistent with the purposes of Goal G.

Additionally, Section 10-2.4(e)(1) of the Kauai County Code 1987, as amended provides that no structure shall be higher than twenty-five feet unless a greater height is authorized by the Planning Commission. As revised, the plans comply with this requirement.

6. Special Treatment-Scenic/Ecologic Resource Requirements
It is the intent of that district to insure that development within these areas recognize, preserve, maintain and contribute to the enhancement of those characteristics which are of particular significance or value to the general public.

In reference to the scenic views, the improvements are visible from the Kilauea Stream and properties across the stream. The Applicant was advised on February 11, 2020 to construct story poles prior to a site visit to allow staff to analyze the view plan impacts. The Applicant contacted the department to advise that the story poles would be erected by March 6, 2020. The department plans to conduct a site visit on March 10, 2020, in regards to the story poles that will identify the view plan impacts.

IX. PRELIMINARY CONCLUSION

Based on the foregoing, it is concluded that issues reflected in the Preliminary Evaluation need to be resolved prior to making a recommendation to take action on this application as submitted.

X. PRELMINARY RECOMMENDATION

Based on the foregoing conclusion, it is recommended that the Second Amendment to Special Management Area Use Permit SMA(U)-2008-5 be **DEFERRED** to allow for staff to conduct a site visit and evaluate view plane issues, and also for comments from Hawaiian Island Land Trust regarding the revision to the Conservation Plan.

a. Pending government agency comments;
b. Testimony from the general public and interested others; and
c. The Applicant's response to staff's report and recommendation as provided herein.

By _____
JODY GALINATO
Planner

Approved & Recommended to Commission:

By _____
KA'ĀINA S. HULL
Director of Planning

Date: 3-9-2020

EXHIBIT "A"

THE PLANNING COMMISSION OF THE COUNTY OF KAUAI

STATE OF HAWAII

IN THE MATTER OF APPLICATION OF CHARLES M. SOMERS and WEST SUNSET 32 PHASE 1, LLC	))))))))	FOR Special Management Area Use Permit SMA(U)-2008-5 Use Permit U-2008-4 Class IV Zoning Permit Z-V-2008-6

PLANNING COMMISSION'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
DECISION AND ORDER

INTRODUCTION

The Application is for a Special Management Area Use Permit, Use Permit, and Class IV Zoning Permit to be issued pursuant to the Comprehensive Zoning Ordinance (hereinafter "CZO") and Special Management Area Rules and Regulations of the County of Kauai (hereinafter "SMA Rules"). The Planning Commission of the County of Kauai (hereinafter "Commission"), having heard the testimony and examined the evidence presented at the hearings held herein and having considered the total record, hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

PARTIES:

1. Charles M. Somers and West Sunset 32 Phase 1 LLC, a California limited liability company (hereinafter "Applicant") is the Applicant for the permits sought herein. The Applicant was also represented in this matter by Max W.J. Graham, Jr. and Lorna A. Nishimitsu of Belles Graham Proudfoot & Wilson, and William M. Tam of Alston Hunt Floyd & Ing to file the application pursuant to the Applicant's authorization.

2. The Planning Department of the County of Kauai (hereinafter "Department") is the agency responsible for coordinating the review of applications for the types of permits discussed herein, and for preparing reports for the Planning Commission's consideration concerning the approval, denial, revocation, amendment or modification of such permits.

EXHIBIT "1"

3. The Petition for Intervention by Peter M. Morimoto on behalf of Elizabeth Freeman, individually and as Trustee of the Revocable Trust of Elizabeth Anne Freeman dated October 18,2005, and Makana Pomaika'i LLC, a Hawai'i limited liability company was granted by the Commission at its January 22, 2008 meeting.

PROCEDURAL MATTERS:

4. The application was entitled "In the Mater of the Application of Charles M. Somers and West Sunset 32 Phase I LLC for a Use Permit, Special Management Area Permit and Class III Zoning Permit For Real Property Situated at Kīlauea, Kaua'i, Hawai'i and Identified by Kaua'i TMK No. (4) 5-2-12: 35 and 5-2-4: 47, CPR #2" was prepared by Applicant's representative.

5. A public hearing notice was published in the Hawaii State and County Public Notices on November 5, 2007. Notice was also given to property owners or lessees within a 300 ft. distance of the perimeter of the involved property, in accordance with Section 9.0 of the SMA Rules as evidenced by an affidavit by Applicant's Representative Max W.J. Graham, Jr. received on November 9, 2007.

6. The Department's Director's Report was transmitted to the Commission by memo dated November 7, 2007, in accordance with Section 8-19.6(c) of the Kaua'i County Code. In accordance with Section 8-19.6 (d), the public hearing for this matter was scheduled for November 27, 2007.

7. On November 20, 2007 Applicant submitted supplemental information in support of the application which provided an Index of Improvements in Area describing improvements and land coverage on lots or condominium units in the vicinity of the subject property, and accompanying tax map to reflect the location of said improvements.

8. The public hearing was held in Room 2A-2B of the Moikeha Building at the Lihue Civic Center, in Lihue, Kauai, Hawaii, on November 27, 2007. The public hearing portion of this matter was continued to January 22, 2008 and closed on February 26, 2008.

9. The Petition for Intervention on behalf of the Kīlauea Neighborhood Association was denied as their request did not comply with Section 1-4-3 of the Rules of Practice and Procedures of the Planning Commission. The request was denied by the Commission at its January 22, 2008 meeting.

10. A pre-hearing conference was held on January 23, 2008 with the Applicant, Department, Commission, and Intervenor representatives present. The following contested case schedule was agreed upon: March 4, 2008 (date to complete exchange of information,

including witness list, exhibits and testimonies); March 18, 2008 (date of 1st hearing), and April 1, 2008 (date of 2nd hearing).

11. On Saturday March 8, 2008 the Planning Commission conducted a field inspection of a portion of the property pursuant to notice provided by the Commission to the Applicant, Intervenor, Public and Department.

12. Oral and written testimony against the project was presented at the public hearings by John Bailey, Beryl Blaich, Gary Blaich, Josephine Bonapart, Susan Boynton, Justin Britt, Ellen Caldwell, Ken Carlson, Jeff Chandler, Bill Chase, Carol Conly, Felicia Cowden, Evelyn DeBur, Linda Ditric, Edward Dreiss, Elaine Dunbar, Tevita Fonua, Elizabeth Freeman, Steve Goldberg, Kirsten Jackson, Makaala Kaaumoana, Denise Kaufman, Susan Lindquist, Scott Majerus, Suzanne Marinelli, Paul Massey, Nicholas Moore, Mark Nesselson, Caitlin Odom, Gary Pacheco, Chadwyn Pasadava, Linda Pasadava, Deborah Pence, Evajoy Peru, Marilyn Pollock, Kim Richard, Nani Rogers, Elliott Rosenblum, Merlyn Ruddell, Todd Rundgren, Laura Schronen, Andrea Slevin, Tora Smart, Michael Somers, Carrie Souza, Linda Sproat, Evan & Shane Valiere, Suzanne Vance, Winston Welborn, Sandra Wood, Luisa Wooten, Rodney Yadao, Robert Zelkovsky, 3 petitions with 48 signatures was also submitted.

The following concerns were provided:

- "The Somers parcel has high importance to the Kīlauea Point Fish and Wildlife Refuge expansion plans, and is an ideal habitat for nene and four endangered Hawaiian water fowl. The parcel is essential to the health and protection of the estuary and to providing managed public access to Kīlauea Falls."
- "This is one of the few coastal areas on the inhabited portion of the North Shore that lack adjacent residential development, and should be preserved a such for the benefit of current and future generations."
- "The uses proposed in the permit application needlessly and recklessly endanger the aesthetic and biological values inherent to the area."
- "The development would change the character of the beach for all of the many local people and children who come to enjoy the area."
- "The size of the homes, the barn, and the 20 parking spots is completely out of scale and not in line with this sacred and important ecological coastal area. The pastures and overall development would highly disturb the estuary's health, and interrupt all public peace and enjoyment of this pristine valley."
- "Such magical places are the foundation of local lore, the very imagery of paradise, and the face that the State of Hawai'i would like the world to see. To sully it would be an admission that no place is magical enough to resist one man's money, and no beauty is worth preserving against one man's desire to take for

himself. That a man would besmirch this natural wonder in such a boorishly gaudy and self-centered manner, well....."

- "Concerns about the impact of this oversized proposal on the open space and views there. Also worried about the impact on the water quality, beach and recreational availability, fishing, surfing, crabbing, and mainly general changes in the area that will be compromised by this building."
- "This area should continue to be a wildlife refuge, as was already voted upon. If the property owner builds, I believe they should build up further on the property, farther from sensitive areas and nesting habitats for the wildlife there. Such a large house will definitely impact the entire area and destroy the sanctuary aspect for birds and humans alike."
- The knoll where the residence is being located is the most important portion of the property for the USFWS expansion program.
- The SMA objectives are not being met and the project should be denied because the cumulative impacts to both the water quality and quantity to the adjacent Kīlauea River estuary have not been addressed.
- "This is a "legacy" property that should be protected in a natural state for the benefit of future generations."

13. Oral and written testimony for the project was presented at the public hearings by Brandon Miranda, Ray Asuncion, Robert & Pamela Warren, Jorgen Lien, Rick & Julie Hearst, Nathan Teixeira, & Gary Tobey.

Support was based on the following:

- "...a commitment is made to forfeit future density in perpetuity, one large residence or cluster development is better than multiple development."
- "The proposed project has minimal visual impact to the surrounding areas, benefits Kīlauea resident's by improving the upper portion of the access road, and further protects the remaining portions of the Kīlauea River Valley because of the willingness of the land owner to forfeit additional home sites throughout the greater acreage surrounding the limits of development of the property. The proposed project is evidence of any applicant who, granted the sensitivity of the area, seeks to integrate himself into a community he hopes will recognize his conviction to responsibly develop the land he has been entrusted to steward."
- "The Somer's property is beautiful. We would hope that every caution would be instituted to ensure that it remains so. It is not our intention to halt the Somers' project. However, we do suggest vigilance. Home construction of the proposed scope will visually impact on the area. Yes, there are other residences visible from the river; however, none have such a large footprint. Reconfiguring the project to break the enclave into smaller, more easily camouflaged units

would lessen the visual impact. Failure to rethink the grading program is tantamount to disaster for the ecology of Kīlauea River. The County should inspect the property access to determine if the large trucks necessary to fire prevention can negotiate the Kahili Quarry Road."

14. The contested case portion of this hearing was held on March 18, 2008, April 1, 2008, and closed on May 6, 2008. Applicant provided the following witnesses: Gary Tobey (architectural design, but not as an architect), John Edson (forester), David Shideler (archaeologist), Eric Guinter (ecologist/botanist and aquatic biologist), Greg Boyer (landscape architect), Reginald David (biologist), and Gordon Ring (licensed civil engineer).

    Intervenor provided the following witnesses: Chipper Wichman (CEO of National Tropical Botanical Gardens), Don Heacock (aquatic biologist not representing DLNR), Matt Rosensen (licensed civil engineer), Michael Hawkes (USFWS preserve manager), Brenda Zaun , Kawika Winter (botanist), Andrew Bushnell (retired professor of history) , Gary Smith (Kīlauea community member involved with previous USFWS acquisitions in Kīlauea), Duane Preble (University of Hawai'i professor of art), and John Harrison (biological sciences and zoology).

15. At the May 6, 2008 hearing, the Applicant submitted the following:

    - a copy of the "Archaeological Inventory Survey of an Approximately 74-Acre Portion of the Kīlauea Falls Ranch Property, Kīlauea Ahupua'a, Hanalei District, Kaua'i Island, TMK 5-2-12: por. 3 prepared by Cultural Surveys Hawai'i, Inc.," dated March 2008. In addition, Applicant provided a routing cover sheet to DLNR-SHPD dated April 4, 2008 which evidenced that a copy of the report was provided to the agency for review.
    - Index of Lots in Kīlauea, Open/Special Treatment-Resource District (O/ST-R).

DESCRIPTION OF THE PROPERTY

16. The properties subject of this application are located in Kilauea, Kauai, bounded on the north by Kahili Quarry Road, and on the south with portions of Kīlauea Stream, which meanders through the property. Lot 2 is a parcel of land identified by Kaua'i Tax Map key 5-2-12: 35, and contains 161.88 acres. This property is referred to in the application as "Kīlauea Falls Ranch" property. Kahili Quarry Road is located on Kaua'i Tax Map Key 5-2-4: 47, CPR #2, and is located on land known as Unit B of the Seacliff Gardens Condominium. Unit B contains approximately 5.687 acres. (Application, Director's Report)

17. The area of the subject property in which the development will occur is situated within the State Land Use Agricultural "A" District, General Plan "Open" District, and zoned "Open District and Special Treatment –Resource (O/ST-R). A small portion of Lot 2 is also located within the State Land Use Commission "Urban" district, General Planned "Residential Community", and zoned Residential District "R-6". Based on the zoning and size of the property, the maximum dwelling unit density for the portion of Lot 2 located within the O/ST-R zoning district is approximately 32 dwelling units. (Application, Director's Report)

18. Planning Designations. The property is within the "Important Land Form" Heritage Resources Designation of the Kauai General Plan, 11/2000. Mountains, stream valleys and gulches, bluffs and other coastal features were identified on the Heritage Resource Maps as "Important Land Form" areas. The stated policy for identifying an area as an "Important Land Form" was to "protect steep slopes and streams from erosion and to protect landforms from development that might affect scenic views." (Director's Report)

19. The property is zoned Open/Special Treatment-Resource. The purpose of a Special Treatment district is defined as:

    a. To designate and guide development of County areas which because of unique or critical cultural, physical or locational characteristics have particular significance or value to the general public.
    b. To insure that development within those areas recognize, preserve, maintain and contribute to the enhancement of those characteristics which are of particular significance or value to the general public.

    The ST-Resource designation is for land and water areas which have unique natural forms, biologic systems, or aesthetic characteristics which are of particular significance and value to the general public. (Director's Report)

20. Substantially all of the subject property is located within the County of Kauai Special Management Area (SMA). Generally, the first dwelling unit is considered exempt from the SMA requirements. However, since the SMA provides for a "cumulative effect consideration", proposed improvements that are part of the applicant's request were considered for the SMA permit request. (Director's Report)

21. Cultural Surveys Hawaii, Inc. completed an archaeological inventory survey of approximately 74-acre portion of the property located along the lower reaches of the Kīlauea Stream Valley. This survey was prepared to support the proposed project's historic preservation review under Hawai'i Revised Statutes (HRS) Chapter 6E-42 and Hawai'i Administrative Rules (HAR) Chapter 13-284. This survey was submitted to the State Department of Land and Natural Resources, Historic Preservation Division

(hereinafter "SHPD"), on April 4, 2008. SHPD has not completed its review at the time the contested case hearing was closed.

22. Map Panel 87 of the "Detailed Land Classification – Island of Kauai", by the Land Study Bureau, University of Hawaii, 1967 classifies the soils on the property as "D" and "E", on a scale of "A" (best) to "E" (worst). Lands having an "A" classification have the highest productivity. The portions of the property closest to Quarry Road is classified as D44 and E87, signifying that it is not or is poorly suited for machine tillability, has slopes ranging from 21-35%, and 36-80%, and is poorly to well drained. The portion of the property further up Kilauea Stream Valley is classified as "E87", is not suited for machine tillability, and has slopes of 36 – 80", and is well drained.

    Map Panel 25 of the "Soil Survey for the Islands of Kauai, Oahu, Maui, Molokai, and Lanai, State of Hawaii" prepared by the U.S. Department of Agriculture, Soil Conservation Service, identifies the following soils on the property:

    - rRR, rough broken land, which consists of very steep land broken by numerous intermittent drainage channels. The slope is 40-70%. Runoff is rapid, and geologic erosion is active. This land type is used primarily for watershed and wildlife habitat. In places it is used also for pasture and woodland.
    - LhD, Lihue silty clay, 15-25% slopes. Runoff is medium and the erosion hazard is moderate. This soil is used for sugarcane, pineapple, pasture, wildlife habitat, and woodland. This series of well drained soils are located on the uplands on Kauai.
    - MtA, Mokulea clay loam, poorly drained variant.
    - Mr, Mokulea fine sandy loam. Runoff is very slow, and erosion hazard is slight. This soil is used for pasture.
    - BS, beaches, occur as sandy, gravelly, or cobbly areas, and are washed and rewashed by ocean waves.
    - HrB, Hanalei silty clay, deep water table, 0-6% slope. This series of soil is somewhat poorly drained to poorly drained soils on bottom lands. These soils are used for taro, pasture, sugarcane, and vegetables. (Director's Report)

23. Applicant prepared an "Agroforestry Management Plan" for approximately 30 acres of the property. The balance of the property is unsuitable for agricultural activities due to slope constraints. This plan was prepared by John Edson, an agroforester specializing in high-value hardwoods.

PROPOSAL FOR DEVELOPMENT

24. ***Main dwelling unit.*** The main dwelling unit is split level with approximately 9,580 sq.ft. in living area. There are 5 bedrooms, 5 bathrooms, a dining/kitchen area, a living area, a theater room, a pool and water features, decks, and a 928 sq.ft.3-car garage. Land

coverage for this improvement is 7,952 sq.ft for the living area, 16,713 sq.ft. for walkways/lanais/paved driveway; 1,482 sq.ft. for wood deck area, and 5,910 sq.ft. for the pool/pond area, for a total of 32,057 sq.ft.

Caretaker unit. The second dwelling is for caretaker purposes, and is designated the Ranch Manager's House. This facility is one story and consists of 2 bedrooms, 2 bathrooms, a kitchen/living room/dining room area, decks, and an attached 2 car garage. Land coverage for this improvement will be approximately 1,424 sq.ft. of living area, a wood deck area of 620 sq.ft., and walkway/Lāna'i areas of 226 sq.ft., for a total of 2,270 sq. ft.

Barn. The proposed single story barn will contain 1 tack room, 5 stalls for animals, and a storage area, totaling approximately 3,238 sq.ft. under roof, and will be used for horses, farm machinery and equipment.

All totaled, the proposed lot coverage of these improvements will be approximately 37,829 sq. ft, or .53% of the total land area of Lot 2, which is 161.88 acres in size. Permissible lot coverage within the Open District is 10%. (Application, Director's Report)

25. Applicant has chosen to place the building improvements as close to Kahili Quarry Road, and as far from Kilauea Stream, as could be managed without intruding further upstream into the valley area, which is sought to be preserved in order to establish agricultural uses. The proposed location is also to try and address visual impacts of said improvements.

26. ***Grading.*** The proposed grading area for this project will encompass approximately 1.3 acres. The total cut will be approximately 5,600 cubic yards and the total fill will be approximately 5,400 cubic yards. The proposed grading plan is included within the applicants permit application.

    Water well. The Applicant's also intend to drill a well and construct a 14,500 gallon water tank as an accessory to the proposed residential and agricultural uses. The steel, cylindrical tank will be approximately 18.4 feet in diameter and approximately 9 feet high.

27. A portion of Kahili Quarry Road will be graded and improved with compacted gravel, which will be covered with a sealant. The improved portion of Kahili Quarry Road will be approximately 10 feet wide, and will run for approximately 3,700 feet from the end of the existing paved portion of Kahili Quarry Road to the entrance to the proposed driveway on Lot 2. The proposed Kahili Quarry road earthwork involves 1.4 acres; total excavation – 953 cubic yards; total embankment – 673 cubic yards; and net excavation – 280 cubic yards.

APPLICANT'S REASONS AND JUSTIFICATION:

28. "***Compatibility With Surrounding Uses.*** The subject Property is surrounded by properties located within the SLUC Urban District, the SLUC Agricultural District, the CZO Residential District, the CZO Open District, and the Special Treatment District (Scenic/Ecologic Resources). Uses on the surrounding lands include residential uses, farm dwelling uses, and agricultural uses. The Subject Property is similar in topography, character and nature with adjacent and surrounding properties, and the Development activities are consistent with such surrounding uses."

29. ***"Developments Compliance with Special Treatment District Standards.*** The Development on the Subject Property will have no negative impact on the Special Treat District. The Development is and will be compatible with existing uses in areas on or around the Subject Property. The Development will not impact scenic or open space resources within the Special Treatment District. The Development will not increase runoff or otherwise endanger the Special Treatment District. The Development will not increase runoff or otherwise endanger the coastal ecosystem. The Development (of buildings) on the Subject Property is not located in a coastal hazard area. The Development will have no detrimental impact on recreational, historic, economic or resources. The Development will not have detrimental impacts on beach or marine resources. Approval of the Development will not result in the foreclosure of future management options for development in the area. The design, siting, and landscaping of the Development proposed will ensure that the proposed Development recognizes, preserves, maintains and contributes to the characteristics of the surrounding lands (which lands are recognized to be of particular significance or value to the general public). In particular, the Development will be compatible with, and will protect, the unique natural forms of, biologic systems contained within, and aesthetic characteristic of, the Special Treatment Area."

30. ***"Development's Compliance with CZO Use Permit Standards.*** The Development activities on the Subject Property are in compliance with the standards for Use Permits as contained in CZO Section 8-20.5(a) in that the Development will be:

    a. A compatible use;
    b. Not detrimental to health of persons residing or working in the neighborhood;
    c. Not detrimental to safety of persons residing or working in the neighborhood
    d. Not detrimental to peace of persons residing or working in the neighborhood;
    e. Not detrimental to morals of persons residing or working in the neighborhood;

f. Not detrimental to comfort and general welfare of persons residing or working in the neighborhood;
g. Not detrimental or injurious to property or improvements in the neighborhood
h. Not detrimental to the general welfare of the community
i. Not a cause of substantial harmful environmental consequences to the Subject Property, or to other lands or waters;
j. Not inconsistent with the intent of Chapter 8, KCC; and
k. Not inconsistent with the General Plan." (Application)

31. ***"Development's Compliance with CZO Class IV Zoning Permit Standards.*** The Applicants have complied with the procedural provisions for a Class IV Zoning Permit by their filing and process of this Application."

32. ***"Development Plan Goals and Objectives.*** The goals and objec6tives of the North Shore Update, as adopted by the North Shore Development Plan ordinance, include the following:

Goal A:	To preserve the unique natural beauty of the North Shore Planning Area.
Goal B:	To preserve the special rural charm of the North Shore Planning Area.
Goal C:	To provide for the safety and welfare of the people of their property of the North Shore Planning Area.
Goal D:	To provide for economic development of the North Shore Planning area.
Goal E:	To preserve the wildlife and flora and the north Shore, recognizing man's dependence upon this preservation for his own health and welfare.
Goal F:	To insure the preservation of historic-archaeological sites in the North Shore Planning Area.
Goal G:	To create a development for evolutionary growth that depends upon a planning process whereby conflicts can be resolved through the establishment of priorities and community participation.
Goal H:	To provide for recreational opportunities that are compatible with unique qualities and natural features of the North Shore."

33. ***"Development's Compliance with Development Plan Standards.*** The proposed use of the Subject Property will not conflict with any of the Goals contained in the North Shore DPO. The design, layout and outside appearance of the Development is and will be compatible with the natural beauty of the area. As such, the proposed use will not conflict with Goals A or B. The proposed use will provide economic opportunity for Kaua'i

residents and as such will promote Goal D. The proposed use will have no negative impact on the public safety or welfare, on any endangered species of plants or animals, on archaeological or historic sites, or on recreational opportunities on or around the Subject Property. As such, it will not conflict with Goals C, E, F or H. The process of filing this Application is consistent with the purposes of Goal G."

34. "***Development's Impacts Within SMA.*** The Development on the Subject Property will have no negative impact on the SMA. The Development is and will be compatible with existing uses in areas on or around the subject Property. The Development will not negatively impact scenic or open space resources within the SMA. The Development will not increase runoff or otherwise endanger the coastal ecosystem. The Development (of buildings) on the Subject Property is not located in a coastal hazard area. The development will have no detrimental impact on recreational, historic, economic or resources. The Development will not have detrimental impacts on beach or marine resources. Approval of the Development will not result in the foreclosure of future management options for development in the area. The design, siting, and landscaping of the Development as proposed will ensure that the proposed development recognizes, preserves, maintains and contributes to the characteristics of the surrounding lands (which lands are recognized to be of particular significance or value to the general public). In particular, the Development will be compatible with, and will protect, the unique natural forms of, biologic systems contained within, and aesthetic characteristic of, the SMA."

35. "***Development's Compliance with SMA Standards.*** The Development activities on the portions of the Subject Property within the SMA fulfill the provisions of the SMA Rules in that:

    a. The Development will have no affect on public access to publicly owned or used beaches and recreational areas;
    b. The Development will not detrimentally effect any wildlife or endangered plant or animal species which may be located at this site.
    c. Provisions for solid and liquid waste treatment, disposition and management will be developed in order to minimize adverse effects on the Special Management Area.
    d. Alteration to existing land forms or vegetation and the construction of structures will cause minimum adverse effects to water resources and scenic and recreational amenities, and will minimize danger of floods, wind damage, storm surge, landslides, erosion, siltation, or failure in the event of earthquake.
    e. The Development will not require dredging, filling, or altering any bay, estuary, salt marsh, river mouth, slough or lagoon.
    f. The Development will not reduce the size of any beach or other area useable for public recreation.

g. The Development will not reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions or rivers or streams within the Special Management Area and the mean high tide line where there is no beach.

h. The Development will not substantially interfere with or detract from the line of sight toward the sea from the State highway nearest the coast.

i. The Development will not adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agriculture uses of land.

j. The Development will not have any substantial environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests.

k. The Development is consistent with the objectives, policies, and guidelines set forth in HRS Chapter 205A and Sections 3.0 and 4.0 of the SMA Rules.

l. The Development is consistent with permitted uses in the SLUC Urban D8istrict, the Kaua'i General Plan, the North Shore Development Plan, and the CZO."

36. "***Development's Impacts on Traditional or Cultural Practices.*** The Development will have no impact on any known traditional or customary practices of native Hawaiians. There are no known traditional or customary practices of native Hawaiians that are presently occurring within the Subject Property that will be affected by the Development. There are no special gathering practices taking place within the portion of the Subject Property where the Development will occur that will be affected. The Development will not detrimentally affect: access to any streams; access to the shoreline or other adjacent shoreline areas; or gathering along any streams, the shoreline, or in the ocean. There are no known religious practices taking place within the portion of the subject property where the Development will occur. The Development will have no negative impact on any cultural or historic sites or resources located within the Subject Property."

LEGAL REQUIREMENTS:

37. A Special Management Area Use Permit is required since the project is located within the Special Management Area of the County of Kauai, and the valuation of the project exceeds $125,000. A Special Management Area Use Permit Project Assessment was completed as part of the application.

However, certain aspects of the applicant's request can be considered as *not* "development" as per Sec. 1.4 (H) Definitions, of the Special Management Area Rules and Regulations of the County of Kaua'i. Development does not include:

(8) Use of any land for the purpose of cultivating, planting, growing, and harvesting plants, crops, trees, and other agricultural, horticultural, or forestry products of animal husbandry, or aquaculture or mariculture of plants or animals, or other agricultural purposes.

(9) Installation of underground utility lines and appurtenant aboveground fixtures less than 4 ft in height along existing corridors. (Directors Report)

38. Use Permit is required by Sec. 8-9.3 of the CZO for all uses, structures, or development within the Special Treatment District.

39. Class IV Zoning Permit required as per Sec. 8-7.7(3)(A) since the proposal is within a Special Treatment District and involves a Use Permit.

OTHER GOVERNMENT AGENCY COMMENTS:

40. Fire Department: The Fire Department has concerns: 1) Access to subject property is questionable (i.e. Road grade, finish, width); 2) Property does not qualify for ADU; 3) Fire protection questionable. Lack of water and length of driveway to structures are significant factors in this review and may need to be addressed appropriately.

41. Department of Land and Natural Resources, State Historic Preservation Division: The aforementioned project is to construct two single family dwelling, a barn and do agroforestry. We reviewed this permit under the previous SMA(U)2007-11 and recommended an archaeological inventory survey for the parcels listed above. In Exhibit F-2, an archaeological literature review and field inspection was conducted by Cultural Surveys Hawai'i (Shideler, Tuchlin and Hammatt) 2007. There is no archaeological survey and this document is not governed by any of our rules and regulations. This is a fine planning tool for due diligence but nothing more. Over ten sites were found on parcel 35. The applicant now includes parcel 47 which would also needs to have an archaeological inventory survey. The application states no impacts will occur to historic properties, we assume that the applicant would like to preserve all historic properties and we will need to commitment by way of a preservation plan. We need to make sure all sites are identified, buffers are adequate if preservation in place is recommended. We need the archaeological inventory survey in order to protect all historic properties. Please have the applicant upgrade his literature search and field inspection to an archaeological inventory survey.

We know that there are historic sites in this area, such as terraces (agricultural and habitation sites). Therefore, we recommend the following conditions be attached to any approved permit to ensure significant historic sites are properly identified and treated:

1. An Archaeological inventory survey shall be conducted by a qualified archaeologist prior to well construction. A report documenting the archaeological work shall be submitted to the State Historic Preservation Division for review and approval. The report should include extensive background research on the history of the Kīlauea and land commission award/title history for this parcel. This report shall propose significance evaluations and shall propose mitigation treatments for any significant historic sites.

2. If significant historic sites are identified and once mitigation commitments are agreed to, then the applicant shall development detailed mitigation plans (scopes of work and preservation plans) and submit these to the State Historic Preservation Division for review and approval. Prior to any land alteration, that Division must verify in writing that these plans have successfully been executed.

3. If burials are discovered during the survey, a burial treatment plan shall be prepared following the procedures outlined in Chapter 6E-43 and its rules. Coordination with the Kaua'i Island Burial Council is required as part of the approval of burial treatment.

42. Department of Public Works, Division of Wastewater. The proposed project is not within the County of Kaua'i's Wastewater service area and the applicant is proposing use of individual wastewater system (IWS's). The applicant shall comply with State of Hawai'i, Department of Health Requirements for all IWS's.

43. County of Kaua'i, Department of Water. The Department of Water has concerns regarding the possible backflow of water into our system and the increase in water demand associated with this re-submittal – Special Management Area use Permit SMA (U)-2008-5 for the proposed Main House, Ranch Managers House, Barn, Driveways, agroforestry, landscaping, site grading, preservation of historic sites, well and water tank and utilities on TMK 5-2-12: 35 and the construction of a proposed roadway (graded and improved with compacted gravel) on TMK 5-2-4: 47, (CPR No.2)

We recommend to the Planning Department that any approval of the proposed re-submittal – Special Management Area use Permit SMA(U)-2008-5 application be conditioned; whereby, the applicant shall be required to:

1. Be made aware that water service provided by the proposed private well shall not be used for domestic water service. If water service from the proposed private well will be used to supply domestic water to the lot, please notify the DOW as soon as possible. Additional requirements will be administered in accordance with the Department's SOP 55 "Private Potable Water Systems for Lots with Existing County Water Meter Service."
2. If the existing or proposed water meter(s) will be used for non-residential purposes. The applicant will be required to submit detailed water demand calculations for the proposed use for the DOW's review and approval. The Department's comments may change depending on the approved water demand calculations.
3. Prepared and receive DOW's approval of construction drawings for the necessary water system facilities and construct said facilities. These facilities shall include but not be limited to:
   a. The interior plumbing plans with the appropriate backflow prevention device.
   b. The domestic service connection(s), if applicable.
   c. The fire service connection(s), if applicable.
4. Pay the applicable charges in effect at the time of payment to the DOW. At the present time, these charges include the Facilities Reserve Charge (FRC) of $4,600 per unit and/or 5/8-inch water meter.

Requests for additional water meters or an increase in water meter size will be dependent on the adequacy of the source, storage, and transmission facilities existing at that time. At the present time, the DOW is restricting water service in this area to five 5/8-inch water meters or five single family dwellings per existing lot of record until additional storage capacity is provided for this area.

44. State Department of Health: Based on our review of the application and our on-site survey of the property, we offer the following environmental health concerns for your consideration:

1. The use of individual wastewater systems is allowed. The type and number of individual wastewater systems to be used on each lot will be determined by the wastewater rules in effect at the time of building permit application.
2. The property may harbor rodents which will be dispersed to the surrounding areas when the site is cleared. In accordance with Chapter 11-26, entitled Vector Control of Title 11, Hawai'i Administrative Rules (HAR), the applicant shall ascertain the presence or absence of rodents on the property. Should the presence of rodents be determined, the applicant

shall eradicate the rodents prior to clearing the site.

3. Noise will be generated during the clearing and construction phase of this project. The applicable maximum permissible sound levels as stated in Title 11, HAR, Chapter 11-46, entitled Community Noise Control shall not be exceeded unless a noise permit is obtained from the Department of Health.

4. Temporary fugitive dust emissions could be emitted when the project site is prepared for construction and when construction activities occur. In accordance with Chapter 11-60.1, entitled "Air Pollution Control", Title 11, HAR, effective air pollution control measures shall be provided to minimize or prevent any fugitive dust emissions caused by the construction work from impacting the surrounding areas. This includes the off site roadways used to enter-exit the project. The control measures include but are not limited to the use of water wagons, sprinkler systems, dust fences, etc.

5. In accordance with Chapter 11-58.1, entitled "Solid Waste Management Control", Title 11, HAR, the grubbed material and construction waste that will be generated by the project shall be disposed of at a solid waste disposal facility that is in compliance with the State Department of Health. The open burning of any of these wastes on or off site is prohibited.

6. The Department of Health (DOH), Clean Water Branch (CWB), has reviewed the subject document, received November 2, 2007, and offers the following comments:

   I. The Army Corps of Engineers should be contacted at 808-438-9258 for this project. Pursuant to Section 401(a)(1) of the Federal Water Pollution Control Act (commonly known as the "Clean Water Act"), a Section 401 Water Quality Certification is required for "[a]ny applicant for Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable water..."

   II. A National Pollutant Discharge Elimination System (NPDES) general permit coverage is required for the following activities:

      - Storm water associated with industrial activities, as defined in Title 40, Code of Federal Regulations, Sections 122.26(b)(14)(i) through 122.26(b)(14)(ix) and 122.26(b)(14)(xi).
      - Construction activities, including clearing, grading, and excavation, that result in the disturbance of equal to or greater than one (1) acre of total land area. The total land area includes a contiguous area where multiple separate

and distinct construction activities may be taking place at different times on different schedules under a larger common plan of development or sale. **An NPDES permit is required before the commencement of the construction activities.**

- Discharges of treated effluent from leaking underground storage tank remedial activities.
- Discharges of once through cooling water less than one (1) million gallons per day.
- Discharges of hydrotesting water.
- Discharges of construction dewatering effluent.
- Discharges of treated effluent from petroleum bulk stations and terminals.
- Discharges of treated effluent from recycled water distribution systems.
- Discharges of storm water from a small municipal separate storm sewer system.
- Discharges of circulation water from decorative ponds or tanks.

7. The CWB requires that a Notice of Intent (NOI) to be covered by an NPDES general permit for any of the above activities be submitted at least 30 days before the commencement of the respective activities. The NOI forms may be picked up at our office or downloaded from our website at: http://www.hawaii.gov/health/environmental/water/cleanwater/forms/genl-index.html.

8. The applicant may be required to apply for an individual NPDES permit if there is any type of activity in which there is a discharge from the project into State waters and/or coverage of the discharge(s) under the NPDES general permit is not permissible (i.e. NPDES general permits do not cover discharges into Class 1 or Class AA State waters). An application for the NPDES permit is to be submitted at least 180 days before the commencement of the respective activities. The NPDES application forms may also be picked up at our office or downloaded from our website at: http://www.hawaii.gov/health/environmental/water/cleanwater/forms/indiv-index.html.

9. Hawai'i Administrative Rules, Section 11-55-38, also requires the applicant to either submit a copy of the new NOI or NPDES permit application to the State Department of Land and Natural Resources, State Historic Preservation Division (SHPD), or demonstrate to the satisfaction of the DOH that the project, activity, or site covered by the NOI or

application has been or is being reviewed by SHPD. Please submit a copy of the request for review by SHPD or SHPD's determination letter for the project.

Please note that, in general, anyone causing or contributing to a violation of the State water quality standards must apply for an NPDES permit coverage. Discharges which are not an integral and normal part of the operation, but are caused by heavy rains, floods or other events outside the reasonable control of the owner or operation must also be permitted. Point sources include vehicle wash discharges or a discharge of processed wastewater from you construction activity. If there is a discharge of any pollutant to State waters, Hawai'i Revised Statutes, Section 342D-30, provides for penalties of up to $25,000 per day for each violation. The CWB reserves its right to seek penalties for all violations.

If you have any questions, please contact Ms. Joanna Seto, Supervisor of the Engineering Section, Clean Water Branch, at (808)-586-4309.

Due to the general nature of the application submitted, we reserve the right to implement future environmental health restrictions when more detailed information is submitted.

45. Department of Public Works, Engineering Division. We reviewed the subject application to construct two (2) single family dwellings and an accessory building (a barn) on the subject property. We offer the following comments:
    - The Department is in receipt of the grading plan for the subject property. The Department has **not** approved the grading plan at this time. Best Management Practices (BMP's) shall be provided to the maximum extent practicable to prevent damage by sedimentation, erosion or dust to streams, waterways, natural areas and the property of others.
    - At page 6, approximately 36 acres of the subject property is intended to be dedicated to agriculture. The applicant needs to be informed that grading and grubbing activities associated with an approved conservation plan approved by the District Soil Water Conservation District can be exempted from the Sedimentation and Erosion Control Ordinance No. 808. Additionally, the applicant must contact the State Historic Preservation Office and resolve all agency comments before the Department is able to exempt the applicant from Ordinance No. 808.
    - We recommend comments be solicited from our Building Division in regards to Flood Plan Management requirements.

46. Department of Public Works, Building Division. According to the Flood Insurance Rate Map panel 60E, the parcel has various flood zones. The Main House and the Ranch manager's House are comfortably located in Zone X outside the flood zone. However, care needs to be taken in locating the Barn so that it is outside the flood zone. Building permits will be required for the work.

STANDARDS FOR ISSUANCE OF A USE PERMIT

47. Section 8-20.1 of the Kauai County Code states:

"The purpose of the Use Permit procedure is to assure the proper integration into the community of uses which may be suitable only in specific locations in a district, or only under certain conditions, or only if the uses are designed, arranged or conducted in a particular manner, and to prohibit such uses if the proper integration cannot be assured."

48. Section 8-20.5 of the Kauai County Code further states:

"A Use Permit may be granted only if the Planning Commission finds that the establishment, maintenance, or operation of the construction, development, activity or use in the particular case is a compatible use and is not detrimental to health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the proposed use or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the community, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters, and will not be inconsistent with the intent of this Chapter and the General Plan."

COUNTY OF KAUAI GENERAL PLAN POLICY

49. Section 5.3.1 of the County of Kauai General Plan, Open Lands, Policy, states:

"Lands designated Open shall include: important landforms such as mountains, coastal bluffs, cinder cones, and stream valleys; native plant and wildlife habitat; areas of predominantly steep slopes; beaches and coastal areas susceptible to coastal erosion or hurricane, tsunami, or storm-wave inundation; wetlands and flood plans; important scenic resources; and known natural, historic and archaeological resources. Open shall also include parks, golf courses, and other areas committed to outdoor recreation."

SPECIAL MANAGEMENT AREA RULES & REGULATIONS

50. Applicable to this permit are the following guidelines for the review of

developments proposed within the Special Management Area, Section 4.0 Guidelines:

A. All development in the special management area shall be subject to reasonable terms and conditions set by the Authority to insure that:

   I. Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles.

   2. Adequate and properly located public recreation areas and wildlife preserves are reserved

   3. Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon special management area resources.

   4. Alterations to existing land forms and vegetation except crops, and construction of structures shall cause minimum adverse effect to water resources and scenic and recreational amenities and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake.

B. No development shall be approved unless the Authority has first found that:

   1. The development will not have any substantial, adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, and welfare, or compelling public interest. Such adverse effect shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect and the elimination of planning options.

   2. The development is consistent with the objectives and policies, as enumerated in Chapter 205A, HRS, and as recited herein under Section 3.0 above; and special management area guidelines set forth in the Rules and Regulations; and

   3. The development is consistent with the County general plan and zoning ordinances. Such a finding of consistency does not preclude concurrent processing where a general plan or zoning amendment may also be required.

C. The Authority shall seek to minimize, where reasonable:

   2. Any development which would reduce the size of any beach or other area usable for public recreation

   3. Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and

streams within the special management area and the mean high tide line where there is no beach.

4. Any development which would substantially interfere with or detract from the line of sight toward the sea from the State Highway nearest the coast, or from existing public view to and along the shoreline.
5. Any development which would adversely affect water quality, existing areas of open water free of visible structure, existing and potential fisheries and fishing grounds, wildlife habitats, estuarine sanctuaries, potential or existing agricultural uses of land.

51. Applicable to this permit are the following sections, Special Management Area Rules and Regulations, Section 7.4 – Significant Adverse Effect Criteria:

In considering the significance of potential environmental effects, the Agency and Applicant shall consider the sum of those effects that adversely affect the quality of the environment, and shall evaluate the overall and cumulative adverse effects of the proposal.

A "significant adverse effect" may vary with the individual setting and circumstances of particular proposals. Generally, however, any proposal which may have a major adverse effect on the quality of the environment or adversely affect the economic or social welfare of an area, or would possibly be contrary to the objectives, policies and guidelines of these Rules and Regulations, the County's General Plan, Development Plans, zoning and subdivision ordinances, policies and purposes, and to the State Plan, would likely result in a "significant adverse effect".

In determining whether a proposal may have a significant adverse effect on the environment, the Agency shall consider every phase of a proposal and expected consequences, either primary or secondary, or the cumulative as well as the short or long term effect of the proposal. The agency should bear in mind that in most instances, the following actors of a proposal, although not limited to same, may constitute a significant adverse effect on the environment when the proposal:

A. involves an irrevocable commitment to loss or destruction of any natural or cultural resources, including but not limited to, historic sites, Special treatment Districts as established in the County CZO ordinance, viewplanes or scenic corridors as outlined in the Development Plans, and recreation areas and resources;
B. curtails the range of beneficial uses of the environment;
C. conflicts with the County's or the State's long-term environmental policies or goals;
D. substantially affects the economic or social welfare and activities of the

community, County or State;

E. involves substantial seconda5ry impacts, such as population changes and effects on public facilities;

F. in itself has no significant adverse effect but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;

G. substantially affects a rare, threatened, or endangered species of animal or plant, or its habitat;

H. detrimentally affects air or water quality or ambient noise levels; or

I. affects an environmentally sensitive area, such as flood plain, shoreline, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water or coastal water.

HAWAII COASTAL ZONE MANAGEMENT ACT

52. Applicable to this permit request are the following objectives and policies of the Hawaii Coastal Zone Management Act:

Objectives

2. Protect, preserve, and where desirable, restore those natural and man-made historic and pre-historic resources in the coastal zone management area that are significant in Hawaiian and American history and culture;
3. Protect, preserve, and where desirable, restore or improve the quality of coastal scenic and open space resources;
4. Protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems.;
6. Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, and subsidence.

Policies

1. Historic Resources
   b. Maximize information retention through preservation of remains and artifacts or salvage operations.
   c. Support State goals for protection, restoration, interpretation and display of historic resources.
2. Scenic and Open Space Resources
   b. Insure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views and along the shoreline.
6. Coastal Hazards
   b. Control development in areas subject to storm wave, tsunami, flood, erosion, and subsidence hazard;

c. Ensure that developments comply with requirements of the Federal Flood Insurance Program;
d. Prevent coastal flooding from inland projects.

DISCUSSION AND TEST FOR PERMITS

Relative to the standards, considerations and guidelines for the issuance of the requested permits, the following are considered:

1. The proposed residential and agricultural use of the property are not expressly forbidden by zoning, the General Plan, nor the North Shore Development Plan, provided certain issues are properly addressed to ensure the development's integration within the surrounding community of uses, as previously discussed above in items #48-53, above.

   Residential and agricultural uses have been successfully developed within the Open/Special Treatment-Resource District. Short term inconveniences and impacts such as noise, dust, visual, drainage, erosion, etc. are created, but are addressed with the implementation of the BMPs. Such visual, social and environmental impacts are eliminated in the long term with the grow out of landscaping, use of earth tone and non-reflective colors, implementation of drainage improvements, etc. Staff acknowledges visual impacts from those surrounding residential improvements that did not benefit from an SMA and Use permit review as is being done for this application.

2. Intervenor's witnesseses Gary Smith and Chipper Wichmann both stated that a win-win situation permitting some development can be achieved. It is that general scenario that the Department will explore, with the following considerations:

   a. **Level of development to be considered.** The size and design of the primary residence, upon initial review, is quite large, given all the accessory concepts (ponds, walkways, pool, etc.) incorporated. Such large and excessive residential designs are foreign, and many times obscene, for those of us who live here. And, this residence will not be a full time residence, instead being watched over by a caretaker in the second proposed residence. Staff has no objection to the primary residence as proposed *provided* the caretaker residence and barn improvements are deferred to a later date, or are eliminated. That makes this residence the primary, and only, residence. An absentee landlord's palatial residential structure in this location, remaining uninhabited a majority of the time, is not an acceptable proposition. The barn would no longer be necessary if the balance of the property will exist as a wildlife preserve, and no large scale agricultural operations would occur.

      An alternative to that concept: Permit the proposed primary dwelling unit, where is, as is. Eliminate the barn. And/or permit the second dwelling unit and barn only if and

when the applicant completes the following specific activities that staff visualized would be the responsibility of the NPO:

- Complete the survey and subdivision of the property that clearly identifies the preservation easement area, and the residential area;
- Construct a fence line to wildlife preservation standards between the preservation easement area, and the residential area;
- Landscape said fence line, between the preservation easement area, and the residential area.

This alternative minimizes or eliminates development and expansion expenses for the NPO, and transfers the land in a quicker timeframe as compared to having to conduct an appraisal of the land area, do the back and forth negotiations to establish and agree upon value, and then lobby or fundraise to obtain the necessary funds.

b. **Short term impacts.** The proposed improvements to the Kahili Quarry Road will be done to the standards of the Department of Public Works, utilizing and implementing Best Management Practices. Short term inconveniences will occur, but in the long term, long term benefits will clearly outweigh those inconveniences. This is in specific reference to roadway improvements to the Kahili Quarry Road, which should be to its entire length, and not just a portion of it. This provides safer and more convenient access to a recreational amenity for the greater good of more than just the Kīlauea community.

c. **Public Access to Coastal Recreational Resources.** Kahili Quarry Road will serve as access to the subject site; this road is also one of two access roads to the Kīlauea Quarry beach. Applicant has proposed to provide a certain level of improvements to just a portion of the road right of way up to the area to be developed. A greater public benefit will accrue if this road right of way were improved its full length, rather than retain it in its present state where only a few people who have the proper 4-wheel drive vehicle will traverse its length to get to the beach. This recommendation gets to the heart of a social dilemma: retaining a substandard road right of way that only a few people can utilize due to the ruggedness and inconvenience its present state affords, and in the name of preserving the rural character of the area, or provide a safer improved access that many can benefit from, which will encourage a greater numbers of users. A greater appreciation of this resource will result.

d. **Coastal ecosystems.** As represented, the project's proposed drainage system will comply with the County's Drainage standards and requirements. It will also be designed to control drainage flows and minimize impacts to the adjacent and nearby properties and to the nearshore coastal waters. A drainage study is necessary in order to determine, at a minimum, the existing peak runoff from off-site and on-site areas, determine the peak flow generated by the development, address the increase in peak flow and specify the appropriate mitigative measures to be employed, and incorporate appropriate Best Management Practices (BMPs).

Potential water quality impacts to nearshore coastal waters during construction of the project will be mitigated by adherence to State and County of Kana'i water quality regulations governing grading, excavation and stockpiling. Appropriate erosion and sediment controls will be instituted during project grading operations and construction site work activities in compliance with the County's Grading Ordinance and the State Department of Health's National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Associated with construction activity.

e. **Coastal hazards.** The proposed two residence's will not be located within any flood zone as noted on the Flood Insurance Rate Map for the property.

f. **Scenic and Open Space Resources.** The primary viewplane impacted would be from the beach looking back mauka. The applicant proposes grading activities that will bench the residential improvement, which will better set the project against the valley background. On one hand, without this benching, the residential development has more potential to impact the view plane from the beach. On the other hand, the extent of grading is quite extensive – proposed is 5,600 cubic yards of cut, and 5,400 cubic yards of fill, on approximately 1.3 acres. The applicant should explore other design alternatives that can achieve benching in order to sit the house down against an earthern backdrop, but not to the extent proposed. Also, there should be a no-net gain in terms of grade and fill requirements. No additional fill material should be permitted to be imported to the site.

The proposed building massing will be broken up due to the architectural design of the home. The requirement for landscaping and the prohibition of reflective paint, glass or roof material, in addition to the use of earth tone color schemes, should greatly aid minimizing and reducing the proposed development would have on any visual impact to this view corridor.

g. **Historical resources.** The subject application has been submitted for review by the State Department of Land and Natural Resources, Historic Preservation division (SHPD).

h. **Lot coverage.** The proposed lot coverage of this Open/Special Treatment-Resource zoned parcel includes 32,057 sq.ft. for the primary dwelling unit, and 2,270 sq.ft. for the caretaker cottage, for a total of approximately 34,327 sq.ft., or .49% of the overall parcel size of 161.88 acres. Sec. 8-8.5 a-1 of the CZO permits a lot coverage of 10% or 3,000 sq.ft. of the lot or parcel area. In this instance, the 10% will be applicable.

i. **Building height.** Height limit within the North Shore Planning Area is 25 feet; the proposed development does not exceed this height.

RULINGS ON EVIDENCE:

For the purpose of this proceeding, the Commission takes judicial notice of the entire contents of the Department's files for the original request designated Special Management Area Use Permit SMA(U)-2007-11, Use Permit U-2007-19, and Class III Zoning Permit Z-III-2007-2 (which was subsequently withdrawn), and the present application designated Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6

The Commission accepts for the record all of the documents offered by the Applicant, the Department, the Intervenor, the public, and the County of Kauai permit review agencies.

RULINGS ON PROPOSED FINDINGS:

1. Any of the proposed Findings of Fact submitted by any other party to this proceeding not already ruled upon by the Commission by adoption herein, or rejected by clearly contradicted Findings of Fact herein, are hereby denied and rejected.

2. On July 22, 2008, the Commission voted to adopt the Planning Department's Findings of Fact, Conclusions of Law, Decision and Order and made revisions pursuant to the Rules of Practice and Procedure of the Planning Commission ("Planning Commission Rules"), §1-6-18(f)(1). The Commission rejected the Applicants' Proposed Findings of Fact, Conclusions of Law, and Decision and Order and Intervener Elizabeth Freeman's Proposed Findings of Fact, Conclusions of Law, Decision and Order submitted by the Applicant and the Intervenor.

3. The Commission adopted a proposed Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order on August 12, 2008 and served the document upon the Applicant and the Intervener.

4. Intervener submitted her Exceptions to the Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order.

5. On September 23, 2008, the Commission heard argument on Intervener's Exceptions to the Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order.

6. On September 23, 2008, the Commission modified its August 12, 2008, Findings of Fact, Conclusions of Law, Decision and Order after hearing argument regarding Intervener's Exceptions to the Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order as follows:

a. Finding of Fact No. 37(2) was deleted.

b. Finding of Fact No. 40 was deleted.

c. Under the heading, "DISCUSSION AND TEST FOR PERMITS":

i. Paragraph No. 1 was modified as follows:

The second sentence of the second paragraph was deleted and third paragraph was deleted.

ii. Paragraph No. 2(a) was deleted.

iii. Paragraph No. 2(c) was deleted.

iv. Paragraph No. 2(i), which is currently numbered as 2(g), was modified to read:

Historical resources. The subject application has been submitted for review to Department of Land and Natural Resources, Historic Preservation division (SHPD).

The remainder of No. 2(i) was deleted.

d. Decision and Order No. 11(d)(i) was modified to include an additional paragraph as follows:

"Prior to recordation, the Conservation Easement shall be submitted to the Planning Department to review its compliance with this condition. The Planning Department shall solicit comments from the U.S. Fish & Wildlife Service. The Planning Department shall have 45 days to provide written comments to the Applicant, in the absence of which the Conservation Easement shall be deemed acceptable. The Planning Commission shall resolve any disagreements concerning the language of the Conservation Easement."

e. The fourth sentence in Decision and Order No. 12 was modified to read:
"The use of gravel and chemical sealant shall not be permitted."

7. Applicant, Intervener and Department agreed to the modifications made to the Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject permits under provisions of Article XIV of the Kauai County Charter, the Special Management Area Rules and Regulations of the County of Kaua'i, as amended, and Section 8-20.5 of the Comprehensive Zoning Ordinance ("CZO"), as codified by the Kaua'i County Code, 1987 ("KCC").

2. Due notice was given and all parties were offered an opportunity to present evidence and argument on the requested petition.

3. The development will not have any substantial adverse environmental or ecological effect. Any adverse environmental or ecological effect that may result will be minimized to the extent practicable by the conditions set forth in Paragraphs 1 through 14 of the Decision and Order herein, and will be clearly outweighed by the public health, safety and welfare, and other compelling public interest;

4. The proposed project complies with the policies and guidelines of the Special Management Area Rules and Regulations, and with the following:

    a. The development will not have any substantial, adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, and welfare, or compelling public interest;

    b. The development is consistent with the objectives and policies, as enumerated in Chapter 205A, Hawai'i Revised Statues ("HRS"), and as recited in Section 3.0 of the SMA Rules; and Special Management Area Guidelines set forth in the SMA Rules; and

    c. The development is consistent with the County general plan and zoning ordinances.

5. The development complies with standards applicable to uses within: the State Land Use Commission Agricultural District as contained in HRS Section 205-4.5(a); the Kaua'i General Plan Open Land use Designation as contained in Section 5.3 of the Kaua'i General Plan, Kaua'i County Ordinance No. 753; the CZO Open District as contained in KCC Chapter 8, Article 8; and the CZO Special Treatment (Scenic/Ecologic Resources) District as contained in KCC Chapter 8, Article 9.

6. The development complies with the standards for Use Permits contained in KCC Section 8-20.5(a).

7. The Applicant has complied with the procedural provisions for a Class IV Zoning Permit as contained in KCC Sections 8-7.7(4)(A), 8-8.7, and 8-19.6.

8. The development complies with and/or will not conflict with any of the Goals contained in the North Shore Development Plan Ordinance contained in KCC Chapter 10, Article 2.

DECISION AND ORDER

BY ORDER OF THE PLANNING COMMISSION, the application by Charles M. Somers and West Sunset 32 Phase 1, LLC for a Special Management Area Use Permit, Project Development Use Permit, Use Permit, and Class IV Zoning Permit to undertake development on two lots located within the Special Management Area (SMA) and within the Open/Special Treatment-Resource District (O/ST-R), further identified as Tax Map Key 5-2-12: 35 ("Lot 2") and 5-02-4: 47, CPR #2 ("Kahili Quarry Road"), Kilauea, Kauai, be approved, subject to the following conditions:

1. As represented by the Applicant, the development subject to this permit approval shall be limited to: the single family residence/farm dwelling unit referred to in the Application as the "Main House'; the Driveway accessory to the Main House; Landscaping; Site Grading for the Main House and Driveways; Preservation of Historic Sites; utilities; Well and Tank; and improvements to Kahili Quarry Road.

2. Applicant shall provide annual status reports to the Planning Commission beginning from one year from the date of this approval. The reports shall be submitted to the Department no later than 30 days prior to the annual anniversary date of approval of this project. The report shall provide project status and progress towards project completion and compliance with conditions of approval. Annual reports shall be provided until completion of the project, and compliance with all conditions of approval.

3. Applicant shall substantially commence construction of the project development within one (1) year from the date of full approval, and shall complete construction of the project development within 5 years from the date of approval of the subject permits.

4. Subject permits approved herein cannot be sold and are not transferable to other than Applicant, its subsidiaries and affiliated corporations and legal entities prior to the completion of the project and issuance of the occupancy permit.

5. Filling of the property with material obtained from off-premises shall not be permitted. This prohibition of imported fill material shall not apply to top soil used for landscaping purposes in accordance with the approved landscaped plans. Mass pad filling to increase the heights of the proposed structures shall not be permitted.

6. The Applicant shall apply for Leadership in Energy and Environmental Design (LEED) registration.

7. The Applicant shall comply with the requirements and recommendations of applicable County, State and Federal Agencies, including the County Fire, Water, Engineering and Building Divisions of the Department of Public Works, the State Department of Health, and State Department of Land and Natural Resources, Historic Preservation Division, as reflected in Findings #41-47 above.

8. The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or revoke the subject permits through proper procedures should the Applicant fail to comply with the conditions of approval, or should unforeseen circumstances occur or result.

9. In view of the various conditions and recommendations imposed by the various government agencies as referenced to herein, building permit application or preconstruction work for any phase of the project or portion of the property shall not be accepted until the Applicant submits a status report of all permit conditions that are either required to be complied with prior to or at time of building permit application.

10. Should the applicant be unable to comply with the development time line in condition #3 above and request an extension of time, applicant is advised that any new laws, ordinances, or regulations that have been implemented within this time frame may become applicable to the project.

11. Prior to building permit review, the applicant shall:

    a. Redesign the project to reduce the proposed grading area and volume, while still retaining the benching and proposed architectural design concept. A soil study/report and proposed grading plan shall be submitted to the Department of Public Works for review and approval. Such grading plans should include all off-site improvements.

    b. In order to help screen the structures from public views as seen from public areas, and to blend the structures with its surroundings, external colors shall be of earth tones, complementary to and compatible with the surrounding natural background. In addition, the Applicant shall prepare a landscape plan to further soften the existing building mass. The landscape plan shall reflect the use of native plants that are common to the area, endemic, indigenous, or Polynesian-introduced. Use of herbicides, pesticides and non-organic fertilizers shall be kept to a minimum. The proposed color scheme and landscape plan shall be submitted to the Planning Director for review and approval prior to building permit review.

c. Record all of the conditions imposed under the subject permits with the deed(s) to the subject property(ies). A copy of this recordation shall be provided to the Planning Department.

d. As represented by the Applicant, prior to the issuance of any building permits, the Applicant agrees to transfer a perpetual Conservation Easement over an approximately eighty (80) acre portion of Lot 2 ("Conservation Easement Area"). The Conservation Easement shall comply with the applicable terms, conditions, and definitions contained in Chapter 198 (Conservation Easements) of the Hawai'i Revised Statutes, subject to the following terms and conditions:

   i. The Applicant shall convey the Conservation Easement to a governmental entity or 501C(3) organization of Applicant's choice, provided such organization constitutes a "qualified organization" as defined in 170(h)(3) of the Internal Revenue Code of 1986 (the Code). Said entity or organization shall have the capability of developing and maintaining threatened and endangered species habitat consistent with the Kīlauea Point National Wildlife Refuge Land Conservation Plan and Environmental Assessment (May 2007) prepared by the U.S. Fish and Wildlife Service.

      Prior to recordation, the Conservation Easement shall be submitted to the Planning Department to review its compliance with this condition. The Planning Department shall solicit comments from the U.S. Fish & Wildlife Service. The Planning Department shall have 45 days to provide written comments to the Applicant, in the absence of which the Conservation Easement shall be deemed acceptable. The Planning Commission shall resolve any disagreements concerning the language of the Conservation Easement.

   ii. The delineation and determination of the Conservation Easement's boundaries and the content of the restrictive terms of the Conservation Easement document shall be as negotiated and agreed upon between the Applicant and the qualified organization provided:

      1. That the Conservation Easement shall encumber approximately 80 acres of Lot 2

      2. That the Conservation Easement shall expressly extinguish density for sixteen (16) of the dwelling units permitted within Lot 2. It is Applicant's intention that any dwelling unit density attributable to and arising out of the Conservation Easement Area shall be extinguished, and shall not be transferred to any other portion of Lot 2.

3. That the lands encumbered by the Conservation Easement and the terms set forth in the Conservation Easement fulfill a "conservation purpose", as defined in 170(h)(4) of the Code.

4. That except as restricted in the Conservation Easement document, the Applicant shall have the right to the use, possession and enjoyment of the Conservation Easement Area.

5. That no dwelling units (including single family residences and farm dwelling units) shall be allowed to be located within the Conservation Easement Area.

6. That to the extent reasonably possible, and subject negotiations with the qualified organization, the Conservation Easement Area will include: areas adjacent to the Kīlauea Stream; and the archaeological sites identified as SIHP #50-30-04-580 and 581 in the Archaeological Inventory Study of an Approximately 74-Acre Portion of Kīlauea Falls Ranch property (Applicant's Exhibit "F-5").

e. Evidence shall be provided that reflects resolution or compliance to the comments and recommendations of the government agency(ies) reflected in Condition #7 above.

12. Applicant shall provide roadway improvements to the entire length of Kahili Quarry Road as may be authorized by its present owners. Said roadway improvements should include clearing and drainage improvements as may be permitted by the present road right-of-way width. The use of crushed coral would be acceptable to retain a rural ambience. The use of gravel and chemical sealant shall not be permitted. As represented, Applicant shall maintain this road right-of-way. Said improvements shall implement and utilize best management practices as recommended by the Department of Public Works. No weekend or holiday work shall be permitted.

13. The proposed residence(s) shall not be used for vacation rental or bed and breakfast purposes.

14. The Applicant is advised that prior to and/or during construction and use, additional government agency conditions may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agency(ies).

15. In order to minimize adverse impacts on Federally Listed Threatened Species, such as Newell's Shearwater and other seabirds, if external lighting is to be used in connection with

the proposed project, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, signage or hotel features within the project site shall be prohibited.

16. As represented, Applicant shall contribute no less than $5,000 towards the conduct of a water quality baseline study of Kīlauea River.

17. Customary and traditional rights and practices including without limitation those exercised for subsistence, culture, religious, access or gathering purposes, as provided for in the Hawai'i Constitution or Hawai'i Revised Statutes, shall be permitted.

18. Access to the waterfall shall be permitted at the Applicant's discretion.

Amended and approved by the Planning Commission on September 23, 2008 by a 6-0 vote.

By _____
Chairperson, County of Kaua'i,
Planning Commission

Date 10-2-08

EXHIBIT “B”

Sean Mahoney
Chair

Louie Abrams
Vice-Chair

Roy Ho
Wayne Katayama
Kimo M. Keawe
Members

PLANNING COMMISSION
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TEL (808) 241-4050 FAX (808) 241-6699

Michael A. Dahilig
Clerk of the Commission

APR 28 2016

Max Graham
Belles Graham Proudfoot Wilson & Chun LLP
4334 Rice Street, Suite 202
Lihue, HI 96766

Subject: Amendment to Special Management Area Use Permit SMA(U)-2008-5
Use Permit U-2008-4
Class IV Zoning Permit Z-IV-2008-6
Tax Map Key: (4) 5-2-012:035
Kilauea, Kauai
Charles Somers, as Trustee of the Charles Somers Living Trust
Dated November 12, 2002, and West Sunset 32 Phase 1 LLC, Applicant

Dear Mr. Graham,

This letter memorializes the action taken by the Kaua'i Planning Commission effective APRIL 26, 2016 concerning approval of the above subject permits. The approval by the Planning Commission, per your consent, is subject to the following conditions:

A1. The conservation manager's house and garage shall be sunken approximately five feet below grade and shielded, by way of dense shrubbery and tall tree landscaping in order to alleviate view plain impacts of the proposed new structures from Kahili Beach as well as looking westward across Kilauea Stream. The conservation maintenance building and conservation manager's house shall be constructed as revised. The structures shall also be operated as represented. Any changes to said structures shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.

A2. The applicant shall comply with the requirements of the State of Land and Natural Resources, Historic Preservation Division, County's Department of Public Works, as well as any other applicable government agencies.

A3. The applicant shall develop and utilize Best Management Practices (BMPs) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.

A4. In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, or the ocean shall be prohibited.

A5. To the extent possible within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors, and shall seek to employ residents of Kauai in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-Kauai residents for particular skilled jobs where no qualified Kauai resident possesses such skills. For the purposes of this condition, the Commission shall relieve the applicant of this requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.

A6. The applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environment Design (LEED) standards or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.

A7. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may create, or to revoke the permits through the proper procedures should conditions or approval not be complied with or be violated.

A8. The applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the applicant shall contact the State Department of Land and Natural Resources – Historic Preservation Division at (808) 692-8015 and the Planning Department at (808) 241-4050.

A9. The applicant shall not use this residence for vacation rental purposes. This restriction shall be incorporated into the deed restrictions of the subject parcel, draft copies of which shall be submitted to the Planning Department prior to building permit approval.

A10. Applicant is on notice that the property is "Agricultural" under State Land Use designations. Applicant must comply with all requirements pursuant to Hawaii Revised Statutes Chapter 205 including the submission and approval of a farm plan to the director prior to building permit approval.

A11. The applicant shall submit for review and approval by the Planning Department a landscape plan composed of native species, or species common to the area, to help screen the proposed structures, and integrate the site with its surroundings.

A12. Exterior colors and finishes of all structures, including roof colors, shall be limited to medium or dark earth tones such as brown, green, or grey, or other colors compatible with the area's natural surroundings. Use of reflective materials or colors shall be prohibited. The proposed color scheme and samples shall be submitted to the Planning Department for design review and approval prior to building permit application.

A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5 prior to the issuance of building permits for the residence and maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application and complete the proposed development within two (2) years of the date of approval of the building permit.

A14. The applicant shall pay a $500 fine for the "After-the-Fact" permit for the temporary maintenance structure. The structure shall be removed once the conservation maintenance building is constructed.

A15. The Nene fencing shall be constructed as stated, including landscaping as recommended. The fencing and landscaping shall be completed prior to construction of the conservation manager's house and maintenance building.

A16. Given Finding 18 of the 2008 Decision and Order, applicant shall provide director contact information should a member of the public wish to seek access to the falls understanding access is at the landowner's discretion.

Sincerely,

MICHAEL A. DAHLIG
Clerk, Kaua'i Planning Commission

Cc: County- Public Works, Fire, Water, Real Property Division, Housing, Transportation, State- Health, Historic Preservation

RE:	**Director's Report Supplement #7** Modification of Class IV Zoning Permit Z-IV-2008-6 Use Permit U-2008-4 in conjunction with Status Report Special Management Area Use Permit SMA(U)-2008-5 Tax Map Key (4) 5-2-012:035 Manager's House and Maintenance Building
REQUEST:	Submittal of Staff Recommendations and Findings for the Second Amendment to Manager's House and Maintenance Building
APPLICANT:	Charles M. Somers/West-Sunset 32 Phase 1, LLC
ACTION REQUESTED:	Consideration of Modification to Special Management Area Use Permit for the construction of a Conservation Manager's Residence, Conservation Maintenance Building, "After-the-Fact" Temporary Equipment Structure and Nene Fencing

Project Description and Use

As represented, the applicant is proposing to construct a one-story agricultural building. It will contain maintenance, work and storage areas. The floor area will contain 4,000 square feet, together with a covered entry containing 204 square feet, and covered wooden walkways containing 29 square feet.

The original modification proposed a footprint of 2,832 with an 800 square foot loft. The amended building will have a footprint of 4,023 square feet and no loft. The site of the building has been moved approximately one hundred (100) feet to the north.

The conservation manager's house and garage has been lowered approximately five feet below the current grade to help mitigate visual impacts as recommended by the department.

The total lot coverage has been increase to 37,238 square feet from 35,837 for an increase of 1,401 square feet. The total lot coverage is ½% of the total area of lot 2.

As-built landscaping plans showing the location of stone retaining walls and types of vegetation has been slightly amended.

The applicant is maintaining an equipment tent which has a floor area of 1,800 square feet. This temporary structure will be removed once the conservation maintenance building is constructed. The applicant is requesting an "After-the-Fact" permit.

The exterior colors for both the conservation manager's house and maintenance building will be earth tones and similar to that of the main residence.

Pursuant to the Conservation Plan, the applicant is requesting to include a six foot high Nene enclosure/predator exclusion fence for approximately 3.75 acres as identified in the Conservation Plan which was submitted to the Planning Commission on January 26, 2016.

(See the attached request and revised plans)

Property History

A brief summary of the history regarding this application is as follows:

- The original application for a residence, manager's/caretaker's residence and barn/maintenance building was submitted in 2007. The application was sent for contested case hearing and a Decision and Order (Exhibit "A") was issued.
- The original approval deferred approval of the manager's/caretaker's residence and barn/maintenance building. The Planning Commission heard the application to include these structures on April 30, 2013 and petitions to intervene were filed by Kilauea Neighborhood Association and Elizabeth Freeman.
- The intervening parties withdrew their petitions and the contested case hearing was cancelled.
- The application was pended at the January 28, 2014 Planning Commission meeting for pending completion and acceptance of the Conservation Plan to justify the manager's/caretaker's residence and size of the barn/maintenance building and modifications requested by the department.
- At the January 26, 2016 Planning Commission meeting regarding the annual status report, the applicant stated that the Conservation Plan was completed

and submitted to Hawaiian Islands Land Trust for their review and approval. The matter of the pending application for modification of conditions of approval was set for March 8, 2016 Planning Commission.

Exhibits

- Exhibit "A" Decision and Order dated October 2, 2008
- Exhibit "B" Original Director's report dated March 27, 2013
- Exhibit "C" Minutes from the April 30, 2013 Planning Commission meeting
- Exhibit "D" Minutes from the January 26, 2014 Planning Commission meeting
- Exhibit "E" Pedestrian Access Easement "P-1" location map
- Exhibit "F" Agency comments

Staff offers these additional findings relative to concerns previously stated and the proposed amendments:

1. The SLUD Agricultural designation and County zoning would normally permit an additional residential unit on the property. The elements for contested case hearing were limited to Special Management Area Use Permit requirements and the view plane County constraint zoning (ST-R) to require development comports with maintaining the natural landscape, and view planes consistent with coastal zone management.

2. The record, at least at the initial contested case hearing and public's additional testimony at time of amendment hearing, lacks an overwhelming opposition to the element of the proposal involving an additional residential unit (caretaker's residence) and a barn/maintenance building.

3. The majority of the testimony received at the public hearing held on the amendment generally concerns the lack of access to Kilauea Falls. A review of the past decision and order by the Planning Commission in its 2008 findings already considered whether mauka public access to the falls should be exacted to mitigate the effects of the main house. As the additional conservation manager's house, garage and conservation maintenance building relate generally to the conservation easement and not to the main house, the Department believes there is no nexus to require additional mauka public access to the falls as mitigation for this

additional development given a rough proportionality standard. Additionally, the applicant has agreed to work with the County regarding the existing twenty foot wide pedestrian access located on the northeast side of the property further identified as P-1 Easement (Exhibit "E").

4. Given the Scenic Views Policy in Section 3.2.1 that states that the County shall seek to preserve scenic resources and public views, the Department has requested revised plans to sink, by way of grading, and shield, by way of landscaping, the proposed new structures to alleviate view plan impacts from Kahili Beach as well as looking westward across Kilauea Stream. The applicant has revised the plans to lower the residence by approximately five (5) feet.

5. The loft, bathroom and lanai proposed as part of the conservation maintenance building have been deleted as they are not compatible with a maintenance building. The applicant has now requested an increase in the size of the structured due to the deletion of the loft. Moreover, grading and landscaping plans in addition to exterior colors and materials used in the design should be submitted to the Department prior to building permit issuance.

6. With regard to Section 5.3.1 relative to the intent of the Open Designation, it is to preserve, maintain or improve the natural characteristics of non-urban land and water areas that: (1) are of significant value to the public as scenic or recreation resources; (2) perform essential physical and ecologic functions important to the welfare of the surrounding lands, waters, and biological resources; (3) have the potential to create or exacerbate soil erosion or flooding on adjacent lands. Additionally, lands designated Open shall include important landforms such as stream valleys, areas of predominately steep slopes (20% or greater), native plant and wildlife habitat and known natural, historic and archaeological resources. These lands shall remain predominately free of development involving buildings, paving and other construction. Given the above, the Department had concerns with the proposed conservation maintenance building and manager's structures' design and recommended for revisions. The applicant has submitted revisions based on these recommendations. The lot coverage is ½% (one half of one percent) which is well below the maximum allowable lot coverage of 10%.

On page 23 of the Decision and Order states:

"*<u>Discussion and Test for Permits</u> Section a.* ***Level of development to be considered.*** *The size and design of the primary residence, upon initial review, is quite large, given all the accessory concepts (ponds, walkways, pool, etc.) incorporated. Such large and excessive residential designs are foreign, and many times obscene, for those of us who live here. And, this residence will not be a full time residence, instead being watched over by a caretaker in the second proposed residence. Staff has no objection to the primary residence as proposed provided the caretaker residence and barn improvements are deferred to a later date, or are eliminated. That makes this residence the primary, and only, residence. An absentee landlord's palatial residential structure in this location, remaining uninhabited a majority of the time, is not an acceptable proposition.*

The barn would no longer be necessary if the balance of the property will exist as a wildlife preserve, and no large scale agricultural operations would occur.

An alternative to that concept: Permit the proposed primary dwelling unit, where is, as is. Eliminate the barn. And/or permit the second dwelling unit and barn only if and when the applicant completes the following specific activities that staff visualized would be the responsibility of the Non-Profit Organization:

- *Complete the survey and subdivision of the property that clearly identifies the preservation easement area, and the residential area;*
- *Construct a fence line to wildlife preservation standards between the preservation easement area, and the residential area;*
- *Landscape said fence line, between the preservation easement area, and the residential area."*

7. The established 149.4 acre Conservation Easement in favor of Kauai Public Land Trust will help to preserve and protect this area per the original Decision and Order. The Applicant has stated that a Natural Resources Management Plan (Conservation Plan) has now been completed as part of this Conservation Easement terms. The applicant

has stated that the plan has been accepted by the Hawaiian Islands Land Trust.

8. In evaluating the proposed development relative to the goals and objectives of the SMA Rules and Regulations and the Special Management Area Permit Guidance, the following aspects will be considered:

    a. Public Access and Coastal Recreation – The Applicant has agreed to improve Kahili Quarry Road which provides public beach access in accordance with Condition #12 from the original permit set approval. The improvements to Kahili Quarry Road will improve public beach access. The use of crushed coral for the access road has been approved to maintain the rural ambience. Access along the Kahili Quarry Road will continue as well as access to the lower portion of Kilauea Stream via County easements. Access to the waterfall will be at the Applicant's discretion as provided in Condition #18 of the original permit set.

    The SMA permit Guidance for the Hawaii Coastal Zone Management Program Dated April 2013 states that there must be an "essential nexus" and "rough proportionality" between the SMA permit conditions and the CZM law's substantive and legal provision to withstand judicial scrutiny. Mitigation measures to achieve consistency with the CZM objectives and policies and SMA guidelines may include:

    - Provision and maintenance of public beach access
    - Preservation of archaeological sites
    - Protection of life and property from coastal hazards
    - Boundary setbacks and building height restrictions to preserve coastal views; or
    - Drainage improvements to control siltation in coastal waters

CONCLUSION

Based on the foregoing, staff recommends Modification of the original Decision and Order by allowing for the construction of a conservation manager's house,

garage, conservation maintenance building, "After-the-Fact" temporary equipment structure and Nene fencing in addition to these conditions:

A-1. The conservation manager's house and garage shall be sunken approximately five feet below grade and shielded, by way of dense shrubbery and tall tree landscaping in order to alleviate view plain impacts of the proposed new structures from Kahili Beach as well as looking westward across Kilauea Stream. The conservation maintenance building and conservation manager's house shall be constructed as revised. The structures shall also be operated as represented. Any changes to said structures shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.

A-2. The applicant shall comply with the requirements of the State of Land and Natural Resources, Historic Preservation Division, County's Department of Public Works, as well as any other applicable government agencies.

A-3. The applicant shall develop and utilize Best Management Practices (BMPs) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.

A-4. In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, or the ocean shall be prohibited.

A-5. To the extent possible within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors, and shall seek to employ residents of Kauai in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-Kauai residents for particular skilled jobs where no qualified Kauai resident possesses such skills. For the purposes of this condition, the Commission shall relieve the applicant of this

requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.

A-6. The applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environment Design (LEED) standards or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.

A-7. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may create, or to revoke the permits through the proper procedures should conditions or approval not be complied with or be violated.

A-8. The applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the applicant shall contact the State Department of Land and Natural Resources – Historic Preservation Division at (808) 692-8015 and the Planning Department at (808) 241-4050.

A-9. The applicant shall not use this residence for vacation rental purposes. This restriction shall be incorporated into the deed restrictions of the subject parcel, draft copies of which shall be submitted to the Planning Department prior to building permit approval.

A-10. Applicant is on notice that the property is "Agricultural" under State Land Use designations. Notwithstanding the Applicant's previous submittal of a farm plan at the initial submittal in 2008, and the subsequent adjudication leading the designation of the area planned for farming to be placed instead in a conservation easement for preservation purposes, Applicant must comply with all requirements pursuant to Hawaii Revised Statutes Chapter 205.

A-11. The applicant shall submit for review and approval by the Planning Department a landscape plan composed of native species, or species common to the area, to help screen the proposed structures, and integrate the site with its surroundings.

A-12. Exterior colors and finishes of all structures, including roof colors, shall be limited to medium or dark earth tones such as brown, green, or grey, or other colors compatible with the area's natural surroundings. Use of reflective materials or colors shall be prohibited. The proposed color scheme and samples shall be submitted to the Planning Department for design review and approval prior to building permit application.

A-13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5 prior to the issuance of building permits for the residence and maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application and complete the proposed development within two (2) years of the date of approval of the building permit.

A-14. The applicant shall pay a $500 fine for the "After-the-Fact" permit for the temporary maintenance structure. The structure shall be removed once the conservation maintenance building is constructed.

A-15. The Nene fencing shall be constructed as stated, including landscaping as recommended. The fencing and landscaping shall be completed prior to construction of the conservation manager's house and maintenance building.

The applicant is advised that additional government agency conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agencies. The Planning Commission is further advised that this report does not represent the Planning Department's final recommendation in view of the forthcoming public hearing process scheduled for March 8, 2016 whereby the entire record should be considered prior to decision making. The entire record should include but not be limited to:

a. Pending government agency comments;
b. Testimony from the general public;

c. The applicant's response to staff's Director's Report and recommendation as provided herein.

By: _____
Michael A. Dahilig, Director

By: _____
Jody Galinato, Planner

Date: 3-2-16

KAUA'I PLANNING COMMISSION
REGULAR MEETING
April 26, 2016

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair Mahoney at 9:04 a.m., at the Līhu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Sean Mahoney
Vice Chair Louis Abrams
Mr. Wayne Katayama
Mr. Roy Ho
Mr. Kimo Keawe

Absent and Excused:
Ms. Glenda Nogami Streufert

The following staff members were present: Planning Department – Michael Dahilig, Leslie Takasaki, Jody Galinato; Deputy County Attorney Jodi Higuchi Sayegusa, Office of Boards and Commissions – Administrator Jay Furfaro *(entered at 9:55 a.m.)*, Commission Support Clerk Darcie Agaran

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Mahoney called the meeting to order at 9:04 a.m.

ROLL CALL

Planning Director Michael Dahilig: Commissioner Keawe?

Mr. Keawe: Here.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Here.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Here.

Mr. Dahilig: Vice Chair Abrams?

Mr. Abrams: Here.

Mr. Dahilig: Commissioner Streufert? Chair Mahoney?

Chair Mahoney: Here.

Mr. Dahilig: Five (5) members present, Mr. Chair.

Chair Mahoney: Thank you.

APPROVAL OF THE AGENDA

Mr. Dahilig: You do have Item C, Approval of the Agenda. The Department would recommend moving Item L.2. related to Charles Somers to the first action item after Item H on this morning's calendar. And then that would leave Item L.1., which would be the last item for the agenda this morning.

Chair Mahoney: Okay. Chair will entertain a motion.

Mr. Abrams: Move to revise the agenda.

Mr. Keawe: Second.

Chair Mahoney: Moved and seconded. Any further discussion? Hearing none. All in favor? (Unanimous voice vote) Motion carries 5:0.

MINUTES of the meeting(s) of the Planning Commission

Mr. Dahilig: Thank you, Mr. Chair. We are now on the minutes of the meetings of the Planning Commission. We do not have any for approval this morning.

RECEIPT OF ITEMS FOR THE RECORD

Mr. Dahilig: Item E, Receipt of Items for the Record. We have not received any supplemental testimony or any supplemental information to add to this morning's packet.

HEARINGS AND PUBLIC COMMENT

Continued Agency Hearing (NONE)
New Agency Hearing (NONE)
Continued Public Hearing (NONE)
New Public Hearing (NONE)

All remaining public testimony pursuant to HRS 92 (Sunshine Law)

Mr. Dahilig: We are now on Item F, Hearings and Public Comment. We do not have any Continued Agency Hearings, New Agency Hearings, Continued Public Hearings, or New Public Hearings for this morning. And in terms of Item F.5., the Department would recommend making a call for any testimony on any other remaining agenda item for this morning's meeting.

Chair Mahoney: Is there any member of the public that would like to testify on any agenda item? Seeing none.

CONSENT CALENDAR

Status Reports (NONE)

Director's Report(s) for Project(s) Scheduled for Agency Hearing on 5/10/16.

Class IV Zoning Permit Z-IV-2016-12, Use Permit U-2016-10 and Special Management Area Use Permit SMA(U)-2016-3, for the construction of two (2) portable classroom buildings and associated improvements on the Hanalei Elementary School campus, and Variance Permit V-2016-2 to deviate from the land coverage requirements within the Open (O) zoning district, pursuant to Section 8-9.2(a) of the Kaua'i County Code (1987), further identified as 5-5427 Kūhiō Highway, Tax Map Key 5-5-006:018, and affecting a portion of a larger parcel approx. 3.7 acres in size = *State of Hawai'i, Department of Education.*

Class IV Zoning Permit Z-IV-2016-13 to allow construction of a warehouse facility and associated site improvements on a parcel situated at the terminus of Leleiona Street in Puhi, approx. 700 ft. south of its intersection with Puhi Road and further identified as 1821 Leleiona Street, Tax Map Key 3-3-011:004, and containing a total area of 1.095 acres = *Hawktree Land, Inc.*

Mr. Dahilig: Thank you, Mr. Chair. We do have Item G, which is the Consent Calendar. We do not have any status reports for acceptance this morning, but we do have two (2) Director's Reports; both for Class IV Zoning Permit Z-IV-2016-12, Use Permit U-2016-10, and SMA Use Permit SMA(U)-2016-3, as well as Class IV Zoning Permit Z-IV-2016-13. These items are being asked to be received for the record, as well as set for agency hearing on 05/10/16.

Chair Mahoney: Chair will entertain a motion.

Mr. Abrams: Move to approve the two (2) items, 2.a. and 2.b., and schedule for agency hearing on 05/10/16, Department of Education and Hawktree Land, Inc.

Mr. Ho: Second.

Chair Mahoney: It's been moved and seconded. Any further discussion? Hearing none. All in favor? (Unanimous voice vote) Motion carries 5:0.

EXECUTIVE SESSION

Mr. Dahilig: Thank you, Mr. Chair. We are now on Item H. We do not have an executive session for this morning.

UNFINISHED BUSINESS (For Action)

Amendment to Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4 and Class IV Zoning Permit Z-IV-2008-6 in conjunction with Status Report in the matter of *Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1 LLC.*

Mr. Dahilig: We are moving to Item L.1., which is Unfinished Business. This is Item L...sorry, L.2., my apologies. Amendment to Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 in conjunction with the status report in the matter of Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1 LLC. The amendment hearing was closed and deferred on 04/30/13 and on January 28, 2014, and this item was recalled and re-deferred on 03/08/16.

Jody has been the planner that has been handling this for the past three (3) years.

Staff Planner Jody Galinato: Good morning, Mr. Chair and members of the Commission. I have Director's Report Supplement No. 7, and I'll just kind of go over this to refresh you because it's been a long history.

Ms. Galinato read the Project Description and Use, Property History, and Exhibits sections of the Director's Report Supplement No. 7 for the record (on file with the Planning Department).

Ms. Galinato: I'll hold off for my conclusion, and I did receive, yesterday afternoon, Phase I Grading Plans that were submitted to the County and a letter submitted to State Historic Preservation. And I would defer to the applicant if there's any questions. I haven't gotten through all that.

Chair Mahoney: Okay. Is there a representative for the applicant present? Could you state your name for the record, please?

Max Graham: Good morning, Planning Commissioners. I'm Max Graham, and I represent the applicant in this matter. The owners of the property are Charles Somers, the Charles Somers Trust, and an associated LLC, West Sunset Phase 1 LLC, so those are the two (2) owners. And after that pretty thorough presentation, if you have any specific questions, I'd be happy to answer them. I don't know what I could add to the background in this matter, unless the new Commissioners want me to point out, on a map, where the specific areas on the property are.

Chair Mahoney: Are there any concerns from the Commissioners? You want any identification? Good?

Mr. Ho: I'm good.

Chair Mahoney: Okay. Any questions for the applicant?

Mr. Abrams: One (1). Max, Jody said she received an SHPD letter. Could you summarize what the substance of that letter was?

Mr. Graham: The Kahili Quarry Road is a separate lot adjacent to the property. It's been maintained up to this point; just routine maintenance. Now the owner has filed grading plans for the more or less permanent improvements to the road, which will include swales and an appropriate covering of the road that required a grading permit application and the preparation of an NPDES permit application. The State Historic received a copy of it and asked me to present them with the background on the matter, and we will be meeting onsite with the Kaua'i Archaeologist, Mary Jane Naone, to look at the...so she can look at the road.

Mr. Abrams: Okay.

Mr. Graham: So I was just copying the Planning Department on that.

Mr. Abrams: Well that's good because I know we had a lot of discussion on the road and it seems like it is making progress. It's good to hear. Thank you.

Chair Mahoney: Any further questions for the applicant by any members of the Commission? No?

Mr. Katayama: Chair. Max, one of the issues with the Quarry Road was the...working with the wildlife there. Has those issues...it seemed like it was a three-party issue on developing the road, depending on which segment of the road, and where the road...if it would go down all the way to the original Quarry Bay itself. Has that been resolved?

Mr. Graham: Yes, it has. So what will happen is the applicant has prepared a Phase I Grading Permit with plans and that takes the improvements from the top of Kahili Quarry Road on the Kīlauea Plateau where the pavement ends, takes it all the way down to the driveway into the present main house. Phase II plans are being prepared and will be ready in about a week or two. The Phase II plans will take the road from that driveway area through the Fish and Wildlife lot to the parking area down by the river mouth, and that is being done in conjunction with the Fish and Wildlife Service. So at the end of the day, there will be an improved road that will go all the way down to the parking area in the Fish and Wildlife lot.

Mr. Katayama: And the farm plan that is currently on record, is that the proposed farm plan?

Mr. Graham: We don't have a farm plan on record. There will be a requirement that we present a farm plan, so we will need to...the plan is to do orchard crops in front of the main house. So in

order to get the building permits, we will need to present the farm plan to the Planning Department. Agricultural activities are allowed within the conservation easements, but we will still have to run the farm plan by the Hawaiian Islands Land Trust as well, and amend the conservation plan to make sure that we are consistent with the conservation values. But that will be done prior to any building permit approvals.

Mr. Katayama: I guess the challenge before this Commission is...well, one of the challenges has been is the farm plan consistent with the development of the infrastructure; namely the farm dwelling or the barn. I mean, when will the Commission get a feel if it's appropriate for the Ag operation? Or is this something that's going to be left up to Building to decide?

Mr. Graham: I think, actually, it's left up to the Planning Director to decide, but I'll let the Planning Director speak to that.

Mr. Dahilig: *You got to love these Ag questions. (Laughter in background) I will say this.* That when you look at the large acreage of the property and if there are areas that do need to be maintained even from a scale standpoint, there is, I believe, a reasonable expectation that some heavy equipment needs to be maintained and stored on the property. That being said, whether the equipment that is used is in the facilitation of very large Ag production versus, you know, what is, I guess, routine in terms of maintaining, I mean, it's many, many acres. Having some type of storage facility for that type of equipment, I think, is at least reasonable. Now, whether it's done in conjunction with what we expect as, you know, growing up when you hear a barn, you think of animals and those types of things in there. I don't think that this is something I would expect that would facilitate, I guess, a very large farm plan if you are also looking at context of a conservation plan that is being put forth by HILT. If I had my druthers about one way or the other, where you want to see the area cultivated versus where you want to see the area preserved, I think it's...the natural state elements, I think, would have to weigh in on our evaluation of the farm plan because I think that's what, generally, has come out through the community process has been this desire to leave things at a natural state. So that being said, I think we would not be predisposed to requiring a certain type of farm plan for the property, but at the same time, I think the discussion I'm bringing is probably the views I would probably ask Jodi to review the farm plan with. But I think at least at a minimum, there is a reasonable, I guess, expectation that they would need to have somewhere to store large equipment on the property.

Mr. Katayama: I guess the view from this Commissioner is that the use of the land, I think, is up to the landowner. The concern here is the ability to urbanize the land under the pathway of what is an appropriate facility to support the farm operation. Again, its where is that balance to be vetted in this process because this has gone on for quite a while.

Mr. Dahilig: Right.

Mr. Katayama: And it's been, you know, I give the applicant high marks for persevering, but again it comes down to this central issue where I'm not quarreling with the use. I just want to understand that the community needs are being addressed vis-à-vis the pathways and somewhat

the conservation plan, which is quite admirable. And now it is the comfort that what seems to be posed as ancillary agricultural support facilities doesn't become an urbanization of that parcel.

Mr. Dahilig: We would agree.

Mr. Katayama: So again, where does that vetting take place?

Mr. Ho: Max, is there an IRS farm designation that would cover this?

Mr. Graham: I think we'll need to do that as part of the presentation of the plan to the Planning Department, so not done yet. As a little background here, just...there has always been a tension between Ag activities and the conservation activities. This is a 160-acre parcel. There are only 12 acres set aside for building improvements, and that will be utilized by the main house, and if you approve it, by the second farm dwelling unit. So that will mean that there are no further improvements other than Ag buildings, or the conservation maintenance building. The remaining 149 acres are subject to the conservation easement and that property, if you're familiar with it, is pretty steep, so it's not really good for Ag upland anyway. And then there are about 70 acres of the conservation area that are subject to the protection plan to protect the historic sites, so we don't want to touch any of those areas. We want to protect those areas, so the only Ag that really can be done is sublimited Ag down in front of the main house in the flat area by the river, and that would seem appropriate for the amount of development that has been undertaken on the parcel.

Mr. Dahilig: Mr. Chair, we also do have some public testimony that came in late, so if there's any other questions for the applicant.

Chair Mahoney: Any further questions for the applicant?

Mr. Katayama: No. Thanks, Max.

Chair Mahoney: Okay. Is there any member from the public who would like to testify on this agenda item? Could you state your name for the record, please? Come to the microphone. Thank you.

Yoshito L'Hote: Aloha, Chair. My name is Yoshito L'Hote. I'm here to represent the Kīlauea Neighborhood Association, and I'm the current President. This is a long testimony, so maybe I'll skip some of the formalities in the beginning, but try to cover and make the main points that we are trying to make.

So summary, the KNA supports the recommendations of the Director's Report Supplement No. 7; particularly the rental use restriction, the requirement to do agriculture and the requirement that all the previous conditions imposed in conjunction with the SMA and Use Permits for the main house be completed before building permits are granted for the additional structure. Because the small acreage and minimum scope of conservation management, we ask that the square footage of the barn be reduced by 1,000 square feet. We ask for two (2) additional amendments to the 2008 Decision and Order pertaining to public access.

The Planning Director's recommendation. If this application is approved, it is critical that the following recommendations of the Planning Director's Report Supplement No. 7 be adopted: A-9 No vacation rental use, A-10 Agriculture is required, A-13 No building permits granted until previous conditions are complied with. Condition No. 12 of SMA Use Permit 2008-5 is particularly important to the Kīlauea community. Condition No. 12 stated in part: Applicant shall provide roadway improvements to the entire length of Kahili Rock Quarry as may be authorized by present owners. Said roadway improvements should include clearing drainage improvements as may be permitted by the present road right-of-way width. While the KNA is highly gratified that Mr. Somers, the Fish and Wildlife Service, and the County are starting to work together to accomplish this condition, road improvements must be completed before any new structures are constructed. Please note that Condition A-13 also requires that the preservation of the archaeological site must be completed before building permits are issued.

Limited Conservation Plan. The two (2) conservation easements on the 161-acre property covers 149 (acres). Among important values and resources of the area identified in the conservation easement documents are wetland habitat for endangered Kōloa ducks, stilts and coots, nēnēs and sea bird habitat, archaeology, agriculture and scenic resources. The easements also state that the owners have the right, but not the obligation, to conduct land management and/or environmental restoration activities within the easement areas including, but not limited to removal of alien species, restoration of wildlife habitat, restoration of wetland, and introduction of native species. At the previous application for these buildings in January 2014, the KNA was gratified that the Planning Commission required Mr. Somers to develop a conservation plan in order to demonstrate the need and use for the conservation manager's house and conservation maintenance barn. The conservation plan, which was submitted...

Mr. Dahilig: Three (3) minutes, Mr. Chair.

Mr. L'Hote: I'm sorry?

Chair Mahoney: Okay, you used three (3) minutes.

Mr. L'Hote: Oh, three (3) minutes.

Chair Mahoney: Could you just wrap up your testimony?

Mr. L'Hote: Okay, so I'll just jump to the end and wrap it up.

Chair Mahoney: Thank you.

Mr. L'Hote: Because it is two (2) more pages.

Chair Mahoney: Yes.

Mr. L'Hote: So finally...and you'll get a chance to read the rest of it. But finally, the KNA wants to publicly also acknowledge the monetary assistance Mr. Somers has given to the development of the County-owned, community-managed Kīlauea Ag Park. We are most grateful

for his neighborliness and involvement. Thank you for your time and attention. Respectfully, Yoshito.

Chair Mahoney: Thank you for your testimony.

Mr. Dahilig: Mr. Chair, I believe we do not have anybody else signed up to testify on this.

Chair Mahoney: Does any other member from the public care to testify on this agenda item? Seeing none. Okay.

Ms. Galinato: Okay, ready for the conclusion?

Chair Mahoney: Yes, please.

Ms. Galinato: Okay.

Ms. Galinato read the Conclusion section of the Director's Report Supplement No. 7 for the record (on file with the Planning Department).

Ms. Galinato: That's all I have, Mr. Chair.

Chair Mahoney: Thank you. Could the representative for the applicant please come to the...? State your name, again, for the record, please.

Mr. Graham: I'm Max Graham, representing the applicant in this matter.

Chair Mahoney: Okay. You heard the conditions.

Mr. Graham: We have no objection to any of the conditions. Thank you very much.

Chair Mahoney: Okay. Okay, the Chair will entertain any motions or any comments.

Mr. Abrams: Mr. Chair, I'd like to make a motion to approve the Staff's recommendation to approve the amendment to the Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 in conjunction with the status report in the matter of the Charles Somers, Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase I LLC.

Chair Mahoney: Okay, the motion.

Mr. Keawe: Second.

Chair Mahoney: It's been moved and seconded. Any discussion?

Mr. Katayama: Chair, on Condition A-10, there is a...as noted, a farm plan that was submitted in 2008. The applicant has testified there is no actionable farm plan at this point. Can we clarify that and make the appropriate status as part of this condition?

Chair Mahoney: Could the applicant...can you comment on...?

Mr. Graham: This is part of what I was talking about the interplay between the Ag and the conservation, so initially, the plan was to...there was an Ag plan to put in forest trees, which would have been placed in the areas where the historic properties are. So rather than do that...actually in working with the Planning Commission, it was decided that that type of Ag was not appropriate to the conservation values, so it was never acted upon.

Mr. Katayama: So I guess, Jody, what would be the appropriate wording for that condition?

Ms. Galinato: I'm not exactly sure what you would want, but basically, we are going to require a new farm plan.

Mr. Graham: Commissioner, just...my understanding is that what is being meant by this condition is that since the original plan was never implemented, because, you know, pretty much by agreement with all the participants at the time, this time a farm plan will be required and the applicant will be required to submit it and have it approved prior to issuance of any building permits.

Mr. Katayama: So would that be the appropriate wording for that condition?

Ms. Galinato: Basically we are acknowledging that there was one sent in and there was some discussion as to that initial farm plan, and that they would have to comply with the requirements as how this was set up.

Chair Mahoney: Would it be...yeah.

Mr. Dahilig: If I may, would that be...would the Commission be comfortable, then, in memorializing it...a fixed condition and actually stating that a farm plan will be required and have it...amend Condition A-10 to have something that has a date certain?

Mr. Katayama: Yeah, I think the applicant has acknowledged that the previous farm plan is inappropriate and so be it. And yet, you know, I think to move forward that they need to revise it and get...is the Department in agreement?

Mr. Dahilig: I think it's reasonable, certainly. I would...

Mr. Katayama: Sort of reflects the facts of this situation.

Mr. Dahilig: So I guess as a proffer, we could add it as an amendment to Condition A-10, at the very end of the paragraph, must comply with all requirements pursuant to HRS Chapter 205 and submit an amended...

Mr. Katayama: I would delete the original (inaudible) farm plan.

Mr. Dahilig: Yeah.

Mr. Katayama: Because that is void, I would think.

Mr. Dahilig: Yes. It's a notwithstanding language just to, I guess, more for historical purposes to kind of characterize what...because I mean, certainly we are not objectionable to striking the whole thing and then just putting up a certain farm plan language in there. Maybe it would be appropriate if we could take a 5-minute break to try to resolve the language on that and then we can reconvene.

Chair Mahoney: Can we take a...

Mr. Abrams: I had one other thing, maybe, that would be incorporated into the... I noticed the neighborhood association has proposed a trial program, which at that point, to try and get access up to the falls. But you did state that people could call you to gain access because you'd go through that process, and I think that that's fair. Would that be something that we would want to also include the manager there as having the authority? I'm not...you are not going to be around forever, so at that point... (Laughter in background) I want to have something that goes beyond that, so that the community can figure that out.

Mr. Graham: Thank you, Commissioner. (Laughter in background) I think appropriately the contact should be the conservation manager.

Mr. Abrams: Okay.

Mr. Graham: Alright.

Mr. Abrams: Okay. If that would be something...I mean, we don't even actually have a condition in there.

Mr. Dahilig: Yeah, we've...there's actually not a condition because it was a finding as part of the initial Contested Case Hearing.

Mr. Abrams: Okay.

Mr. Dahilig: When they...that saying that there was a Finding of Fact that it was at the owner's discretion.

Mr. Abrams: Yeah.

Mr. Dahilig: Whether that discretion needs to be memorialized as a condition of approval, maybe it's something we can talk about with Mr. Graham over the break because I can see him smiling and (inaudible).

Mr. Abrams: Yeah. It can be some sort of formal letter or whatever; I don't know. Something that if in case something came back to the Planning Department relative to something like that that happened in the future, that you would be able to go back to something that would allow that.

Mr. Dahilig: We probably have to take a look at the '08 language.

Mr. Abrams: Okay.

Mr. Dahilig: And try to...

Mr. Keawe: So are we going to take a break?

Mr. Dahilig: Yeah, it would probably be appropriate to take a...maybe just make it a caption break since we are almost at the top of the hour.

Chair Mahoney: Okay. We are going to take a caption break.

The Commission recessed this portion of the meeting at 9:50 a.m.

Administrator Furfaro entered the meeting at 9:55 a.m.

The Commission reconvened this portion of the meeting at 10:00 a.m.

Chair Mahoney: Call the meeting back to order, please.

Mr. Dahilig: Mr. Chair, given the Condition A-10 as proposed, the Department would like to actually amend its Director's Report to have Condition A-10 state the following. It would be stricken in its entirety and rewritten as follows, "Applicant is on notice that the property is "Agricultural" under State Land Use designations. Applicant must comply with all the requirements pursuant to HRS 205, including the submission and approval of a farm plan to the Director prior to building permit approval." We'd also like to add an additional condition, A-16, to our list of conditions on the amendment, and that would state, "Given the Finding No. 18 of the 2008 Decision and Order, applicant shall provide Director contact information should a member of the public wish to seek access to the falls, understanding access is at the landowner's discretion." We would suggest those two (2) amendments to our report, and if not objectionable, would seek indulgence from the Commission to incorporate that as part of their motion.

Mr. Abrams: Okay. Well, we'll start with the process of withdrawing it, Jodi?

Chair Mahoney: No, you can (inaudible).

Mr. Abrams: Or just do this as an amendment?

Mr. Dahilig: As a friendly amendment.

Chair Mahoney: Can we?

Deputy County Attorney Jodi Higuchi Sayegusa: That's fine. I mean, but it might be cleaner just to withdraw, withdraw the second, and then make a new motion.

Mr. Abrams: Okay, I'm going to withdraw my motion. You withdraw the second.

Mr. Keawe: Withdraw the second.

Chair Mahoney: Okay, the Chair will entertain a new motion.

Mr. Abrams: Okay, I move to approve, as amended, Staff reports, Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 in conjunction with the...

Chair Mahoney: Excuse me. Before we continue, does the applicant have any objections to...?

Mr. Graham: No objections.

Chair Mahoney: Okay, we'll continue.

Mr. Abrams: Okay.

Chair Mahoney: Thank you.

Mr. Abrams: Alright, I'll start again. Move to approve Staff's amended report to Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 in conjunction with the Status Report in the matter of the Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset Phase 1 LLC.

Mr. Keawe: Second.

Chair Mahoney: Okay. It's been moved and seconded. Any discussion? Hearing none. All in favor? (Unanimous voice vote) Motion carried 5:0.

Mr. Graham: Thank you very much.

Chair Mahoney: Thank you.

GENERAL BUSINESS MATTERS

Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision Related to the Forfeiture of Non-Conforming Use Certificate TVNCU#*5165*, Jonathan J. Chun, Esq., representing *Lloyd R. Fischer and Shirley Fischer*, Tax Map Key (4)

EXHIBIT “C”

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April 4, 2019

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Lihue, Kauai, Hawaii 96766

VIA EMAIL ONLY

Re: **Amendment To Special Management Area Use Permit SMA(U)-2008-5, Use Permit No. U-2008-4, and Class IV Zoning Permit No. Z-IV-2008-6**
Lot 2
Kilauea, Kauai, Hawaii
Kauai Tax Map Key No. (4) 5-2-012:035
Owner: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company

Dear Mr. Hull:

Pursuant to Condition A10. Of the Amendment To Special Management Area Use Permit SMA(U)-2008-5, the Owner is required to submit a Farm Plan to the Planning Director for review and approval prior to building permit approval for the Conservation Maintenance Building. In fulfillment of this condition, I have enclosed the following:

1. Farm Plan Application Form.

2. Farm Plan (Exhibit "A").

3. Barn Floor Plans (Exhibit "B").

4. Tax Map 5-2-12 (Exhibit "C") showing the location of the Barn, the Agricultural Area, and the Main House on the Kilauea Falls Ranch.

Thank you very much for your assistance in this matter.

Sincerely yours,

BELLES GRAHAM LLP

Max W. J. Graham, Jr.

MWJG:jgm
Enclosures
cc: Mr. Charles Somers, w/encls. (via email only)
Mr. Ron Alvarado, w/encls. (via email only)
Mr. Rohn Boyd, w/encls. (via email only)

EXHIBIT "A"

FARM PLAN /COUNTY OF KAUAI

Somers FARM PLAN, KAHILI QUARRY RD., KILAUEA, KAUAI

PREPARED BY: Kilauea Falls Ranch, 1957 Kahili Quarry Rd., Kilauea, Hawaii 96754

August 15, 2016

FARM PLAN /SOMERS/KAHILI QUARRY ROAD

Location:
The farm will be located on a portion of (TMK (4) 5-2-012:035), on the North shore of Kauai. The farmable area of the property is situated on a flat area fronting the Kilauea river, 12 ft. above sea level. This portion of the property (approx. 7 acres) is mostly level and is Zoned Open STR. It is located in the State Land Use District – Agricultural.

Climate:
The property is exposed to the trade winds and receives an average of 40-60 inches of rainfall per year. Typically, the dry season runs from June through October, the wet season runs November to April. The average temperature range is 65 degrees to 85 degrees, year round.

Soils:
The soils are classified as (MT) Mokuleia Fine Sandy Loam with aged organic matter. The soil will need significant amendments including calcium silicate, gypsum, additional organics (compost) and a variety of broad spectrum organic fertilizers.

History:
The property was originally Hawaiian Native lowland mesic forest, for the past 100 years it has been utilized for rice and taro production, as well as cattle ranching.

Current Use:
The property is currently being maintained in short grass.

Proposed Use:
We will utilize approximately 7acres for fruit tree and flower farming.

Crops:
A variety of fruit trees will be farmed, (See attached map).

Flower Crops:
a)Plumeria 20 trees @8-10'spacing
b)Pua kinikini 20 trees @8-10'spacing

EXHIBIT "A"

Tree crops:
a) Citrus 20 trees
b)Avocado/mixed fruit 25 trees 25' x25' spacing
c)Papaya 50 trees at 8' spacing
d)Banana 50 trees at 12' spacing

Vegetables: (Garden and mixed landscape setting, primarily for owners and employees consumption)
a)Pole Beans & sweet peas
b)Brassica (Chinese greens, collards, kale and cabbages)
c)Beets
d)Eggplant
e)Taro
f)Sweet Potato
g)Sugarloaf Pineapple

Maintenance:
The farm will be mowed and weeded twice a month, fertilized twice a year and inspected monthly for pests and/or disease.

Timeframe:
Farm installation will be complete and operational by May 1, 2017.

Yields:
The plumeria and Pua kinikini will average $75.00 worth of flower production per tree per year at maturity.
Citrus, avocado, and mixed fruit trees will average $150.00 worth of fruit per tree per year at maturity.
Papaya will yield an average of $75 per tree per year.
Bananas will yield an average of $120 per tree per year.

Cost of production:
The cost of production includes water, fertilizer, fuel, maintenance, and harvesting.

Water - water cost will be minimal, with only dry season supplemental water required. The estimated cost per year is $850.00.

Fertilizer - the trees and field crops will require fertilizer twice per year. The estimated cost of fertilizer per year is $1,800.00.

Maintenance - the maintenance cost will average $6,000.00 per year (or $500 per month).

Fuel costs - machinery and transportation will average $1,500 per year.

Harvesting - cost will be an average of $40 per tree per year x 185 trees = $7,400.00 per year.

Miscellaneous costs - (tools, etc.) $750.00 per year.

Total average cost of production is approximately $ 18,300.00 per year.

Farm Gate Value/Wholesale value:

50 papaya trees @ $75.00 each	=	$ 3,750.00 per year
45 mixed fruit trees @ $150 each	=	$ 6,750.00 per year
50 banana trees @ $120.00 each	=	$ 6,000.00 per year
Pua kinikini and Plumeria	=	$ 3,000.00 per year
Total estimated average crop value		$19,500.00 per year
Less the cost of production		$18,300.00 per year
Estimate farm profit per year		$ 1,200.00 per year

Marketing Plan:
Flowers will contracted out to local lei makers who supply the hotels and gift shops with fresh lei's, and kiosks at Lighthouse village shopping center.

Fruit will be sold at the farmers markets, fruit and juice stands, and local stores.

Best management practices and protocols for Somers Farm Plan.

(1) Soil management:
a) Ground preparation - the orchard area will be lawn at time of planting. Ground disturbance will be limited to 3 ft. diameter / 3ft deep planting holes, planting holes will be dug, planted, filled and mulched consecutively within a 48 hour time frame. There will be minimal soil disturbance.
b) Tillage - there will minor tillage on the property to install and rotate field crops.
c) Dust control - planting will occur during the wet season and there will be no dust created by planting activities.
d) Ground cover - the ground cover will be grass and be maintained by mowing at a minimum twice monthly or as needed.

(2) Water management:
a) Rainfall /drainage- the property is predominantly level with no erosion or visible drainage channels. The rainfall tends to disperse evenly. Since the orchard area is river bottom land, and thus the soil a sandy texture, the rainfall soaks in rapidly with excellent percolation. The orchard also will provide additional water retention capability and decrease any potential runoff possibility.
b) Irrigation- there will be minimal irrigation needed.

(3) Nutrient management:

a) Planting - at planting an organic slow release NPK 3-2-2 fertilizer will be placed inside the planting holes. Organic compost will be part of the planting soil mix.

b) Fertilizer - Orchards will be fertilized by top dressing with an organic NPK 3-2-2 fertilizer bi-annually.

c) Type - Fertilizer will be composed of slow release organic material such as: Cal phos, greensand, worm castings, compost, and bird guano.

d) Mulch - Orchard trees will be top-dressed with mulch at planting and the bi-annually

e) Storage- Fertilizer will be stored in the proposed Conservation Maintenance Building on the property, which is at a higher elevation, and situated near the existing residence.

(4) Integrated pest management:

a) crop diversity - the orchard is planned as polyculture fruit forest and the resulting species diversity will inhibit disease and insect infestation contagion.

b) pest /resistant cultivars -the orchard will be planted with grafted cultivar specially select for the local microclimate and maximum disease and pest resistance

c) monitoring - the orchard will be inspected for diseases and insect outbreaks as part of the monthly maintenance program

d) treatment - upon discovery of disease or insect infestation the affected will be treated with organic pyrethrum based insecticides such as "Safer Soap", copper based fungicides, and diatomaceous earth as warranted

f) removal- if a disease or infestation does not respond to treatment , then the subject tree will be removed and replaced with another variety

e) biological controls - beneficial insects such parasitic wasps, native spiders, lady bugs etc., thrive in the orchard habitat and will assist in natural pest control

f) pollination - several bee hives will be maintained in the orchard area to assist in successful pollination of the fruits and vegetables, additional beehives and honey production for the farm will be a future option

(5) Pesticides:

a) pesticides will be of the organic type, pyrethrum based and be labeled for use up to 3 days prior of harvest.

b) usage will be a spot of infestation application, will no regular spraying schedule anticipated.

c) rainfall periods - there will no spraying of pesticides of any type during periods of high rainfall.

d) storage - storage of any organic pesticides on the property will be in the Conservation Maintenance Building.

Agricultural Equipment Storage

Agricultural equipment required for the planting and maintenance of the Orchards as well as the maintenance of the Conservation areas, will be stored and serviced in the Conservation Maintenance Building.

The equipment consists of large farm tractor, tillers, disk harrow, shredder, sprayer, zero-turn mowers, weed-whackers, harvesting trailer, utility vehicles, and hand tools.

The Conservation Maintenance Building will also serve to store organic fertilizers used in the maintenance of the farm crops, boxes for packaging products etc., and covered packing area for the fruit and flower products.

F-1

KILAUEA FALLS RANCH

AGOR ARCHITECTURE
4374 KUKUI GROVE DR., # 204
LIHUE, KAUAI, HAWAII 96766

EXHIBIT "B"

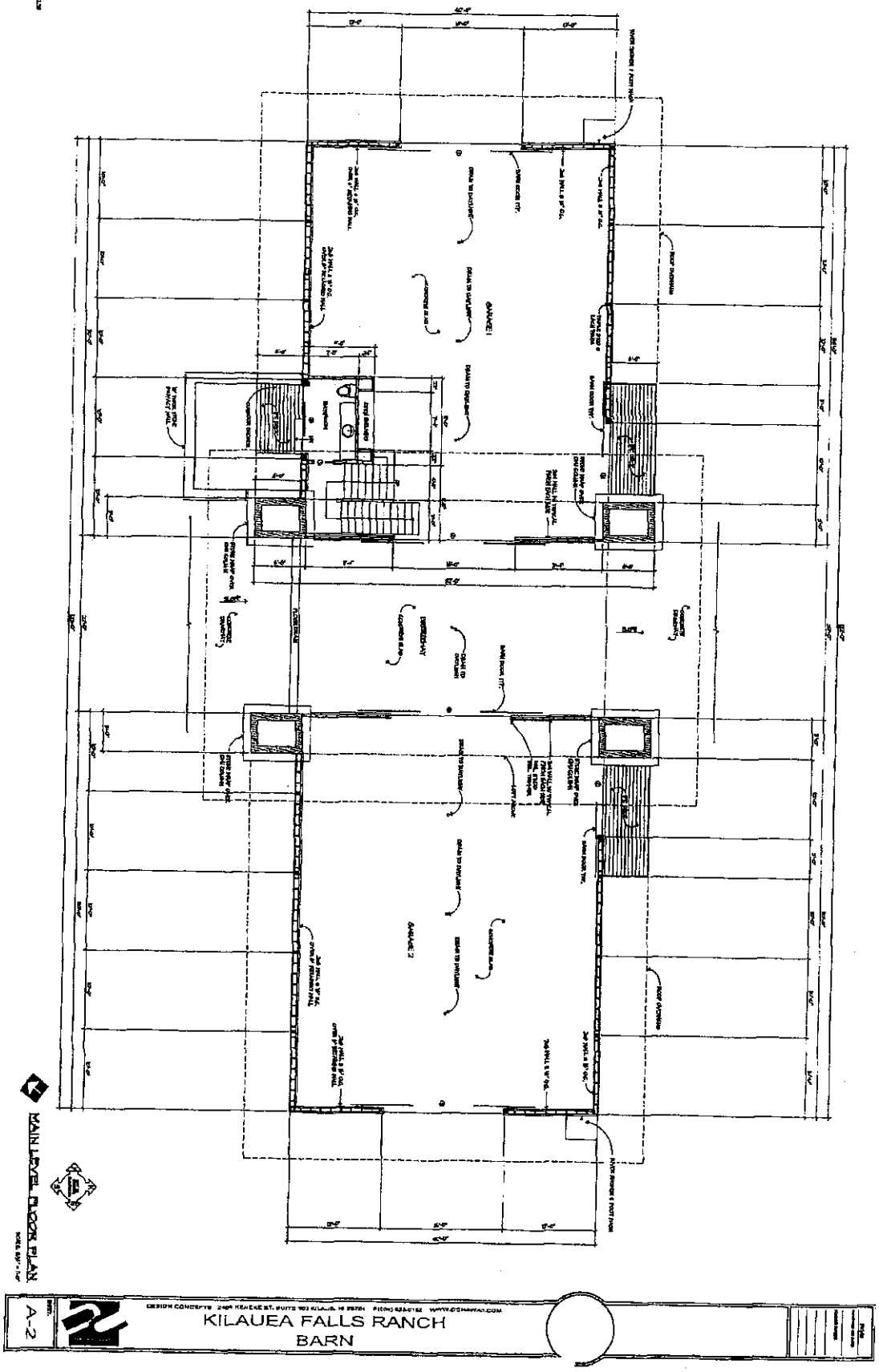
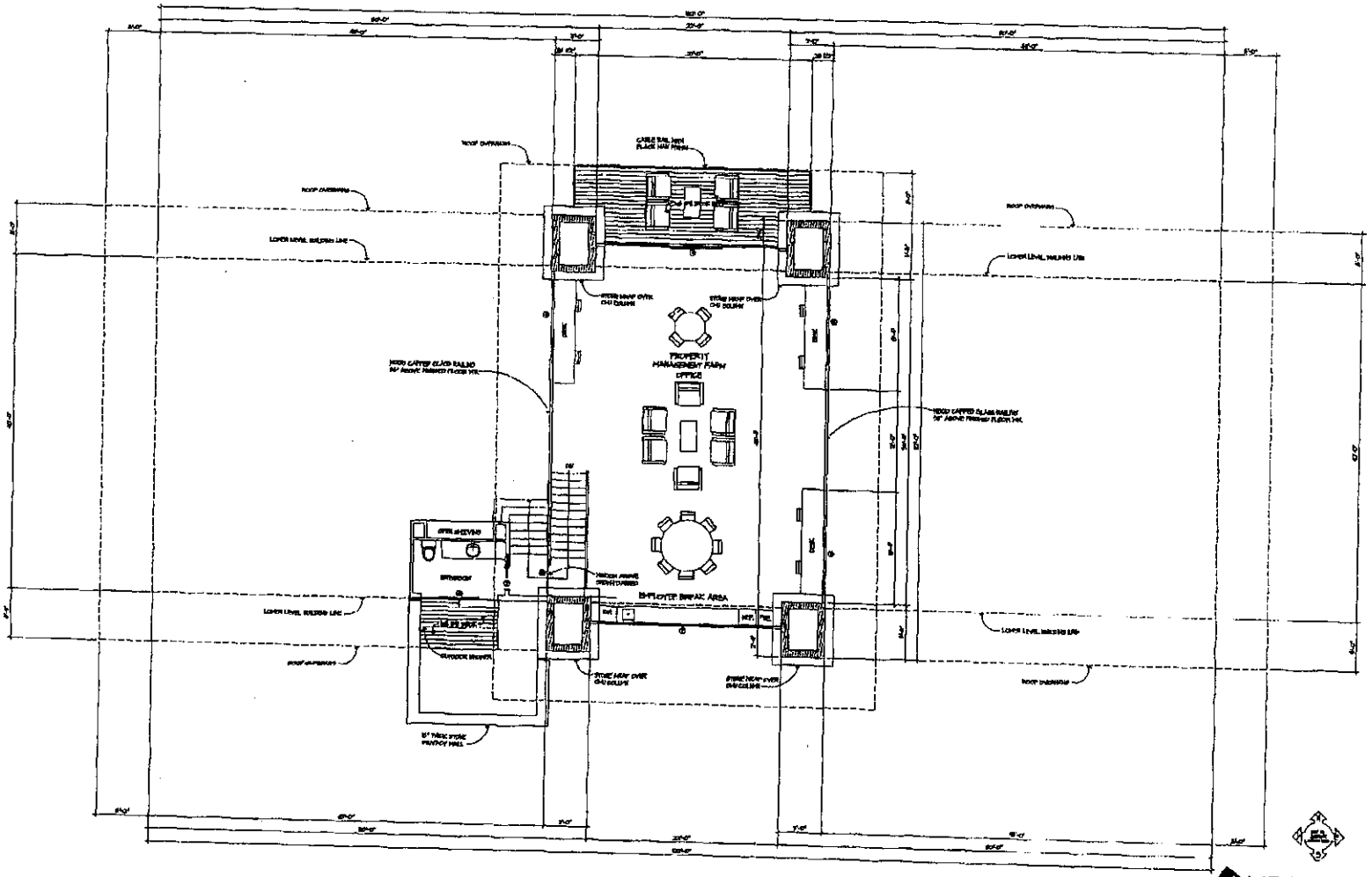


EXHIBIT "B"



DESIGN CONCEPTS 3444 KILAUEA ST. SUITE 102 HONOLULU, HI 96816 (808) 732-0110 WWW.DESIGNCONCEPTS.COM

KILAUEA FALLS RANCH

BARN

A-2.1

EXHIBIT "C"

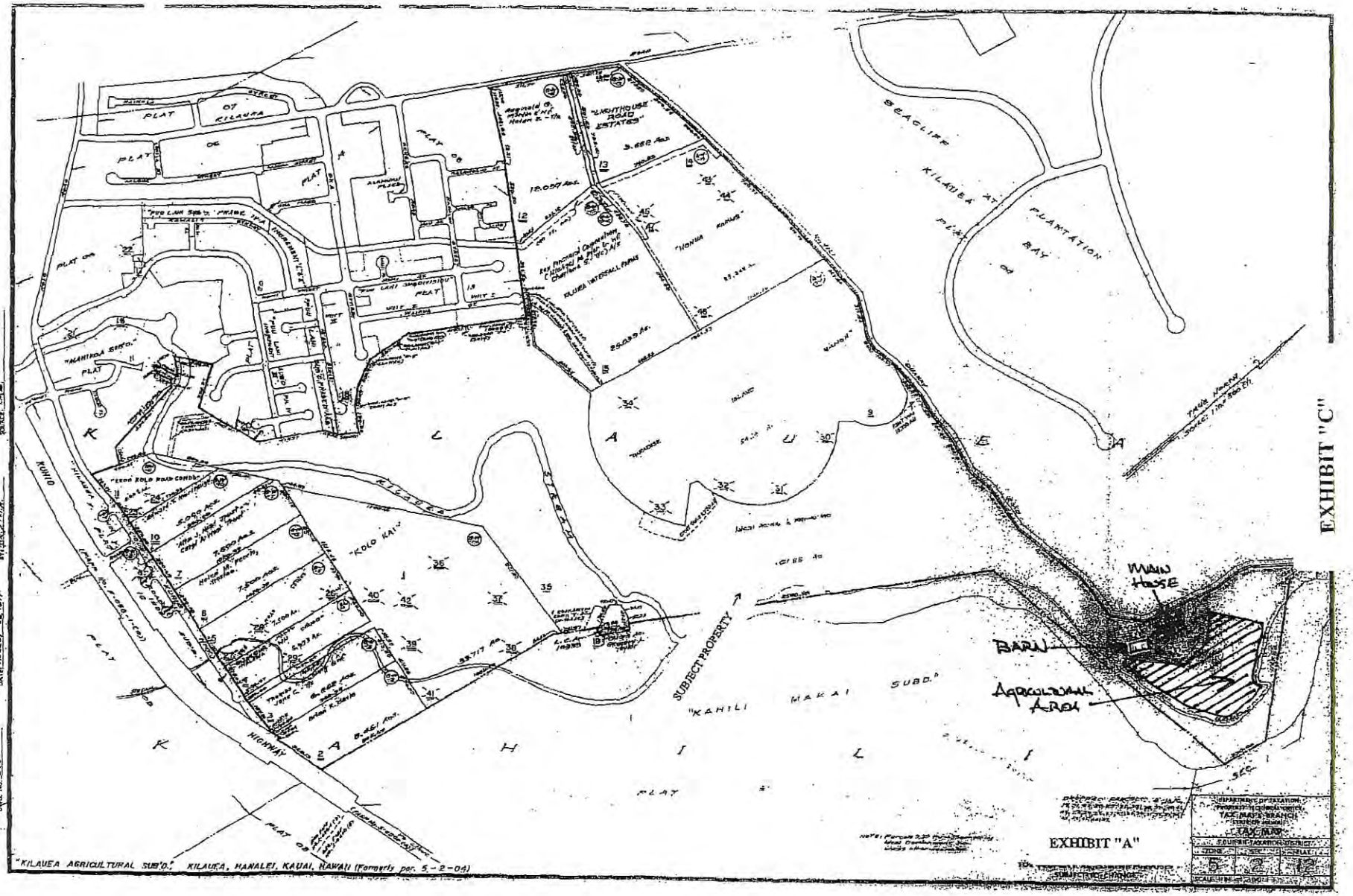


EXHIBIT "C"
EXHIBIT "A"
SUBJECT PROPERTY
MAIN HOUSE
BARN
AGRICULTURAL AREA
"KAHILI MAKAI SUBD."
"KOLO KAI"
"LIGHTHOUSE ROAD ESTATES"
"FOO LAN SUB'D."
"MAHINDA SUB'D."
"FOO KOLO ROAD CONDO"
"KILAUEA AGRICULTURAL SUB'D." KILAUEA, HANALEI, KAUAI, HAWAII (Formerly por. 5-2-04)
TAX MAP
5 2 12

DEPARTMENT OF PLANNING
THE COUNTY OF KAUA'I
DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHILIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

TMK: (4) 5-2-012:035 **CLASS I ZONING PERMIT NO.** Z-IV-2008-6

DATE: April 4, 2019 **BY** MAX W. J. GRAHAM, JR., ESQ.

Planning Director's Conditions of Approval for Agricultural Structures on State and/or County Agriculture Zone Land:

1) The Applicant shall submit an Agricultural Plan detailing crops, utilization of space within the structures of processing or working the crops, how the structures are relevant, and how many anticipated employees the structure will accommodate within five (5) days of approval or the Applicant will be considered in violation of the terms of approval. The Director or his designee must approve of the farm plan to validate agriculture use on the property.

2) Any change or deviation from the farm plan must receive approval from the Planning Director in advance of a change.

3) The Applicant must produce income from the agricultural activity.

4) The Applicant shall annually transmit electronically to the Planning Department copies of its relevant Schedule F, income tax filings and general excise tax statements evidencing agricultural income on the property before April 30 of each year to czoupdate@kauai.gov.

5) Failure to conform to the terms of the approved farm plan shall be considered a violation under the CZO, and could be punishable up to a $10,000 fine and/or revocation of this permit.

ATTACHMENT OF THIS FORM TO THE ZONING PERMIT SHALL BE CONSIDERED INCLUDED MANDATORY CONDITIONS OF APPROVAL PURSUANT TO SECTION 8-19.3(C), KAUA'I COUNTY CODE (1987), AS AMENDED.

Ka'āina S. Hull
Director of Planning

V:\Resource Library\Forms - Applications\Ag Structures_Director's Cond 20180108 page 1.dotx.docx

DEPARTMENT OF PLANNING
THE COUNTY OF KAUA'I
DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHILIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

DIRECTOR'S MANDATORY CONDITIONS OF APPROVAL CONCERNING NON-RESIDENTIAL STRUCTURES ON AGRICULTURAL LANDS

FARM PLAN FOR CLASS I ZONING APPLICATIONS

THIS FORM IS PROVIDED TO APPLICANTS FOR CLASS I ZONING PERMITS TO AID IN MEETING THE REQUIREMENTS OF THE DIRECTOR'S MANDATORY CONDITIONS FOR NON-RESIDENTIAL STRUCTURES ON AGRICULTURAL LANDS:

1) The Applicant shall submit an Agricultural Plan detailing crops, utilization of space within the structures of processing or working the crops, how the structures are relevant, and how many anticipated employees the structure will accommodate within five (5) days of approval or the Applicant will be considered in violation of the terms of approval. The Director or his designee must approve of the farm plan to validate agriculture use on the property.
2) Any change or deviation from the farm plan must receive approval from the Planning Director in advance of a change.
3) The Applicant must produce income from the agricultural activity.
4) The Applicant shall annually transmit electronically to the Planning Department copies of its relevant Schedule F, income tax filings and general excise tax statements evidencing agricultural income on the property before April 30 of each year to czoupdate@kauai.gov.
5) Failure to conform to the terms of the approved farm plan shall be considered a violation under the CZO, and could be punishable up to a $10,000 fine and/or revocation of this permit.

CLASS I PERMIT NUMBER:	Z-IV-2008-6
TYPE OF CROP(S):	Orchard crops (citrus, avocado, banana, papaya); vegetables; flowers (plumeria, puakinikini)
VOLUME OF CROP(S) ANTICIPATED:	See the Farm Plan attached as Exhibit "A"
BUILDING(S) REQUIRED FOR WHAT PURPOSE?	The Barn (Conservation Maintenance Building) will be used to store equipment and supplies. See the Barn Floor Plans attached as Exhibit "B".
NO. OF EMPLOYEES ANTICIPATED:	Four (4) employees will be involved in the agricultural activities.

***NOTE: To complete this form, the Applicant must attach a copy of the approved Floor Plan and outline the use of each space within the structure, and explain how the spaces are necessary to the cultivation of the above referenced crops. Plans must also show where certain crops are anticipated to be planted on the subject property.**

SUBMITTED BY (Print Name, Sign and Date):

4/4/19

MAX W. J. GRAHAM, JR.

PLANNING DEPARTMENT:

Dis/Approved By _____

Date:

EXHIBIT “D”

BELLES GRAHAM LLP

ATTORNEYS AT LAW

MICHAEL J. BELLES
MAX W.J. GRAHAM, JR.
DONALD H. WILSON
JONATHAN J. CHUN
IAN K. JUNG

WATUMULL PLAZA
4334 RICE STREET, SUITE 202
LIHUE, KAUAI, HAWAII 96766-1388

TELEPHONE NO: (808) 245-4705
FACSIMILE NO: (808) 245-3277
E-MAIL: mail@kauai-law.com

OF COUNSEL
DAVID W. PROUDFOOT

COUNSEL
LORNA A. NISHIMITSU

Federal I.D. No. 99-0317663

April 5, 2019

Mr. Ka'āina S. Hull
Director of Planning
Planning Department
4444 Rice Street, Suite A-473
Lihue, Kauai, Hawaii 96766

VIA EMAIL ONLY

Re: **Amendment To Special Management Area Use Permit SMA(U)-2008-5, Use Permit No. U-2008-4, and Class IV Zoning Permit No. Z-IV-2008-6**
Lot 2
Kilauea, Kauai, Hawaii
Kauai Tax Map Key No. (4) 5-2-012:035
Owner: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company

Dear Mr. Hull:

Pursuant to Condition A16. of the Amendment To Special Management Area Use Permit SMA(U)-2008-5, the Owner is notifying you that the following person has designated to receive requests from the public to access the Kilauea Falls:

Mr. Rohn Boyd
P. O. Box 820
Kilauea, Kauai, Hawaii 96754
Phone: (808) 652-0530
Email: rohnboyd@gmail.com

Thank you very much for your assistance in this matter.

Sincerely yours,

BELLES GRAHAM LLP

Max W. J. Graham, Jr.

MWJG:jgm
cc: Mr. Charles Somers (via email only)
Mr. Ron Alvarado (via email only)
Mr. Rohn Boyd (via email only)

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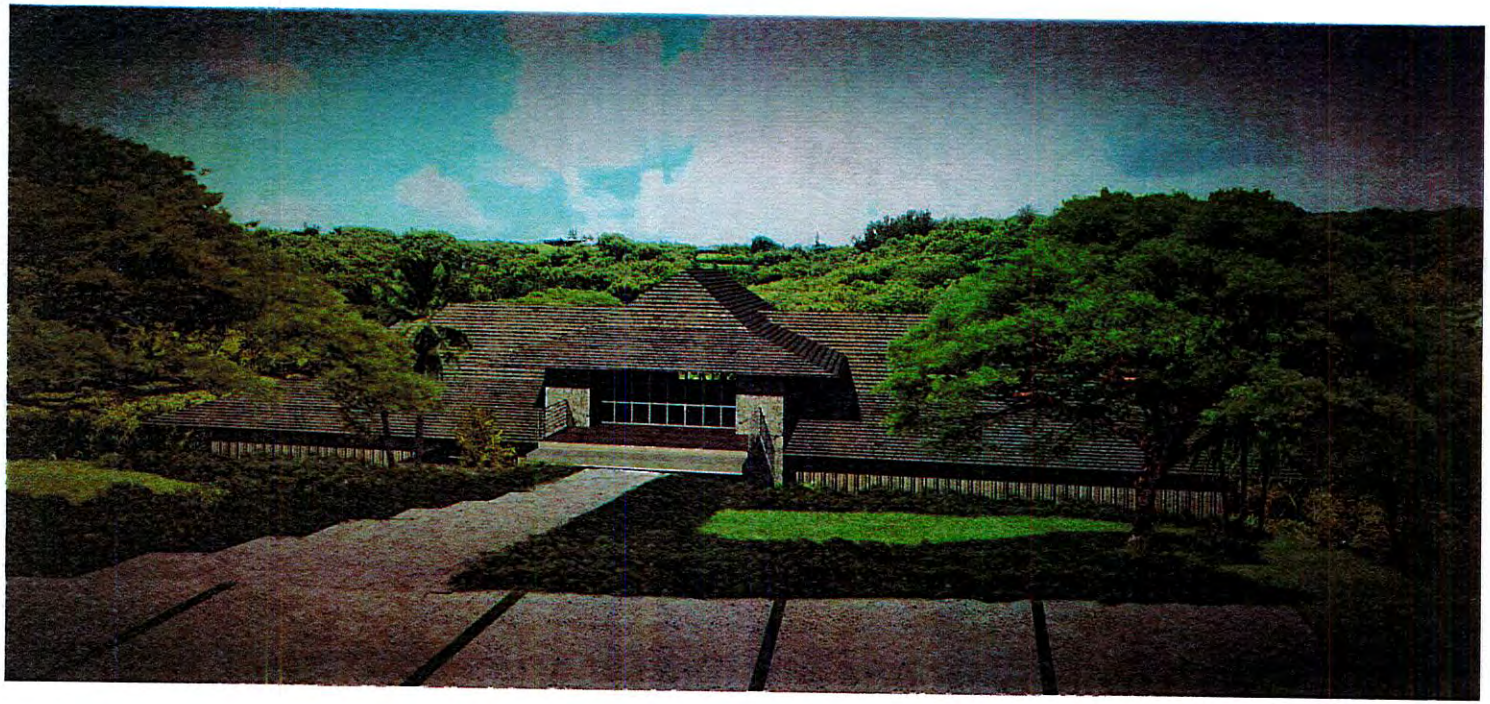
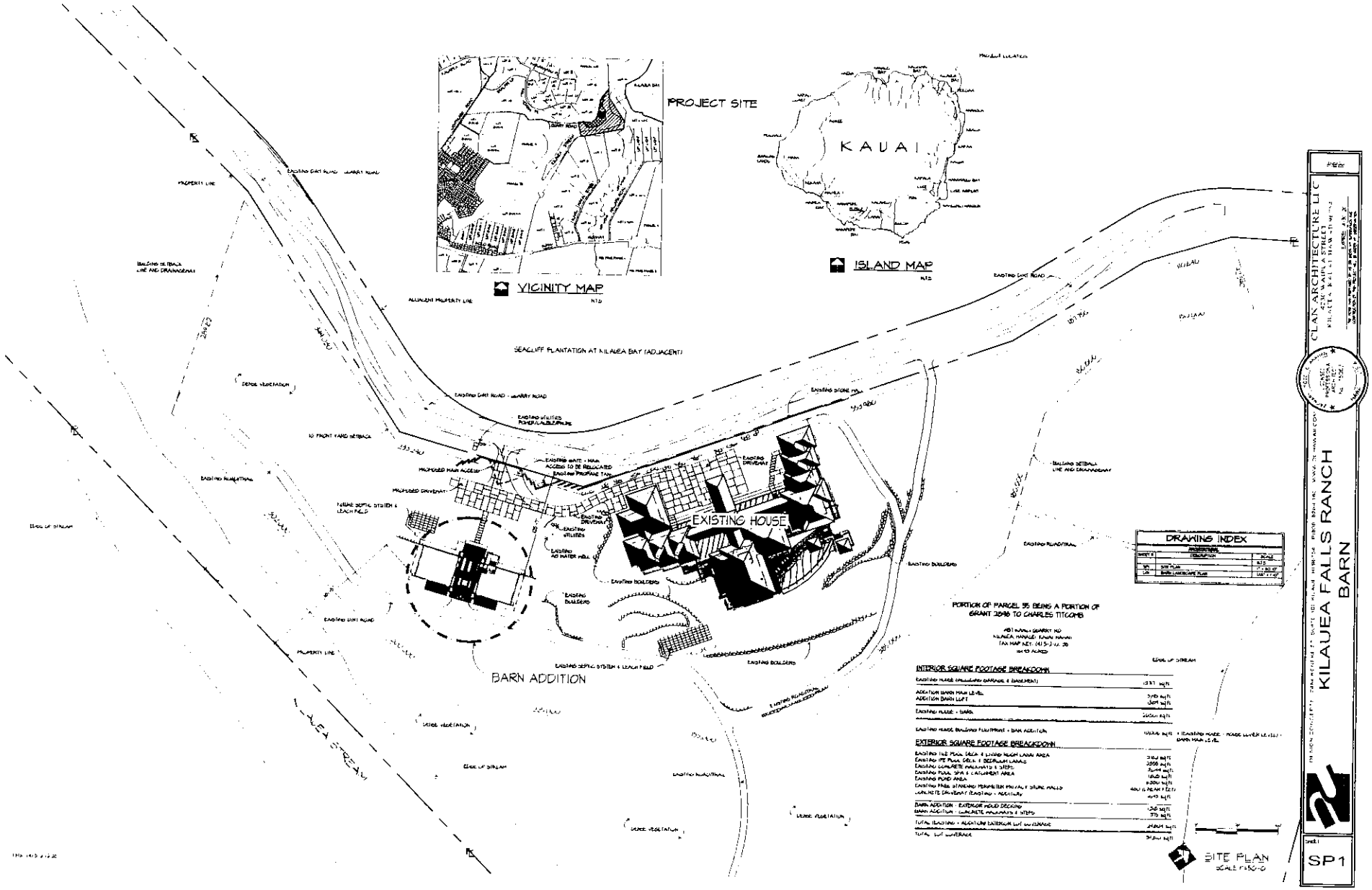
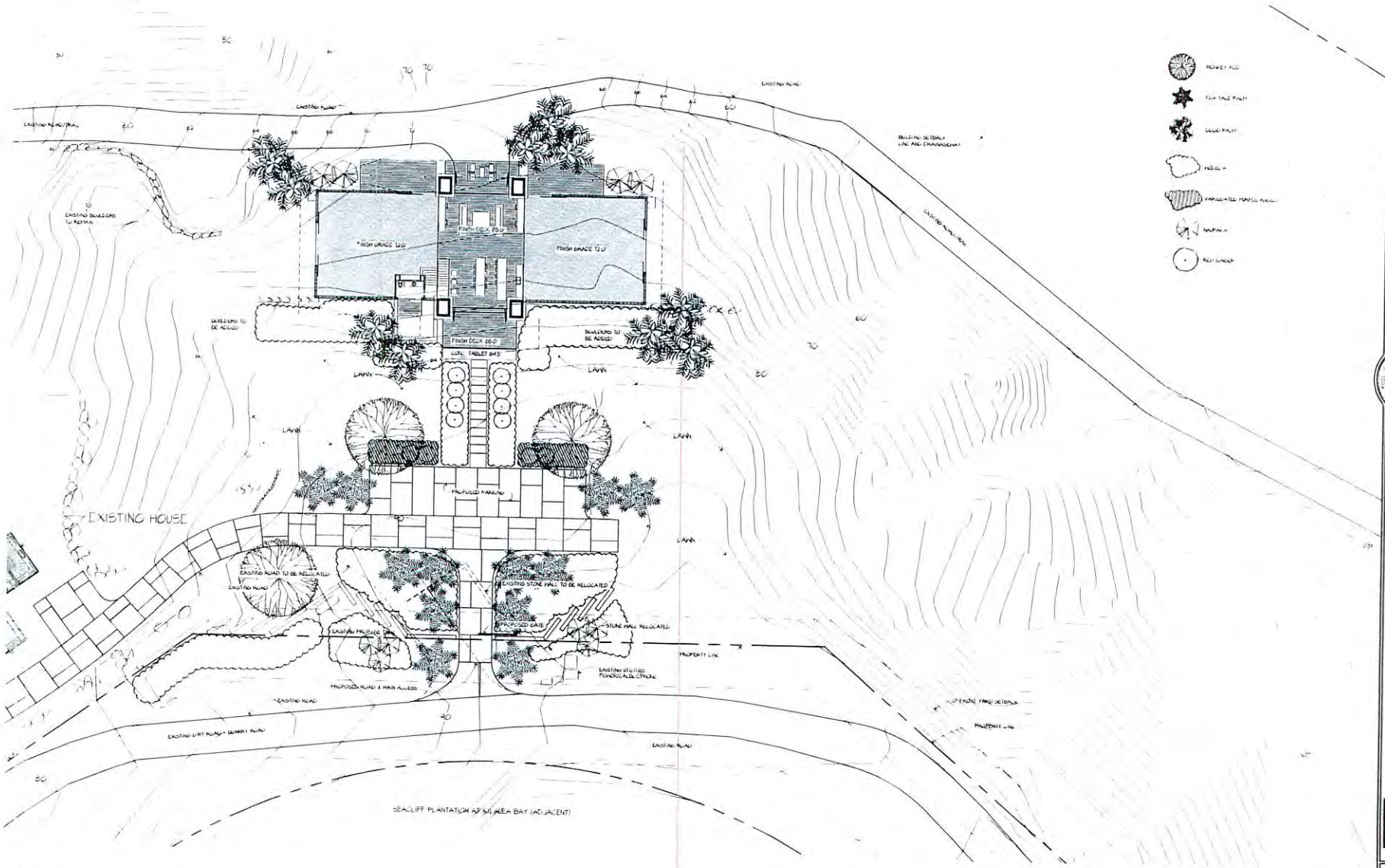
EXHIBIT “E”




PROJECT SITE
VICINITY MAP
KAUAI
ISLAND MAP
SEACLIFF PLANTATION AT KILAUEA BAY (ADJACENT)
EXISTING HOUSE
BARN ADDITION
KILAUEA STREAM
PROPERTY LINE
EXISTING DIRT ROAD
EXISTING BOULDERS
EXISTING SEPTIC SYSTEM & LEACH FIELD
PROPOSED MAIN ACCESS
PROPOSED DRIVEWAY
EXISTING DRIVEWAY
EXISTING UTILITIES
EXISTING STONE WALL
EXISTING RUNOFF
DENSE VEGETATION
BUILDING SETBACK LINE AND DRAINAGEWAY
10' FRONT YARD SETBACK
EDGE OF STREAM
DRAWING INDEX
PORTION OF PARCEL 35 BEING A PORTION OF GRANT 3046 TO CHARLES TITCOMB
INTERIOR SQUARE FOOTAGE BREAKDOWN
EXTERIOR SQUARE FOOTAGE BREAKDOWN
SITE PLAN
SCALE 1"=50'-0"
CLAN ARCHITECTURE LLC
KILAUEA FALLS RANCH
BARN
SP1



BARN CONCEPTUAL LANDSCAPE PLAN

SCALE 1/16=1'-0

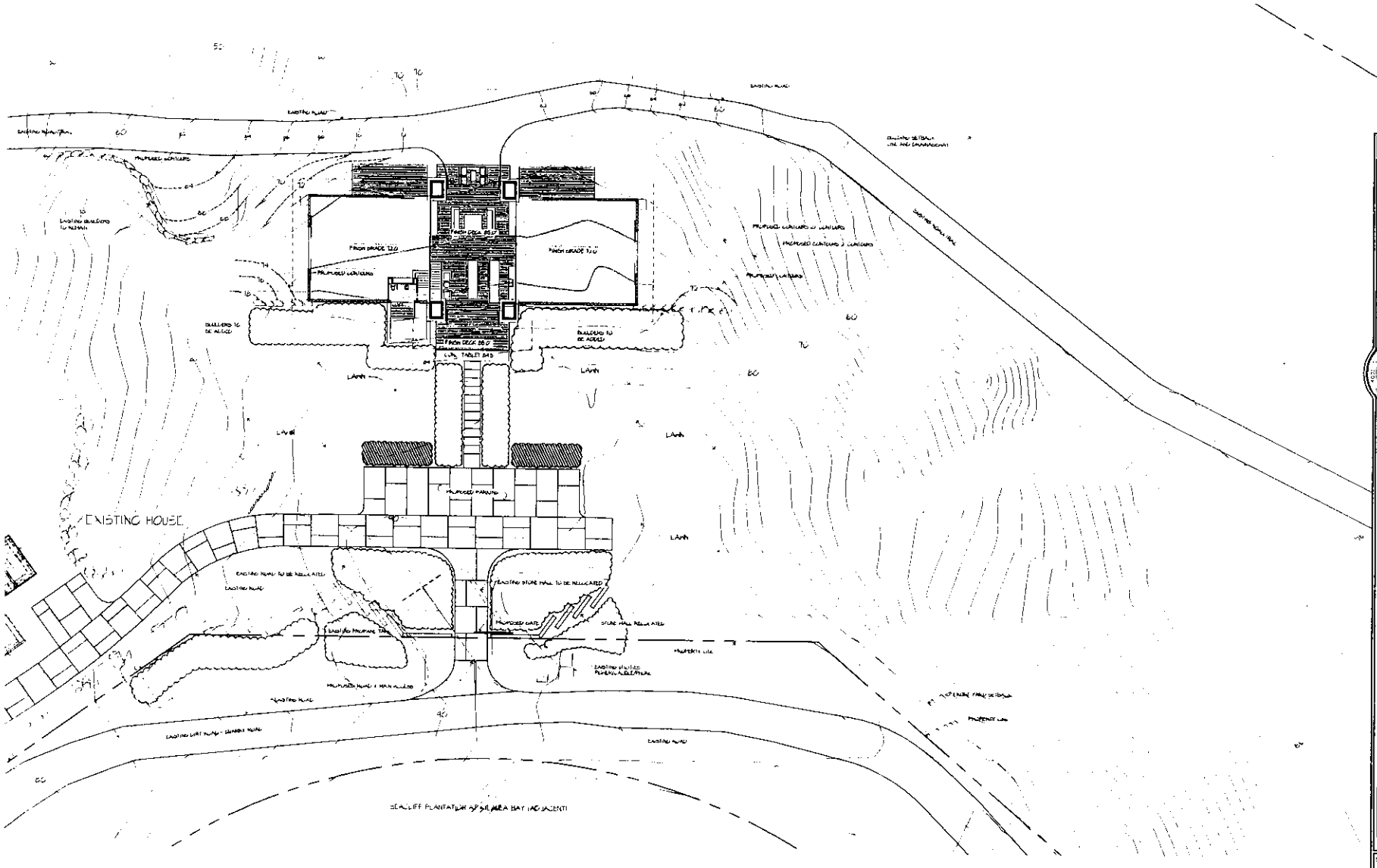
CLAN ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

SHEET

L01



BARN CONCEPTUAL GRADING PLAN

SCALE 1/16"=1'-0"

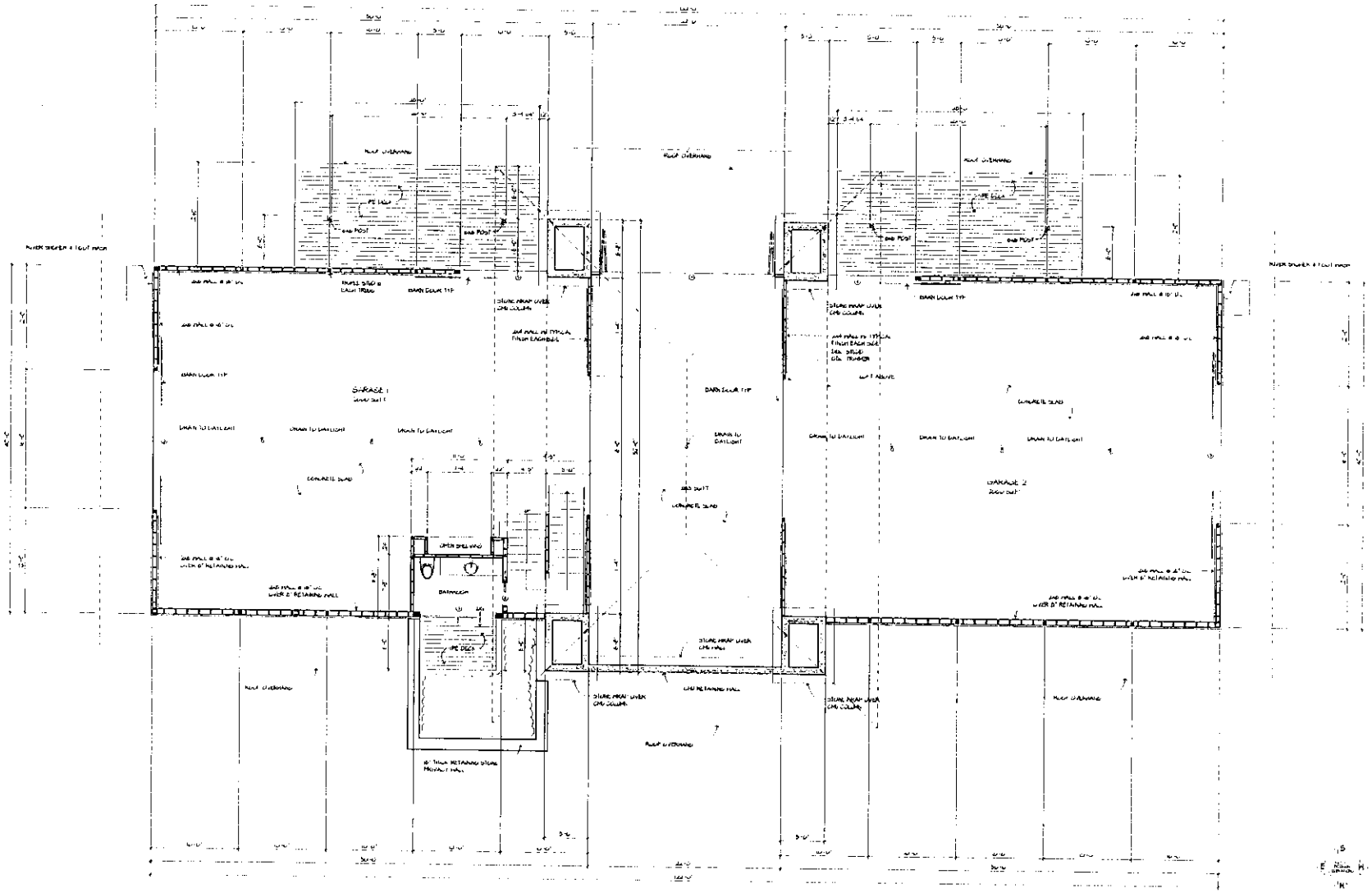
CLAN ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

SHEET

C01

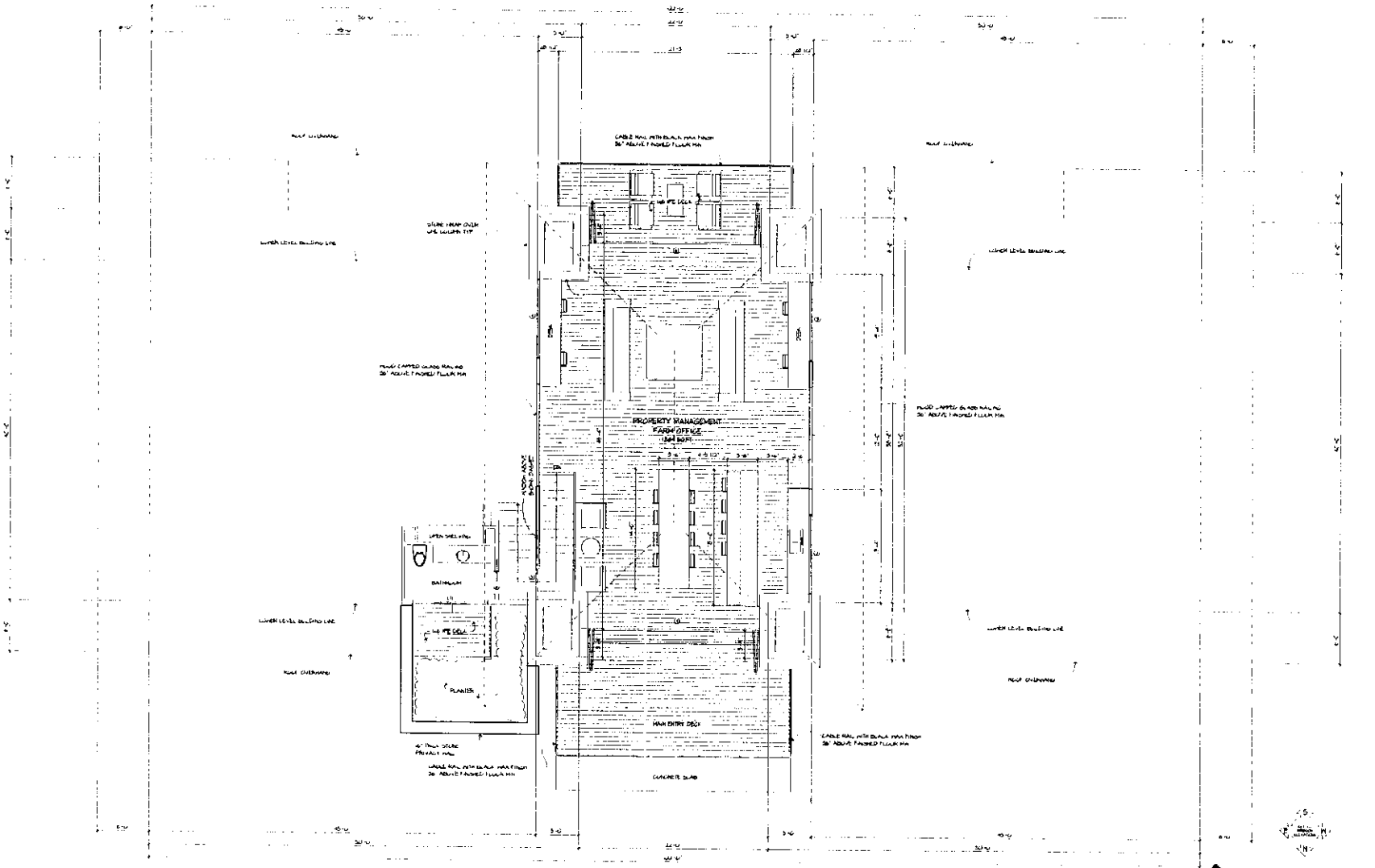


MAIN LEVEL FLOOR PLAN

CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

A01



LOFT FLOOR PLAN

SCALE: 3/16" = 1'-0"

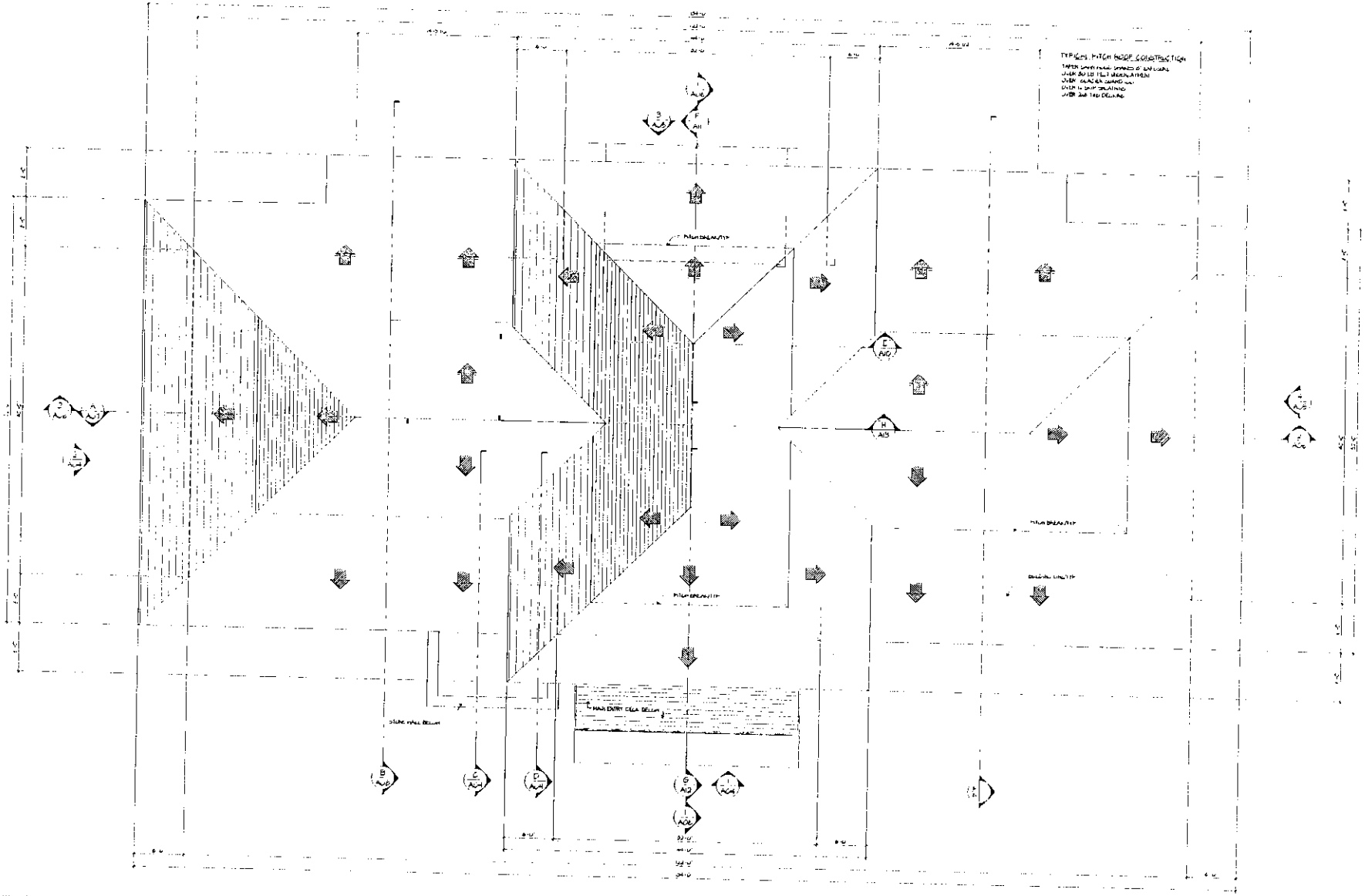
CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

SHEET

A02

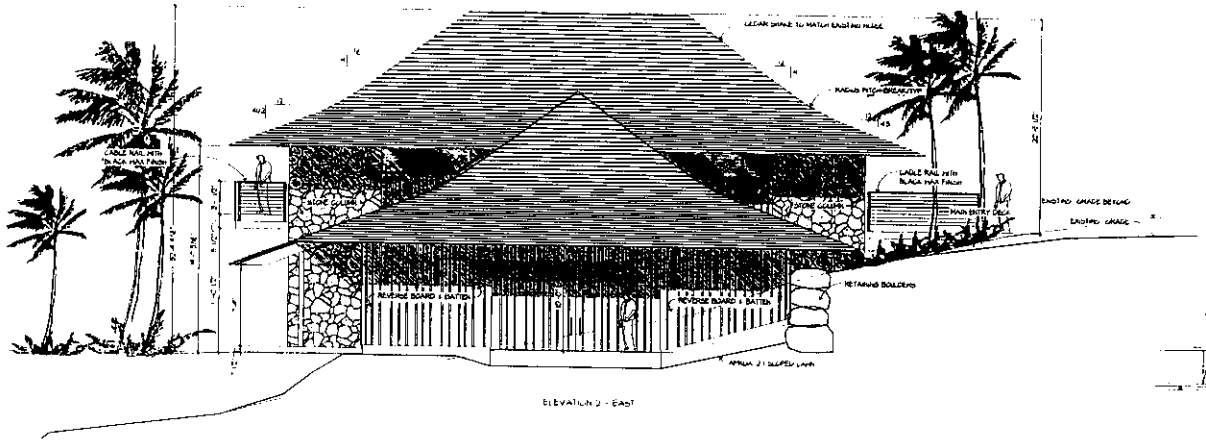


ROOF PLAN & KEY TO SECTIONS

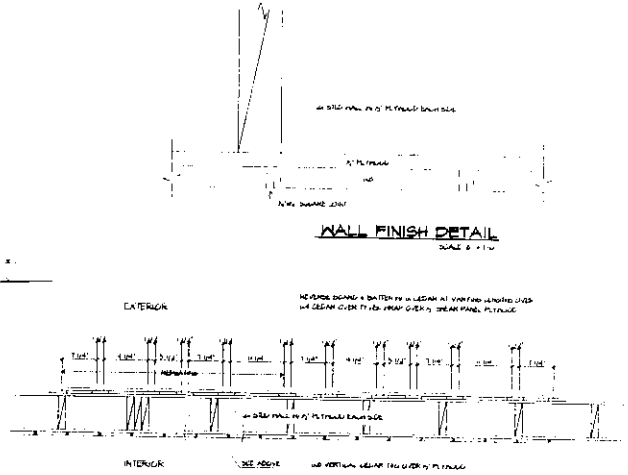
CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

A03

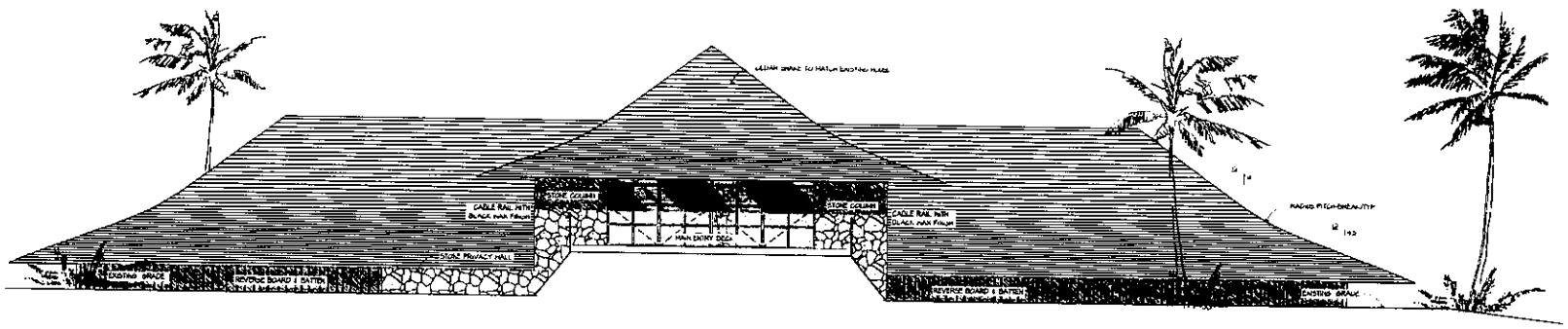


ELEVATION 2 - EAST



WALL FINISH DETAIL

EXTERIOR WALL FINISH DETAIL



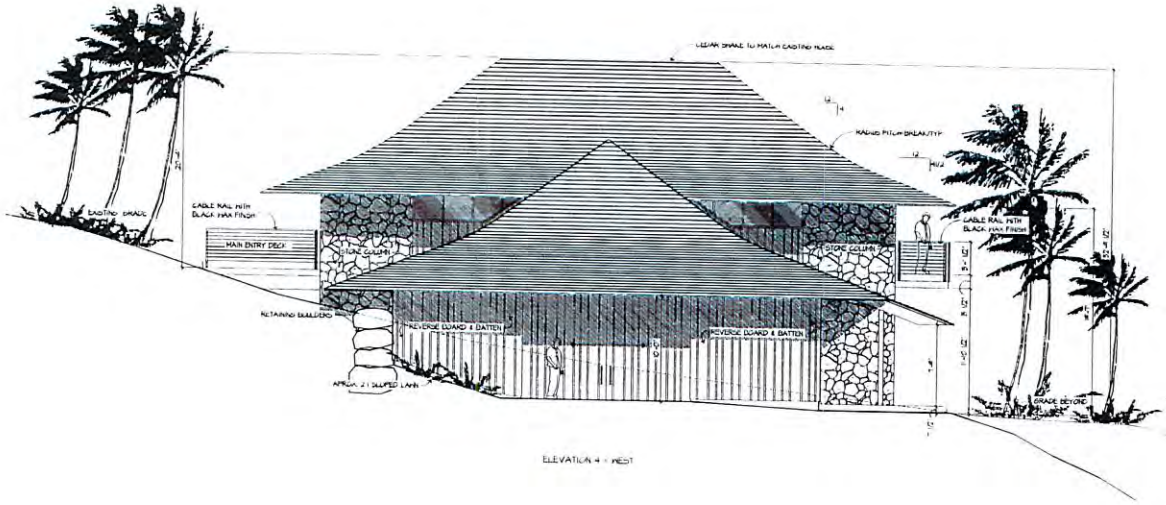
ELEVATION 1 - NORTH

EXTERIOR ELEVATIONS

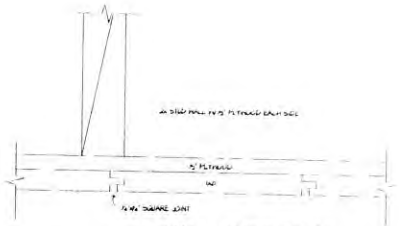
CLA ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

SHEET:
A04

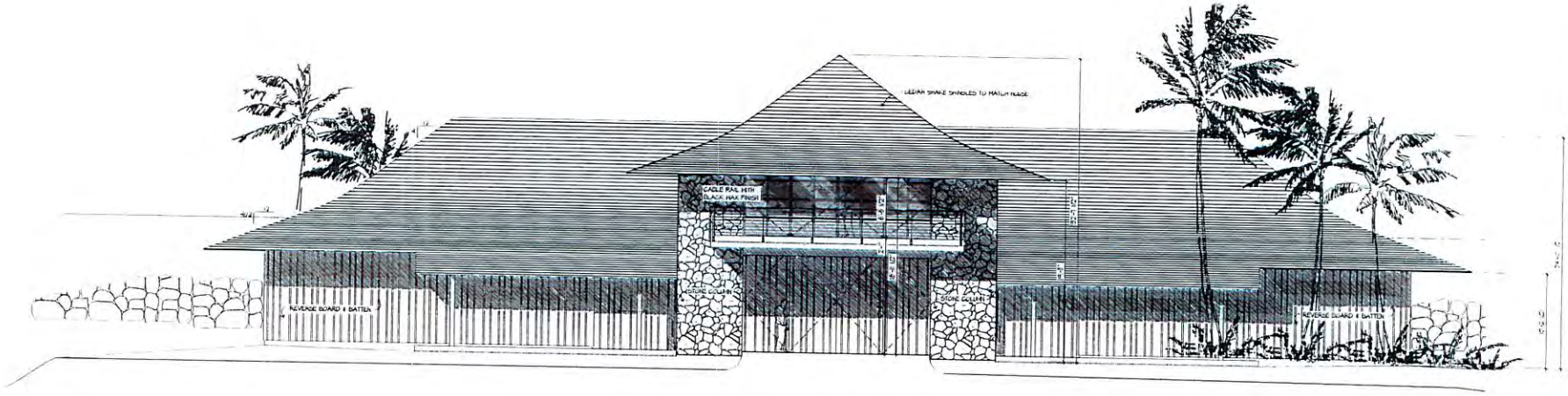


ELEVATION 4 - WEST



WALL FINISH DETAIL

EXTERIOR WALL FINISH DETAIL



ELEVATION 3 - SOUTH

EXTERIOR ELEVATIONS

SCALE: 3/16" = 1'-0"

DESIGN CONCEPTS 2486 KENUKE ST. SUITE 110 KILAUE, HI 96754 PHONE 808-828-1881 DAVID DONALDSON, CDM

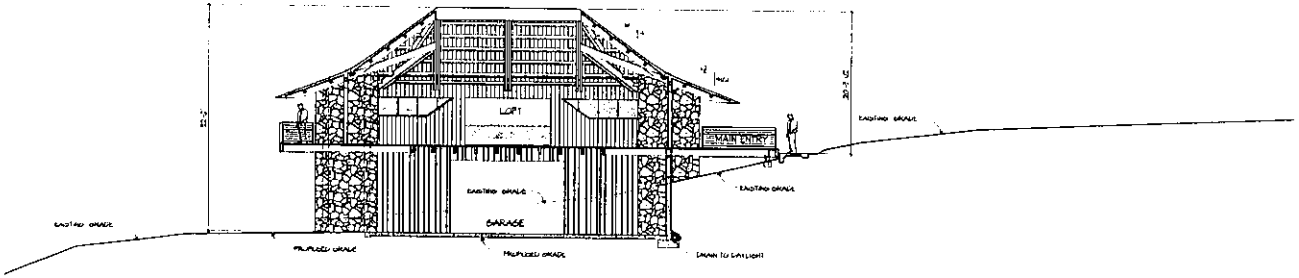
CLAY ARCHITECTURE LLC
4-5-5 KAUMALII HIGHWAY
KILAUEA, KAUAI, HI 96754
EXPIRES: 4-30-22

LICENSED PROFESSIONAL ARCHITECT NO. 5656

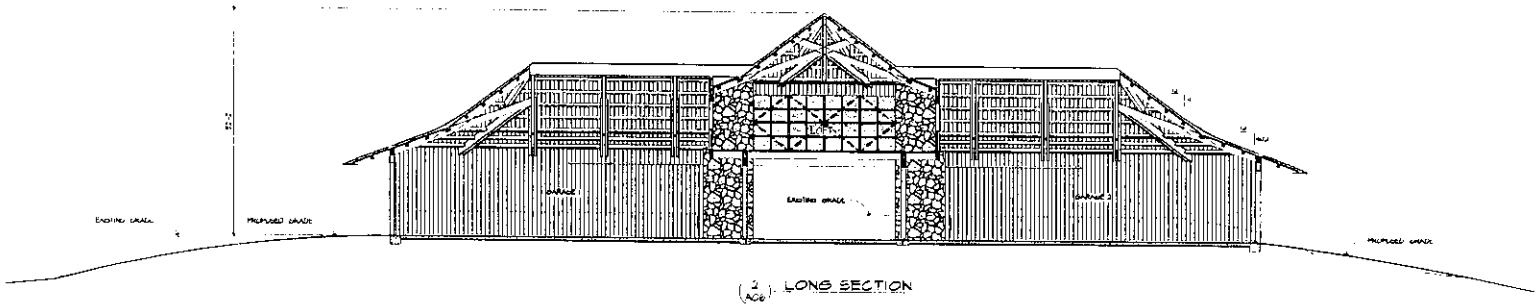
KILAUEA FALLS RANCH BARN

SHEET
A05

TMK: 5-4-5-2-1-0-2-0



(1/A06) SHORT SECTION



(2/A06) LONG SECTION

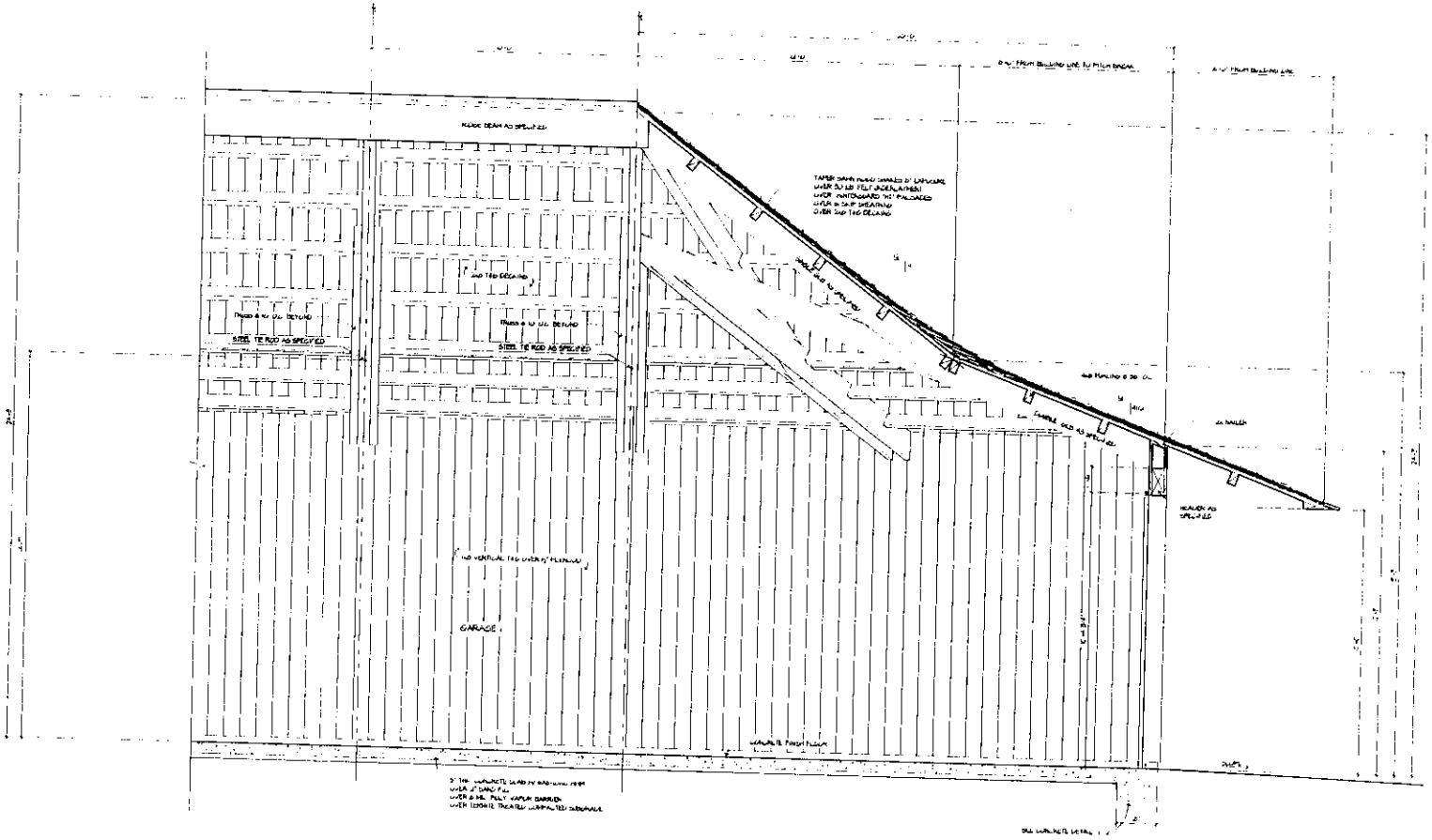
SITE SECTIONS

SCALE: 1/8" = 1'-0"

CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

SHEET
A06



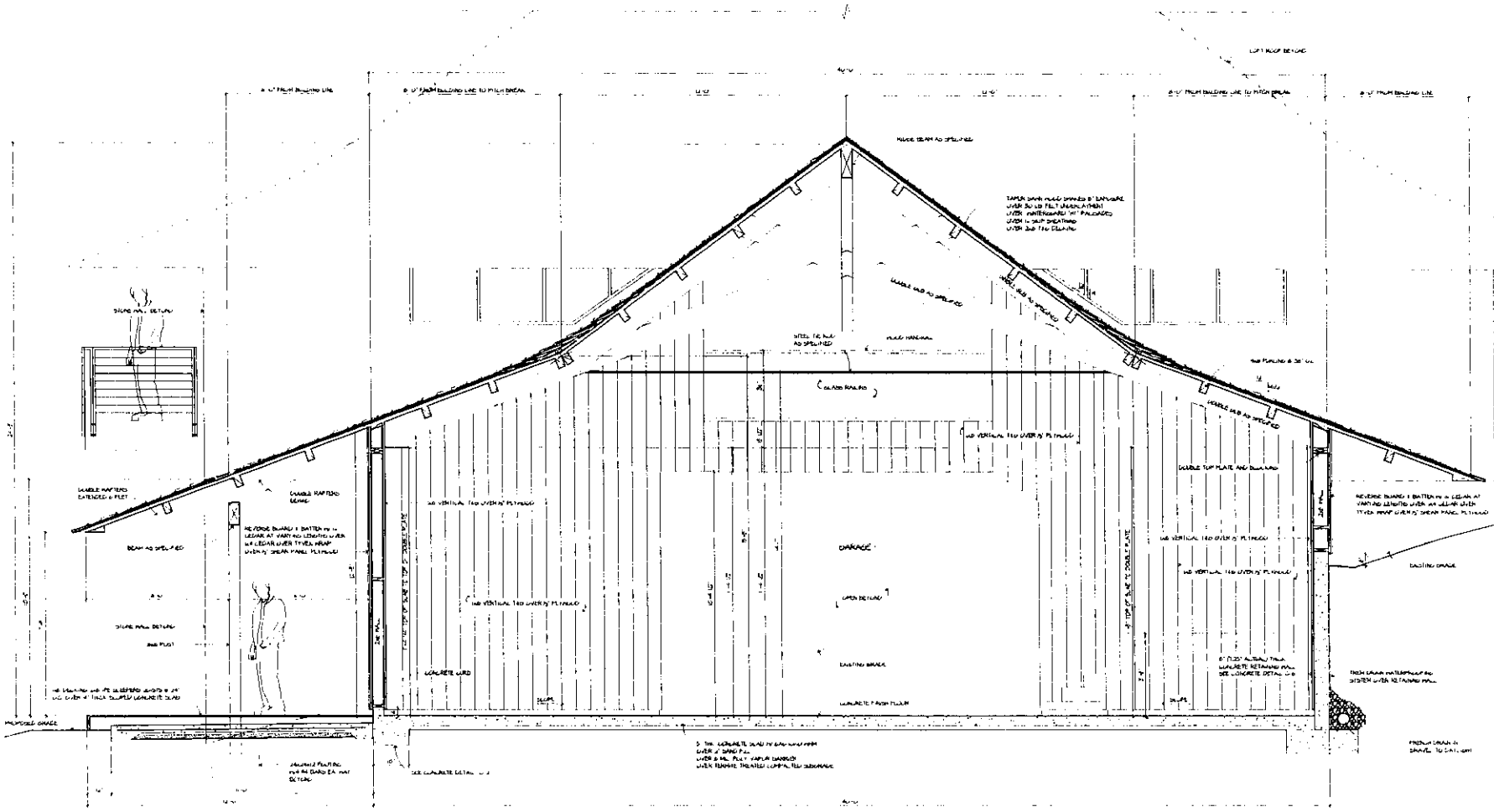
A07 - LONG SECTION THRU GARAGE 1

DETAILED BUILDING SECTION

CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

SHEET
A07



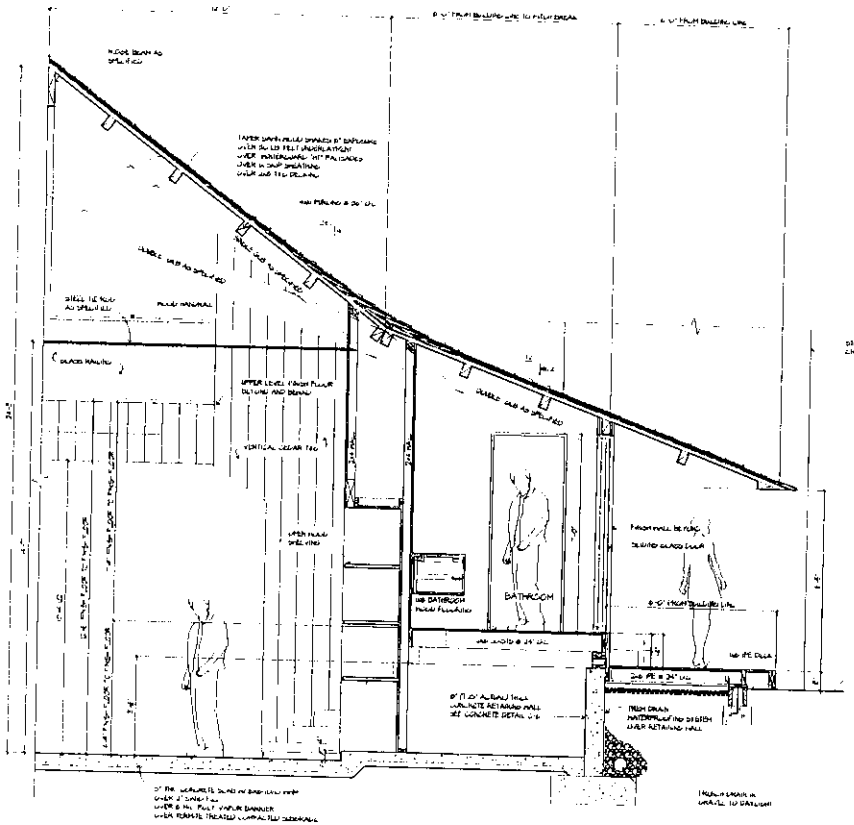
B. SHORT SECTION THRU GARAGE I
A08

DETAILED BUILDING SECTION

CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

SHEET
A08



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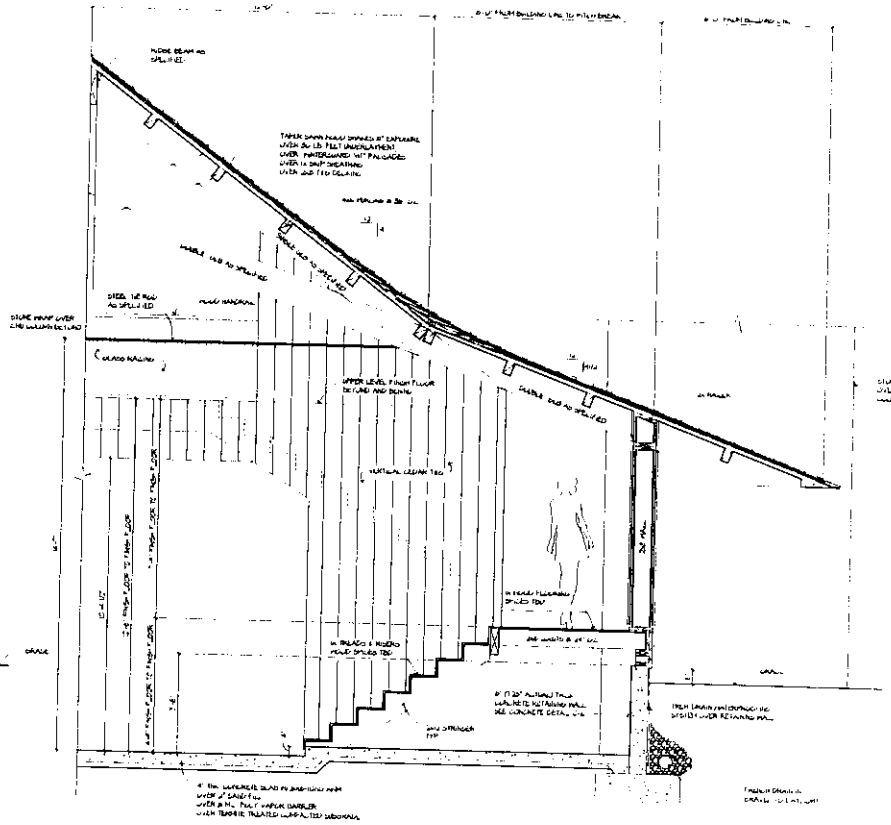


D A2.1 SECTION THRU STAIRS

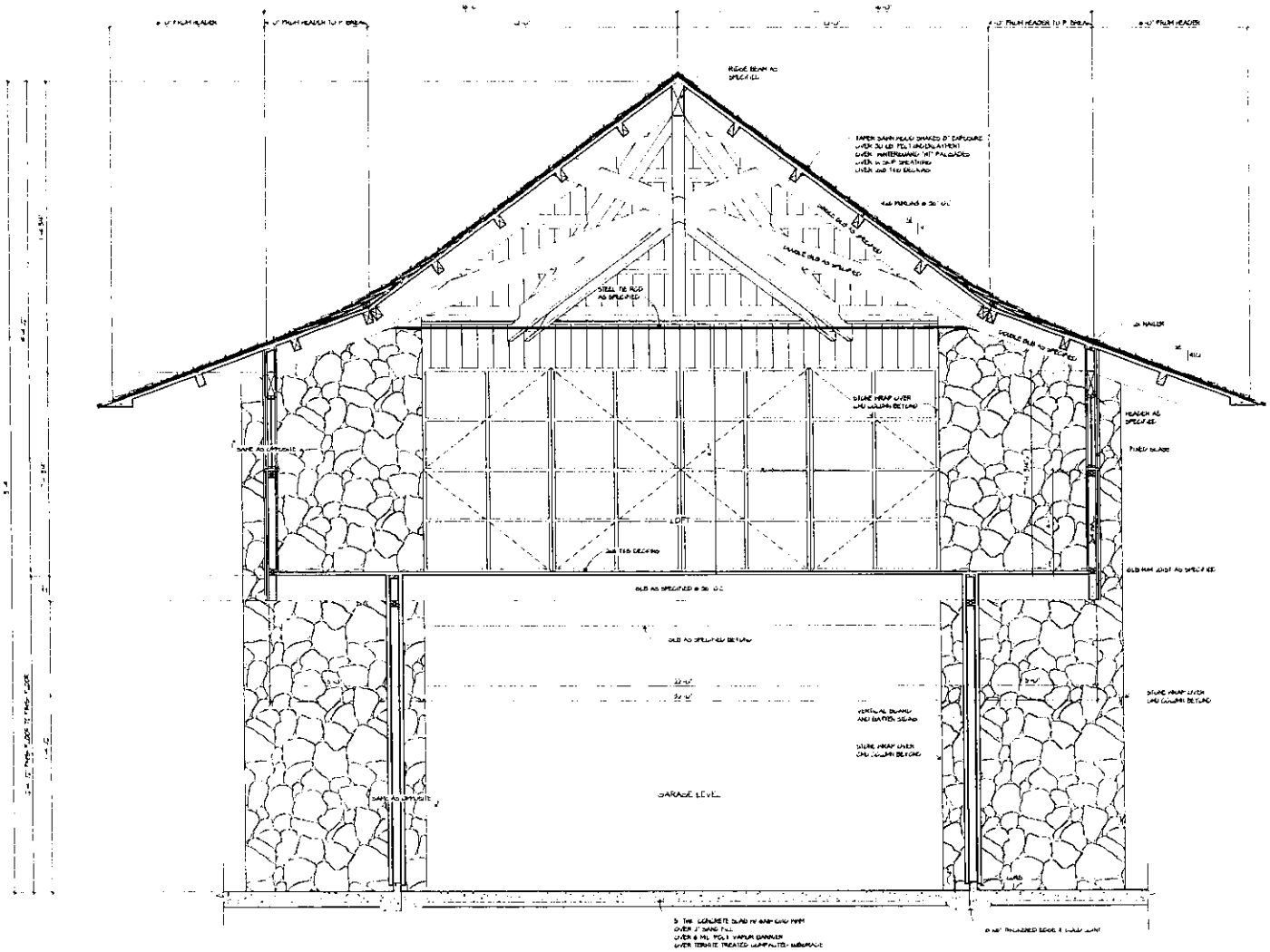
DETAILED BUILDING SECTION

SCALE

CLA ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

A09



(E/A10) SECTION THRU LOFT

DETAILED BUILDING SECTION

SCALE: 1/2" = 1'-0"

CLAN ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

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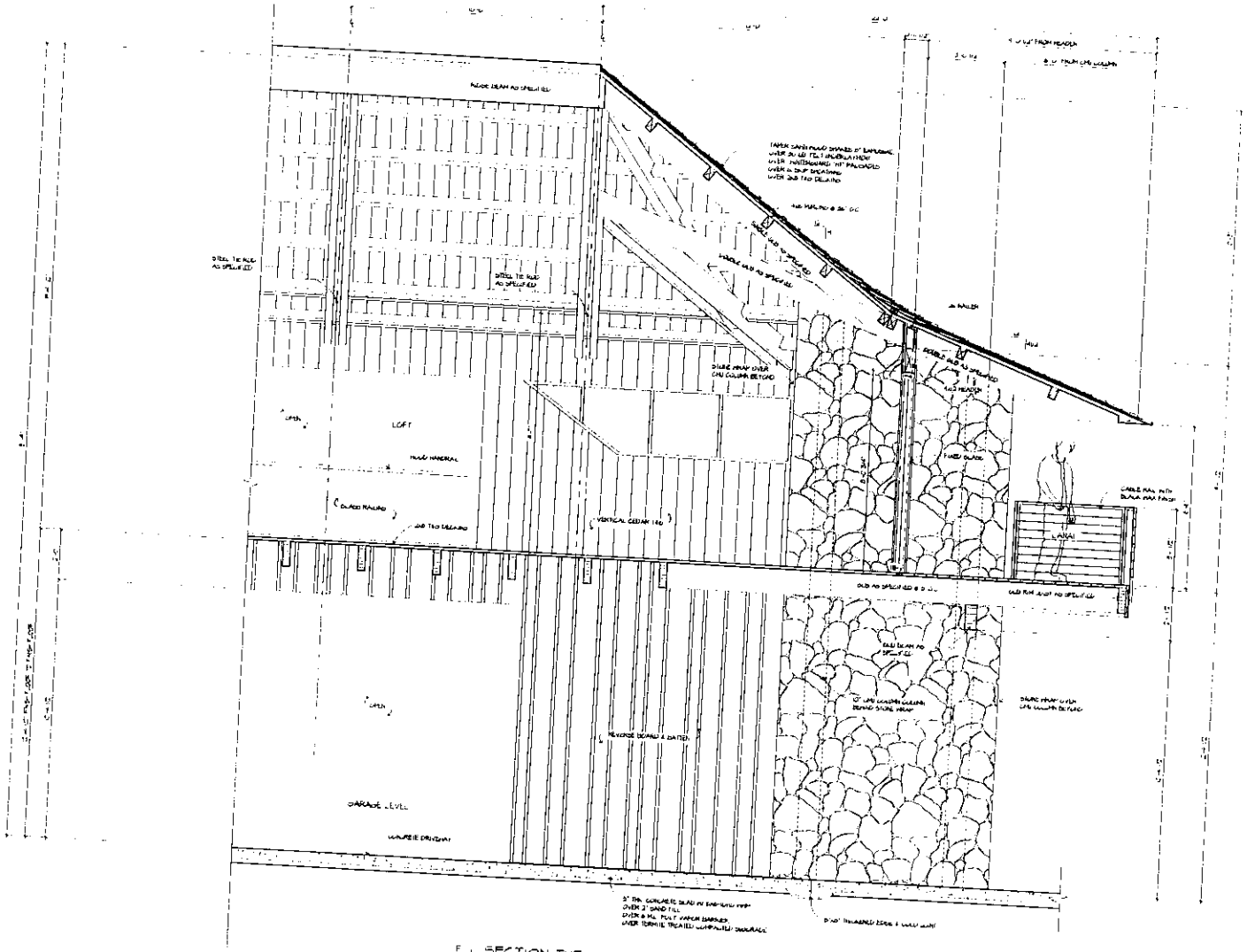
A10



(F/All) SECTION THRU LOFT

DETAILED BUILDING SECTION

SCALE: 1/2"

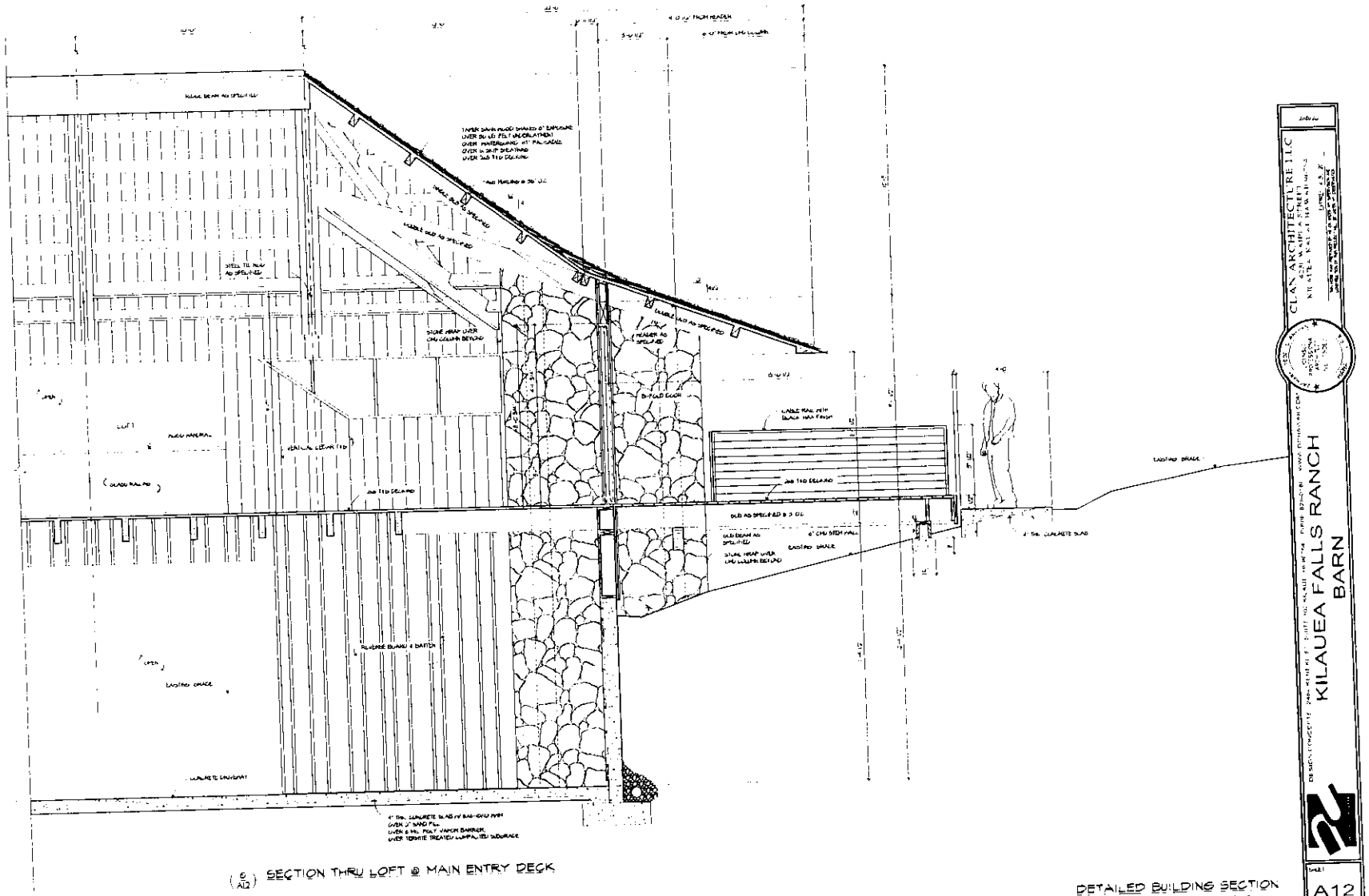
CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

SHEET

A11



(6/A12) SECTION THRU LOFT @ MAIN ENTRY DECK

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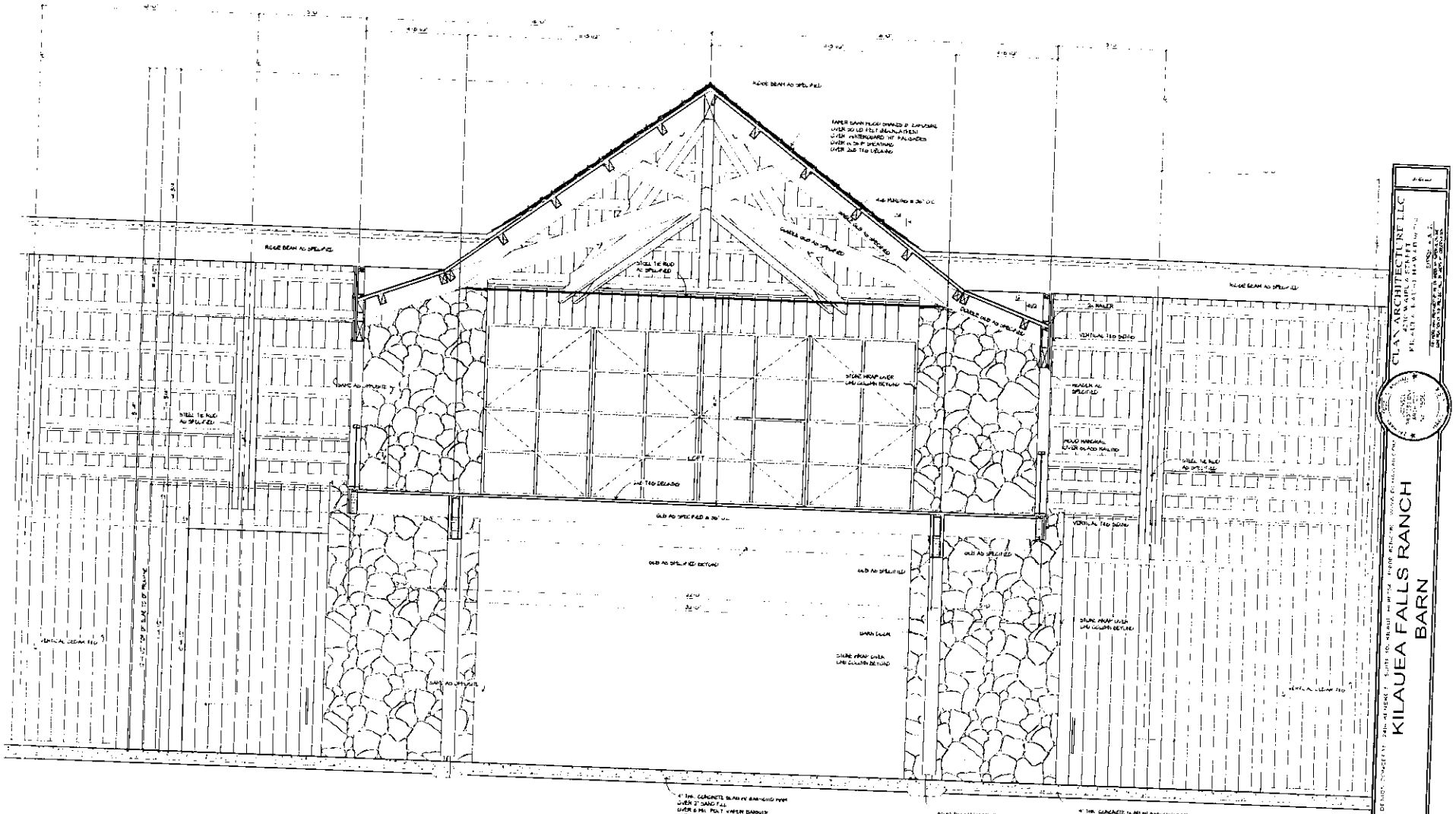


(F/A13) SECTION THRU LOFT @ MIDDLE POINT

DETAILED BUILDING SECTION

SCALE: 1/2" = 1'-0"

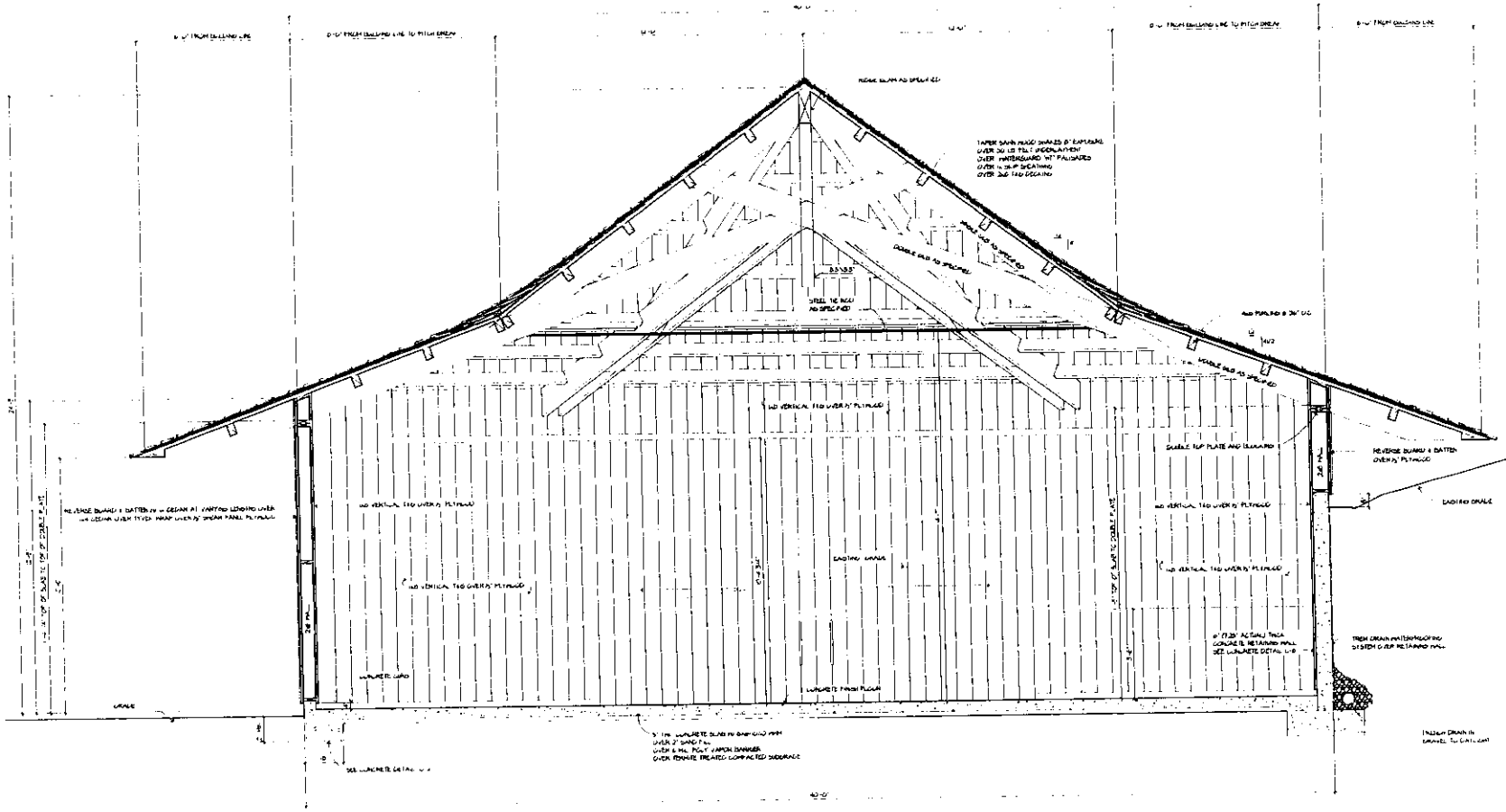
CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

SHEET

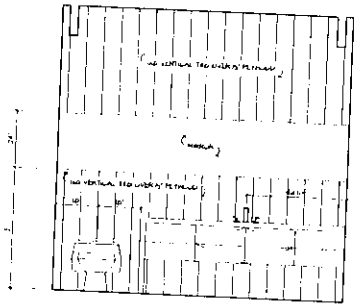
A13

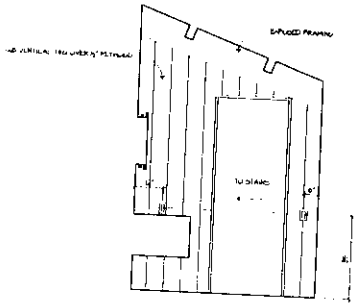


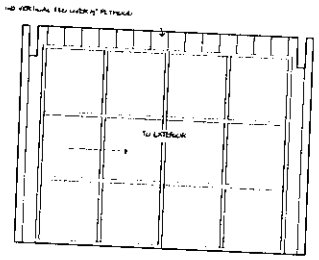
(1) A14 SHORT SECTION THRU GARAGE 2

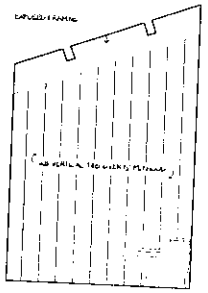
DETAILED BUILDING SECTION
SCALE 1/2" = 1'-0"

CLAY ARCHITECTURE LLC
KILAUEA FALLS RANCH
BARN
SHEET
A14







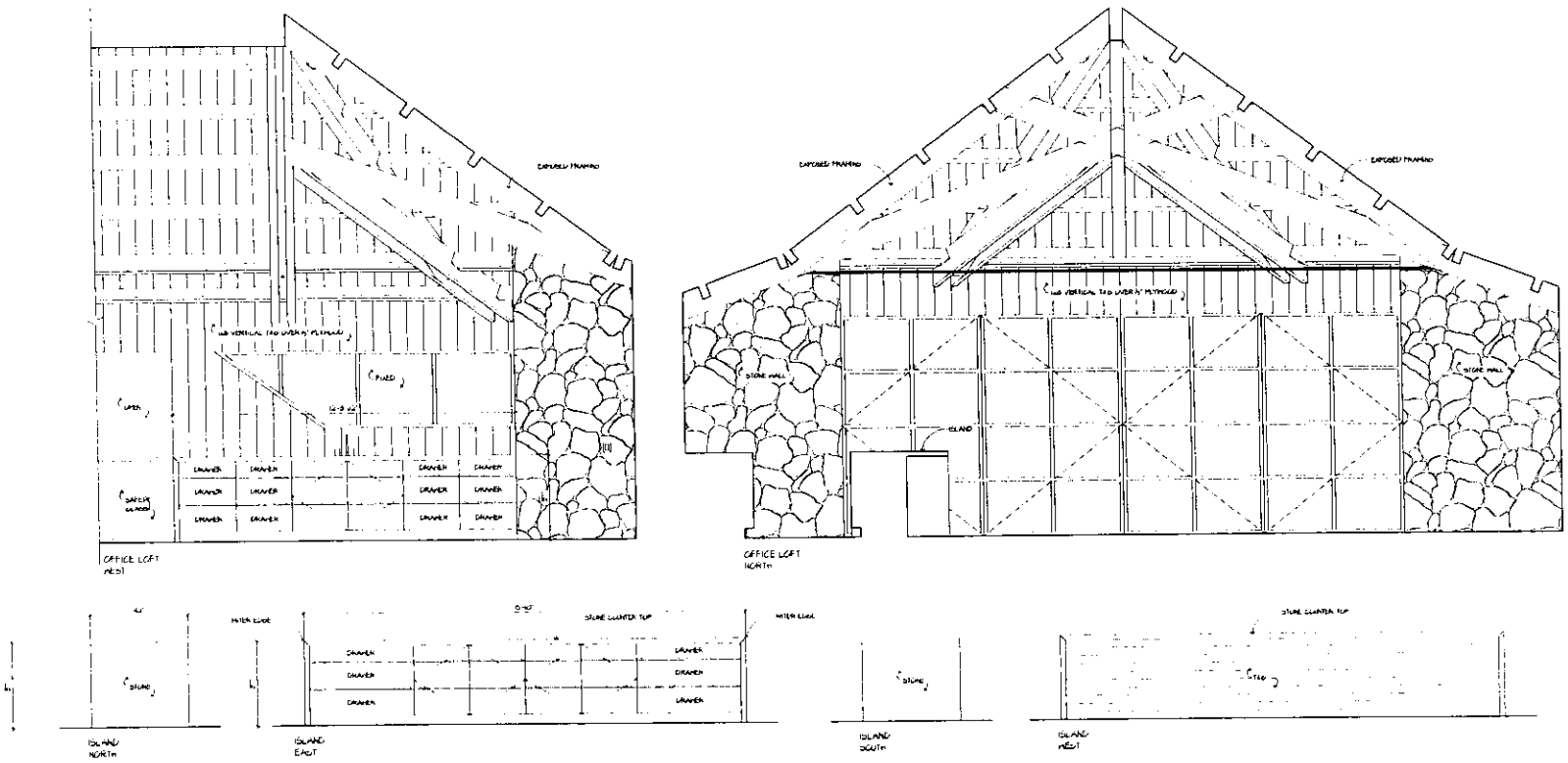


INTERIOR ELEVATIONS

CLAY ARCHITECTURE LLC

KILAUEA FALLS RANCH
BARN

SHEET
A15



INTERIOR ELEVATIONS

SCALE 1/2" = 1'-0"

CLAN ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

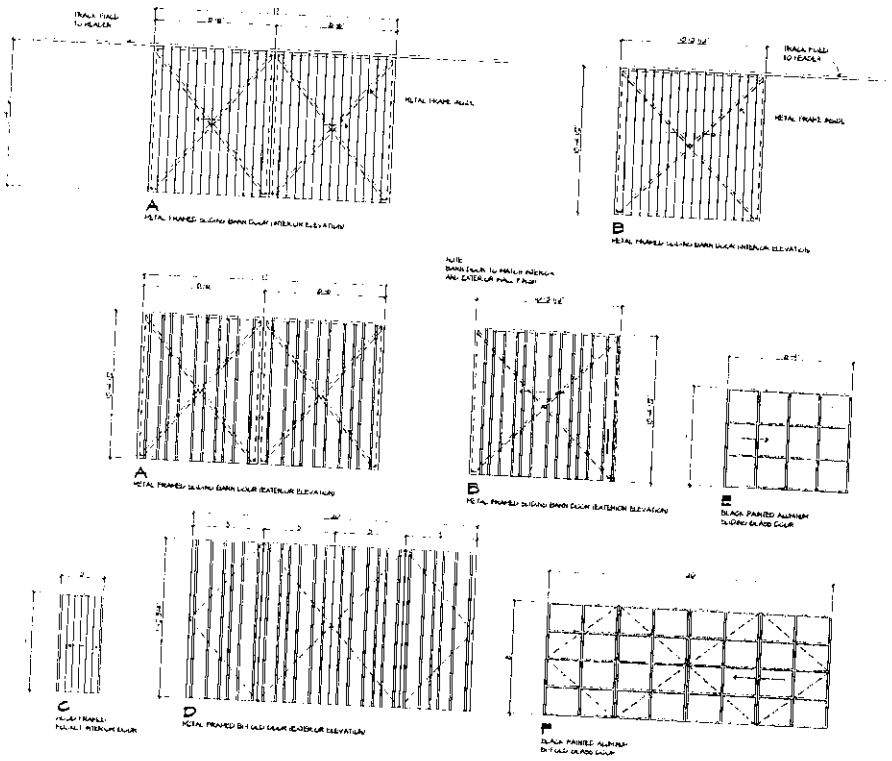
SHEET

A16

DOOR SCHEDULE

SYMBOL	NOMINAL DOOR SIZE	THICKNESS	LOCATION	TYPE	DESCRIPTION					HARDWARE	FINISH	REMARKS
(1)	30'-0" X 11'-3 3/4"		GARAGE SOUTH	D	EXTERIOR BI-FOLD DOOR					SEE SPECS	SEE SPECS	METAL FRAMED
(2)	11'-0" X 10'-4 1/2"		GARAGE 1	A	EXTERIOR SLIDING BARN DOOR					& DRAWINGS	& DRAWINGS	METAL FRAMED
(3)	11'-0" X 10'-4 1/2"		GARAGE 2	A	EXTERIOR SLIDING BARN DOOR							METAL FRAMED
(4)	10'-8 1/2" X 10'-4 1/2"		GARAGE 3	B	EXTERIOR SLIDING BARN DOOR							METAL FRAMED
(5)	10'-8 1/2" X 10'-4 1/2"		GARAGE 4	B	EXTERIOR SLIDING BARN DOOR							METAL FRAMED
(6)	5'-0" X 7'-0"		BATHROOM	C	INTERIOR POCKET							METAL FRAMED
(7)	5'-4" X 7'-10"		BATHROOM	E	EXTERIOR SLIDING GLASS DOOR							METAL FRAMED
(8)	30'-0" X 8'-0"		LOFT	F	EXTERIOR BIFOLD GLASS DOOR							METAL FRAMED
(9)	30'-0" X 8'-0"		LOFT	F	EXTERIOR BIFOLD GLASS DOOR							WOOD FRAMED

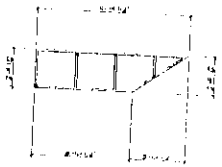
NOTE
1. SEE DRAWINGS AND SPECIFICATIONS FOR DOOR FINISHES AND HARDWARE
2. DOOR SIZES SHOWN ARE NOMINAL SIZES - VERIFY NET SIZES & WARNTIES OF REFERENCE TO MEANS DETAILS SPECIFICATIONS AND SITE VISIT
3. JAMBS CALLED OUT AS VIEWED FROM EXTERIOR
4. SEE DETAILS AND SPECIFICATIONS FOR HARDWARE AND FINISHES



WINDOW SCHEDULE

SYMBOL	NOMINAL WINDOW SIZE	LOCATION	TYPE	DESCRIPTION	JAMB (L)	JAMB (R)	HEAD	SILL	MULLION	HARDWARE	FINISH	REMARKS
(1)										SEE SPECS	SEE SPECS	
(2)	10'-4 1/2" x 4'-4 1/2"	LOFT	A	FIXED						& DRAWINGS	& DRAWINGS	
(3)	10'-4 1/2" x 4'-11 1/2"	LOFT	A	FIXED								
(4)	10'-4 1/2" x 4'-11 1/2"	LOFT	A	FIXED								
(5)	10'-4 1/2" x 4'-11 1/2"	LOFT	A	FIXED								

NOTE
1. SEE DRAWINGS AND SPECIFICATIONS FOR DOOR FINISHES AND HARDWARE
2. WOOD WINDOWS TO BE FROM SAMPLE
3. DOOR SIZES SHOWN ARE NOMINAL SIZES - VERIFY NET SIZES & WARNTIES OF REFERENCE TO MEANS DETAILS SPECIFICATIONS AND SITE VISIT
4. EXTERIOR DOOR JAMBS CALLED OUT AS VIEWED FROM EXTERIOR
5. ALL WINDOWS TO HAVE LIGHT BLOCK TAPE



DOOR & WINDOW SCHEDULE
SCALE 1/4" = 1'-0"

CLAS ARCHITECTURE LLC
KILAUEA FALLS RANCH
BARN

A17

NOTES

1) ALL SINGLE-CONTROLLED LIGHTING OUTLETS SHALL BE MOUNTED 48" CENTER LINE FROM FLOOR AND SHALL BE DECORATOR TYPE. PORTABLE ROOMS: BATHROOMS, HALLWAYS, STAIRWAYS, ATTACHED GARAGES, ATTICS, SUBAREAS

2) LIGHTING OUTLETS: ATTIC, UNDER FLOOR SPACE, OUTLETS ROOM, STORAGE, BASEMENT

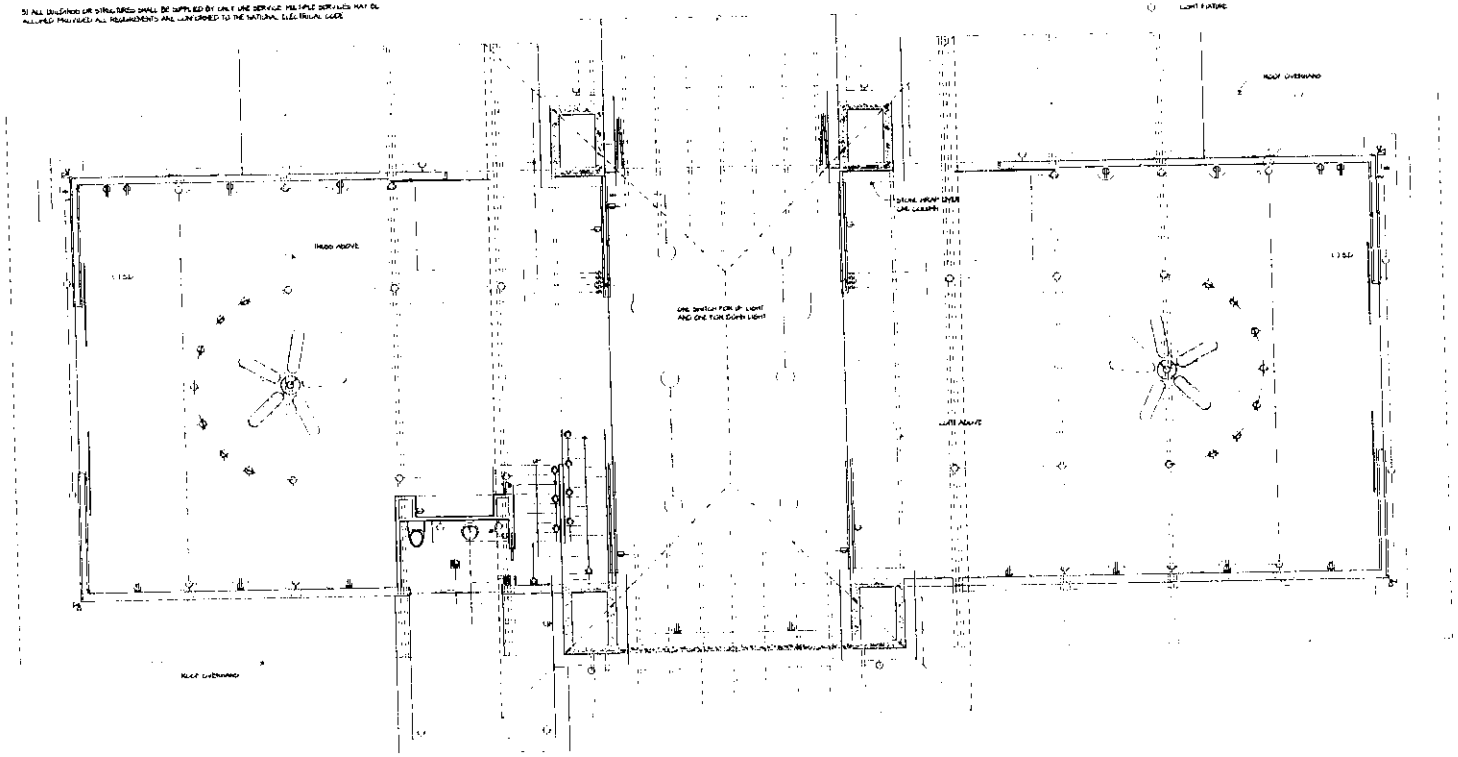
3) WALL RECEPTACLE OUTLETS SHALL BE MOUNTED VERTICALLY AT 18 INCHES FROM FINISH FLOOR AND 6 FEET MAXIMUM FROM OPENINGS AND EVERY 12 FEET ALONG WALLS: KITCHEN, FAMILY ROOM, DINING ROOM, BREAKFAST ROOM, LIVING ROOM, PARLOR, LIBRARY, DEN, DEN ROOM, DEDICATED, REC ROOM, OTHERS

4) ALL 120 VOLT SINGLE PHASE 15 & 20 AMPERE RECEPTACLES IN BATHROOMS, GARAGES, AND OUTDOORS SHALL HAVE GROUND FAULT INTERRUPTER PROTECTION FOR PERSONNEL

5) ALL UNDERGROUND STRUCTURES SHALL BE SUPPLIED BY ONLY ONE SERVICE. MULTIPLE SERVICES MAY BE ALLOWED PROVIDED ALL REQUIREMENTS ARE CONFORMED TO THE NATIONAL ELECTRICAL CODE

SYMBOL LEGEND

	DUPLEX WALL MOUNT		WIRE LINE
S	LIGHT SWITCH		HOSE BIB
	3 WAY LIGHT SWITCH		
	FLOWER PATH		60" HANDLEBAR MOUNT
	110V OUTLET		
	WATERPROOF 110V OUTLET		
	GFI OUTLET IN 110V CIRCUIT		CEILING FAN
	RUBBER MOUNT OUTLET		
	240V OUTLET		
	SMOKE DETECTOR		
	FLOOR MOUNTED LIGHT		TELEPHONE JACK
	RECESSED CAN LIGHT & EXHAUST FAN		COAX CABLE TV/INTERNET
	LIGHT FIXTURE		CAT 5/INTERNET



MAIN LEVEL ELECTRICAL PLAN

CLAS ARCHITECTURE LLC
4211 WAIPUA STREET
KILAUEA, KAUAI, HAWAII 96754

KILAUEA FALLS RANCH
BARN

E01

NOTES:

[illegible]

[illegible]

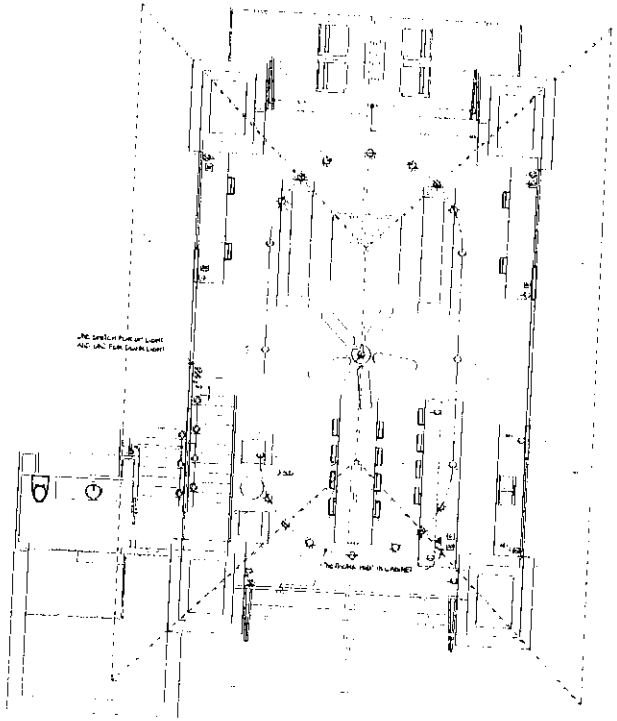
[illegible]

[illegible]

[illegible]

SYMBOL LEGEND

[illegible]



LOFT ELECTRICAL PLAN

SCALE: [illegible]

CLA ARCHITECTURE LLC

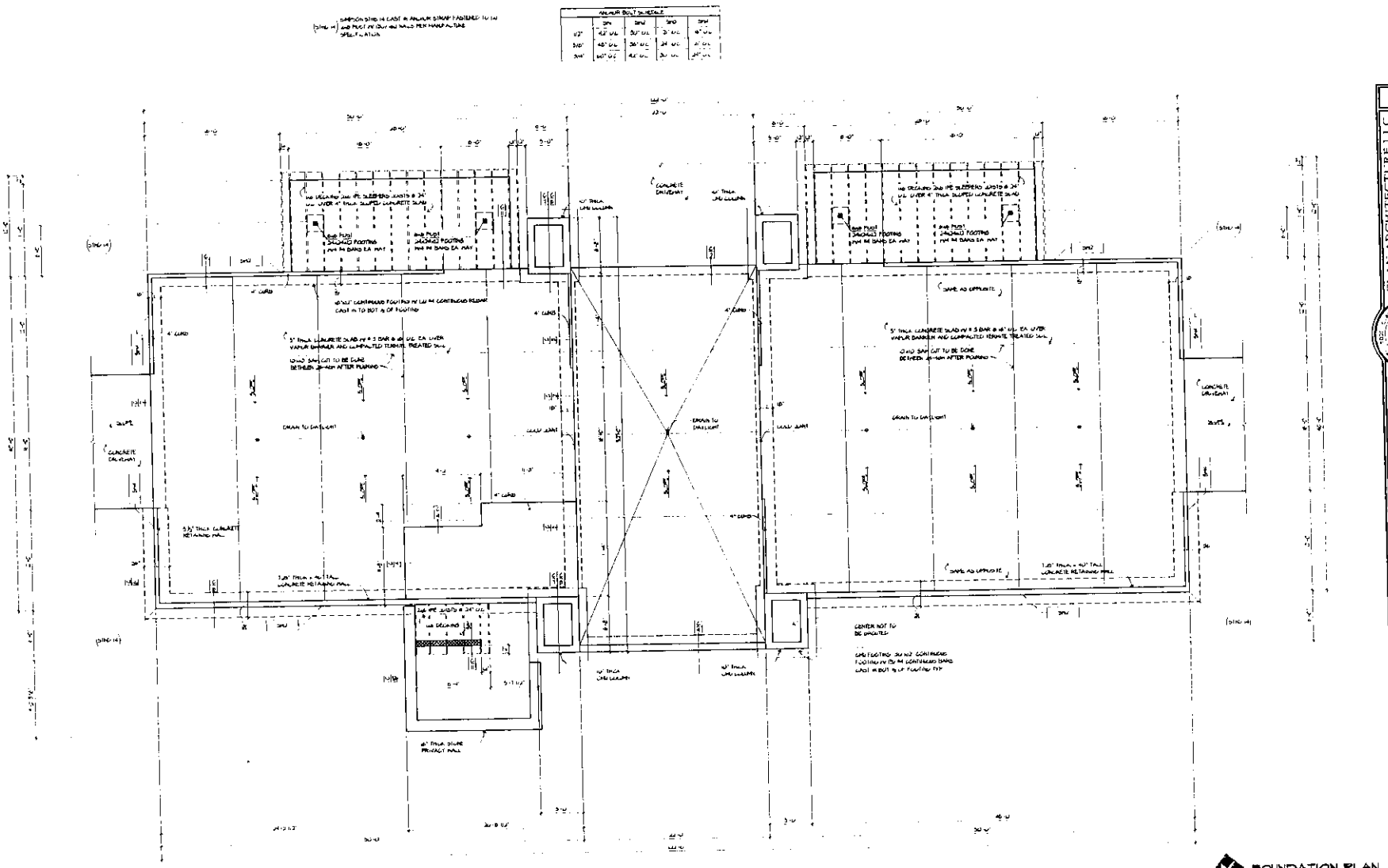
[illegible]

KILAUEA FALLS RANCH

BARN

SHEET

E02



FOUNDATION PLAN

SCALE: 3/16" = 1'-0"

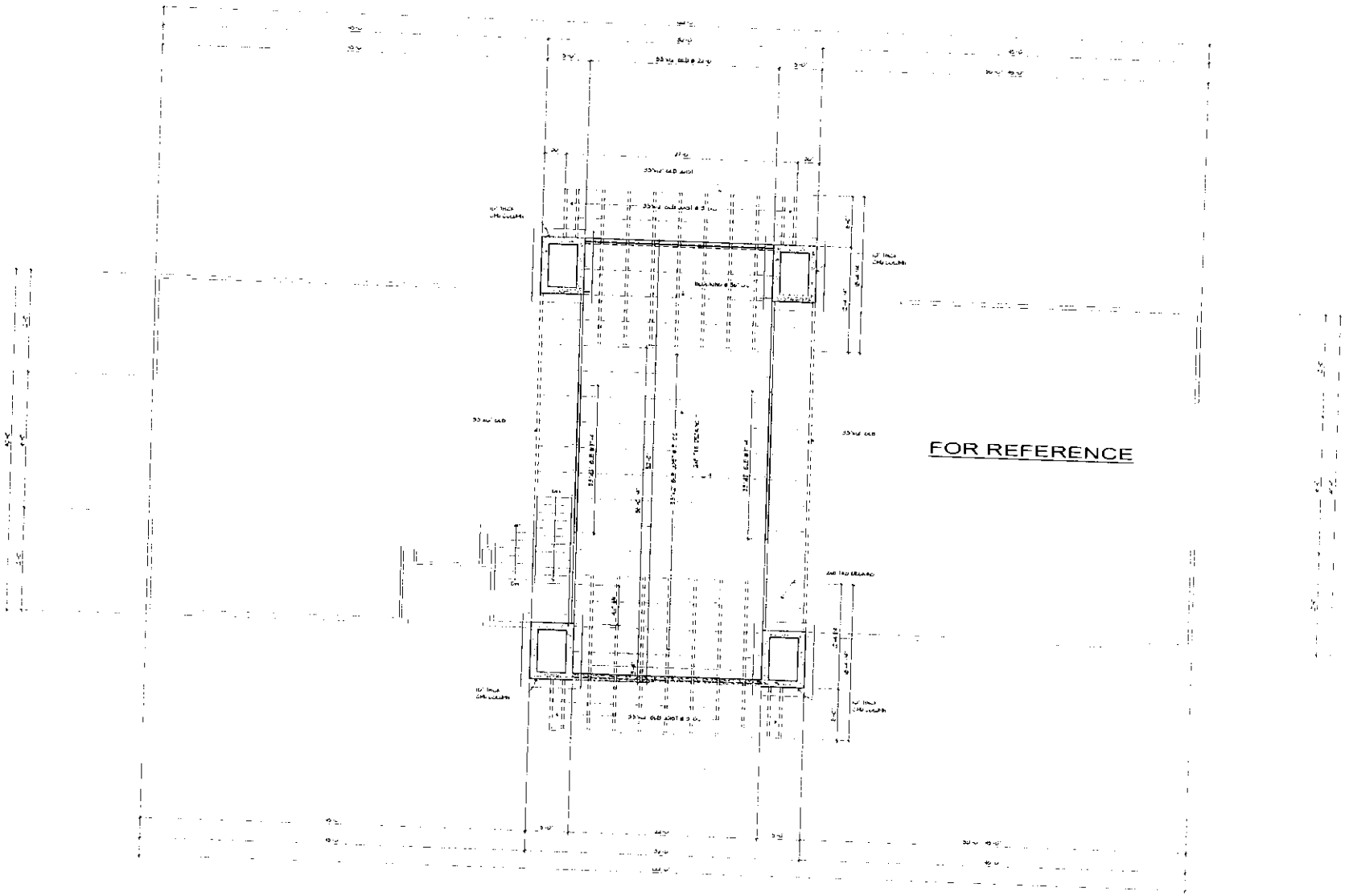
CLAN ARCHITECTURE LLC

KILAUEA FALLS RANCH

BARN

SHEET

S-1



LOFT FLOOR FRAMING PLAN

KILAUEA FALLS RANCH
BARN

S-2

EXHIBIT “F”

Conservation Plan
KĪLAUEA FALLS RANCH

KĪLAUEA, KAUA'I, HAWAI'I

PREPARED FOR:

Belles Graham Proudfoot Wilson & Chun, LLP

PREPARED BY:

PLANNING SOLUTIONS

SEPTEMBER 2015

EXHIBIT "9"

PROJECT SUMMARY

Project:	**Kīlauea Falls Ranch Conservation Plan**
Client:	Belles Graham Proudfoot Wilson & Chun, LLP 4334 Rice Street, Suite 202 Līhu'e, Hawaii 96766 Contact: Max W. J. Graham, Jr. Phone: (808) 246-6962
Approving Agency:	Planning Commission, County of Kaua'i 4444 Rice Street, Suite A473 Līhu'e, Hawai'i 96766 Phone: (808) 241-4050 Hawaiian Islands Land Trust, a Hawaii nonprofit corporation P. O. Box 562 Kīlauea, Hawai'i 96754 Contact: Jennifer Luck Phone: (808) 346-9419
Location:	Kīlauea, Kaua'i, Hawai'i
Proposed Action:	Nēnē habitat restoration, native vegetation management, predator control, downed seabird and endangered species response protocols, archaeological site preservation, conservation plan infrastructure.
Associated Actions Requiring Conservation Plan:	Construction within the Special Management Area pursuant to Chapter 205A, Hawai'i Revised Statutes
Tax Map Key:	(4) 5-2-012:035
Parcel Area:	~163 acres
Project Area:	Natural Resource Conservation Area 3.75 ac. Archaeological Resource Conservation Area 16.2 ac.
Judicial District:	Hanalei (Halele'a)
State Land Use District:	Agricultural
County Zoning:	Open District/Special Treatment-Resource
Required Permits & Approvals:	Amendment to: • Special Management Area Permit SMA(U)-2008-4; • Use Permit U-2008-4; and • Class IV Zoning Permit Z-IV-2008-6
Anticipated Determination:	Approval of Amendment
Consultant:	Planning Solutions, Inc. 210 Ward Avenue, Suite 330 Honolulu, HI 96814 Contact: Mākena White (808-550-4538)

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List of Acronyms

Acronym	*Phrase*
AIS	Archaeological Inventory Survey
APP	Archaeological Preservation Plan
CP	Conservation Plan
CZO	Comprehensive Zoning Ordinance
DLNR	Department of Land and Natural Resources
DO	Decision and Order
HAR	Hawai'i Administrative Rules
HRS	Hawai'i Revised Statutes
HILT	Hawaiian Islands Land Trust
KPLT	Kaua'i Public Land Trust
KFR	Kīlauea Falls Ranch
LLC	Limited Liability Company
SHPD	State Historic Preservation Division
SMA	Special Management Area
TMK	Tax Map Key

Source: Compiled by Planning Solutions, Inc. (2014)

1. OVERVIEW OF THE CONSERVATION PLAN

1.1 OVERVIEW

This Conservation Plan (CP) presents a series of conservation measures planned for Kīlauea Falls Ranch (KFR) [TMK No. (4) 5-2-012:035], located on the western bank of Kīlauea Stream on the North Shore of the island Kaua'i, in the State of Hawai'i (see Figure 1.1). It has been prepared at the request of the Kaua'i County Planning Commission at their January 28, 2014 meeting. The property, totaling approximately 163 acres, encompasses significant biological, archaeological, and historical resources which are the subject of the Conservation Plan. In addition, the property is located within the Special Management Area (SMA), making it subject to Chapter 205A, Hawai'i Revised Statutes (HRS) and the Special Management Area Rules and Regulations of the County of Kaua'i.

KFR was purchased by Charles M. Somers and West Sunset 32 Phase 1 LLC (hereafter, "the Owner") in 2004, and construction work on a main residence and associated infrastructure began in February, 2011. The Main House was completed in February, 2014. The work to install the required landscaping and to improve Kahili Quarry Road remains to be completed. This construction work, which constitutes development within the SMA, required the Planning Commission of the County of Kaua'i to grant the Owner a Special Management Area Use Permit, which it did [SMA(U)-2008-4] in its *Final Decision and Order in the Matter of Application of Charles M. Somers and West Sunset 32 Phase 1, LLC for Special Management Area Use Permit*, dated October 2, 2008.

That Decision and Order (DO) specifically identifies two conditions on the issuance of the SMA permit which are pertinent to this CP:

- DO Condition 1 requires archeological preservation work, per the terms of the State Historic Preservation Division (SHPD)-approved Archaeological Preservation Plan.
- DO Condition 11.d.i. required the granting of a conservation easement over a portion of the KFR to a qualified nonprofit organization.

Further, the DO granted approval only for development of a main house, a driveway accessory to the main house, landscaping, site grading for the main house and drive way, preservation of historic sites, utilities, a well and storage tank, and improvements to Kahili Quarry Road. The Owner is presently seeking the addition of a Conservation Manager's Residence and Conservation Maintenance Building, approval of which the Planning Commission has made contingent upon acceptance of a Conservation Plan for the property. This CP is intended to fulfill this requirement. The location of the Main House, and the proposed locations of the Conservation Manager's Residence and Conservation Maintenance Building are described further in Chapter 4.

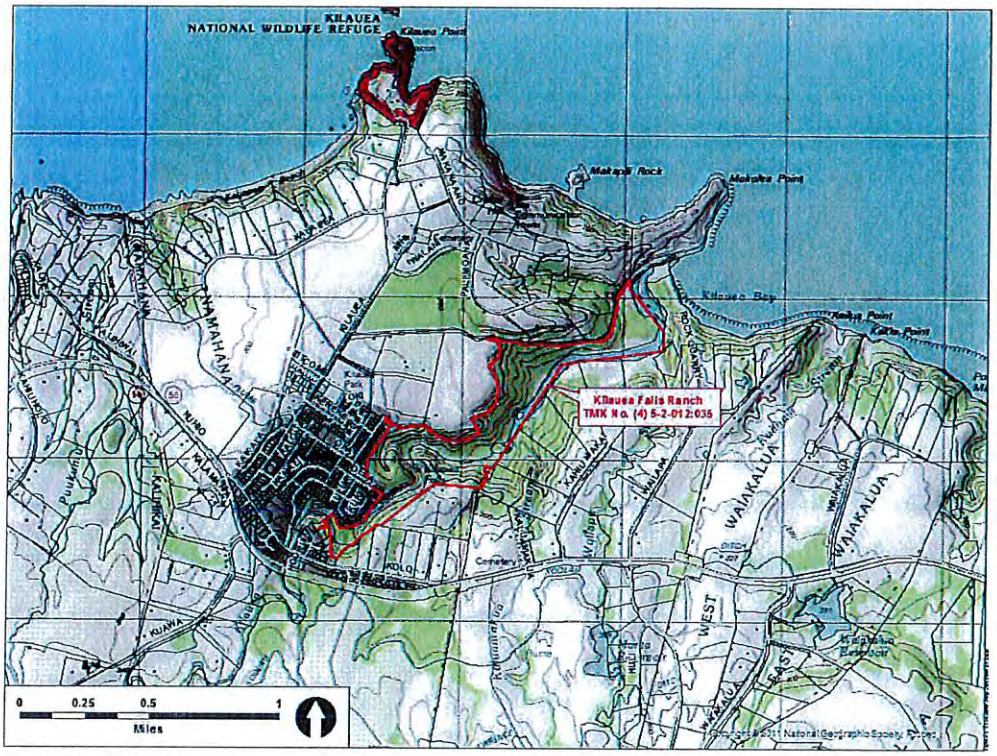
1.2 CONSERVATION EASEMENTS

Condition 11.d.i of the DO states, in part:

> *The Applicant shall convey the Conservation Easement to a governmental entity or 501C(3) organization of Applicant's choice, provided such organization constitutes a "qualified organization" as defined in 170(h)(3) of the Internal Revenue Code of 1986 (the Code). Said entity or organization shall have the capability of developing and maintaining threatened and endangered species habitat consistent with the Kilauea Point National Wildlife Refuge Land Conservation Plan and Environmental Assessment (May 2007) prepared by the U.S. Fish and Wildlife Service.*

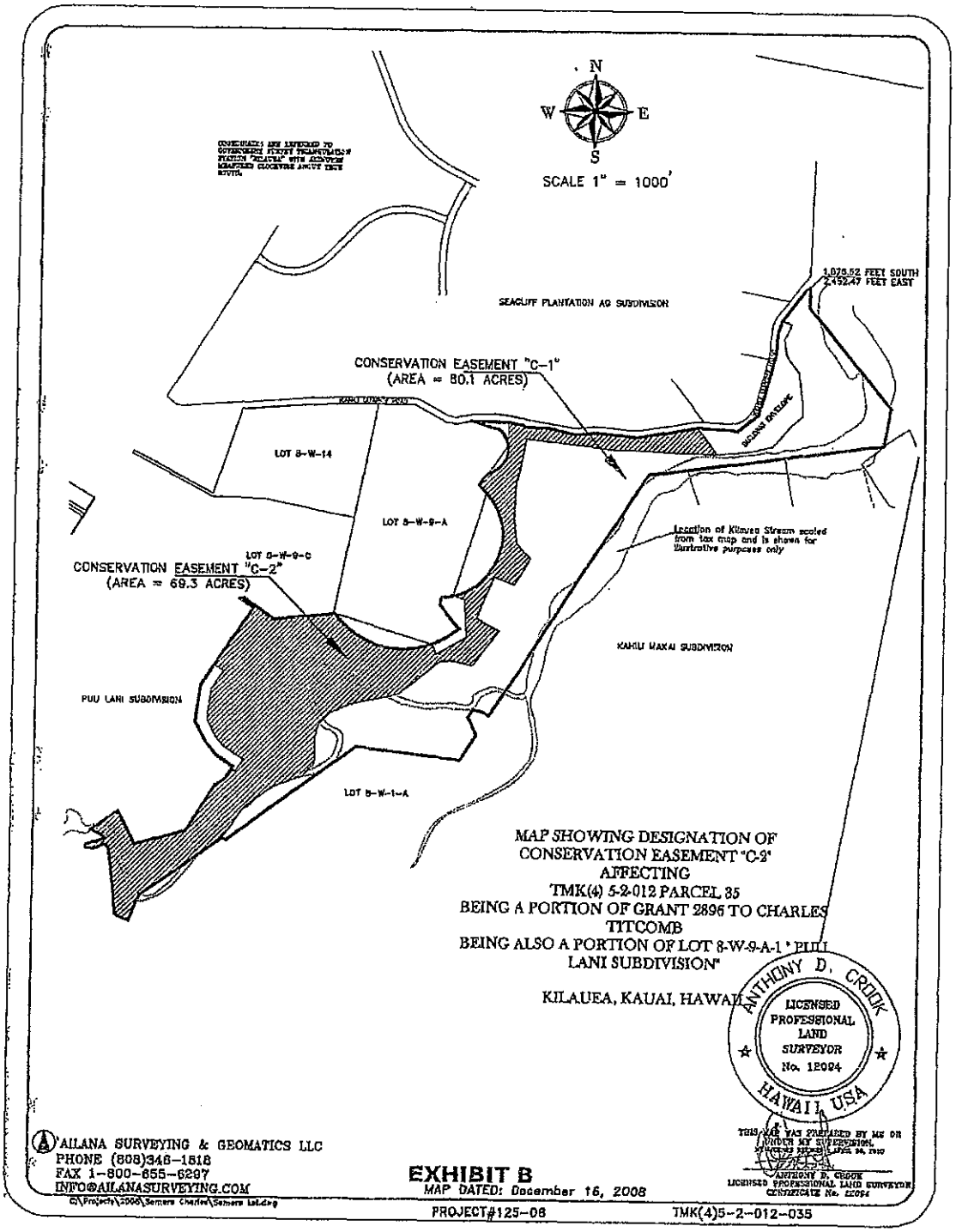
Pursuant to this requirement, the owner granted Easement C-1 (see Figure 1.2) to the Kaua'i Public Land Trust [which has since merged with the Hawaiian Islands Land Trust (HILT)]. Easement C-1 contains 80 acres. In addition, the Owner subsequently conveyed a second conservation easement (Easement C-2, containing 69.33 acres, as shown on Figure 1.2) to HILT.

Figure 1.1 Location Map



Source: Planning Solutions, Inc. (2014)

Figure 1.2 Location of Conservation Easements C-1 and C-2



Source: Belles Graham Proudfoot Wilson & Chun, LLP (2014)

The purpose of these two easements is to establish and maintain forever (subject to restrictions identified in the easement documents), and to prevent any use of the easement areas that will significantly impair or interfere with, a series of "Conservation Values". These conservation values are defined in Table 1.1 below.

Table 1.1 Conservation Values for Easements C-1 and C-2

Ordinal	*Conservation Values*	*Description*
A	Water and Wetlands Resources	To protect the quality of water resources within or in the vicinity of the Easement Area, including protect the quality of wetlands, including the habitat they provide for endangered water birds.
B	Archaeological Resources	To protect Native Hawaiian archaeological resources, which have been identified in the Baseline Documentation or are identified or discovered subsequently.
C	Indigenous Wildlife Resources	To protect intact areas of wildlife habitat, including endangered species.
D	Scenic Resources	To the extent not in conflict with the Water and Wetlands Resources, Archaeological Resources, and Wildlife Resource, Scenic Resource, to protect scenic vistas visible from public rights-of-way and other public access points in the vicinity of the property.
E	Agricultural Resources	To the extent not in conflict with the Water and Wetlands Resources, Archaeological Resources, and Wildlife Resources, Agricultural Resources, to protect and preserve land suitable for agricultural purposes, including agroforestry uses.

Source: Section 1.2 of *Grant of Conservation Easement Doc. Nos. 2008-191932* and *2008-192741*, State of Hawai'i, Bureau of Conveyances

According to the terms of the two Grants of Conservation Easement, the Owner has the right—but no obligation—to conduct land management and/or environmental restoration activities within these easement areas. These activities can include, but are not limited to, removal of alien species, restoration of wildlife habitat, restoration of wetlands, and introduction of native species.

Some aspects of these management activities may require coordination with, or notification of, HILT (identified below as "the Holder" of the easement). Section 5.2.c of the Grant(s) of Conservation Easements provides:

> *With respect to any land management or environmental restoration activities within the Easement Area which will affect an aggregate area of more than two (2) acres in any consecutive twelve month period or twenty (20) acres in aggregate over any time period, the following procedures apply:*
>
> *Owner and Holder shall agree upon a consulting third party with appropriate credentials and expertise ("Environmental Consultant") to prepare a restoration management plan for the portion of the Easement Area to be restored ("Management Plan").*
>
> *During preparation of the Management Plan, the Environmental Consultant shall consult with Holder to assure consistency with the pertinent aspirations enunciated in the Kilauea Point National Wildlife Refuge Land Conservation Plan and Environmental Assessment (May 2007), which are: (i) protect and enhance native coastal plant communities; (ii)*

protect and enhance nesting areas for native species such as Nene, seabirds and wintering shorebirds; (iii) protect and encourage the recovery of endangered Hawaiian water birds and other endangered birds; and (iv) conserve and enhance aquatic resources.

Holder is granted up to but not more than sixty (60) days in which to engage in consultation with the Environmental Consultant; provided Holder and Owner may extend the consultation period by mutual agreement.

If Owner, Holder or the Environmental Consultant deems it helpful, any of them may consult with the United State Fish and Wildlife Service regarding the proposed Management Plan during the consultation period.

Owner shall conduct all work in accordance with the Management Plan, or, as necessary, seek and obtain amendments to the Management Plan, subject to the procedures set forth in this Section 5.2.

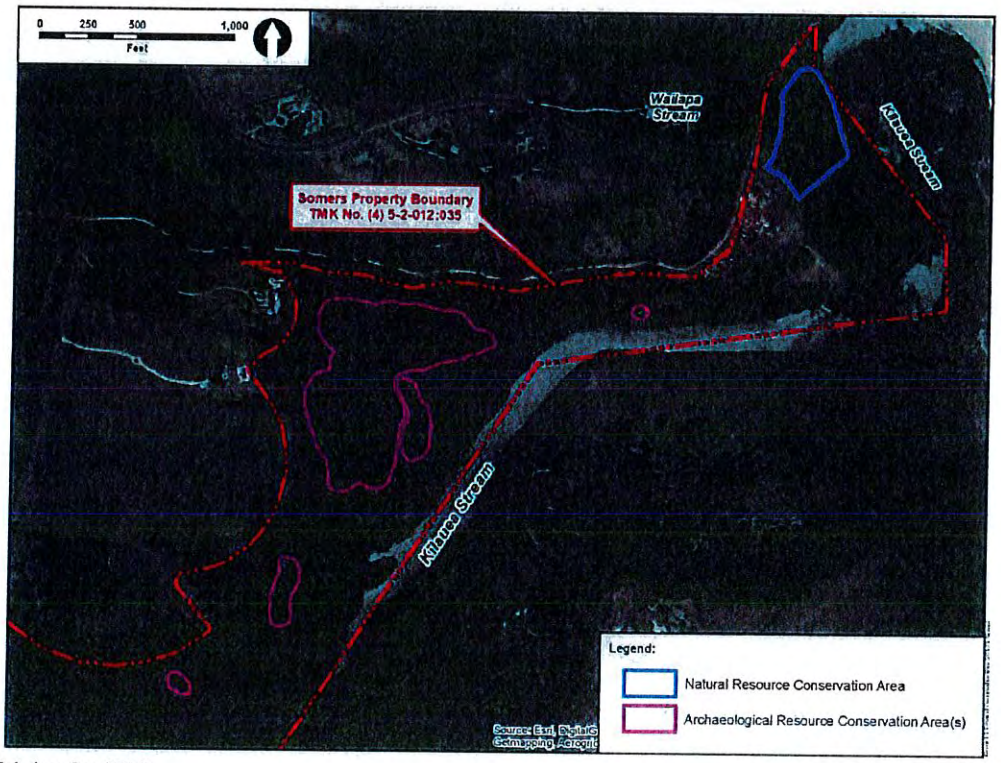
This CP has been evaluated by the Owner and Environmental Consultant for consistency with the pertinent objectives of the *Kīlauea Point National Wildlife Refuge Land Conservation Plan and Environmental Assessment* (May 2007) and is intended to be synonymous with the "Management Plan" as described in the two Grant(s) of Conservation Easements. The geographic scope of this CP is depicted in Figure 1.3 below.

1.3 SUMMARY OF CONSERVATION ACTIVITIES

As articulated by the Conservation Values described in Section 1.2, this CP addresses three areas:

1. *Protection and Habitat Enhancement for Indigenous Wildlife.* Enhanced wildlife conservation is a key "conservation value" as outlined in Table 1.1. Within a specific area depicted in Figure 1.3 ("Natural Resource Conservation Area"), the CP delineates an ungulate-, canine- and feline-resistant fence intended to create an exclosure for conservation purposes, within which Nēnē (*Branta sandvicensis* or Hawaiian Goose) habitat will be protected and enhanced. The CP also includes a subsequent scope and schedule for habitat enhancement activities and a feral cat trapping program for implementation once an exclosure is in place, to further develop safe nesting habitat for Nēnē.
2. *Native Plant Restoration.* The CP provides vegetation management guidelines for replacing existing alien, invasive species with endemic, indigenous and/or Polynesian-introduced plants where practicable. Given the very large size of the property, these efforts will be limited to specific areas, such as within the Nēnē enclosure.
3. *Preservation of Archaeological Resources.* This plan incorporates a series of Interim Protection Measures and Long-Term Preservation measures for archeological resources present on the property, drawing on information from the SHPD-approved Archaeological Inventory Survey (AIS) and Archaeological Preservation Plan (APP) and as stipulated in Condition 1 of the DO.

Figure 1.3 Scope of Conservation Plan



Source: Planning Solutions, Inc. (2015)

1.4 ORGANIZATION OF THE REPORT

The remainder of this report is organized as follows:

- Chapter 2 describes the proposed Nēnē habitat enhancement in detail, including its location, design, and mode of operation.
- Chapter 3 discusses the archaeological preservation activities which are incorporated in this CP.
- Chapter 4 outlines the infrastructure required to implement the conservation activities described in the previous two chapters.
- Chapter 5 provides a budget and schedule for implementation of the terms of this CP.
- Chapter 6 identifies references cited during preparation of this CP.

2. HABITAT ENHANCEMENT

Endangered Nēnē are currently using resources in the grassy area downslope from the main home and associated infrastructure on a seasonal basis. Given the ongoing growth of the Nēnē population on the North Shore of Kaua'i, use of the Kīlauea Falls Ranch area is also anticipated to increase. Nēnē are a naïve species which evolved in an ecosystem devoid of mammalian predators, they are easy prey for numerous introduced predators present on Kaua'i, including dogs, cats, pigs and rats. Consistent with the Grant(s) of Conservation Easements call to, "protect intact areas of indigenous wildlife habitat, including endangered species" the CP encompasses a program of Nēnē habitat enhancement at Kīlauea Falls Ranch (to be located in the Natural Resource Conservation Area depicted in Figure 1.3).

This chapter provides details about the species and presents a series of measures which are intended to enhance Nēnē habitat at a select portion of Kīlauea Falls Ranch. The proposed Nēnē enclosure/predator exclosure is the cornerstone of this habitat enhancement program. General information on Nēnē is provided below, followed by: (*i*) Nēnē habitat enhancement, (*ii*) predator control methods, (*iii*) an injured or killed endangered species response protocol, and (*iv*) a vegetation management and enhancement plan.

2.1 NĒNĒ HABITAT MANAGEMENT

2.1.1 TAXONOMY AND SPECIES DESCRIPTION

The Nēnē is a medium-sized Hawaiian endemic goose, with an overall length of approximately 63 to 69 centimeters (cm) (i.e., between 25 and 27 inches). This species is adapted to a terrestrial and largely non-migratory lifestyle in the Hawaiian Islands with limited freshwater habitat. Compared to the related Canada Goose (*Branta canadensis*), Nēnē wings are reduced by about 16 percent in size and their flight is relatively weak. Nonetheless, Nēnē are capable of both interisland and high altitude flight (Banko et al. 1999, pg. 9, David 2014).

Figure 2.1 A Pair of Nēnē

Source: R. David (2011)

2.1.2 HISTORIC AND CURRENT DISTRIBUTION

Fossil evidence shows that Nēnē were found on all the main Hawaiian Islands at one time. It is believed they were abundant, with a total population of 25,000 birds, on the Big Island prior to the arrival of Captain James Cook in 1778 (USFWS 2004, pg. 24). Currently, there are wild populations of Nēnē on the islands of Hawai'i, Maui, Moloka'i and Kaua'i, with an estimated 611, 462, 146, and 1,500 individuals, respectively (A. Marshall 2008, pers. comm, R. David 2013, pers. comm.). After approaching extinction in the 1940s and 1950s, Nēnē populations have been slowly rebuilt through captive-breeding programs. As a result of such programs, Nēnē have been reintroduced onto four of the main Hawaiian Islands (Kaua'i, Maui, Moloka'i and Hawai'i). There are currently four population centers on Kaua'i, each resulting from releases of captive-bred birds. Approximately 25 captive Nēnē were released by Kipu Kai Ranch in

1985 on the southeast coastline of Kaua'i. Another 38 captive-bred Nēnē have been released at the nearby Kīlauea Point National Wildlife Refuge since 1991. A third population was initiated on the Nā Pali Coast of northwestern Kaua'i with the release of 62 captive-bred Nēnē between 1995 and 1996. Twenty-four Nēnē were introduced to the Hanalei National Wildlife Refuge in April 2000 (USFWS 2004, pp. 17-18).

2.1.3 LIFE HISTORY

The Nēnē has an extended breeding season with eggs reported from all months except May, June and July, although the majority of birds in the wild nest during the rainy winter season, between October and March (Banko et al. 1999, pg. 4). Nesting peaks in December and most goslings hatch from December to January (Banko et al. 1999). Nēnē typically nest on the ground, in a shallow scrape in the dense shade of a shrub or other vegetation. A clutch typically contains three to five eggs, and incubation lasts between 29 to 31 days. While the female incubates the eggs, the male stands guard nearby, often from an elevated position. Once hatched, the young remain in the nest for one or two days (Banko et al. 1999, pp. 16-17). Fledging of captive birds occurs at 10 to 12 weeks, but may occur later in wild birds. During molt, adults are flightless for a period of 4 to 6 weeks, generally attaining their flight feathers at about the same time as their offspring. When flightless, goslings and adults are extremely vulnerable to predators such as dogs, cats, and mongooses. From June to September, family groups join others in post-breeding aggregations or flocks, often far from nesting areas.

2.1.4 HABITAT DESCRIPTION

The current distribution of Nēnē has been highly influenced by the location of release sites for captive-bred birds. Nēnē are known to occupy various habitat and vegetation community types ranging from coastal dune vegetation and non-native grasslands (e.g., golf courses, pastures, and rural areas) to sparsely vegetated low- and high-elevation lava flows, mid-elevation native and non-native shrubland, cinder deserts, native alpine grasslands and shrublands, and open and non-native alpine shrubland-woodland community interfaces (Banko et al. 1999, pp. 4-6).

Nēnē are browsing grazers. The composition of their diet depends largely on the vegetative composition of their surrounding habitats and they appear to be opportunistic in their choice of food plants as long as they meet nutritional demands (Banko et al. 1999, pp. 6-8; Woog and Black 2001, pg. 324). Nēnē may exhibit seasonal movements to grasslands in periods of low berry production and wet conditions that produce grass with a high water content and resulting higher protein content.

The distribution of Nēnē nests generally has also been associated with the location of release sites of captive-bred Nēnē since 1960. The sites used by Nēnē for nesting range from coastal lowland to subalpine zones and demonstrate considerable variability in physiognomic features (Banko et al. 1999, pg. 4-5). Nest sites studied at Haleakalā National Park on Maui were located in well-vegetated habitat. During the breeding season, Nēnē were observed feeding mainly on berries and other plant items found near their nest sites. Although some birds supplemented their diets by feeding in grasslands due to declining berry densities, during the pre-breeding and non-breeding season their principal foods are cultivated grasses (Black et al. 1994, pp. 65-109). On Kaua'i the majority of Nēnē currently use lowland habitats including golf courses, small farms and other grassy areas (R. David, 2014).

2.1.5 THREATS TO NĒNĒ

The Nēnē were listed as endangered in 1967 (USFWS 1967, pg. 4001). The first Nēnē Recovery Plan was written in 1983. A *Draft Revised Recovery Plan for the Nēnē or Hawaiian Goose* (USFWS, June 2004) was published two decades later. This report was incorporated a considerable amount of new information in the fields of genetics, paleontology, nutrition, behavior, effects of predation, and

predator control. The plan also recommends a shift in recovery efforts to include more intensive habitat management and releases of captive-bred birds at lower elevations (USWFS 2004, pg. 3).

The main factors which currently limit Nēnē recovery are predation by introduced mammals, insufficient nutritional resources for both breeding females and goslings, limited availability of suitable habitat, and human-caused disturbance and mortality (USFWS 2004, pg. iii). In order for Nēnē populations to survive, they must be provided with: (*i*) relatively predator-free breeding areas, (*ii*) sufficient food resources, (*iii*) human-caused disturbance and mortality must be reduced to a minimum, and (*iv*) genetic and behavioral diversity must be maximized. At the same time, it is recognized that Nēnē are highly adaptable birds, successfully utilizing a gradient of habitats, ranging from highly altered to completely natural, which bodes well for the recovery of the species. The USWFS *Draft Revised Recovery Plan for the Nēnē or Hawaiian Goose* proposes utilizing a mix of natural and human-altered habitats in such a way that meets the life history needs of the species and promotes self-sustaining populations at, or above, recovery target levels (USFWS 2004, pp. iv-vi).

2.1.6 NĒNĒ AT KĪLAUEA FALLS RANCH

There are currently a fairly large number of Nēnē present in the north shore area – between Moloa'a and Hanalei there are three main groups of Nēnē totaling something on the order of 300 individuals (David, 2014, T. Kaiakapu, 2014, pers comm). In the course of building the house on the property and beginning to manage the grounds immediately *makai* of the residence the tall Guinea grass (*Panicum maximum)* has been mowed, and maintained as a rough lawn (see Figure 2.2, below). Nēnē have been seen on the site on a seasonal basis with numbers ranging from ten (10) to one hundred (100). The birds have been seen primarily within the mowed grassy areas on the property. No nesting has yet been recorded on the property, but there is adequate suitable nesting habitat to support a number of nesting pairs.

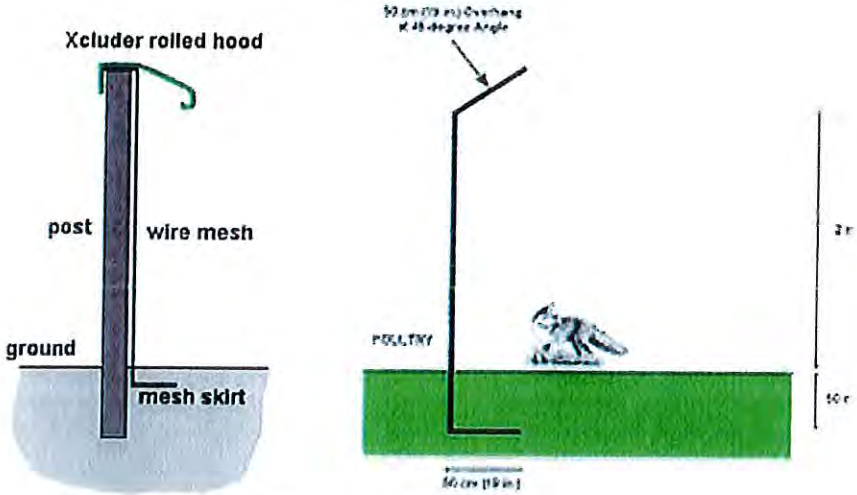
Figure 2.2 Photograph of Proposed Natural Resource Conservation Area

2.1.7 CONSTRUCTION OF NĒNĒ ENCLOSURE/MAMMALIAN PREDATOR EXCLOSURE FENCE

A cornerstone of this Conservation Plan is the construction and maintenance of a Nēnē enclosure/predator exclosure fence. The fence's primary function will be to provide a safe haven for Nēnē and from which cats, dogs, and pigs can be removed and maintained free of.

- Components of the predator barrier include (*i*) fence posts buried in the ground; (*ii*) a six-foot high wire mesh covering with small enough openings to prevent access by dogs, cats, and pigs; (*iii*) installation of Katzecure™ or other similar cat exclusion roller system on the top of the fence, on the outside facing sides of the fence which will prevent cats from climbing over the fence and entering the Nēnē enclosure; and (*iv*) a 12-inch wire mesh or synthetic mesh "skirt" buried below grade on the outside of the fence to prevent dogs and pigs from digging under the fence.
- Human access gates should be set in such a way that there is not enough room at the hinge points, or below the gate for cat sized animals to get through or under – this usually can be accomplished by cementing in a tracked gate that rides on runners inset into the concrete face plate. Conversely a double blind gate could be used – their function essentially means that one door is always closed while the second is opened.
- There will need to be a strip on the outer perimeter of the fence which is cleared and maintained, free of woody vegetation, wide enough that cats cannot climb adjacent vegetation over the enclosure and drop into the Nēnē habitat. This "buffer area" needs to be maintained and any vegetation that may start to climb the fence will need to be managed (i.e., cut back or removed) on a regular basis.
- If the Client desires to mask the fence with a hedge or other plantings on the inside of the fence, partially screening it from views from the main house, a hedge-row or other plantings should be separated from the fence by a distance sufficient to prevent vegetation from overgrowing the fence, and to allow for easy access along the fence-line, to (*i*) control vegetation, (*ii*) conduct regular inspections of the fence for damage, and (*iii*) to check mammalian predator traps placed along the fence line.
- Select fencing resembles one of the conceptual diagrams below in Figure 2.3.

Figure 2.3 Conceptual Nēnē Enclosure



Source: Compiled by Rana Biological Consulting (2014)

2.1.8 OPERATION AND MAINTENANCE OF ENCLOSURE

A predator excluding fence is only as good as its maintenance, and adherence to operational guidelines set up to prevent incursions of the target mammalian predators, in this case, pigs, cats and dogs.

Operation and maintenance of the fenced enclosure:

- Always keep all access gates closed even if entering the exclosure for a brief period of time.
- Inspect the fence on a regular basis to ensure that there are no breaks, tunneling under, or vegetation climbing on, or over-topping the fence.
- If such vegetation is found, control or remove vegetation which may compromise the efficacy of the fence in excluding the target mammalian predators.
- Maintain mowed buffer zones along both the interior and exterior of the fence line.
- Remove or prune vegetation on the outside of the fence which reaches a height whereby cats could climb the vegetation and drop/jump into the enclosure, this is particularly important during the Nēnē nesting season that on Kaua'i usually runs from October through March.

2.2 NATIVE BIRD EDUCATION

The day-to-day predator control, vegetation management, and fence maintenance activities described in this CP will be conducted by on-site staff. In doing so, it is imperative that the personnel conducting these activities be aware of, and able to identify, Nēnē. In addition, they must be aware of the guidelines and restrictions on appropriate interactions, as well as any potential issues that they may encounter in their daily operations.

Identification of Nēnē is straight forward – photographs of adult birds and goslings of this species are included in Figure 2.4, below.

Figure 2.4 Photographs of Goslings and Adult Nēnē

A pair of adult Nēnē.

Three Nēnē goslings.

Source: Rana Biological Consulting (2014)

2.2.1 INTERACTING WITH NATIVE BIRDS

2.2.1.1 Nēnē

Nēnē are naïve, having evolved in the Hawaiian Islands without mammalian predators. Nēnē are not naturally afraid of man, or any of the introduced mammalian predators now found in the Hawaiian Islands. To ensure that conservation activities, and other normal usage of the property does not result in harm to this protected species, the following guidelines should be followed whenever Nēnē are present on the site.

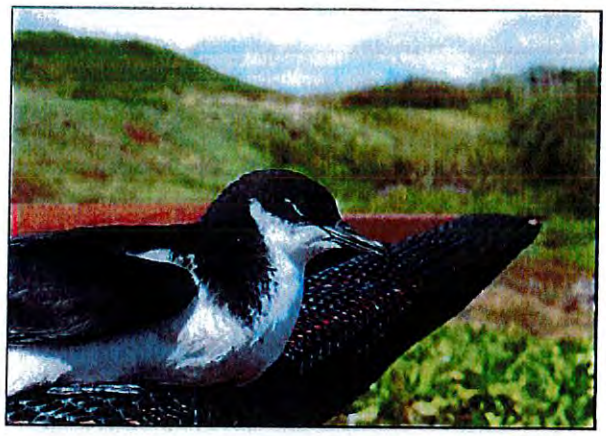
- Do not approach Nēnē, or try to pet them,
- Do not feed Nēnē, they can become terrible moochers and are happy taking human food in the form of handouts. Nēnē have evolved to eat predominately plants, human foods can be injurious to them. Feeding Nēnē trains them to approach humans, not a behavior to encourage since these birds fly to other areas where the humans may not understand it inappropriate to feed the birds;
- Ensure that all trash containers that have food or food packaging are covered to reduce the number of rodents, and to discourage birds from trying to feed from the trash receptacles;
- Do not allow dogs within the Nēnē exclosure when birds are present.

2.2.1.2 Other Native Seabirds of Concern

Along with Nēnē described above, several species of seabirds, including the Hawaiian Petrel (*Pterodroma sandwichensis*), Newell's Shearwater (*Puffinus auricularis newelli*), and Wedge-tailed Shearwaters (*Puffinus pacificus*), may be attracted to lights on or near the property and be downed during the fledgling season. The fledgling season for seabirds present on the island of Kaua'i rnns from approximately September 15th through December 15th each year. The three native species most likely to be downed during that period are shown in Figure 2.5, below.

If any of these seabird species are encountered on the property follow the protocols outlined in Section 2.4.

Figure 2.5 Other Native Seabirds of Concern



Newell's Shearwater

Hawaiian Petrel

Wedge-tailed Shearwater

Source: Rana Biological Consulting (2014)

2.3 PREDATOR CONTROL

For the predator exclosure fence to achieve its maximum potential, predator trapping will need to be conducted on an ongoing basis. Once the fence has been completed, and before the gate(s) are finally closed any dogs, cats and pigs within the fenced Natural Resource Conservation Area should be chased out. With the dogs and pigs, this task should be straightforward, depending on the type and height of vegetation present within the exclosure at the time it is put into service; shooing cats out of the exclosure may be somewhat more problematic. It is assumed that once the gate(s) are closed

there will no longer be any dogs or pigs trapped within it. Predator control activities from that point on will focus on the removal of cats and ensuring that they do not re-enter the exclosure.

To control cats within the gated exclosure, the devices and protocols outlined in Section 2.3.1and Section 2.3.2 should be employed. In addition, the Owner or their agent may wish to hire an experienced cat-trapper to set up a regime of trapping and train the conservation management staff in the best practices for predator control activities. If that decision is made, the authors of this CP recommend Mr. Alan Silva, a highly qualified trapper who currently conducts cat-trapping programs on other properties across the Island of Kaua'i.

2.3.1 DEVICES

As shooting is not really an option on this property, the next most humane way to capture and remove cats from the exclosure is by using live traps, and following humane capture and inspection protocols. The most effective live trap for this use, are the Havahart® one door feral cat traps. These traps are designed for non-professional cat trappers and are very easy to use and maintain.

2.3.2 PROTOCOLS

In order for trapping to be effective, it must be an ongoing and adaptive process. The basic protocol is as follows:

1. Deploy four traps baited with cat food, inside the fence, spread evenly along the fence line.
2. Check the traps at least once every 24 hours.
3. When a cat is trapped, take the cat in the trap to the Human Society for adoption or euthanasia.
4. Replace any used trap with a fresh, baited trap. Use traps may be cleaned and rotated back into service as needed.
5. Where cats are consistently observed and/or trapped, traps may be concentrated in that area, as it may represent a point of ingress or egress to/from the exclosure.
6. Continue to deploy traps until no further cats are trapped, then wait until a cat is seen within the exclosure and restart the process.

Open traps should not be deployed when fledgling Nēnē are present in the site to prevent them from being caught in a trap. The period when Nēnē usually have goslings (see Figure 2.4) is between October and March, it will be obvious if they are any on site. If cats continue to be an issue, the Conservation Manager will inspect the fence and any gates into the predator exclosure and where necessary conduct repairs to restore their integrity. As the fenced area is relatively small and readily searchable, cat trapping may not be needed on an ongoing basis, but rather initiated when a cat is spotted and/or one cannot easily be shooed out of the exclosure, after the exclosure is rendered cat free.

2.4 DOWNED SEABIRD SPECIES RESPONSE PROTOCOL

With the construction of the home and associated infrastructure and the planned caretakers house and barn, there is a heightened risk that native nocturnally flying seabirds including, Hawaiian Petrel, Newell's Shearwater Band-rumped Storm-Petrel (*Oceanodroma castro*), and Wedge-tailed Shearwaters may be attracted to lights on the property and be downed during the fledgling season which on Kaua'i runs from approximately September 15th through December 15th each year. There is also the potential that several other seabird species which nest at the Kīlauea Point National Wildlife Refuge and in the cliffs along the shoreline on both sides of the property may also be come down on the site, most likely in close proximity to the buildings.

A downed seabird recovery kit will be assembled and maintained on site which will include the following:

- Mid-size pet carrier;
- Clean towel; and
- Nitril or latex gloves.

During the fledgling season which runs from September 15th through December 15th, the caretaker and staff should inspect the grounds around all of the building on the site on a daily basis, preferably as shortly after sunrise as possible for downed seabirds. If a downed alive seabird is found the staff should follow the following protocols:

1. Deploy seabird recovery kit;
2. Put on protective gloves;
3. Carefully wrap the bird in a clean towel and gently place it in the pet carrier, be careful to keep the birds bill away from your face and eyes;
4. Transport the bird to the nearest SOS Aid-Station;
5. Place the bird carefully in the Aid-Station; and
6. Fill in the white board with the location of the downed bird incident.

The closest SOS Aid Stations to the property are located at the Kaua'i Medical Group-Kīlauea. Once the pet carrier has been used to transport a downed or injured bird it should be cleaned with bleach and water and dried before used to transport another bird.

2.5 INJURED NĒNĒ RESPONSE PROTOCOLS

It is possible that, in the course of maintaining the property and conducting conservation management activities, staff will encounter an injured Nēnē on the property. If an injured Nēnē is encountered follow the following protocols:

- Deploy seabird recovery kit
- Put on protective gloves
- Carefully wrap the bird in a clean towel and gently place it in the pet carrier, be careful to keep the birds bill away from your face and eyes
- Transport the bird to the Kaua'i Humane Society, located at:
    - 3 Kaumuali'i Highway 825, Līhu'e, Hawai'i 96766
    - (808) 632-0610

Once the pet carrier has been used to transport a downed or injured bird it should be cleaned with bleach and water and dried before used to transport another bird.

2.6 VEGETATION MANAGEMENT AND ENHANCEMENT

A botanical survey conducted in 2007 (David and Guinther, 2007) of the Kīlauea Falls Ranch property identified more than 100 species of ferns and flowering plants. Of these, 8 percent are native plants (indigenous and/or endemic species) and another 8 percent are generally regarded as early introductions (before 1778) made by Polynesian migrants (so-called "canoe plants"). These are species widespread in the Central Pacific and associated with early human habitation.

The lower part of the property is dominated by California grass (*Urochloa mutica*) and/or elephant grass (*Paspalum purpureum*) with lesser amounts of wetland sedges (*Cyperus involucratus*) and rushes (*Schoenplectus lacustris*), the latter mostly growing right along open water margin. These wetlands occupy low-lying, level ground directly along the river. The property consists of two other

broad categories of vegetation: forest and grassland. The forest changes significantly in its composition from the north (low-lying riverine forest) to south on the property, no doubt reflecting a general shift in the vegetation along a *mauka-makai* axis all along the windward coast of Kaua'i. The forest of the lowland (on the property, the forested area inside the horseshoe bend) is dominated by *hau*, closest to the river, Christmas berry (*Schinus terebinthefolius*), Java plum (*Syzigium cumini*), and is being heavily invaded by satin leaf (*Chrysophyllum oliviforme*). *Koa haole* (*Leucaena leucocephala*) forms a dense scrub border where this forest lies adjacent to grassland. Several herbaceous plants, notably Guinea grass (*Panicum maximum*) and the vine, *Solanum seaforthianum*, are associated with this forest in the lowest parts of the property.

Vegetation management within areas proposed for Nēnē management in this conservation plan have by-in-large been mowed or controlled through manual and mechanical pruning, clearing and general gardening methods. The vast majority of the vegetation in this area is non-native, and much of it can be considered to be invasive. As it is impractical in this setting to remove these plants and replace them with native species, vegetation management will be centered on providing suitable foraging habitat for Nēnē and other waterbird species, predominately through mowing and clearing of overly dense vegetation.

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3. ARCHAEOLOGICAL PRESERVATION

Protection and preservation of archaeological resources present at Kīlauea Falls Ranch is a condition of its present Special Management Area permit [SMA(U)-2008-4] and, along with endangered species habitat enhancement, is an integral part of this CP. This chapter provides an overview of the archaeological resources at Kīlauea Falls Ranch and a series of SHPD-approved interim protection and long-term preservation measures which will be pursued as part of CP-related activity.

3.1 ARCHAEOLOGICAL INVENTORY SURVEY

As part of the application process for the original SMA permit for construction of the main house and associated infrastructure, the Owner worked with Cultural Surveys Hawai'i, Inc. to prepare an Archaeological Inventory Survey (AIS). The resulting report, *Archaeological Inventory Survey of an Approximately 74-Acre Portion of the Kīlauea Falls Ranch Property, Kīlauea Ahupua'a, Hanalei District, Kaua'i Island TMK: [4] 5-2-012:035 por.* (March 2008) covered 74 acres of the total 163 acre property; there were no plans to develop the remaining approximately 89 acres of the property, which were not surveyed. The survey area is shown in Figure 3.1.

The fieldwork component of the AIS was conducted between December 3rd and 6th, 2007 under Archaeological Permit No. 07-19, issued by the State Historic Preservation Division (SHPD), Department of Land and Natural Resources (DLNR). The resulting AIS report was prepared to support Kīlauea Falls Ranch review under Chapter 6E-42, HRS and Chapter 13-284, HAR. The AIS was designed to fulfill the state requirements for an archaeological inventory survey per Chapter 13-13-276, HAR.

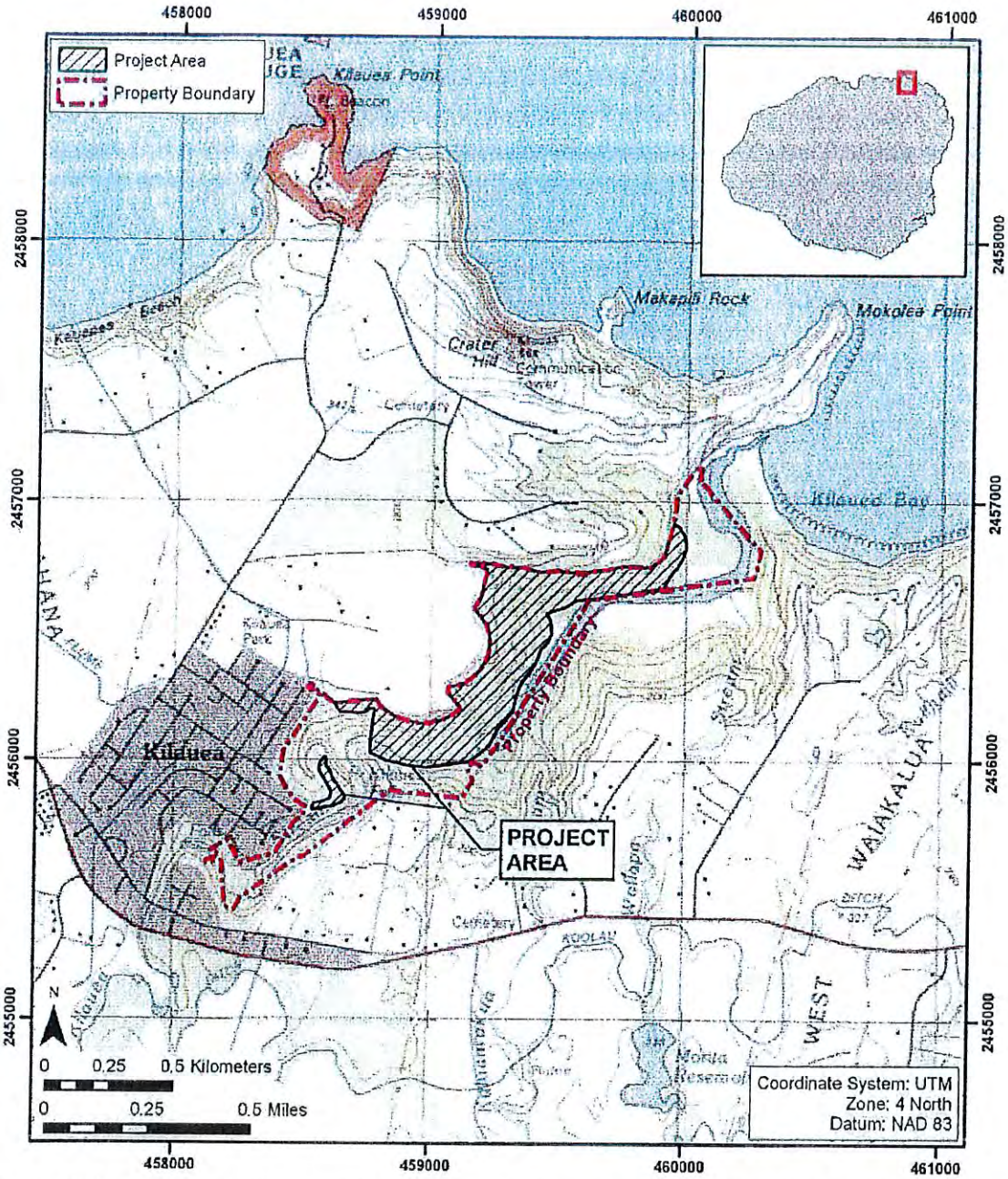
The archaeological properties identified during the course of the AIS, with their State Inventory of Historic Places (SIHP) number and a summary description, are provided in Table 3.1 below. The location of these archaeological sites is shown in Figure 3.2.

Table 3.1 Summary of Archaeological and Historic Sites at Kīlauea Falls Ranch

SIHP No.	*Summary Description*	*Recommendation*
#50-10-04-579	An agricultural terrace.	Inappropriate for Hawai'i Register of Historic Places.
#50-10-04-580	A series of 53 agricultural terraces and 2 possible habitation areas, probably related to agriculture as field shelters.	Preservation recommended. Recommended as eligible for the Hawai'i Register of Historic Places.
#50-10-04-581	A stone retaining wall with cement and alignments and a rock-faced trail understood as a post-contact permanent habitation.	Preservation recommended. Recommended as eligible for the Hawai'i Register of Historic Places.
#50-10-04-582	Agricultural terraces.	Inappropriate for Hawai'i Register of Historic Places.
#50-10-04-583	Agricultural terraces.	Inappropriate for Hawai'i Register of Historic Places.

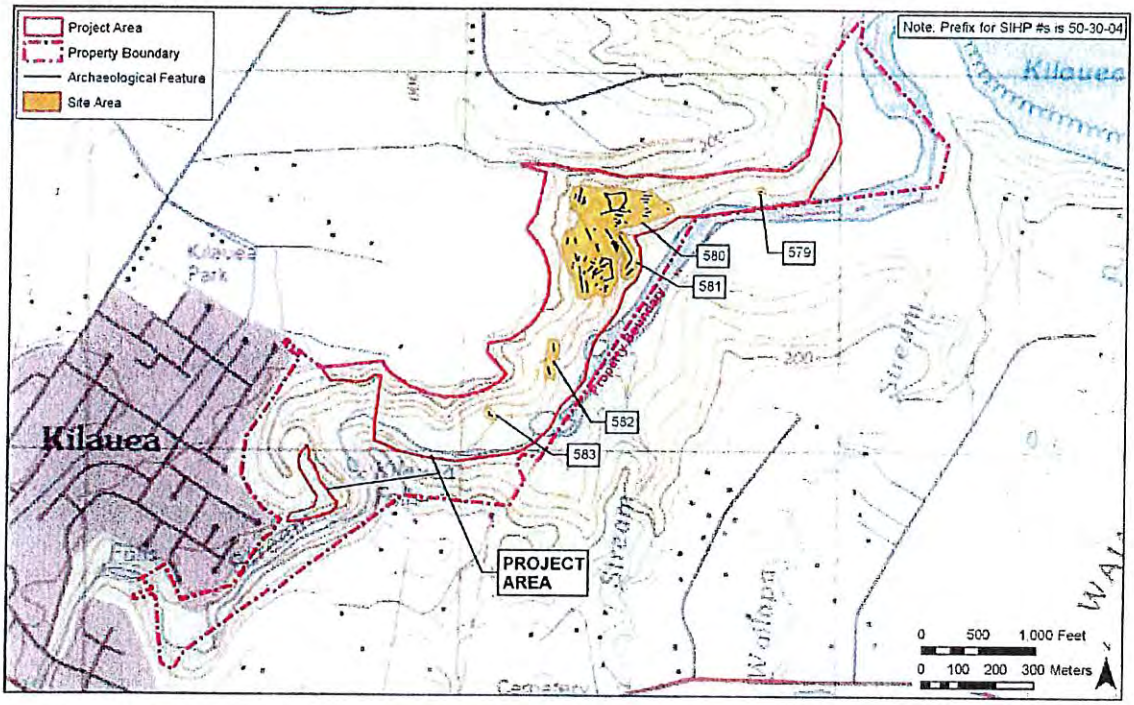
Source: *Archaeological Inventory Survey of an Approximately 74-Acre Portion of the Kīlauea Falls Ranch Property, Kīlauea Ahupua'a, Hanalei District, Kaua'i Island TMK: [4] 5-2-012:035 por.*, Cultural Surveys Hawai'i, Inc. (2008)

Figure 3.1 March 2008 AIS Survey Area



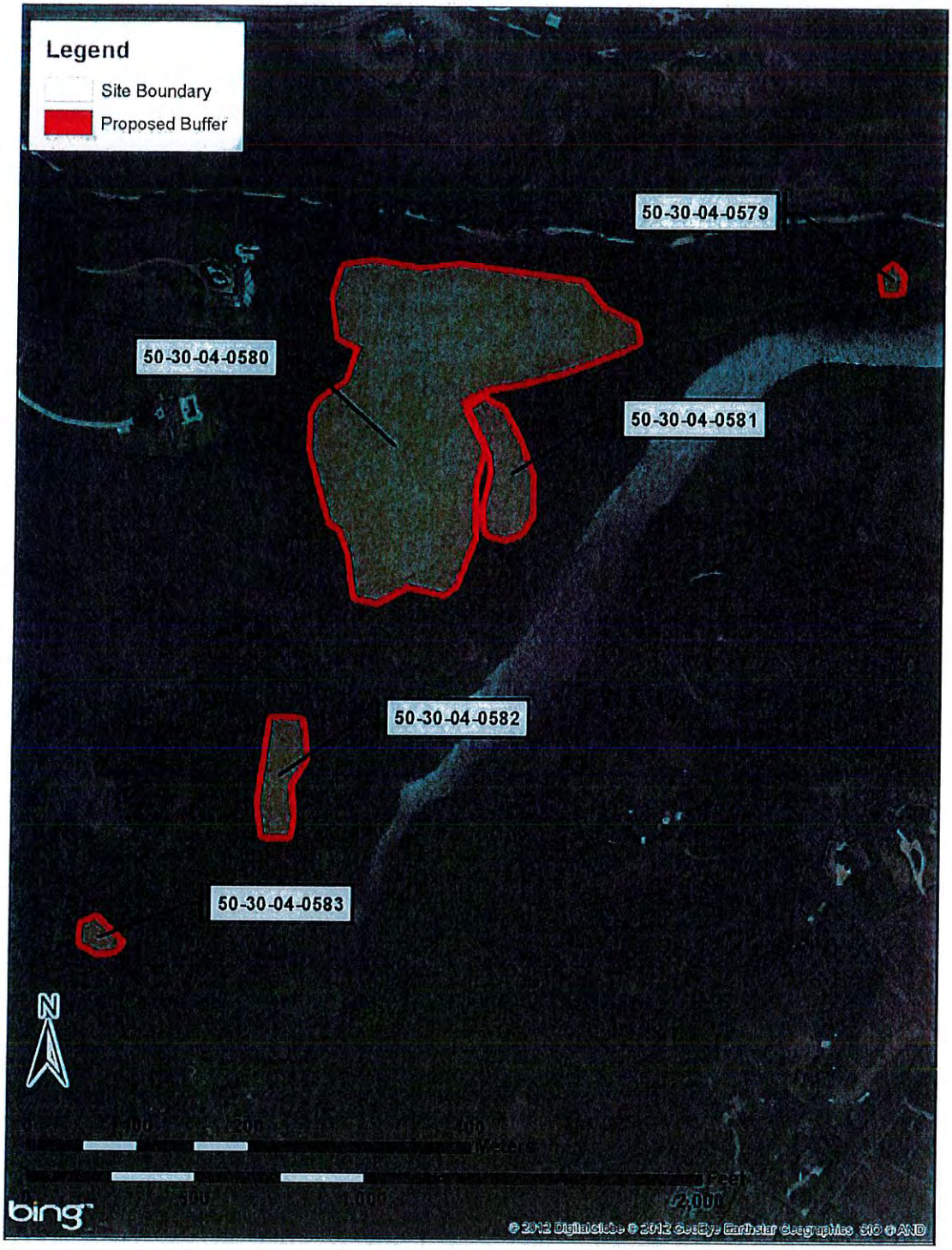
Source: *Archaeological Inventory Survey of an Approximately 74-Acre Portion of the Kīlauea Falls Ranch Property, Kīlauea Ahupua'a, Hanalei District, Kaua'i Island TMK: [4] 5-2-012:035 por.*, Cultural Surveys Hawai'i, Inc. (2008)

Figure 3.2 Location of Archaeological Sites at Kīlauea Falls Ranch



Source: *Archaeological Inventory Survey of an Approximately 74-Acre Portion of the Kīlauea Falls Ranch Property, Kīlauea Ahupua'a, Hanalei District, Kaua'i Island TMK: [4] 5-2-012:035 por.*, Cultural Surveys Hawai'i, Inc. (2008)

Figure 3.3 Aerial View of Archaeological Sites



Source: *Preservation Plan for State Inventory of Historic Places (SIHP) 50-30-04-0579 through -0583 Kīlauea Ahupua'a, Hanalei District, Kaua'i Island TMK: [4] 5-2-012:035 por.*, Cultural Surveys Hawai'i, Inc. (2014)

3.1.1 ARCHAEOLOGICAL SITE DESCRIPTIONS

3.1.1.1 SIHP No. 50-30-04-579

SIHP No. 50-30-04-579 consists of a single soil-retaining terrace geographically separate from the dense clustering of terraces observed within 50-30-04-580 (see Figure 3.2 and Figure 3.3). SIHP No. 50-30-04-579 is composed of a single course of sub-angular to rounded basalt cobbles and boulders measures 10.2 m long by 0.5 m wide with a maximum height of 0.5 m (33′6″ x 1′8″ x 1′8″). The terrace is oriented east-west and utilized a natural basalt bedrock formation as its western edge. This site is in poor condition.

3.1.1.2 SIHP No. 50-30-04-580

SIHP No. 50-30-04-580 consists of a dense cluster of 55 archaeological features including 53 soil-retaining terraces and two possible habitation areas (see Figure 3.2 and Figure 3.3). These features were assigned to SIHP No. 50-30-04-580 based on similarities of geographic location and construction method. Terraces were observed immediately adjacent to and abutting two possible habitation areas (Features L and MM), suggesting a relationship between these enclosures and the surrounding agricultural landscape.

SIHP No. 50-30-04-580 – Feature L consists of a large U-shaped wall encompassing an area of approximately 45 x 50 m (147′8″ x 164′) located just east of the steeply sloping gulch observed within SIHP No. 50-30-04-580. The U-shaped wall was constructed of 1 to 7 courses of sub-angular basalt boulders and cobbles. Natural bedrock outcrops of large basalt boulders were also utilized as portions of the wall. A terrace running east-west abutted the U-shaped wall at the northern extent, which creates a large enclosed area. Soil-retaining terraces were observed within this enclosure and to the east and west of the enclosure walls. A possible habitation area was observed in the northwest corner of the enclosure constructed on small sub-angular basalt boulders stacked within the crevices of natural basalt boulders.

A test excavation did not produce any cultural material or charcoal. A large amount of modern cultural material was observed around the U-shaped wall and enclosure including glass bottles, ceramic shards, aluminum cans, and vehicle tires.

SIHP No. 50-30-04-580 – Feature MM consists of an oval-shaped enclosure encompassing an area of approximately 7 x 7.5 m (22′11″ x 24′7″) centrally located within an area of dense terracing. The enclosure was constructed of 2 to 4 courses of small to medium, sub-angular basalt boulders that were stacked within the crevices of natural basalt boulders. A surface of large basalt cobbles was observed in the western portion of the enclosure underneath a small overhang. The fireplace was constructed of a single course of large basalt cobbles measuring 23 cm (9″) high. During a small test excavation in this area a faunal bone fragment and a *kukui* nut were collected; no cultural materials were observed.

The remaining 53 soil-retaining terraces within SIHP No. 50-30-04-580 were constructed of 1 to 9 courses of sub-angular to rounded basalt cobbles and boulders. Several areas within this site consisted of terraces oriented parallel to one another and extending across slope forming an undulating series of flat agricultural surfaces and steep modified slopes. The majority of the terraces within SIHP No. 50-30-04-580 were observed to be in good condition at the time of the AIS.

3.1.1.3 SIHP No. 50-30-04-581

SIHP No. 50-30-04-581 is a historic (i.e., post-contact) site complex located in the central portion of the AIS survey area (see Figure 3.2 and Figure 3.3). The site is situated near the base of Kīlauea Stream Valley, immediately upslope of the access road. SIHP No. 50-30-04-581 – Feature A consists of a formal stone retaining wall constructed of 4 to 5 courses of well-faced basalt boulders and cobbles measuring approximately 22 m (72′2″) long with an average height of 85 cm (2′9″). A L-

shaped alignment connected to the northeastern portion of the stone retaining wall was observed to be a rock-faced ramp, which may have provided access to the level ground surface created by the retaining wall. This alignment was constructed of 2 to 3 courses of well-faced basalt boulders and cobbles measuring approximately 4 m (13′1″) long with an average height of 60 cm (24″). The southwestern portion of the formal retaining wall abuts a single pile of broken concrete. A second stone retaining wall constructed of 1 to 2 courses of basalt boulders and cobbles measuring approximates 4.1 m (13′5″) is approximately 5 m (16′5″) of the formal stone retaining wall. Abundant historic artifacts, including ceramic pots, glass bottles, and metal fragments were observed scattered about the formal site complex. The site may have functioned as a historic habitation feature.

SIHP No. 50-30-04-581 – Feature B consisted of a partially rock-faced trail oriented parallel to SIHP No. 50-30-04-581 – Feature A. The trail was observed to extend southwest beyond SIHP No. 50-30-04-581 – Feature A into dense vegetation and northeast, curving across slope to about the edge of the steeply sloping gulch. Two parallel rock-faced trail portions located approximately 10 m (32′10″) upslope of SIHP No. 50-30-04-581 – Feature A were observed to be the margins of a rock-faced ramp, which may have provided access from the trail to the level ground surface created by SIHP No. 50-30-04-581 – Feature A. These portions were constructed of 2 to 3 courses of basalt boulders and cobbles and measured approximately 6 m (19′8″) long with an average height of 60 cm (24″). A third stone-faced trail portion located approximately 6 m (19′8″) northwest of the L-shaped alignment observed in SIHP No. 50-30-04-581 – Feature A was constructed on 3 to 5 courses of basalt boulders and cobbles measured 4.1 m (13′5″) long with an average height of 1.2 m (3′11″). SIHP No. 50-30-04-581 – Feature B may have functioned as an access trail and entry to SIHP No. 50-30-04-582 – Feature A. It seems likely that the trail may have continued northeast across the steeply sloping gulch to follow the present path of the project area access road.

3.1.1.4 SIHP No. 50-30-04-582

SIHP No. 50-30-04-582 consisted of two soil-retaining terraces geographically separate from the dense clustering of terraces observed within SIHP No. 50-30-04-580 (see Figure 3.2 and Figure 3.3). SIHP No. 50-30-04-582 – Feature A, located in the northern portion of SIHP No. 50-30-04-582, was composed of a single course of sub-angular to rounded basalt cobbles and boulders measuring 2 m (6′7″) by 0.2 m (8″) wide with a maximum height of 0.5 m (1′8″). The terrace was oriented north-south, and utilized a natural sediment terrace. SIHP No. 50-30-04-582 – Feature B, located in the southern portion of SIHP No. 50-30-04-582, was composed of 1 to 4 courses of small, sub-angular to rounded basalt boulders measuring 5.3 m (17′5″) long by 0.5 m (1′8″) wide with a maximum height of 0.8 m (2′7″).

3.1.1.5 SIHP No. 50-30-04-583

SIHP No. 50-30-04-583 consisted of two soil-retaining terraces geographically separate from the dense clustering of terraces observed within SIHP No. 50-30-04-580 (see Figure 3.2 and Figure 3.3). SIHP No. 50-30-04-583 – Feature A, located on the northern portion of SIHP No. 50-30-04-583, was composed of 3 to 4 courses of sub-angular to rounded basalt cobbles and boulders measuring 3.8 m (12′6″) long by 0.5 m (1′8″) wide with a maximum height of 0.8 m (2′7″). The terrace was oriented northwest to southeast. SIHP No. 50-30-04-583 – Feature B, located in the southern portion of SIHP No. 50-80-04-583, was composed of 2 to 4 courses of small, sub-angular basalt boulders measuring 5.5 m (18′) long by 0.5 m (1′8″) wide with a maximum height of 0.8 m (2′7″); this feature was situated between two large basalt boulder outcrops.

3.1.2 AIS SUMMARY AND RECOMMENDATIONS

No archaeological sites were encountered in the area where the main house and associated infrastructure, was later constructed nor in the area contemplated for the Conservation Manager's Residence or Conservation Maintenance Building. Preservation of two sites, SIHP No. 50-30-04-580

and -581, that include 57 of the 62 identified archaeological and historic features (i.e., 92 percent of the total) is recommended. These form an area of relatively dense agricultural features forming a cultural landscape within which is imbedded a post-contact permanent habitation or work area. The other features are modest outliers that are basically more of the same, but in their relative geographic isolation lack distinctive merit. Finally, the AIS recommended that an Archaeological Preservation Plan (APP) (see Section 3.2) be developed to address sites to be preserved and clarify what may and may not be permitted in the vicinity of sites to be preserved.

3.2 ARCHAEOLOGICAL PRESERVATION PLAN

In its review of the Special Management Area Use Permit [SMA(U)-2008-4], Class IV Zoning Permit, and Use Permit, relating to construction of the main house and associated infrastructure, SHPD noted that preservation of the historic properties identified and documented in the 2008 AIS (see Section 3.1) is one of the 18 conditions placed upon approval by the Planning Commission of the County of Kaua'i in their October 2, 2008 DO. SHPD further concurred with the Owner's intent to prepare an APP that preserves all 62 features identified as part of the five historic properties present at Kīlauea Falls Ranch (discussed in Section 3.1 above).

Pursuant to this requirement, at the request of the Owner, Cultural Surveys Hawai'i, Inc. prepared an *Archaeological Preservation Plan for State Inventory of Historic Places (SIHP) 50-30-04-0579 through -0583*. The plan addresses the proposed preservation measures for SIHP Nos. 50-30-04-579 through -583 in accordance with §13-277, HAR Rules Governing Requirements for Archaeological Site Preservation and Development, and has been reviewed and accepted by SHPD.[1] The information in this section of the CP is drawn from that report.

The archaeological and historic properties present at Kīlauea Falls Ranch are generally linear constructions and completely located within the parcel. Because the archaeological features which make up these site complexes retain their inherent value as representative features of the area, further study of these features using advanced archaeological methods may reveal new information to our understanding of settlement and land use in the Kīlauea Valley during the historic period; thus, preservation is the most appropriate methods of conservation for these features.

Altogether, the areas proposed for preservation cover a discontinuous total of 16.2 acres (65,416 m^2). The areas subject to preservation activity are shown in Table 3.2 below, followed by details of their interim and long-term preservation measures.

[1] The *Archaeological Preservation Plan for State Inventory of Historic Places (SIHP) 50-30-04-0579 through -0583* was approved by SHPD in a letter dated May 16, 2014.

Table 3.2 Area Covered by Preservation Activities for SIHP Nos. 50-30-04-579 through -583

SIHP No. 50-30-04	*Area Covered*		*20 ft. Protective Buffer*		*Total Preservation Area*	
	m^2	*Ac.*	*m^2*	*Ac.*	*m^2*	*Ac.*
-579	279	0.06	511	0.12	790	0.18
-580	46,626	11.52	8,240	2.08	58,653	14.53
-581	3,787	0.93				
-582	2,973	0.75	1,683	0.41	4,656	1.16
-583	607	0.15	710	0.18	1,317	0.33
TOTAL	54,272	13.41	11,144	2.79	65,416	16.2

Source: *Preservation Plan for State Inventory of Historic Places (SIHP) 50-30-04-0579 through -0583 Kīlauea Ahupua'a, Hanalei District, Kaua'i Island TMK: [4] 5-2-012:035 por.*, Cultural Surveys Hawai'i, Inc. (2014)

3.2.1 INTERIM PRESERVATION MEASURES

During construction in adjacent areas of the Kīlauea Falls Ranch property, the following interim preservation measures—which are intended to preserve each historic property or archaeological feature associated with an SIHP site—will be implemented.

3.2.1.1 Interim Protective Buffers During Construction

In the event that any construction occurs in adjacent areas, an interim protective buffer marked by high visibility construction fencing will be established around the historic properties covered by this preservation plan in the event that any construction activities occur in adjacent areas. This buffer will surround the site at 20 ft. from the delineated complex boundary. The intended location and configuration of the Interim Protective Buffers is shown in Figure 3.4, below.

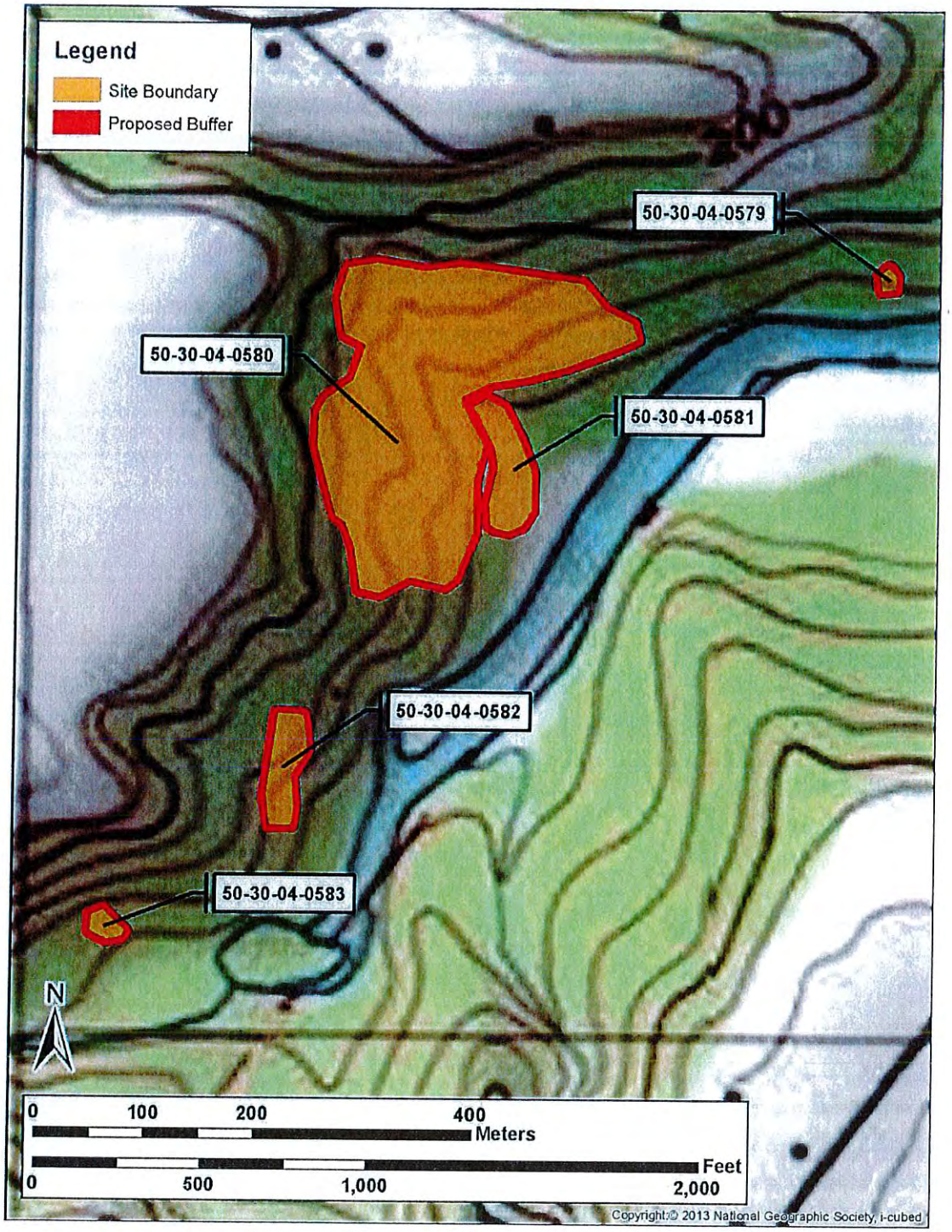
3.2.1.2 Periodic Archaeological Inspections During Construction

Interim protection measures for the historic properties covered by the APP will include periodic inspections by monitoring archaeologists during any construction in adjacent areas to ensure that adverse impacts to historic properties are avoided.

3.2.1.3 Pre-Construction Meetings

A pre-construction meeting prior to any activity which involves ground disturbance near the historic properties will be held with construction personnel in order to make them aware of both the locations and significance of SIHP Nos. 50-30-04-578 to -583. The prime contractor will be responsible for informing all-subcontractors and workers under his direction regarding the importance of avoiding or minimizing impacts to archaeological or historical properties at Kīlauea Falls Ranch.

Figure 3.4 Archaeological Preservation Plan 20-foot Protective Buffers



Source: *Preservation Plan for State Inventory of Historic Places (SIHP) 50-30-04-0579 through -0583 Kīlauea Ahupua'a, Hanalei District, Kaua'i Island TMK: [4] 5-2-012:035 por.*, Cultural Surveys Hawai'i, Inc. (2014)

3.2.2 LONG-TERM PRESERVATION MEASURES

The following are long-term preservation measures for archaeological sites present at Kīlauea Falls Ranch, as itemized in Hawai'i Administrative Title 13, Subtitle 13, Chapter 227-6, *Long Term Preservation Measures*.

3.2.2.1 Demarcation of Long-Term Buffer Zone

The locations of all the historic sites at Kīlauea Falls Ranch are within areas of generally low traffic, a fact which serves to adequately restrict unwanted access. Preservation, in the form of avoidance and protection, is recommended for SIHP 50-30-04578 through -583, as noted in Section 3.2. Long-term preservation for all archaeological and historic properties at Kīlauea Falls Ranch involves the installation of locked gates to the property. The locked gate will prevent public access to the parcel. In addition, access to the property will be controlled by the land owner, Kīlauea Falls Ranch. Limiting public access and routine maintenance of any fencing and/or gate will help to preserve the sites in their present condition.

3.2.2.2 Vegetation Management Methods

If vegetation removal is required within or near the historic properties and their associated archaeological features, then all vegetation clearing activities will be conducted in a manner which minimizes physical disturbance of the sites. Periodic inspections will be made to assess whether vegetation such as weeds, shrubs, or trees are damaging their integrity or stability. If potential vegetation concerns are identified, all vegetation clearance will be monitored by an archaeologist.

When either the Conservation Manager or the monitoring archaeologist determine vegetation management is required, allowable hand tools include, but are not limited to: machetes, chain saws, weed-eaters, and clippers. While herbicides may be used prior to manual clearing in order to minimize the volume of vegetation to be removed, environmental impacts from the use of such chemicals must also be considered. Any personnel engaged in vegetation must be briefed in proper clearance procedures by the Conservation Manger, with an emphasis on exercising care to avoid any disturbance to archaeological or historic properties. No on-site or adjacent burning for vegetation clearance will be allowed.

3.2.2.3 Stabilization Measures

No stabilization measures are anticipated in the foreseeable future for any of the archaeological or historic sites, or portions thereof, present at Kīlauea Falls Ranch. None of the sites are in immediate danger of collapse or other disturbance by human or natural causes. Should future events result in the need for stabilization measures for any of the SIHP sites on the property, stabilization measures shall be limited to repairs in areas where rocks have been displaced. This level of work should be limited to the effort needed to restoring damaged areas of the archaeological-historic properties to its prior condition and appearance. Such work will be performed by persons experienced in dry-stacked rock wall building, and in consultation with SHPD, utilizing the same materials and methods as are present in the original construction.

3.2.2.4 Landscape Planning

Any landscaping being built or maintained in the vicinity of the archaeological-historic features will be limited to stabilizing disturbed areas as necessary using erosion control matting and grass planning, using Bermuda grass. At present, no formal landscaping plan exists for areas within, or directly adjacent to, SIHP Nos. 50-30-04-578 through -583. In the event that future plans call for formal landscaping within one meter (3'3") of the preservation buffers, the following provisions are recommended:

1. Use of *ti*, *laua'e* fern, or other native dry-land species that require minimal irrigation and may be used as appropriate and practical for buffers between the historic site and adjacent areas;

2. Minimal ground alteration during landscaping activities in order to maintain the integrity of the archaeological and historic features; and
3. Vegetation incorporated into landscaping adjacent to historic properties should not include varieties that contain large and ground disturbing root systems, large overhanging branches, or which are so overbearing as to destroy or overrun structural elements of the historic properties.

3.2.2.5 Pathways, Lighting, and Other Hardscape Structures

The archaeological or historic properties that are present at Kīlauea Falls Ranch are all on privately-owned land and are not generally accessible by the public. No hardscape construction, pathways, or lighting are planned for these areas. No benches or lighting, drawing particular attention to the preserve areas, is indicated. Any future plans for hardscape construction within the immediate vicinity of these sites will be made in consultation with SHPD.

3.2.2.6 Access to Historic Properties

SHPD staff will be provided access to the historic sites to periodically inspect their condition and compliance with this APP. Access will be allowed only with prior written consent of the Owner or their appointed representative, such as the Conservation Manager responsible for executing the terms of this CP.

3.2.2.7 Litter Control

Litter within the boundaries of the APP protective buffers or adjacent areas should be removed by the Owner, Conservation Manager, or other designated party on a periodic basis.

3.2.2.8 Interpretive Signage

Because Kīlauea Falls Ranch is private property, there is no plan for permanent interpretive signage or other materials to be placed along, or near, the archaeological and historic sites there. However, if in the future additional public access is contemplated, an appropriate warning of the penalties for disturbance to the historic properties, such as the following, is recommended by the APP:

Table 3.3 Recommended Interpretive Signage

Kapu – Mālama nā wahi pana Kaua'i **Tabu – Protect the Legendary Places of Kaua'i**
Damage to these Historic Sites is Punishable Under Chapter 6E-11, Hawai'i Revised Statutes To report violations Contact the State Historic Preservation Division (808) 692-8015 Kīlauea Falls Ranch

3.2.2.9 Future Archaeological Research

If any future archaeologic research is proposed, a research plan must be submitted, reviewed, and accepted by the Owner and SHPD prior to the commencement of work.

3.2.2.10 Penalties

Noncompliance with the provisions and procedures of the SHPD-approved APP, following acceptance by the Owner and SHPD shall result in a directive to the person or party involved not to proceed with any further construction in adjacent areas, and may result in a denial or revocation of

SHPD's written concurrence or agreement. Noncompliance may also result in penalties as provided HRS Chapter 6E-11 and applicable laws.

4. CONSERVATION PLAN INFRASTRUCTURE

4.1 CONSERVATION MANAGER POSITION AND INFRASTRUCTURE

Implementation of the habitat enhancement and archaeological preservation activities called for under this CP will require a considerable investment of labor and equipment. To oversee these CP-related operations, the Owner has appointed a Conservation Manager, who will be responsible for the ongoing execution of this Plan. The Conservation Manager will be required to conduct and/or oversee a variety of tasks, including but not limited to: (*i*) installation and regular inspection/maintenance of the Nēnē enclosure; (*ii*) mammalian predator trapping and disposal; (*iii*) downed bird recovery; (*iv*) vegetation maintenance, (*v*) visitor and worker awareness training for native species and archaeology; and (*vi*) archaeological preservation inspections and activities.

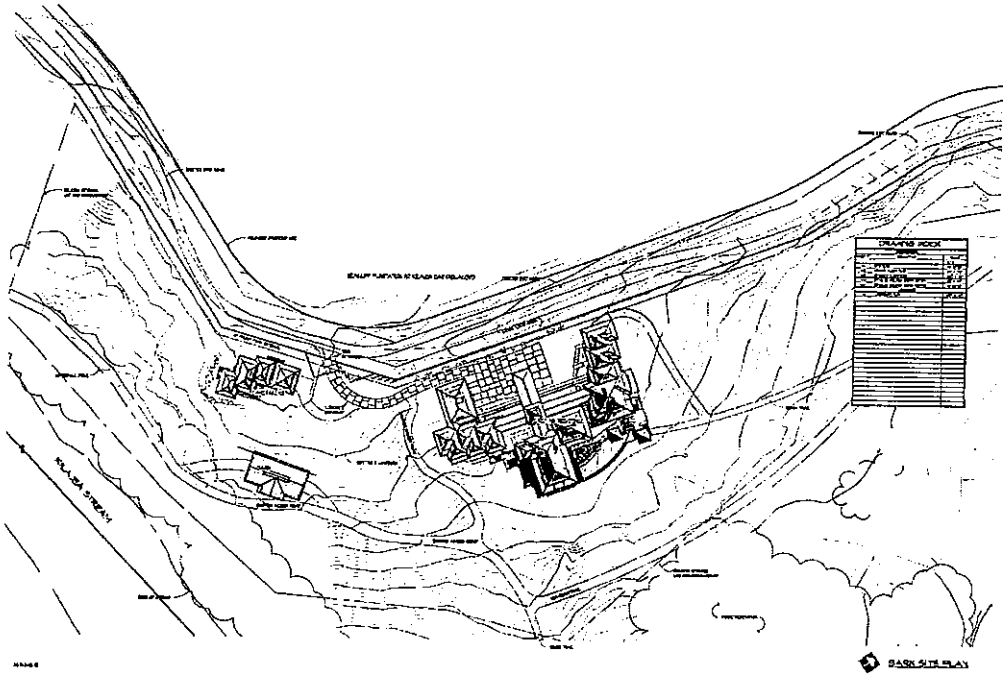
In order to support the Conservation Manager's efficient implementation of these and other duties at Kīlauea Falls Ranch, the CP incorporates specific infrastructure in the form a Conservation Manager's Residence and a Conservation Maintenance Building. The addition of this infrastructure at Kīlauea Falls Ranch will allow the Conservation Manager to live on-site, allowing for continuous oversight of the property, rapid response to changing conditions, and fostering a sense of *kuleana* and curatorship. The Conservation Maintenance Building will allow for the storage of equipment and materials necessary for the land management activities tied to this plan.

Prior to construction, the Conservation Manager's Residence and Conservation Manager's Building will require the Owner to obtain amendments to the existing County of Kaua'i Special Management Area Permit SMA(U)-2008-4, Use Permit No. U-2008-4, and Class IV Zoning Permit No. Z-IV-2008-6.

4.2 CONSERVATION MANAGER'S RESIDENCE

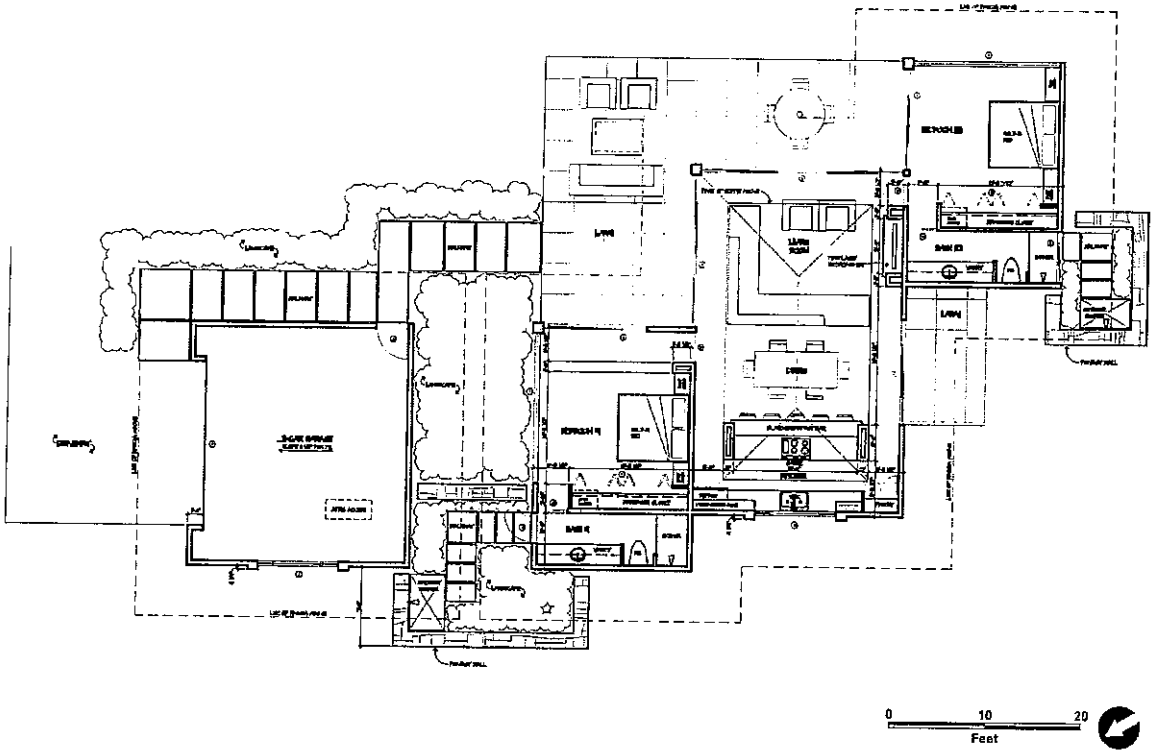
The Conservation Manager's Residence will be a single family residence, one story, with two bedrooms, a living area, outdoor patio, and an unattached two-car garage. Adjacent areas will be landscaped. A site plan showing the relationship of the existing and planned structures on the property is shown in Figure 4.1. A conceptual plan view of the Conservation Manager's Residence is shown in Figure 4.2; conceptual section views are shown in Figure 4.3.

Figure 4.1 Plan View of Existing and Proposed Structures



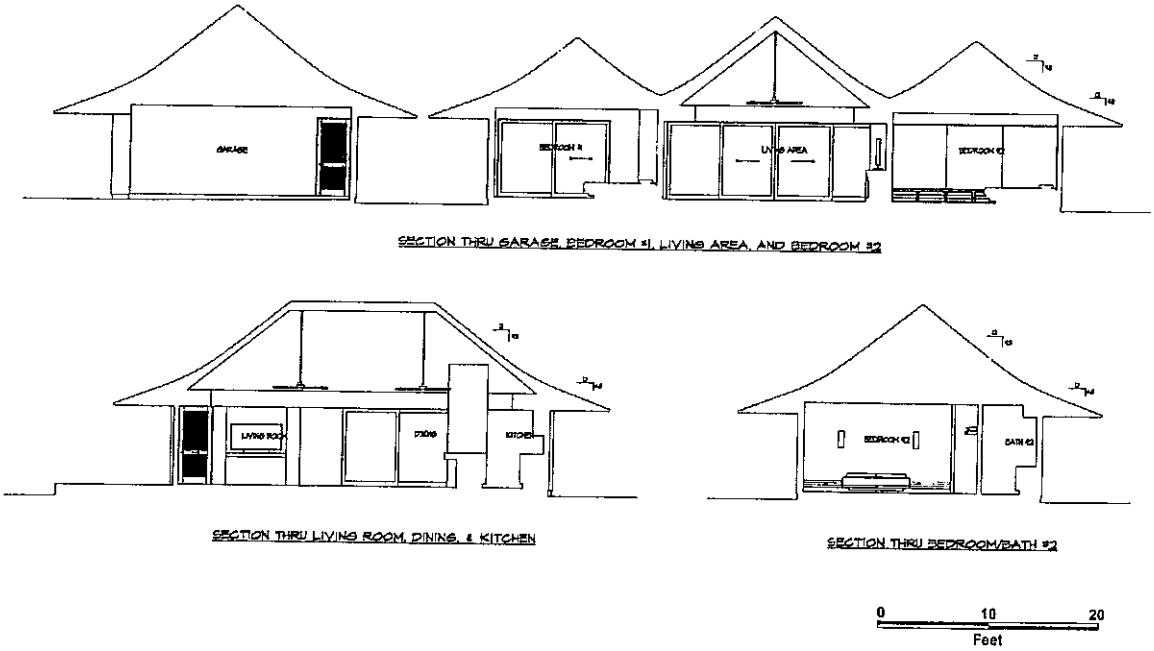
Source: Agor Architecture (2014)

Figure 4.2 Conceptual Plan View of Conservation Manager's Residence



Source: Agor Architecture (2014)

Figure 4.3 Conceptual Section Views of Conservation Manager's Residence



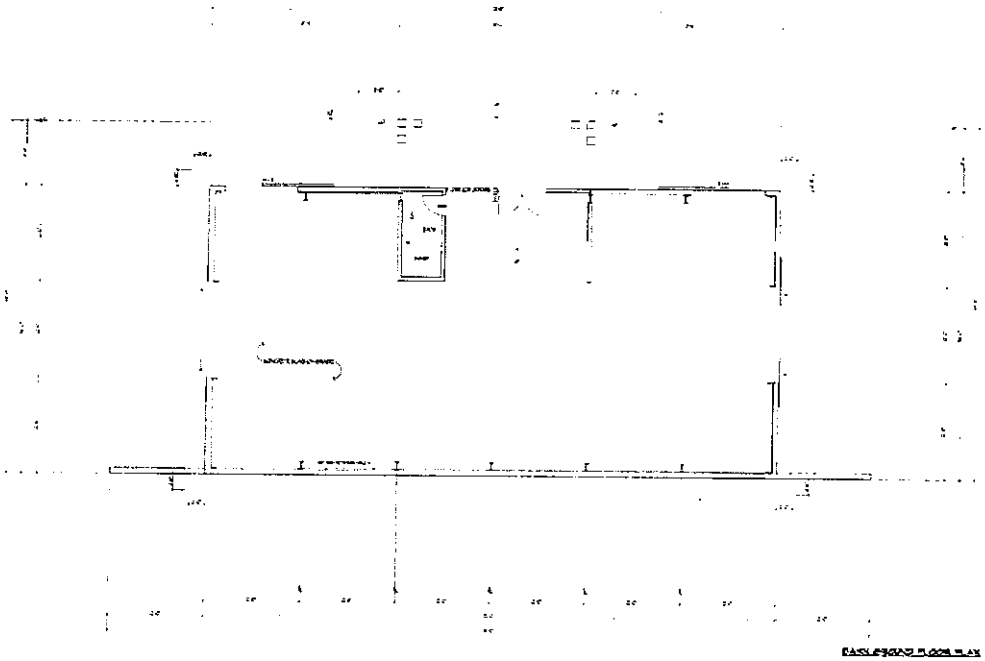
Source: Agor Architecture (2014)

4.3 CONSERVATION MAINTENANCE BUILDING

The Conservation Maintenance Building is designed as a single-story agricultural building with 2,592 square feet of work area and 240 square feet of deck area. It will contain maintenance, work, and storage areas. Plan and elevation views of the Conservation Maintenance Building are shown in Figure 4.4 and Figure 4.5.

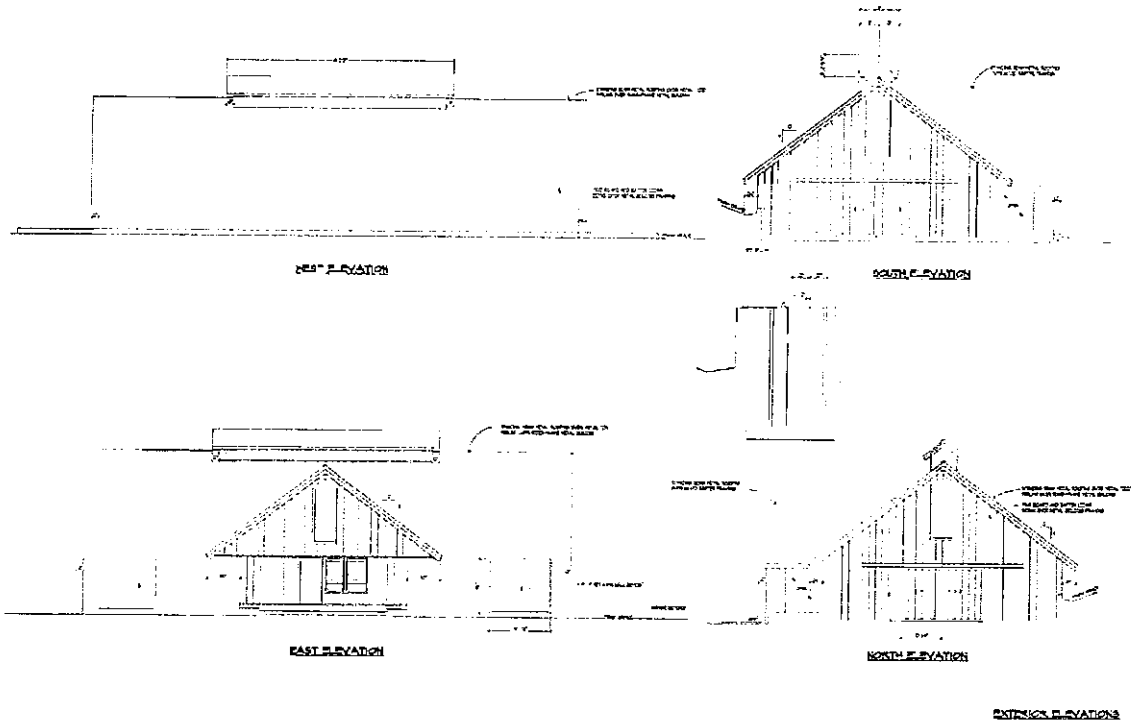
The Conservation Maintenance Building will be used to store the equipment, material, and other supplies necessary to maintain the Resource Conservation Areas (i.e., the Nēnē habitat enclosure and the archaeological preservation areas), including: a pick-up truck with lift-gate, a tractor with mower attachment, lawn mowers, weed-whackers, chainsaws, and quad-ATVs.

Figure 4.4 Conceptual Plan View of Conservation Maintenance Building



Source: Agor Architecture (2014)

Figure 4.5 Conceptual Section Views of Conservation Maintenance Building



Source: Agor Architecture (2014)

4.4 ADDITIONAL INFRASTRUCTURE

4.4.1 EQUIPMENT TENT

There is an existing Equipment Tent located to the west of the Main House. It is in the shape of a Quonset hut and has a metal frame and a cloth covering. It is a temporary structure used to house the equipment used to maintain the KFR, including: a lift-gate pick-up truck; a tractor with mower attachment; lawn mowers; weed-whackers; and quad/ATVs (6). The Equipment Tent will be removed once the Conservation Maintenance Building is constructed, and in no case later than may be required by any amendment to the existing permits.

5. BUDGET AND IMPLEMENTATION SCHEDULE

The Conservation Plan described in this report consists of both initial capital improvements to the Kīlauea Falls Ranch property, and subsequent operations and maintenance activities, including but not limited to the conservation management activities outlined in Chapters 2 and 3. The Owner, or their designated representative, will initiate the itemized capital improvements which are part of this CP within one year of receiving approval of the Planning Commission of the County of Kaua'i, and expects that it can complete them within the following two years (three years total). Subsequent maintenance of the facilities will be ongoing and would consist of regular (i.e., monthly, quarterly, or annual) comprehensive reviews of the integrity of the CP improvements.

5.1 PROJECT COSTS

The preliminary capital cost estimates based on the conservation measures described in Chapters 2, 3, and 4 are summarized in Table 5.2.

Table 5.1 Estimated Conservation Measure Capital Costs

Component	*Cost ($)*
Fencing Material	11,500
Fencing Contractor labor and installation	20,000
Traps (3) & Bait	250
Bird Recovery Kit	100
Total	31,850

Source: Rana Biological Consulting (2015)

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6. REFERENCES

Banko, P. C., J. M. Black, and W. E. Banko. (1999). *Hawaiian Goose (Nene) The birds of North America*, No 434, A. Poole and F. Gill (editors). The Birds of North America, Inc. Philadelphia, P.A.

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David, R. E., and E. B. Guinther (2007). A Survey of Botanical, Avian and Terrestrial Mammalian Species, Kīlauea Falls Ranch, Hanalei District, Island of Kaua'i. Prepared for: Belles Graham Proudfoot Wilson & Chun, LLC.

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Kauai County Planning Commission, *Final Decision and Order in the Matter of Application of Charles M. Somers and West Sunset 32 Phase 1, LLC for Special Management Area Use Permit*, dated October 2, 2008.

Marshall, A. (2008). Pers. comm. – regarding individual island populations of Nēnē.

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Woog, F. and J. M. Black (2001). *Foraging behavior and the temporal use of grasslands by Nēnē: Implications for Management.* Studies in Avian Biology 22:319-328.

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A. ARCHAEOLOGICAL INVENTORY SURVEY

EXHIBIT "G"

JAN 2 4 2020

COUNTY OF KAUAI
PLANNING DEPARTMENT
4444 RICE STREET, SUITE A473, LIHUE, HI 96766
(808) 241-4050

FROM: Kaaina S. Hull, Director (Galinato) Friday, January 24, 2020

20 FEB 21 P2:

SUBJECT: Class IV Zoning Permit Z-IV-2008-6, Use Permit U-2008-4, Special Management Area Use Permit SMA(U)-2008-5, Construction of 2 single-family residences/farm dwelling units, barn, and associate site improvements, Tax Map Key:(4)5-2-12:35, Charles M. Somers and West Sunset 32 Page 1,

TO:

- ☐ Department of Transportation - STP
- ☐ DOT-Highway, Kauai(info only)
- ☐ DOT-Airports, Kauai (info only)
- ☐ DOT-Harbors, Kauai (info only)
- ☑ State Department of Health
- ☐ State Department of Agriculture
- ☐ State Office of Planning
- ☐ State Dept. of Bus. & Econ. Dev. Tourism
- ☐ State Land Use Commission
- ☑ State Historic Preservation Division
- ☐ DLNR- Land Management
- ☐ DLNR-Foresty & Wildlife
- ☐ DLNR-Aquatic Resources
- ☐ DLNR- OCCL
- ☑ DPW-Engineering
- ☐ DPW-Wastewater
- ☐ DPW-Building
- ☐ DPW-SolidWaste
- ☐ Department of Parks & Recreation
- ☑ Fire-Department
- ☑ County Housing-Agency
- ☐ County Economic Development
- ☐ KHPRC
- ☑ Water Department
- ☐ Kauai Civil Defense
- ☐ U.S. Postal Department
- ☐ UH_Sea_Grant
- ☑ Other: Trans. Planner (Lee S.)
- ☑ County Transportation Agency

FOR YOUR COMMENTS(pertaining to your department): 2/26/20

This project shall comply with the Kauai County Fire Code

This matter is scheduled for a public hearing before the County of Kauai Planning Commission on Tuesday, March 24, 2020 at the Lihue Civic Center, Moikeha Building, Meeting Room 2A-2B, 4444 Rice Street, Lihue, Kauai, at 9:00 am or soon thereafter.

If we do not receive your agency comments within one (1) month from the date of this request, we will assume that there are no objections to this permit request. Mahalo!

Jody Galinato

From: Jeremy Lee
Sent: Monday, January 27, 2020 2:09 PM
To: Jody Galinato
Cc: Celia Mahikoa; Lee Steinmetz
Subject: Z-IV-2008-6, U-2008-4, SMA(U)-2008-5, TMK:4521235/452447 Charles M. Somers and West Sunset 32 page 1

Jody,
Mahalo for giving us the opportunity to comment on the subject zoning permit application.
The CTA does not have any comments.
Mahalo,

Jeremy Kalawaia Lee
The Kauai Bus
Program Specialist III
3220 Hoolako Street
Lihue, HI 96766
(808)246-8112
jlee@kauai.gov

COUNTY OF KAUA'I
PLANNING DEPARTMENT
4444 RICE STREET, SUITE A473, LIHU'E, HI 96766
Phone: (808) 241-4050

20 FEB 13 P2:56

TO: Kaaina S. Hull, Director (Galinato)

Date: Friday, January 24, 2020

SUBJECT: Class IV Zoning Permit Z-IV-2008-6, Use Permit U-2008-4, Special Management Area Use Permit SMA(U)-2008-5, Construction of 2 single family residence/farm dwelling units, barn, and associate site improvements.
Tax Map Key: (4) 5-2-012:035, Charles M. Somers and West Sunset 32 Page 1,
PW 01.20.114

FROM:

- ☐ Department of Transportation – STP
- ☐ DOT- Highways, Kaua`i (info only)
- ☐ DOT-Airports, Kaua'i (info only)
- ☐ DOT-Harbors, Kaua`i (info only)
- ☒ State Department of Health
- ☐ State Department of Agriculture
- ☐ State Office of Planning
- ☐ State Dept. of Bus. Econ, Dev. Tourism
- ☐ State Land Use Commission
- ☒ State Historic Preservation Division
- ☐ DLNR – Land Management
- ☐ DLNR – Forestry & Wildlife
- ☐ DLNR – Aquatic Resources
- ☐ DLNR – OCCL
- ☒ DPW - Engineering
- ☐ DPW - Wastewater
- ☐ DPW - Building
- ☐ DPW - Solid Waste
- ☐ Department of Parks & Recreation
- ☒ Fire Department
- ☒ County Housing Agency
- ☐ County Economic Development
- ☐ KHPRC
- ☒ Water Department
- ☐ Kaua'i Civil Defense
- ☐ U. S. Postal Department
- ☒ Other: Trans. Planner (Lee S.)
- ☒ County Transportation Agency

FOR YOUR COMMENTS (pertaining to your department): February 10, 2020

We have reviewed the proposed second amendment of the Master Permit for Charles M. Somers and West Sunset 32. We offer the following comments for TMK: (4) 5-2-012:035 in regards to grading:

1. A grading and/or grubbing permit in compliance with the County's Sediment and Erosion Control Ordinance No. 808 is required if the work area exceeds one (1) acre and/or grading involving excavation or embankment or combination thereof exceeds more than 100 cubic yards.
2. Best management Practices (BMPs) shall be incorporated to the maximum extent practicable to prevent damage by sedimentation, erosion, or dust to watercourses, natural areas, and other properties. The permittee and the property owner shall be responsible to ensure that BMPs are satisfactorily implemented at all times.

PW 01.20.114

Very truly yours,

MICHAEL MOULE, P.E.
Chief, Engineering Division

Concur,

LYLE TABATA
Deputy County Engineer

MM/SI/PT
Copy: Design and Permitting

This matter is scheduled for a public hearing before the County of Kaua'i Planning Commission on Tuesday, March 24, 2020, at the Līhu'e Civic Center, Moikeha Building, Meeting Room 2A-2B, 4444 Rice Street , Līhu'e, Kaua'i, at 9:00 am or soon thereafter.

If we do not receive your agency comments within one (1) month from the date of this request, we will assume there are no objections to this permit request. Mahalo!

RECEIVED
JAN 28 2020
ENVIRONMENTAL HEALTH SERVICES
KAUAI

COUNTY OF KAUAI
PLANNING DEPARTMENT
4444 RICE STREET, SUITE A473, LIHUE, HI 96766
(808) 241-4050

FROM: Kaaina S. Hull, Director (Galinato) Friday, January 24, 2020

20 FEB -7 P2:50

SUBJECT: Class IV Zoning Permit Z-IV-2008-6, Use Permit U-2008-4, Special Management Area Use Permit SMA(U)-2008-5, Construction of 2 single-family residences/farm dwelling units, barn, and associate site improvements, Tax Map Key:(4)5-2-12:35, Charles M. Somers and West Sunset 32 Page 1,

TO:

- ☐ Department of Transportation - STP
- ☐ DOT-Highway, Kauai(info only)
- ☐ DOT-Airports, Kauai (info only)
- ☐ DOT-Harbors, Kauai (info only)
- ☑ State Department of Health
- ☐ State Department of Agriculture
- ☐ State Office of Planning
- ☐ State Dept. of Bus. & Econ. Dev. Tourism
- ☐ State Land Use Commission
- ☑ State Historic Preservation Division
- ☐ DLNR- Land Management
- ☐ DLNR-Foresty & Wildlife
- ☐ DLNR-Aquatic Resources
- ☐ DLNR- OCCL
- ☑ DPW-Engineering
- ☐ DPW-Wastewater
- ☐ DPW-Building
- ☐ DPW-SolidWaste
- ☐ Department of Parks & Recreation
- ☑ Fire-Department
- ☑ County Housing-Agency
- ☐ County Economic Development
- ☐ KHPRC
- ☑ Water Department
- ☐ Kauai Civil Defense
- ☐ U.S. Postal Department
- ☐ UH_Sea_Grant
- ☑ Other: Trans. Planner (Lee S.)
- ☑ County Transportation Agency

FOR YOUR COMMENTS(pertaining to your department):

See comments on attached sheet.

January 31, 2020

Patrick Peck, Chief
District Environmental Health Program Kauai

This matter is scheduled for a public hearing before the County of Kauai Planning Commission on Tuesday, March 24, 2020 at the Lihue Civic Center, Moikeha Building, Meeting Room 2A-2B, 4444 Rice Street, Lihue, Kauai, at 9:00 am or soon thereafter.

If we do not receive your agency comments within one (1) month from the date of this request, we will assume that there are no objections to this permit request. Mahalo!

Class IV Zoning Permit Application: **Z-IV-2008-6**
Use Permit: **U-2008-4**
Special Management Area: **SMA(U)-2008-5**
Applicant: **Charles M. Somers & West Sunset 32 Phase 1, LLC.**

Based on our review of the application, please note below comments or environmental health concerns for your consideration.

1. Noise will be generated during the construction phase of this project. The applicable maximum permissible sound levels as stated in Title 11, (HAR), Chapter 11-46, "Community Noise Control", shall not be exceeded unless a noise permit is obtained from the State Department of Health (DOH).

2. Temporary fugitive dust emissions could be emitted when the project site is prepared for construction and when construction activities occur. In accordance with Title 11, HAR, Chapter 11-60.1 "Air Pollution Control", effective air pollution control measures shall be provided to prevent or minimize any fugitive dust emissions caused by construction work from affecting the surrounding areas. This includes the off-site roadways used to enter/exit the project. The control measures include but are not limited to the use of water wagons, sprinkler systems, dust fences, etc.

3. The property may harbor rodents which will disperse to the surrounding areas when the site is cleared. In accordance with Title 11, HAR, Chapter 11-26, "Vector Control", the applicant shall ascertain the presence or absence of rodents on the property. Should the presence of rodents be determined, the applicant shall eradicate the rodents prior to clearing the site.

4. The construction waste that will be generated by the project shall be disposed of at a solid waste disposal facility that complies with the applicable provisions of Title 11 HAR, Chapter 11-58.1 "Solid Waste Management Control", the open burning of any of these wastes on or off site prohibited.

5. Disposal of farm green waste is not permitted by open burning without a DOH approved agricultural burning permit.

Due to the general nature of the application submitted, we reserve the right to implement future environmental health restrictions when more detailed information is submitted.

EXHIBIT “H”

Jody Galinato

From: Tonneson, Heather <Heather_Tonneson@fws.gov>
Sent: Friday, March 06, 2020 3:24 PM
To: Jody Galinato; Waipa, Jennifer
Cc: Nadig, Aaron
Subject: Re: Charles Somers Request

CAUTION: This email originated from outside the County of Kauai. Do not click links or open attachments even if the sender is known to you unless it is something you were expecting.
Aloha Jody,

Thank you for your message and sending this plan. Ultimately, since this is a conservation easement with HILT, it seems that they would have the first say as to whether or not they are going to agree to allow this provision to be removed. If they do not agree, then it would seem that the agreement could not be altered in any way. If you have already talked with HILT and they are in agreement on removing this provision, and you need specific consultation with the U.S. Fish and Wildlife Service, your best contact would be Aaron Nadig in our Ecological Service program, who is cc'd here and if it is not under his purview, then he could likely refer you to the correct contact. The refuge does not have jurisdiction over wildlife concerns off-refuge.

If I have misinterpreted your request, please let me know.

Sincerely,
Heather

From: Jody Galinato <jgalinato@kauai.gov>
Sent: Friday, March 6, 2020 12:34 PM
To: Waipa, Jennifer <jennifer_waipa@fws.gov>; Tonneson, Heather <Heather_Tonneson@fws.gov>
Subject: [EXTERNAL] RE: Charles Somers Request

Here you go.

Jody Galinato
Planner
County of Kauai
Planning Department
4444 Rice Street, Ste. A-473
Lihue, Hi 96766
(808) 241-4050

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipients). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. Please do not forward or distribute this message to anyone. If you are not the intended recipient please contact the send and destroy all copies of the communication.

From: Waipa, Jennifer <jennifer_waipa@fws.gov>
Sent: Friday, March 06, 2020 12:13 PM
To: Jody Galinato <jgalinato@kauai.gov>; Tonneson, Heather <Heather_Tonneson@fws.gov>
Subject: Re: Charles Somers Request

CAUTION: This email originated from outside the County of Kauai. Do not click links or open attachments even if the sender is known to you unless it is something you were expecting.
Aloha Jody,
Mahalo for your email about this matter. Michael Mitchell has retired and I am cc'ing the Project Leader on this email.

I don't believe we have a copy of the Conservation Plan submitted by Somers. Would you be able to provide that?
Thank you,
Jen

From: Jody Galinato <jgalinato@kauai.gov>
Sent: Friday, March 6, 2020 9:35 AM
To: Waipa, Jennifer <jennifer_waipa@fws.gov>
Subject: [EXTERNAL] Charles Somers Request

Aloha Jennifer,
I have been trying to get through to Michael Mitchell or whoever is acting in his capacity regarding a request to revise a Conservation Plan submitted by Charles Somers. They want to delete the requirement for Nene Fencing. The Conservation Plan was dated September 2015. His tax map key number is 5-2-012:035 and is adjacent to the Kilauea Point site.

The Planning Commission is scheduled to hear this request at the March 24, 2020 meeting and your comments would be appreciated. If you have any questions, please contact me by email or phone 241-4065.

Mahalo!

Jody Galinato
Planner
County of Kauai
Planning Department
4444 Rice Street, Ste. A-473
Lihue, Hi 96766
(808) 241-4050

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipients). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. Please do not forward or distribute this message to anyone. If you are not the intended recipient please contact the send and destroy all copies of the communication.

COUNTY OF KAUA'I, PLANNING DEPARTMENT
4444 RICE STREET, LIHUE, KAUAI, HAWAII 96766

MEMORANDUM

DATE: *May 1, 2020*

TO: *Planning Commission*

FROM: *Clerk of the Commission*

SUBJECT: *Addition to the Planning Commission 5/12/2020 Agenda*

G. HEARINGS AND PUBLIC COMMENT

2. New Agency Hearing

a. ***Charles Somers & West Sunset 32 Phase I, LLC***

2. Supplement No. 1 to Director's Report pertaining to this matter.

3. Continued Public Hearing

a. ***County of Kauai, Planning Department (ZA-2020-7)***

2. Supplemental No. 5 to Director's Report pertaining to this matter.

a. ***County of Kauai, Planning Department (ZA-2020-10)***

2. Supplemental No. 2 to Director's Report pertaining to this matter.

A

G.2.a.2.

MAY 1 2 2020

SUBJECT TO CHANGE

SUPPLEMENT #1 TO PLANNING DIRECTOR'S REPORT

RE: Special Management Area Use Permit SMA(U)-2008-5
Class IV Zoning Permit Z-IV-2008-6
Use Permit U-2008-4

APPLICANT: CHARLES M. SOMERS/WEST SUNSET 32, PHASE 1 LLC.
Max W. J. Graham, Jr., Esq., Authorized Agent

A. Application Summary

The Application involves amendments to the project that are noted below, and it is considered the "Second Amendment" of the permits. As represented and noted in the Director's Report, the amendments to the Master Permit involves the following:

1. **Maintenance Building (aka. Barn)** – The structure has been redesigned as a two-story building and the overall square footage has increased from a total floor area of 2,832 square feet (SF) to 4,000 SF at the lower level and approximately 1,384 SF at the upper level.

   Functionally, the lower floor will be utilized to repair, maintain and store equipment and materials related to agricultural activities on the property. The upper floor will be used as a management office by the Applicant and its employees.

2. **Manager's/Caretaker's House (aka. Ranch Manager's House)** – At the time the project was presented to the Planning Commission in 2008, the Manager's House featured farm dwelling unit contain 2 bedrooms, 2 bathrooms, kitchen/living area, and 2-car garage encompassing a total area of 2,270 SF. Associated improvements included a driveway, landscaping, and utilities. Through this application, the Applicant is *eliminating* this feature.

3. **Nene Fencing** – As condition of the First Amendment, it required the Applicant to install fencing for the Nene habitation area (Condition A15 of Exhibit 'B', Director's Report dated March 9, 2020). The intent of the fencing was to work in conjunction with the Conservation Plan. Through this application, the Applicant is requesting to *eliminate* this requirement and the justification is noted on Page 31, Section 6.1 h.(i) of the Application.

4. **Timeline** – The construction timeline for the project was established through Condition A13 of the First Amendment and the Applicant is requesting an amendment to modify the timeline for the project to read as follows:

G.2.a.2. (A)
MAY 12 2020

"A13. The Applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [residence and] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development within two (2) years of the date of approval of the building permit."

*Note: New material shown underscored, material to be deleted shown in brackets.

5. **Associated Improvements** – The Application does not involve any changes to associated improvements that includes the installation of utilities, driveways, required landscaping, site grading related to the construction of the barn, and the use of the 1,800 SF temporary equipment tent. As required by Condition A14 of the First Amendment, the temporary structure will be removed once the construction of the barn is completed.

The following is a continuation of the project's evaluation taken from Section VIII. of the Director's Report dated March 9, 2020.

VIII. EVALUATION

3. SMA Rules and Regulations

- Scenic and Open Space Resources – Staff conducted a site visit on March 10, 2020 to review the location of the proposed barn and evaluate the potential visual impacts of the project as viewed from several public vantage points. As previously noted in the Director's Report, due to the project location along a ridgeline situated above Kīlauea River, the revised design of the barn and its location may be visible from certain public areas.

  The project site is not visible from Kīlauea Town or several vantage points along Kīlauea Lighthouse Road. However, staff took several pictures of the current farm dwelling unit (Main Residence) as viewed from the beach below situated at the Kīlauea River estuary. It was evident that the existing residence is visible, however, the dark-tone color of the dwelling is integrated very well into the surrounding vegetation and the background hillside. In considering the proposed barn, it is noted that its location is actually advantageous in that the project site is at an elevation below Kahili Quarry Road. While it is designed as a two-story structure, the most visible section will appear as a single-story structure from the public vantage points along the beach area. With proper landscaping and exterior treatment of the structure that is similar to the main residence, the potential visual impacts of the project could be minimized. This is

reinforced through Conditions A11 (Landscaping) & A12 (Exterior Treatment) of the First Amendment approval letter (refer to Exhibit 'B' of the Director's Report dated March 9, 2020).

In further considering the Applicant's proposal to increase the overall size of the barn, it is noted that the approval of the First Amendment allowed a development containing the Manager's/Caretaker's House & Barn encompassing a total square footage of approximately 5,508 SF (Caretaker House = 2,270 SF, Barn = 3,238 SF). While the size of the barn increased from 3,238 to 5,384 SF, the overall footprint of the project (approx. 4,000 SF) remains smaller than the cumulative development of the Caretaker's House and Barn.

- Costal Ecosystems – As previously noted, the subject property is within a coastal ecosystem. The Conservation Plan determined that the construction and maintenance of a Nene fence would be necessary. Studies of the ecosystem recognized that a fencing would be beneficial since it would serve as a boundary between the wildlife preservation area and the residential development area. Since the project's initial approval, the Conservation Easement area has been identified and it is currently being managed by the Hawaii Island Land Trust (HILT). It is unclear as to whether the Applicant has communicated with HILT regarding their proposal to eliminate the Nene fencing, as required by Condition A15. As represented in the First Amendment of the project, the fencing works in conjunction with the Conservation Plan. Therefore, until the Applicant is able to obtain support from HILT and the U.S. Fish and Wildlife Service to remove the Nene fencing, the department discourages the removal of this requirement.

- SMA Timeline – Section 10.0 of the County's SMA Rules and Regulations specify that "*an Applicant must make substantial projects, as determined by the Director, regarding the development or activity within two (2) years.*" Condition A13 is a standard requirement imposed on all developments within the SMA. Due to the time that is required to prepare construction drawings for any development, the department has allowed a year to complete the construction drawings and submit for building permit, and then two (2) years to complete the project once the building permit is approved.

  The Applicant is proposing an amendment to Condition A13 that could enable the Applicant to "restart" the time clock when there is any design modification to the barn. As a general practice, the department encourage Applicants to complete their project within the 3-year time period as noted above. With the exception of eliminating the reference to the residence (Caretaker's Residence) in the first sentence of the requirement, the department has some reservations regarding the proposed modification to Condition A13 since it could endlessly extend the time period to complete the construction of the barn and associated improvements. As a compromise to the Applicant's proposed amendment, the

department suggest incorporating a steadfast completion date rather than the desired standard time requirement as previously noted. As such, the condition could be modified to read:

"A13. The Applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [residence and] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development no later than June 30, 2023 [within two (2) years of the date of approval of the building permit]."

IX. CONCLUSION

Based on the information contained in the Director's Report, it is concluded that the proposed development as amended complies with the policies and guidelines of the Special Management Area Rules and Regulations in that:

1. Through proper mitigation measures, the development should not have any substantial, adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, and welfare, or compelling public interest;
2. The development is consistent with the objective and policies, as enumerated in Chapter 205A of the Hawai'i Revised Statutes, and as recited in Section 3.0 of the County of Kauai SMA Rules, and SMA Guidelines set forth in the SMA Rules; and
3. The development is consistent with the objectives/goals/policies of the County General Plan, North Shore Planning Area, the Comprehensive Zoning Ordinance (CZO), and other applicable ordinances.

Additionally, the proposal is in compliance with the standards applicable to uses within:

1. The State Land Use Commission Agricultural District as contained in HRS Section 205-4.5(a);
2. The General Plan "Natural" Designation as contained in Section 2.2 of the Kaua'i General Plan, Kaua'i County Ordinance No. 1025;
3. The CZO "Open District" as contained in Chapter 8, Article 9 of the Kaua'i County Code (1987, as amended (KCC);
4. The CZO Special Treatment District (Scenic/Ecologic Resources) as contained in Chapter 8, Article 11 of the KCC; and

It is finally concluded that the development complies with the standards for a Use Permit contained in Section 8-3.2 of the KCC. The Applicant should continue to institute "Best

Management Practices" during all phases of the construction in order to ensure that the proposed development does not general impact that may affect the health, safety, and welfare to those in the surrounding area.

X. RECOMMENDATION

Based on the foregoing evaluation and conclusion, it is recommended that the Applicant's proposal involving design revisions to the maintenance building (aka. Barn) and elimination of the Manager's/Caretaker's House be APPROVED. In the matter of the Applicant's proposal to eliminate Condition No. A15 concerning the Nene fencing, the department recommends a DENIAL. In the matter of the Applicant's proposal to modify Condition A13, the department recommends an amendment to the requirement that reads:

> "A13. The Applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [residence and] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development no later than June 30, 2023 [within two (2) years of the date of approval of the building permit]."

*Note: New material shown underscored, material to be deleted shown in brackets.

Dale Cua

By Dale Cua (Apr 30, 2020)

DALE A. CUA
Staff Planner

Approved & Recommended to Commission:

By Ka`aina Hull (Apr 30, 2020)

KA'ĀINA S. HULL
Director of Planning

Date: 04/30/2020

Charles Somers Trustee of the Somers Living Trust dated November 12, 2002 and West Sunset 32 Phase 1 LLC
Status of Permit Requirements
SMA(U)-2008-5; Z-IV-2008-6, U-2008-6

Condition # (CATEGORY)	REQUIREMENT	STATUS			COMMENTS
		Met	Not Met	N/A	
1.	As represented by the Applicant, the development subject to this permit approval shall be limited to: the single family residence/ farm dwelling unit referred to in the Application as "Main House" the driveway accessory to the Main House, Landscaping, Site Grading for the Main House and Driveways; Preservation of Historic Sites; utilities; Well and Tank improvements to Kahili Quarry Road.			X	*Advisory requirement, the Applicant acknowledges this condition.*
2.	Applicant shall provide annual status reports to the Planning Commission beginning from one year from the date of this approval. The reports shall be submitted to the Department no later than 30 days prior to the annual anniversary date of approval of this project. The report shall provide project status and progress towards project completion of the project, and compliance with all conditions of approval.		X		*Sixth Annual Status report submitted to the Department October 27, 2015*
3.	Applicant shall commence construction of the project development within one (1) year from the date of full approval, and shall complete construction of the project development within 5 years from the date of approval of the subject permits.		X		*Pertains to Caretaker residence. Barn not constructed.*
4.	Subject permits approved herein cannot be sold and are not transferable to other than Applicant, its subsidiaries and affiliated corporations and legal entities prior to the completion of the project and issuance of the occupancy permit.			X	*Advisory requirement, the Applicant acknowledges this condition.*
5.	Filling of the property with material obtained from off-premises shall not be permitted. This prohibition of imported fill material shall not apply to top soil used for landscaping purposes in accordance with the approved landscaped plans. Mass pad filling to increase the heights of the proposed structures shall not be permitted.			X	*Advisory requirement, the Applicant acknowledges this condition.*
6.	The Applicant shall apply for Leadership in Energy and Environmental Design (LEED) registration.			X	*Advisory requirement, the Applicant acknowledges this condition.*
7.	The Applicant shall comply with the requirements and recommendations of applicable County, State and Federal Agencies, including the County Fire, Water, Engineering and Building Divisions of the Department of Public Works, the State Department of Health, and State Department of Land and Natural Resources, Historic Preservation Division, as reflected in Findings #41-47 9 (sic) above.		X		*Conservation Nene fencing not installed*
8.	The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or revoke the subject permits through proper procedures			X	*Advisory requirement, the Applicant acknowledges this condition.*

Condition # (CATEGORY)	REQUIREMENT	STATUS			COMMENTS
		Met	Not Met	N/A	
	should the Applicant fail to comply with the conditions of approval, or should unforeseen circumstances occur or result.				
9.	In view of the various conditions and recommendations imposed by the various government agencies as referenced to herein, building permit application of preconstruction work for any phase of the project of portion of the property shall not be accepted until the Applicant submits a status report of all permit conditions that are either required to be complied with prior to or at time of building permit application.		X		*Sixth Annual Status Report submitted to the Department October 1, 2014. Updated Sixth Annual Status Report submitted to the Department October 27, 2015.*
10.	Should the applicant be unable to comply with the development time line in condition #3 above the request an extension of time, applicant is advised that any new laws, ordinances, or regulations that have been implemented within this time frame may become applicable to the project.		X		*Advisory requirement, the Applicant acknowledges this condition. Barn caretakers residence and Nene fencing no constructed. No extension request submitted. Barn permit submitted 2/15/17 but was not as previously approved.*
11.	Prior to building permit review, the applicant shall:				*Ongoing*
	a. Redesign the project to reduce the proposed grading area and volume, while still retaining the benching and proposed architectural design concept. A soil study/ report and proposed grading plan shall be submitted to the Department of Public Works for review and approval. Such grading plans should include all off-site improvements.		X		
	b. In order to help screen the structures from the public views as seen from public areas, and blend the structures with its surroundings, external colors shall be of earth tones, complementary to and compatible with the surrounding natural background. In addition, the Applicant shall prepare a landscape plan to further soften the existing building mass. The landscape plan shall reflect the use o native plants that are common to the area, endemic, indigenous, or Polynesian-introduced. Use of herbicides, pesticides and non-organic fertilizers shall be kept to a minimum. The proposed color scheme and landscape plan shall be submitted to the Planning Director for review and approval prior to building permit review.	X			
	c. Record all of the conditions imposed under the subject permits with the deed(s) to the subject property(ies). A copy of this recordation shall be provided to the Planning Department.			X	*Conditions recorded*
	d. As represented by the Applicant, prior to the issuance of any building permits, the Applicant agrees to transfer a perpetual Conservation Easement over an approximately eighty (80) acre portion of Lot 2 ("Conservation easement Area"). The Conservation Easement shall comply with the applicable terms, conditions, and definitions contained			X	*Recorded Nene fencing not provided*

Condition # (CATEGORY)	REQUIREMENT	STATUS			COMMENTS
		Met	Not Met	N/A	
	in Chapter 198 (Conservation easements) of the Hawai'i revised Statues, subject to the following terms and conditions: i. The Applicant shall convey the Conservation Easement to a governmental entity or 501C(3) organization of Applicant's choice, provided such organization constitutes a "qualified organization" as defined in 170(h)(3) of the Internal Revenue Code of 1986 (the code). Said entity or organization shall have the capability with the Kīlauea Point National Wildlife Refuge Land Conservation Plan and Environmental Assessment (May 2007) prepared by the U.S. Fish and Wildlife Service. ii. The delineation and determination of the Conservation Easement s boundaries and the content of the restrictive terms of the Conservation easement document shall be negotiated and agreed upon between the Applicant and the qualified organization provided: 1. That the Conservation Easement shall encumber approximately 80 acres of Lot 2. 2. That the Conservation Easement shall expressly extinguish density for sixteen (16) of the dwelling units permitted within Lot 2. It is Applicant's intention that any dwelling unit density attributable to and arising out of the Conservation Easement Area shall be extinguished, and shall not be transferred to any other portion of Lot 2. 3. That the lands encumbered by the Conservation Easement and the terms set forth in the Conservation Easement fulfill a "conservation purpose", as defined in 170(h)(4) of the Code. 4. That except as restricted in the Conservation Easement document, the Applicant shall have the right to use, possession and enjoyment of the Conservation Easement Area.				

Condition # (CATEGORY)	REQUIREMENT	STATUS			COMMENTS
		Met	Not Met	N/A	
	5. That no dwelling units (including single family residences and farm dwelling units) shall be allowed to be located within the Conservation Easement Area. 6. That to the extent reasonably possible, and subject negotiations with the qualified organization, the Conservation Easement Area will include: areas adjacent to the Kīlauea Stream; and the archaeological sites identified as SIHP #50-30-04-580 and 581 in the Archeological Inventory Study of an Approximately 74-Acre Portion of Kīlauea Falls Ranch property (Applicant's Exhibit "F-5"). e. Evidence shall be provided that reflects of resolution or compliance to the comments and recommendations of the government agency(ies) reflected in Condition #7 above.		X		*Nene fencing not constructed.*
12.	Applicant shall provide roadway improvements to the entire length of Kahili Quarry Road as may be authorized by its present owners. Said roadway improvements should include clearing and drainage improvements as may be permitted by the present road right-of-way width. The use of crushed coral would be acceptable to retain a rural ambience. The use of gravel and chemical sealant shall not be permitted. As represented, Applicant shall maintain this road right-of-way. Said improvements shall be implement and utilize best management practices as recommended by the Department of Public Works. No weekend or holiday shall be permitted.	X			
13.	The proposed residences(s) shall not be used for vacation rental or bed and breakfast purposes.	X			*Requirement acknowledged.*
14.	The Applicant is advised that prior to and/ or during construction and use, additional government agency conditions may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agency(ies).	X			*Ongoing.*
15.	In order to minimize adverse impacts on Federally Listed Threatened Species, such as Newell's Shearwater and other seabirds, if external lighting is to be used in connection with the proposed project, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward of spotlighting of structures, landscaping, signage or hotel features within the project site shall be prohibited.	X			

Condition # (CATEGORY)	REQUIREMENT	STATUS			COMMENTS
		Met	Not Met	N/A	
16.	As represented, Applicant shall contribute no less than $5,000 towards the conduct of a water quality baseline study of the Kīlauea Stream.	X			
17.	Customary and traditional rights and practices including without limitation those exercised for subsistence, culture, religious, access or gathering purposes, as provided for in the Hawai'i Constitution to Hawai'i Revised Statues, shall be permitted.	X			*Ongoing.*
18.	Access to the waterfall shall be permitted at the Applicants discretion.	X			*Ongoing. Contact info for access provided. 4/15/19*
ADDITIONAL CONDITIONS					
A1	The conservation manager's house and garage shall be sunken approximately five feet below grade and shielded, by way off dense shrubbery and tall tree landscaping in order to alleviate view plan impacts of the proposed new structures form Kahili Beach as well as looking westward across Kīlauea Stream. The conservation maintenance building and conservation manager's house shall be constructed as revised. The structures shall also be operated as represented. Any changes to said structures shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.		X		*There is a request to withdraw the construction of the conservation manager's residence. Amendment filed 1.17.20 to delete this condition, delete Nene fencing, and increase size of barn.*
A2	The Applicant will comply with all requirements of the State of Land and Natural Resources, Historic Preservation Division, County Department of Public Works, as well as any other applicable government agencies.	X			*Ongoing.*
A3	The applicant shall develop and utilize Best Management Practices (BMP's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.	X			*Ongoing.*
A4	In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or the ocean shall be prohibited.			X	
A5	To the extent possible within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the applicant shall seek to hire Kaua i contractors as long as they are qualified and reasonably competitive with other contractors, and shall seek to employ residents of Kaua'i in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-Kaua'i residents for particular skilled jobs where no qualified Kaua'i resident possess such skills. For the purposes of this condition, the Commission shall relive the applicant of this requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.	X			*Advisory requirement, the Applicant acknowledges this condition.*

Condition # (CATEGORY)	REQUIREMENT	STATUS			COMMENTS
		Met	Not Met	N/A	
A6	The applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environmental Design (LEED) standards or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted.	X			*Advisory requirement, the Applicant acknowledges this condition. For SFR only*
A7	The Planning Commission reserves the right to revise, add or delete conditions of approval in order to address of mitigate unforeseen impacts the project create, or revoke the permits through the proper procedures should conditions or approval not be complied with or be violated.	X			*Condition acknowledged.*
A8	The Applicant is advised that should any archeological or historical resources be discovered during ground disturbing/ construction work, all work in the area of the archaeological/ historical findings shall immediately cease and the applicant shall contact the State Department of Land and Natural Resources-Historic Preservation Division at (808) 682-8015 and the Planning Department at (808) 241-2050.	X			*Condition acknowledged.*
A9	The Applicant shall not use this residence for vacation rental purposes. This restriction shall be incorporated into the deed restrictions of the subject parcel, draft copies of which shall be submitted to the Planning Department prior to building permit approval.		X		*Recorded 2/14/19*
A10	Applicant is on notice that the property is "Agricultural" under State Land Use designations. Applicant must comply with all requirements pursuant to Hawai'i Revised Statues Chapter 205 including the submission and approval of a farm plan to the director prior to building permit approval.	X			*Condition acknowledged.*
A11	The applicant shall submit for review and approval by the Planning Department a landscape plan composed of native species, or species common to the area, to help screen the proposed structures, and integrate the site with its surroundings.		X		*Ongoing, condition acknowledged*
A12	Exterior colors and finishes of all structures, including roof colors, shall be limited to medium or dark earth tones such as brown, green, or grey, or other colors compatible with the area's natural surroundings. Use of reflective materials or colors shall be prohibited. The proposed color scheme and samples shall be submitted to the Planning Department for design review and approval prior to building permit application.		X		*Ongoing, condition acknowledged*
A13	The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5 prior to the issuance of building permits for the residence and maintenance building. The applicant shall apply for the building within one (1) year of the date of the approval of this application and complete the proposed development within two (2) years of the date of approval of the building permit.		X		*The Applicant is requesting, pursuant to the Second Amendment that this condition be amended provide that the Applicant will have one (1) year from the approval of the Second Amendment to apply for the Building Permit for the Barn.*

Condition # (CATEGORY)	REQUIREMENT	STATUS			COMMENTS
		Met	Not Met	N/A	
A14	The Applicant shall pay a $500 fine for the "After-the-Fact" permit for the temporary maintenance structure. The structure shall be removed once the conservation maintenance building is constructed.	X			*After-the-Fact permit has been paid 4/5/19.*
A15	The Nene fencing shall be constructed as stated, including landscaping as recommended. The fencing and landscaping shall be completed prior to construction of the conservation managers' house and maintenance building.		X		*Through the Second Amendment, the Applicant is requesting to delete this requirement.*
A16	Given Finding 18 of the 2008 Decision and Order, applicant shall provide director contact information should a member of the public wish to seek access to the falls understanding access is at the landowners' discretion.	X			*Provided 4/5/19*

COUNTY OF KAUA'I, PLANNING DEPARTMENT
4444 RICE STREET, LIHUE, KAUAI, HAWAII 96766

MEMORANDUM

DATE: ***May 11, 2020***

TO: ***Planning Commission***

FROM: ***Clerk of the Commission***

SUBJECT: ***Second Addition to the Planning Commission 5/12/2020 Agenda***

G. HEARINGS AND PUBLIC COMMENT

2. New Agency Hearing

a. ***Charles Somers & West Sunset 32 Phase I, LLC***

3. Letter (5/8/2020) from Max W. J. Graham, Esq., w/enclosed Memorandum in Support of Application and Motion for Second Amendment to Master Permit; Exhibits "1" and "2" dated May 8, 2020.

J. GENERAL BUSINESS MATTERS

1. ***Patricia D. McConnell***

b. Stipulation to Continue Hearing Date for Oral Argument from Matthew M. Bracken, Kauai County Attorney and Chris Donahoe, Kauai County Deputy Attorney, Attorneys for Respondent Planning Department of the County of Kauai (5/5/2020) and Gregory W. Kugle and Joannna C. Zeigler, Attorneys for Petitioner Patricia D. McConnell.

MATTHEW M. BRACKEN 10267
County Attorney
CHRIS DONAHOE 9095
Deputy County Attorney
Office of the County Attorney
4444 Rice Street, Suite 220
Līhu'e, Hawai'i 96766
Telephone: (808) 241-4930
Facsimile: (808) 241-6319
Email: mbracken@kauai.gov
cdonahoe@kauai.gov

Attorneys for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Ha'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	CC-2017-4 TMK (4) 5-8-005:005 STIPULATION TO CONTINUE HEARING DATE FOR ORAL ARGUMENT **HEARING**: Date: May 12, 2020 Time: 8:30 a.m. Hearings Officer: Harlan Y. Kimura

J.1.b. A2

MAY 1 2 2020

STIPULATION TO CONTINUE HEARING DATE FOR ORAL ARGUMENT

IT IS HEREBY STIPULATED by and between all parties, through their respective undersigned counsel, to continue the Planning Commission agenda item regarding Petitioner Patricia D. McConnell currently set to be heard by Teleconference on May 12, 2020 at 8:30 a.m., to a future date thereafter as agreed upon by the parties and scheduled through the County of Kaua'i Planning Commission. The parties hereby stipulate and agree to waive any and all time requirements for commencement of the Oral Argument and action on the Hearing Officer's recommendation before the Planning Commission pursuant to the Rules of Practice and Procedure of the County of Kauai Planning Commission, including but not limited to, Rule 1-6-19 and Rule 1-9-4.

This Stipulation may be signed in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

DATED: Honolulu, Hawai'i, May 5, 2020.

DAMON KEY LEONG KUPCHAK HASTERT

Joanna Zeigler Digitally signed by: Joanna Zeigler DN: CN = Joanna Zeigler C = AD Date: 2020.05.05 13:58:44 -09'00'

GREGORY W. KUGLE
JOANNA C. ZEIGLER
Attorneys for Petitioner
PATRICIA D. McCONNELL

DATED: Līhu'e, Kaua'i, Hawai'i, May 5, 2020.

MATTHEW M. BRACKEN
County Attorney

Chris Donahoe Digitally signed by Chris Donahoe Date: 2020.05.06 07:47:55 -10'00'

CHRIS DONAHOE
Deputy County Attorney
Attorneys for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

APPROVED AND SO ORDERED:

_____
GLENDA NOGAMI-STREUFERT
Chair, Kaua'i Planning Commission

SUBJECT TO CHANGE

SUPPLEMENTAL REPORT #2

RE: Special Management Area Use Permit SMA(U)-2008-5
Class IV Zoning Permit Z-IV-2008-6
Use Permit U-2008-4

APPLICANT: CHARLES M. SOMERS/WEST SUNSET 32, PHASE I LLC.
Max W. J. Graham, Jr., Esq., Authorized Agent

Background Summary

As noted in the previous reports involving this application, this proposal involves amendments to the project and the summary of the amendments is contained in Supplement #1 to the Planning Director's Report.

The highlights of the amendments involve the redesign of the Barn, elimination of the Manager's/Caretaker's House and Nene Fencing.

- **Barn:** In Supplement #1, the department is supporting the redesign of the barn since the overall footprint of the project (approx. 4,000 SF) remains smaller than the cumulative development of the Caretaker's House **and** Barn. The approval of the First Amendment allowed a development containing a Manager's/Caretaker's House & Barn that would have encompassed a total square footage of approximately 5,508 SF (Caretaker House = 2,270 SF, Barn = 3,238 SF). The Second Amendment (current application) represents an increased barn area of approximately 5,384 SF (originally 3,238 SF), with an overall footprint of approx. 4,000 SF.

- **Nene Fencing:** In Supplement #1, the department did not support the Applicant's request to eliminate Condition A15 relating to the Nene Fencing. At the time, it was not clear whether the Applicant had communicated with the Hawaii Island Land Trust (HILT) regarding their proposal to eliminate the Nene fencing. Since then, HILT has submitted a correspondence dated May 11, 2020 supporting the Applicant's request to eliminate the fencing (refer to Exhibit 'A'). In addition, the Applicant would like to have the Applicant donate the cost of the fencing material to support HILT's invasive species removal at the Kīlauea River mouth. As such, the Applicant is proposing to an amendment Condition A15 where the current language would be deleted in its entirety and replaced with the following:

  "A15. As represented by the Applicant, prior to issuance of the Building Permit for the Barn, the Applicant shall donate the sum of Eleven Thousand Five Hundred Dollars ($11,500.00) to the Hawaiian Island Land Trust (HILT), to be used by HILT in support of its efforts to protect and preserve the environmental qualities and ecosystem of the Kīlauea Stream and Kalihiwai Beach, including but not limit to the removal of invasive species, the replacing of native species, erosion

F.1.a.1.

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control, the clean-up of Kalihiwai Beach, and the empowerment of community stewardship of the area."

Updated Recommendation

Based on the foregoing evaluation and conclusion, it is recommended that the Applicant's proposal involving design revisions to the maintenance building (aka. Barn) and elimination of the Manager's/Caretaker's House and Nene fencing be APPROVED. In the matter of the Applicant's proposal to modify Conditions A13 & A15, the department recommends the following amendment to the requirements to read as follows:

"A13. The Applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [residence and] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development no later than June 30, 2023 [within two (2) years of the date of approval of the building permit]. The maintenance building shall not be used for residential or habitation purposes, and it shall not be used for transient accommodation purposes.

A15. As represented by the Applicant, prior to issuance of the Building Permit for the Barn, the Applicant shall donate the sum of Eleven Thousand Five Hundred Dollars ($11,500.00) to the Hawaiian Island Land Trust (HILT), to be used by HILT in support of its efforts to protect and preserve the environmental qualities and ecosystem of the Kīlauea Stream and Kalihiwai Beach, including but not limit to the removal of invasive species, the replacing of native species, erosion control, the clean-up of Kalihiwai Beach, and the empowerment of community stewardship of the area."

*Note: New material shown underscored, material to be deleted shown in brackets.

By Dale Cua
Dale Cua (Jul 8, 2020 08:32 HST)

DALE A. CUA
Staff Planner

Approved & Recommended to Commission:

By Ka`aina Hull
Ka`aina Hull (Jul 8, 2020 08:40 HST)

KA'ĀINA S. HULL
Director of Planning

Date: 07/08/2020

EXHIBIT 'A'

(HILT Correspondence)

For reference

HAWAIIAN ISLANDS
LAND TRUST

Board of Directors 2020

Board Chair
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Vice Chair
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Laura H. E. Kaakua

ph. 808.791.0729
138 Queen St, Ste. 306
Honolulu, Hawai'i 96813
www.hilt.org

May 11, 2020
County of Kauai Planning Commission
c/o County of Kauai Planning Department
4444 Rice Street, Suite A473
Lihue, Kauai, HI 96766

Re: Tuesday May 12, 2020 Kauai Planning Commission Teleconf. Meeting Agenda Item G. 2. a. Amendment to Special Management Ara Use Permit SMA (U)-2008-5, Class IV Zoning Permit Z-IV-2008-6, and Use Permit U-2008-4 involving the construction of two single-family residences/farm dwelling units, barn, and associated site improvements on a parcel situated near the terminus of Kahili Quarry Road in Kilauea, further identified as 1957 Kahili Quarry Road. Tax Map Key: 5-2-012:035 and 5-2-004:047, CPR Unit 2, and affecting an area approx. 161.88 acres = Charles M. Somers & West Sunset 32 Phase 1, LLC.

Aloha Kaua'i Planning Commissioners,

Hawaiian Islands Land Trust, holder of the two conservation easements protecting conservation values on Mr. Somers' property identified as TMK No. 5-2-012:035, supports Mr. Somers' request to remove condition A15 regarding the construction of the Nene fence along the banks of Kīlauea stream.

Hawaiian Islands Land Trust also owns and stewards Kāhili Beach Preserve which includes Kīlauea river mouth and the sand dunes above Kāhili beach. Collaboration between community and government partners is necessary to comprehensively care for this important natural and cultural landscape. While we appreciate the intent of the fence to improve Nene habitat, in practice the fence is neither practicable nor effective, given the nature and rapid growth of the vegetation in this area, and the existing Nene habitat that the expansive mowed yard along the stream provides. Kāhili is a well used and loved place by locals and we also expect the fence would impair the viewshed from Kīlauea streamouth looking mauka, likely upsetting beach users. Hawaiian Islands Land Trust recommends that instead of constructing the Nene fence, it would be more beneficial to the ecosystem to donate the estimated cost of the fencing materials, $11,500.00, to support Hawaiian Islands Land Trust's invasive species removal efforts Kīlauea river mouth and Kāhili Beach.

Hawaiian Islands Land Trust (HILT) is Hawai'i's islands-wide land trust that is both a Hawai'i 501(c)3 nonprofit, and a nationally accredited land trust. Our mission is to protect and steward the lands that sustain Hawai'i, and to perpetuate Hawaiian values by connecting people to 'āina. HILT has protected over 21,000 acres across Hawai'i, through 7 public preserves owned and stewarded by HILT, 52 conservation easements protecting agricultural, ecological, and cultural resources on private lands, and 5 facilitated conservation transactions. We protect lands that are integral to Hawai'i's well-being and character, upholding our kuleana to these lands, and the communities they are in, through thoughtful stewardship that deepens community connection to, and builds reciprocal relationships with, 'āina. Hawaiian Islands Land Trust's Kāhili Educators and Stewards are Kaninau Villanueva, Tim Asuncion, and Ann Eu. This Kāhili stewardship team is monitoring and keeping Kāhili Beach clean, removing invasive species, replanting native species to stop erosion, and empowering community stewardship of the area. Once it is safe to gather in groups, they will resume monthly community volunteer days and regular field trip visits to educate Kaua'i's keiki. We appreciate this opportunity to work collaboratively in protecting the ecosystem of Kīlauea and Kāhili.

Mahalo,

Laura H.E. Kaakua
CEO, Hawaiian Islands Land Trust

BELLES GRAHAM LLP

ATTORNEYS AT LAW

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MAX W.J. GRAHAM, JR.
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OF COUNSEL

DAVID W. PROUDFOOT
DONALD H. WILSON

Federal I.D. No. 99-0317663

May 11, 2020

Mr. Ka'āina S. Hull
Director of Planning
Planning Department
4444 Rice Street, Suite A473
Lihue, Kauai, Hawaii 96766

VIA EMAIL ONLY

Re: **Memorandum In Support Of Application And Motion For Second Amendment To Master Permit**
Application for a Special Management Area Use Permit, Use Permit, and Class IV Zoning Permit by CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, affectiug real property located at Kilauea, Hanalei, Island and County of Kauai, State of Hawaii, more particularly identified as Kauai Tax Map Key No. (4) 5-2-012:035
Special Management Area Use Permit SMA(U)-2008-5
Use Permit No. U-2008-4
Class IV Zouing Permit No. Z-IV-2008-6
Lot 2
Kilauea, Kauai, Hawaii
Kauai Tax Map Key No. (4) 5-2-012:035
Owncr: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company

Dear Mr. Hull:

I am writing to you on behalf of Charles Somers, Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC ("Owners"), the owners of the above-described Property. Pursuant to Rule 1-3-2(e) of the Rules Of Practice And Procedure Of The Kaua'i County Planning Commission, I am submitting the enclosed letter to the County of Kauai Planning Commission from Laura H.E. Kaakua, CEO, Hawaiian Islands Land Trust, dated May 11, 2020.

As you know, Condition A15 of the Second Amendment to the Master Permit contains a requirement that a proposed Nēnē Fence be constructed as proposed by the Applicant. In the Application for Second Amendment, the Applicant has requested that Condition A15 be deleted.

Consistent with the enclosed letter from Hawaiian Islands Land Trust, the Applicant is requesting that Condition A15 be deleted in its entirety and replaced with the following language:

> "15. Condition A15. As represented by the Applicant, prior to issuance of the Building Permit for the Barn, the Applicant shall donate the sum of Eleven Thousand Five Hundred And No/100 Dollars ($11,500.00) to the Hawaiian Islands Land Trust ("HILT"), to be used by HILT in support of its efforts to protect and preserve the environmental qualities and ecosystem of the Kilauea Stream and Kalihiwai Beach, including but not limited to: the removal of invasive species; the replanting of native species; erosion control; the clean-up of Kalihiwai Beach; and the empowerment of community stewardship of the area."

Thank you very much for your continued assistance in this matter.

Sincerely yours,

BELLES GRAHAM LLP

Max W. J. Graham, Jr.

MWJG:jgm
Enclosure
cc: Ms. Jodi A. Higuchi Sayegusa, Deputy Planning Director, w/encl. (via email only)
Mr. Dale A. Cua, w/encl. (via email only)
Ms. Jody Galinato, w/encl. (via email only)

BELLES GRAHAM LLP

ATTORNEYS AT LAW

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MAX W.J. GRAHAM, JR.
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Federal I.D. No. 99-0317663

May 11, 2020

Mr. Ka'āina S. Hull
Director of Planning
Planning Department
4444 Rice Street, Suite A473
Lihue, Kauai, Hawaii 96766

VIA EMAIL ONLY

Re: **Memorandum In Support Of Application And Motion For Second Amendment To Master Permit**
Application for a Special Management Area Use Permit, Use Permit, and Class IV Zoning Permit by CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, affecting real property located at Kilauea, Hanalei, Island and County of Kauai, State of Hawaii, more particularly identified as Kauai Tax Map Key No. (4) 5-2-012:035
Special Management Area Use Permit SMA(U)-2008-5
Use Permit No. U-2008-4
Class IV Zoning Permit No. Z-IV-2008-6
Lot 2
Kilauea, Kauai, Hawaii
Kauai Tax Map Key No. (4) 5-2-012:035
Owner: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company

Dear Mr. Hull:

I am writing to you on behalf of Charles Somers, Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC ("Owners"), the owners of the above-described Property. Pursuant to Rule 1-3-2(e) of the Rules Of Practice And Procedure Of The Kaua'i County Planning Commission, I am submitting the enclosed letter to the County of Kauai Planning Commission from Laura H.E. Kaakua, CEO, Hawaiian Islands Land Trust, dated May 11, 2020.

F.1.a.2.

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As you know, Condition A15 of the Second Amendment to the Master Permit contains a requirement that a proposed Nēnē Fence be constructed as proposed by the Applicant. In the Application for Second Amendment, the Applicant has requested that Condition A15 be deleted.

Consistent with the enclosed letter from Hawaiian Islands Land Trust, the Applicant is requesting that Condition A15 be deleted in its entirety and replaced with the following language:

> "15. Condition A15. As represented by the Applicant, prior to issuance of the Building Permit for the Barn, the Applicant shall donate the sum of Eleven Thousand Five Hundred And No/100 Dollars ($11,500.00) to the Hawaiian Islands Land Trust ("HILT"), to be used by HILT in support of its efforts to protect and preserve the environmental qualities and ecosystem of the Kilauea Stream and Kahili Beach, including but not limited to: the removal of invasive species; the replanting of native species; erosion control; the clean-up of Kahili Beach; and the empowerment of community stewardship of the area."

Thank you very much for your continued assistance in this matter.

Sincerely yours,

BELLES GRAHAM LLP

Max W. J. Graham, Jr.

MWJG:jgm
Enclosure
cc: Ms. Jodi A. Higuchi Sayegusa, Deputy Planning Director, w/encl. (via email only)
Mr. Dale A. Cua, w/encl. (via email only)
Ms. Jody Galinato, w/encl. (via email only)

HAWAIIAN ISLANDS
LAND TRUST

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Honolulu, Hawaii 96813
www.hilt.org

May 11, 2020
County of Kauai Planning Commission
c/o County of Kauai Planning Department
4444 Rice Street, Suite A473
Lihue, Kauai, HI 96766

Re: Tuesday May 12, 2020 Kauai Planning Commission Teleconf. Meeting Agenda Item G. 2. a. Amendment to Special Management Ara Use Permit SMA (U)-2008-5, Class IV Zoning Permit Z-IV-2008-6, and Use Permit U-2008-4 involving the construction of two single-family residences/farm dwelling units, barn, and associated site improvements on a parcel situated near the terminus of Kahili Quarry Road in Kilauea, further identified as 1957 Kahili Quarry Road. Tax Map Key: 5-2-012:035 and 5-2-004:047, CPR Unit 2, and affecting an area approx. 161.88 acres = Charles M. Somers & West Sunset 32 Phase 1, LLC.

Aloha Kaua'i Planning Commissioners,

Hawaiian Islands Land Trust, holder of the two conservation easements protecting conservation values on Mr. Somers' property identified as TMK No. 5-2-012:035, supports Mr. Somers' request to remove condition A15 regarding the construction of the Nene fence along the banks of Kīlauea stream.

Hawaiian Islands Land Trust also owns and stewards Kāhili Beach Preserve which includes Kīlauea river mouth and the sand dunes above Kāhili beach. Collaboration between community and government partners is necessary to comprehensively care for this important natural and cultural landscape. While we appreciate the intent of the fence to improve Nene habitat, in practice the fence is neither practicable nor effective, given the nature and rapid growth of the vegetation in this area, and the existing Nene habitat that the expansive mowed yard along the stream provides. Kāhili is a well used and loved place by locals and we also expect the fence would impair the viewshed from Kīlauea streamouth looking mauka, likely upsetting beach users. Hawaiian Islands Land Trust recommends that instead of constructing the Nene fence, it would be more beneficial to the ecosystem to donate the estimated cost of the fencing materials, $11,500.00, to support Hawaiian Islands Land Trust's invasive species removal efforts Kīlauea river mouth and Kāhili Beach.

Hawaiian Islands Land Trust (HILT) is Hawai'i's islands-wide land trust that is both a Hawai'i 501(c)3 nonprofit, and a nationally accredited land trust. Our mission is to protect and steward the lands that sustain Hawai'i, and to perpetuate Hawaiian values by connecting people to 'āina. HILT has protected over 21,000 acres across Hawai'i, through 7 public preserves owned and stewarded by HILT, 52 conservation easements protecting agricultural, ecological, and cultural resources on private lands, and 5 facilitated conservation transactions. We protect lands that are integral to Hawai'i's well-being and character, upholding our kuleana to these lands, and the communities they are in, through thoughtful stewardship that deepens community connection to, and builds reciprocal relationships with, 'āina. Hawaiian Islands Land Trust's Kāhili Educators and Stewards are Kaninau Villanueva, Tim Asuncion, and Ann Eu. This Kāhili stewardship team is monitoring and keeping Kāhili Beach clean, removing invasive species, replanting native species to stop erosion, and empowering community stewardship of the area. Once it is safe to gather in groups, they will resume monthly community volunteer days and regular field trip visits to educate Kaua'i's keiki. We appreciate this opportunity to work collaboratively in protecting the ecosystem of Kīlauea and Kāhili.

Mahalo,

Laura H.E. Kaakua
CEO, Hawaiian Islands Land Trust

BELLES GRAHAM LLP

ATTORNEYS AT LAW

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OF COUNSEL

DAVID W. PROUDFOOT
DONALD H. WILSON

Federal I.D. No. 99-0317663

May 18, 2020

Mr. Ka'āina S. Hull
Director of Planning
Planning Department
County of Kauai
4444 Rice Street, Suite A473
Lihue, Kauai, Hawaii 96766

VIA EMAIL ONLY

Re: **Updated Seventh Status Report**
Application for a Special Management Area Use Permit, Use Permit, and Class IV Zoning Permit by CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, affecting real property located at Kilauea, Hanalei, Island and County of Kauai, State of Hawaii, more particularly identified as Kauai Tax Map Key No. (4) 5-2-012:035
Special Management Area Use Permit SMA(U)-2008-5
Use Permit No. U-2008-4
Class IV Zoning Permit No. Z-IV-2008-6
Lot 2
Kilauea, Kauai, Hawaii
Kauai Tax Map Key No. (4) 5-2-012:035
Owner: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company

Dear Mr. Hull:

I am writing to you on behalf of Charles Somers, Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, the owners of the above-described Property. I have enclosed for your review and comment a draft Updated Seventh Status Report.

{W:/DOCS/26951/1/W0164323.DOCX }

G.1.a.

JUL 1 4 2020

Thank you very much for your continued assistance in this matter.

Sincerely yours,

BELLES GRAHAM LLP

Max W. J. Graham, Jr.

MWJG:jgm
Enclosure
cc: Ms. Jodi A. Higuchi Sayegusa, Deputy Planning Director, w/encl. (via email only)
Mr. Dale A. Cua, w/encl. (via email only)
Ms. Jody Galinato, w/encl. (via email only)

UPDATED SEVENTH STATUS REPORT

Re: UPDATED SEVENTH STATUS REPORT
Special Management Area Use Permit SMA(U)-2008-5,
Use Permit No. U-2008-4; and Class IV Zoning
Permit No. Z-IV-2008-6
In the Matter of the Application of Charles Somers, as
Trustee of the Charles Somers Living Trust dated
November 12, 2002, and West Sunset 32 Phase 1 LLC for
a Use Permit, Special Management Area Permit and Class IV
Zoning Permit For Real Property Situated at Kilauea, Kauai, Hawaii
and Identified by Kauai Tax Map Key No. (4) 5-2-012:035

Property: Lot 2
Kilauea, Kauai, Hawaii
Kauai TMK No. (4) 5-2-012:035

Owners: Charles Somers, as Trustee of the Charles Somers
Living Trust dated November 12, 2002, and
West Sunset 32 Phase 1, LLC, a California limited
liability company

Property: Kahili Quarry Road
Unit B, Seacliff Gardens Condominium
Lot 26-B
Kilauea, Kauai, Hawaii
Kauai TMK No. (4) 5-2-004:047 (CPR No. 2)

Owner: Charles Somers, as Trustee of the Charles Somers
Living Trust dated November 12, 2002

This Updated Seventh Status Report ("Report") is submitted by Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC (jointly, the "Applicant"). This Report is intended to provide a report on the status of the Project as of June 1, 2020.

A. COMPLIANCE WITH INITIAL CONDITIONS.

The Planning Commission of the County of Kauai ("Planning Commission") approved the above described permits("Master Permit") pursuant to the Planning Commission's Findings Of Fact, Conclusions Of Law, Decision And Order entered on October 2, 2008. The portion of this approval entitled "Decision And Order" contains eighteen (18) conditions of approval ("Conditions"). The Applicant is providing the Planning Commission with this Report on each Condition.

1. Condition 1. *As represented by the Applicant, the development subject to this permit approval shall be limited to: the single family residence/farm dwelling unit referred to in the Application as the "Main House", the Driveway accessory to the Main House; Landscaping; Site Grading for the Main House and Driveways; Preservation of Historic Sites; utilities; Well and Tank; and improvements to Kahili Quarry Road.*

Status. The Applicant continues to acknowledge this limitation concerning the initial scope of the project ("Project").

2. Condition 2. *Applicant shall provide annual status reports to the Planning Commission beginning from one year from the date of this approval. The reports shall be submitted to the Department no later than 30 days prior to the annual anniversary date of approval of this project. The report shall provide project status and progress towards project completion and compliance with conditions of approval. Annual reports shall be provided until completion of the project, and compliance with all conditions of approval.*

Status. This Report is being submitted in fulfillment of this provision. The Applicant initially filed a preliminary status report on September 1, 2009, a Second Annual Status Report on August 18, 2010, a Third Annual Status Report on September 30, 2011, a Fourth Annual Status Report on September 12, 2012, a Fifth Annual Status Report on October 1, 2013, a Sixth Annual Status Report on October 1, 2014, Update To Sixth Annual Status Report on October 27, 2015, and a Seventh Annual Status Report on December 1, 2019.

3. Condition 3. *Applicant shall substantially commence construction of the project development within one (1) year from the date of full approval, and shall complete construction of the project development within 5 years from the date of approval of the subject permits.*

Status. The status of construction is as follows:

a. Main House. The Applicant submitted its Building Permit Application for the Project in October, 2010. A Certificate of Occupancy for the Main House was issued on February 26, 2014.

b. Well/Tank. The Well has been drilled, the pump has been installed, and the water tank has been completed.

c. Landscaping. The landscaping has been completed as shown on the original Landscape Master Plan (including large palm trees, ground cover, ornamentals, and smaller vegetation).

4. Condition 4. *Subject permits approved herein cannot be sold and are not transferable to other than Applicant, its subsidiaries and affiliated corporations and legal entities prior to the completion of the project and issuance of the occupancy permit.*

Status. The Applicant continues to be the sole owner of the Subject Property. As permitted by the Master Permit, Applicant, Charles M. Somers, transferred his personal interest to himself as Trustee of the Charles Somers Living Trust dated November 12, 2002.

5. Condition 5. *Filling of the property with material obtained from off-premises shall not be permitted. This prohibition of imported fill material shall not apply to top soil used for landscaping purposes in accordance with the approved landscaped plans. Mass pad filling to increase the heights of the proposed structures shall not be permitted.*

Status. The Applicant acknowledges these limitations. In the construction of the Main House, the Applicant did not import fill material or undertake mass pad filling. However, the Applicant did allow the County to deposit rocks and materials from the dredging of Kilauea Stream on the Property.

6. Condition 6. *The Applicant shall apply for Leadership in Energy and Environmental Design (LEED) registration.*

Status. The Applicant, through its consultant, Gary Tobey of Design Concepts has registered a LEED For Homes Single Family with the U. S. Green Building Council.

7. Condition 7. *The Applicant shall comply with the requirements and recommendations of applicable County, State and Federal Agencies, including the County Fire, Water, Engineering and Building Divisions of the Department of Public Works, the State Department of Health, and State Department of Land and Natural Resources, Historic Preservation Division, as reflected in Findings #41-47 (sic) above.*

Status. As part of the Building Permit Approval process, the Applicant complied with the requirements and recommendations of the applicable County, State and Federal Agencies, as set forth in Findings of Fact 40 through 47 as follows:

a. Fire Department (FOF 40). The Applicant has resolved the Fire Department issues sufficiently to obtain its approval for the construction of the Main House.

b. DLNR. The Applicant retained Cultural Surveys Hawaii, Inc. to prepare an Archaeological Inventory Survey and a Preservation Plan. Both reports were submitted to and approved by the State Historic Preservation Division ("SHPD") of DLNR. By letter dated May 12, 2008, from SHPD to the Applicant's archaeologist, SHPD approved the Archaeological Inventory Survey prepared by Cultural Surveys Hawaii, Inc. ("CSH"). By letter

dated May 16, 2014, from SHPD to CSH, SHPD approved the Archaeological Preservation Plan prepared by CSH.

c. Department of Public Works ("DPW") (Wastewater). The Applicant installed an Individual Wastewater System ("IWS") for the Main House in compliance with the State Department of Health ("DOH") requirements.

d. Department of Water. The Applicant has obtained water issued by DOW and constructed the water facilities necessary to provide potable water to the Main House. The Well is used only for agricultural needs and is not connected to the DOW's potable water system.

e. DOH. As noted, the Applicant has installed an IWS in compliance with DOH requirements. All other DOH requirements have been met.

f. DPW (Engineering Division). The Applicant obtained all DPW approvals necessary to construct the Main House.

g. DPW (Building Division). The Applicant obtained all DPW approvals necessary to obtain a Building Permit for, and to construct, the Main House.

8. Condition 8. The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or revoke the subject permits through proper procedures should the Applicant fail to comply with the conditions of approval, or should unforeseen circumstances occur or result.

Status. The Applicant acknowledges the Planning Commission's reservation of authority in this matter.

9. Condition 9. In view of the various conditions and recommendations imposed by the various government agencies as reference to herein, building permit application or preconstruction work for any phase of the project or portion of the property shall not be accepted until the Applicant submits a status report of all permit conditions that are either required to be complied with prior to or at time of building permit application.

Status. The Applicant submitted six (6) annual, and one updated, Status Reports in compliance with this Condition from September 1, 2009 to October 27, 2015. No Status Reports were submitted in 2016, 2017 or 2018. A Seventh Status Report was submitted on December 1, 2019. The instant Status Report is an update as of June 1, 2020.

10. Condition 10. Should the applicant be unable to comply with the development time line in condition #3 above and request an extension of time, applicant is advised that any new laws, ordinances, or regulations that have been implemented within this time frame may become applicable to the project.

Status. The Applicant acknowledges that new legal laws, ordinances and regulations may apply to the Project should an extension of the development time be requested.

11. Condition 11. Prior to building permit review, the applicant shall:

a. Redesign the project to reduce the proposed grading area and volume, while still retaining the benching and proposed architectural design concept. A soil study/report and proposed grading plan shall be submitted to the Department of Public Works for review and approval. Such grading plans should include all off-site improvements.

Status. Grading plans for the Project and a soils report were submitted and approved as part of the Building Permit Application process.

b. In order to help screen the structures from public views as seen from public areas, and to blend the structures with its surroundings, external colors shall be of earth tones, complementary to and compatible with the surrounding natural background. In addition, the Applicant shall prepare a landscape plan to further soften the existing building mass. The landscape plan shall reflect the use of native plants that are common to the area, endemic, indigenous, or Polynesian-introduced. Use of herbicides, pesticides and non-organic fertilizers shall be kept to a minimum. The proposed color scheme and landscape plan shall be submitted to the Planning Director for review and approval prior to building permit review.

Status. The Applicant has utilized the earth tone external colors previously submitted to the Planning Commission and the Planning Department. The Applicant has installed landscaping as set forth in the Landscape Master Plan.

c. Record all of the conditions imposed under the subject permits with the deed(s) to the subject property(ies). A copy of this recordation shall be provided to the Planning Department.

Status. The Declaration Incorporating Conditions Of Approval Into Instruments Of Conveyance ("Restrictive Covenants") was recorded at the Bureau of Conveyances of the State of Hawaii ("Bureau") as Document No. 2010-115969.

d. As represented by the Applicant, prior to the issuance of any building permits, the Applicant agrees to transfer a perpetual Conservation Easement over an approximately eighty (80) acre portion of Lot 2 ("Conservation Easement Area"). The Conservation Easement shall comply with the applicable terms, conditions, and definitions contained in Chapter 198 (Conservation Easements) of the Hawai'i Revised Statutes, subject to the following terms and conditions:

i. The Applicant shall convey the Conservation Easement to a governmental entity or 501C(3) organization of Applicant's choice, provided such organization constitutes a "qualified organization" as defined in 170(h)(3) of the Internal Revenue Code of 1986 (the Code). Said entity or organization shall have the capability of developing and maintaining threatened and endangered species habitat consistent with the Kilauea Point National Wildlife Refuge Land Conservation Plan and Environmental Assessment (May 2007) prepared by the U. S. Fish and Wildlife Service.

Prior to recordation, the Conservation Easement shall be submitted to the Planning Department to review its compliance with this condition. The Planning Department shall solicit comments from the U.S. Fish & Wildlife Service. The Planning Department shall have 45 days to provide written comments to the Applicant, in the absence of which the Conservation Easement shall be deemed acceptable. The Planning Commission shall resolve any disagreements concerning the language of the Conservation Easement.

ii. The delineation and determination of the Conservation Easement's boundaries and the content of the restrictive terms of the Conservation Easement document shall be negotiated and agreed upon between the Applicant and the qualified organization provided:

1. That the Conservation Easement shall encumber approximately 80 acres of Lot 2.

2. That the Conservation Easement shall expressly extinguish density for sixteen (16) of the dwelling units permitted within Lot 2. It is Applicant's intention that any dwelling unit density attributable to and arising out of the Conservation Easement Area shall be extinguished, and shall not be transferred to any other portion of Lot 2.

3. That the lands encumbered by the Conservation Easement and the terms set forth in the Conservation Easement fulfill a "conservation purpose", as defined in 170(h)(4) of the Code.

4. That except as restricted in the Conservation Easement document, the Applicant shall have the right to use, possession and enjoyment of the Conservation Easement Area.

5. That no dwelling units (including single family residences and farm dwelling units) shall be allowed to be located within the Conservation Easement Area.

6. That to the extent reasonably possible, and subject negotiations with the qualified organization, the Conservation Easement Area will include: areas adjacent to the Kilauea Stream; and the archaeological sites identified as SIHP #50-30-04-580 and 581 in the Archaeological Inventory Study of an Approximately 74-Acre Portion of Kilauea Falls Ranch property (Applicant's Exhibit "F-5").

Status. By Grant Of Conservation Easement recorded on December 23, 2008, in the Bureau as Document No. 2008-191932, the Applicant granted the Kauai Public Land Trust, a Hawaii nonprofit corporation ("KPLT"), an easement for conservation purposes (designated as Easement "C-1") over an 80.1 acre portion of the Subject Property. By Grant Of Conservation Easement recorded on December 24, 2008, in the Bureau as Document No. 2008-192741, the Applicant granted KPLT an easement for conservation purposes (designated as Easement "C-2") over a 69.3 acre portion of the Subject Property. As a result, a total of 149.4 acres of the approximately 161.88 acres contained within the Subject Property are covered by the two Conservation Easements. Included within the Conservation Easements are the Archaeological Sites, the wetlands, and the areas adjacent to the Kilauea Stream. In 2011, KPLT merged with the Hawaiian Islands Land Trust ("HILT") and the Conservation Easements were assigned to HILT.

e. Evidence shall be provided that reflects resolution or compliance to the comments and recommendations of the government agency(ies) reflected in Condition #7 above.

Status. As discussed in Paragraph 7, the Applicant has to date complied with the comments and recommendations of governmental agencies.

12. Condition 12. Applicant shall provide roadway improvements to the entire length of Kahili Quarry Road as may be authorized by its present owners. Said roadway improvements should include clearing and drainage improvements as may be permitted by the present road right-of-way width. The use of crushed coral would be acceptable to retain a rural ambience. The use of gravel and chemical sealant shall not be permitted. As represented, Applicant shall maintain this road right-of-way. Said improvements shall implement and utilize best management practices as recommended by the Department of Public Works. No weekend or holiday work shall be permitted.

Status. Kahili Quarry Road is a private road located on Unit B of the Seacliff Gardens Condominium ("Unit B") located on Lot 26-B (Seacliff Plantation At Kilauea Bay Subdivision, Kauai Tax Map Key No. (4) 5-2-004:047). Charles Somers, Trustee, who is one of the Applicants, is the Owner of Unit B. The County of Kauai has been granted an easement ("County Easement") for public access purposes over Kahili Quarry Road.

Unit B, on its makai side, ends at the Fish & Wildlife Service Refuge property located on Lot 19 (Kauai Tax Map Key No. (4) 5-2-004:043) ("FWS Lot"). The FWS Lot is owned by the United States of America and is part of the Kilauea Point Wildlife Refuge operated by the U.S. Fish & Wildlife Service ("FWS"). The FWS Lot is subject to an

easement for access and parking ("Lot 19 Easement") which runs in favor of Lots 1-25 of the Seacliff Plantation At Kilauea Bay Subdivision. The FWS Lot is not subject to any other recorded easements or rights in favor of the County, the general public, or the Property.

The County Easement is part of the access used by the public to get to the shoreline along the FWS Lot. This access runs over Kahili Quarry Road and a portion of the FWS Lot. The Applicant has maintained Kahili Quarry Road so that it is passable. However, FWS does not maintain the road on the FWS Lot ("FWS Lot Road"). By 2015, the FWS Lot Road had become almost unpassable due to erosion. As a result, the Applicant, by letter dated January 16, 2015, to FWS, offered to make improvements to the FWS Lot Road. By email dated October 23, 2015, from Michael Mitchell, Acting Project Leader, FWS agreed to allow the Applicant to undertake such work, subject to FWS approval of construction plans. The Applicant filed a Special Use Permit Application with FWS for permission to undertake the work on November 28, 2018. FWS approved the application and issued a Special Use Permit dated March 15, 2019, allowing the work to progress. The improvements were completed in May, 2019. Kahili Quarry Road was thereafter open to vehicular traffic from Kilauea Lighthouse Road to the parking area on the FWS Lot.

On March 27, 2020, a heavy rain event caused excessive flooding on Kauai. This flood caused substantial damage to a portion of Kahili Quarry Road and culvert structure on Unit B ("Culvert") located near the northern end of the road, close to the FWS Lot. As a result, the County closed Kahili Quarry Road at this point. The preliminary cost of reconstructing the Culvert and road has been estimated to be approximately $220,000.00. The Applicant is currently assessing how this situation might be remedied and will be meeting with the County in this regard.

13. Condition 13. The proposed residence(s) shall not be used for vacation rental or bed and breakfast purposes.

Status. This Condition prohibiting vacation rental and/or bed and breakfast uses is incorporated in the Restrictive Covenants which were recorded and which encumber the title to the Subject Property.

14. Condition 14. The Applicant is advised that prior to and/or during construction and use, additional government agency conditions may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agency(ies).

Status. The Applicant acknowledges that it will need to resolve any additional agency conditions with the applicable governmental agency.

15. Condition 15. In order to minimize adverse impacts on Federally Listed Threatened Species, such as Newell's Shearwater and other seabirds, if external lighting is to be used in connection with the proposed project, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or

spotlighting of structures, landscaping, signage or hotel features within the project site shall be prohibited.

Status. The Applicant has incorporated shielded and indirect lighting as part of the lighting scheme for the Project as shown on its Building and Construction Plans.

16. Condition 16. As represented, Applicant shall contribute no less than $5,000 towards the conduct of a water quality baseline study of Kilauea River.

Status. The Applicant contributed $5,000.00 to the Hanalei Watershed Hui toward the conduct of a water quality baseline study of the Kilauea Stream.

17. Condition 17. Customary and traditional rights and practices including without limitation those exercised for subsistence, culture, religious, access or gathering purposes, as provided for in the Hawai'i Constitution or Hawai'i Revised Statutes, shall be permitted.

Status. This requirement was included in the Restrictive Covenants that were recorded. To date, the Applicant has received no special requests from native Hawaiian individuals or groups regarding the use of or access to the Subject Property.

18. Condition 18. Access to the waterfall shall be permitted at the Applicant's discretion.

Status. The Applicant acknowledges this Condition and permits access, in Applicant's sole discretion, on a case-by-case basis.

B. COMPLIANCE WITH ADDITIONAL CONDITIONS.

On February 4, 2013, the Applicant filed a new Application To Amend the Master Permit (SMA(U)-2008-5, U-2008-4, and Z-IV-2008-6) ("First Amendment") which was approved by the Planning Commission on April 26, 2016. The approval of the First Amendment was subject to sixteen (16) conditions ("Additional Conditions"). In the First Amendment, the Planning Commission approved the construction of a Manager's House, Barn, Accessory Improvements, Nēnē Fence, and Equipment Tent. Work on the Manager's House, Barn and Nēnē Fence was not commenced within the time period set for in Condition A13. As a result, on January 23, 2020, the Applicant filed an Application for a Second Amendment To The Master Permit ("Second Amendment"). In the Second Amendment, the Applicant is asking only for approval of the Barn, has withdrawn Applicant's request to build a Manager's House and Nēnē Fence, and has asked that Condition A15 (relating to the Nēnē Fence) be modified to allow Applicant to make a monetary contribution to the Hawaiian Islands Land Trust ("HILT") in lieu of constructing the Nēnē Fence. The Second Amendment is currently pending before the Planning Commission. The status of the Additional Conditions is as follows:

1. Condition A1. The conservation manager's house and garage shall be sunken approximately five feet below grade and shielded, by way of dense shrubbery and tall tree landscaping in order to alleviate view plain impacts of the proposed new structures from Kahili Beach as well as looking westward across Kilauea Stream. The conservation maintenance building and conservation manager's house shall be constructed as revised. The structures shall also be operated as represented. Any changes to said structures shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.

Status. The request to construct a conservation manager's house ("Manager's House") has been withdrawn. Instead, the conservation maintenance building ("Barn") has been redesigned as described in the Second Amendment and has been submitted to the Planning Commission for approval.

2. Condition A2. The applicant shall comply with the requirements of the State of Land and Natural Resources, Historic Preservation Division, County's Department of Public Works, as well as any other applicable government agencies.

Status. The Applicant will comply with all requirements applicable to the construction of the Barn as maybe imposed by the State Historic Preservation Division ("SHPD"), the County Department of Public Works ("DPW"), and any other governmental agencies.

3. Condition A3. The applicant shall develop and utilize Best Management Practices (BMPs) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.

Status. The Applicant will develop and utilize Best Management Practices ("BMP") as required.

4. Condition A4. In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, all external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping, or the ocean shall be prohibited.

Status. The Applicant agrees that any external lighting that is installed will only be shielded lights, cut-off luminaries, indirect lighting, or other such lighting designed to minimize adverse impacts on endangered or threatened species.

5. Condition A5. To the extent possible within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors, and shall seek to employ residents of Kauai in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-

Kauai residents for particular skilled jobs where no qualified Kauai resident possesses such skills. For the purposes of this condition, the Commission shall relive the applicant of this requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.

Status. To the extent possible, the Applicant will hire Kauai contractors and Kauai residents.

6. Condition A6. The applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environmental Design (LEED) standards or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.

Status. The Applicant will employ sustainable building techniques and operational methods, including Leadership in Energy and Environmental Design ("LEED") standards for the Barn construction and operation.

7. Condition A7. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project create, or to revoke the permits through the proper procedures should conditions or approval not be complied with or be violated.

Status. The Applicant agrees that the Planning Commission has continuing oversight powers concerning the development.

8. Condition A8. The applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the applicant shall contact the State Department of Land and Natural Resources - Historic Preservation Division at (808) 692-8015 and the Planning Department at (808) 241-4050.

Status. The Applicant agrees to stop work and contact SHPD and the Planning Department if any archaeological or historic resources are discovered during ground disturbing construction work.

9. Condition A9. The applicant shall not use this residence for vacation rental purposes. This restriction shall be incorporated into the deed restrictions of the subject parcel, draft copies of which shall be submitted to the Planning Department prior to building permit approval.

Status. The Applicant agrees that the Barn will not be used for vacation rental purposes. The Applicant has recorded a Declaration Incorporating Condition Of Approval A9. Into Instruments Of Conveyances dated January 2, 2019 in the Bureau of Conveyances of the State of Hawaii as Document No. A-69680580 which incorporates this restriction.

10. Condition A10. Applicant is on notice that the property is "Agricultural" under State Land Use designations. Applicant must comply with all requirements pursuant to Hawaii Revised Statutes Chapter 205 including the submission and approval of a farm plan to the director prior to building permit approval.

Status. The Applicant will comply with all applicable provisions of Hawaii Revised Statutes Chapter 205 regarding uses and activities in the State Land Use Commission Agricultural District. Pursuant to this requirement, the Applicant previously submitted to the Planning Department on April 14, 2019, a Farm Plan Application Form for the Barn as approved by the First Amendment, together with a Farm Plan, Barn Floor Plans, and a tax map showing the location of the Barn and the agricultural activities. If the Second Amendment is approved, the Applicant will submit an amended Farm Plan, Barn Floor Plans, and Tax Map for the redesigned Barn as part of the Building Permit Application process.

11. Condition A11. The applicant shall submit for review and approval by the Planning Department a landscape plan composed of native species, or species common to the area, to help screen the proposed structures, and integrate the site with its surroundings.

Status. The Applicant will submit a Barn Landscape Plan to the Planning Department as required.

12. Condition A12. Exterior colors and finishes of all structures, including roof colors, shall be limited to medium or dark earth tones such as brown, green, or grey, or other colors compatible with the area's natural surroundings. Use of reflective materials or colors shall be prohibited. The proposed color scheme and samples shall be submitted to the Planning Department for design review and approval prior to building permit application.

Status. The Applicant agrees: that it will utilize medium to dark earth tones for exterior surfaces; that it will not use reflective materials for external surfaces; and that it will submit color schemes and material samples to the Planning Department for its approval prior to Building Permit approval for the Barn.

13. Condition A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5 prior to the issuance of building permits for the residence and maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application and complete the proposed development within two (2) years of the date of approval of the building permit.

Status. As set forth in this Report, other than with regard to the recent damage to the culvert, which Applicant is working on, the Applicant has complied with all of the Initial Conditions. As part of the Second Amendment, the Applicant is requesting that this Condition A13. be amended to provide as follows:

> "A13. The Applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [residence and] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development no later than June 30, 2023."

14. Condition A14. The applicant shall pay a $500 fine for the "After-the-Fact" permit for the temporary maintenance structure. The structure shall be removed once the conservation maintenance building is constructed.

Status. On April 5, 2019, the Applicant paid a Five Hundred And No/100 Dollar ($500.00) fine for the After-the-Fact Special Management Area Permit for the temporary maintenance structure ("Equipment Tent"). The Equipment Tent will be removed as soon as the Barn is constructed.

15. Condition A15. The Nene fencing shall be constructed as stated, including landscaping as recommended. The fencing and landscaping shall be completed prior to construction of the conservation manager's house and maintenance building.

Status. The request to the Planning Commission to install a Nēnē Fence has been withdrawn. With the approval of HILT, the Conservation Plan for the management of activities within the Easement Areas was amended to eliminate the Nēnē Fence. As a result, the Applicant is requesting the Planning Commission to delete Condition A15 (as currently written) in its entirety and replace it with the following language:

> "15. Condition A15. As represented by the Applicant, prior to issuance of the Building Permit for the Barn, the Applicant shall donate the sum of Eleven Thousand Five Hundred And No/100 Dollars ($11,500.00) to the Hawaiian Islands Land Trust ("HILT"), to be used by HILT in support of its efforts to protect and preserve the environmental qualities and ecosystem of the Kilauea Stream and Kahili Beach, including but not limited to: the removal of invasive species; the replanting of native species; erosion control;

the clean-up of Kahili Beach; and the empowerment of community stewardship of the area."

16. *Condition A16.* *Given Finding 18 of the 2008 Decision and Order, applicant shall provide director contact information should a member of the public wish to seek access to the falls understanding access is at the landowner's discretion.*

Status. By letter to the Planning Director dated April 5, 2019, the name and contact information for the person designated to receive public requests to access Kilauea Falls was submitted to the Planning Director.

INDEX OF Correspondence

File No.

Assigned Deputy: Deputy

Case No.: CC-2017-4

Case Name: Patricia D. McConnell vs. Planning Department

Case Description: TMK: (4)5-8-005:5, Hāʻena, Kauaʻi
Appeal Decision of Planning Director related to Notice of Violation and Order to Pay Fines for the Operation of Illegal Transient Accommodation Use

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10/4/17	Request for additional information from Hearings Officer Nadine Ando	Gregory W. Kugle	C
7/31/18	Referral Letter to Boards and Commissions	Michael A. Dahilig	D
11/1/18	Referral Letter from Boards and Commissions to Hearings Officer	Nicholas Courson	E
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File No. 2

Assigned Deputy: Deputy

Case No.: CC-2017-4

Case Name: Patricia D. McConnell vs. Planning Department

Case Description: Appeal Decision of Planning Director related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use
TMK: (4) 5-8-005:5, Hāʻena Kauaʻi

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File No. 2

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PLANNING COMMISSION
CONTESTED CASE INFO SHEET

Case Name: Patricia D. McConnell vs. Planning Department

Case No.: CC-2017-4 TMK: (4)5-8-005:5, Hāʻena, Kauaʻi

Assigned Deputy: SELECT Choose an item.

Planning Contact: INSERT Planning contact person

Case Description: Appeal Decision of Planning Director related to the Notice of Violation and Order to Pay Fines for the Operation of Illegal Transient Accommodation Use

Prehearing Conference	INSERT Enter date @ 9am
Contested Case Hearing	INSERT Enter date @ 10am
Prehearing (Position) Statement	INSERT Enter date by 4:30pm
Witness List	INSERT Enter date by 4:30pm
Exhibit List and Exhibits	INSERT Enter date by 4:30pm
Prehearing Motions	INSERT Enter date by 4:30pm
Responses to Prehearing Motions	INSERT Enter date by 4:30pm
Replies [Due 3 **business** days upon receipt of Responses]	INSERT Enter date by 4:30pm
Hearing on the Prehearing Motions	(if applicable) to be held immediately prior to the Contested Case Hearing

PARTIES

Attorney for Applicants/Petitioners:	**Hearings Officer:**
Damon Key Leong Kupchak Hastert Gregory W. Kugle Joanna C. Ziegler 1300 Bishop Street, Suite 1600 Honolulu, Hawaiʻi 96813-6452 Tel. No. (808) 531-8031 Fax. No. (808) 533-2242	Harlan Y. Kimura, Esq. Central Pacific Plaza 220 South King Street, Suite 1660 Honolulu, HI 96813 Tel. No. (808) 521-4134 (Office) Tel. No. (808) 564-0811 (Direct) Tel. No. (808) 226-2225 (Cell) Fax No. (808) 521-0361

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17 JUN 13 P2:52

June 9, 2017

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LAW FIRMS WORLDWIDE MERITAS

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VIA E-MAIL (khull@kauai.gov),
FACSIMILE & U.S. MAIL

Mr. Ka'aina S. Hull
Deputy Director of Planning
Planning Department
County of Kauai, State of Hawaii
4444 Rice Street, Suite A-473
Lihue, Hawaii 96766

Re: **Notice of Appeal and Demand for Contested Case Hearing** from Zoning Violation for Transient Accommodation Use at: 4813 Ananalu Road; TMK: 5-8-005:005

Dear Mr. Hull:

We represent Patricia Dawn McConnell, owner of the above-referenced property ("Property") and appellant herein. This letter constitutes a notice of appeal and demand for a contested case hearing pursuant to Chapter 9 of the Rules of Practice and Procedure of the Kauai Planning Commission ("Kauai Commission Rules") in response to the Director's Notice of Violation & Order to Pay Fines ("NOV & Order") dated May 23, 2017, which stemmed from a purported violation of Section 8-18.1(b) of the Comprehensive Zoning Ordinance, Chapter 8, Kauai County Code, 1987, as Amended ("CZO").

By way of background, Ms. McConnell is a sixty seven (67) year old, disabled woman. Ms. McConnell suffers from severe asthma, three ruptured discs in her neck, two ruptured discs in her back, arthritis, which is all compounded by lung damage, which resulted from a chemical exposure. In light of the severity and multitude of Ms. McConnell's disabilities, her doctors recommended that she move somewhere with fresh vegetation to provide ample oxygen supply, and a warm and steady climate. Upon his recommendation, Ms. McConnell moved to Oahu, but she soon fell in love with Kauai. Ms. McConnell has resided there ever since.

1
CC-2017-4

In 2006, Ms. McConnell began renting rooms in her home as a way to make a living despite her numerous disabilities. Renting rooms also proved to be therapeutic and healing because it allowed her to stay self-sufficient (pay her mortgage, handymen, bills, etc.), remain intellectually active through conversations with visitors from around the world, and brought her closer to her community, to which she stayed engaged to inform and refer guests to local events and vendors. Over past twelve years, Ms. McConnell focused on her business and was able to create a steady stream of clientele who are respectable, quiet guests, that return to her home time and time again.

On May 18, 2016, the Kauai County Council arbitrarily banned homestays in Ms. McConnell's neighborhood through Ord. No. 987, June 19, 2015 and Ord. No. 1002, May 18, 2016, codified as Sec. 8-18.1 of the CZO ("Homestay Ordinance"). The Homestay Ordinance does not contain a grandfathering provision to cover preexisting operations and does not provide guidance on preexisting legal uses. Upon implementation of the Homestay Ordinance, Ms. McConnell's business became a vested, non-conforming use. Thus, she is not subject to Sec. 8-18.1 of the CZO, or subject to its associated fines.

On January 11, 2017 the Director erroneously issued a Zoning Compliance Notice. To defend herself and her livelihood, Ms. McConnell promptly arranged a meeting. On April 12, 2017, Ms. McConnell met with Bambi Emayo, a Planning Department official. Mr. Emayo informed Ms. McConnell that there was nothing to do but for Ms. McConnell to shut down her business and find another way to make a living. A Planning Department employee chimed in, "if you lose your home, you can go live on the beach." Ms. McConnell felt threatened and mocked, but she did not respond because she felt embarrassed and sad, knowing that she may very well lose her home without the rental income that supported her over the past twelve years.

On May 23, 2017, the Director acted erroneously, arbitrarily, and manifestly abused his discretion when he ignored Ms. McConnell's valid concerns about the applicability Homestay Ordinance to her business and issued the NOV & Order.

For the foregoing reasons, and such others that may be shown at the hearing, Ms. McConnell respectfully demands a contested case hearing pursuant to Chapter 9 of the Kauai Commission Rules.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
VERONICA A. NORDYKE

GWK/VAN:rp
356596_2

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	HEARING OFFICER'S SCHEDULING ORDER; CERTIFICATE OF SERVICE
	)	HEARING (Scheduled):
	)	Date: August 6-7, 2019
	)	Time: 9:00 a.m. on both days
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

HEARING OFFICER'S SCHEDULING ORDER

On December 12, 2018 at 1:30 p.m. the Prehearing Conference was held herein by telephone pursuant to Rule 1-6-7 of the *Rules of Practice and Procedure of the Kaua'i County Planning Commission* ("Commission Rules"). Gregory W. Kugle and Joanna C. Zeigler appeared on behalf of Petitioner

PATRICIA D. McCONNELL ("Petitioner") and Maryann S. Sasaki appeared on behalf of the PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI ("Planning Department"). No other parties appeared.

Based upon the Prehearing Conference the following schedule shall apply:

1. **Contested Case Hearing** to be held on **August 6-7, 2019**, 2019, commencing at 9:00 a.m. on both days;

2. **Prehearing Statement** due no later than **July 29, 2019** at 4:30 p.m.;

3. **Witness List** due no later than **July 29, 2019** at 4:30 p.m.;

4. **Exhibit List and Exhibits** due no later than **July 29, 2019** at 4:30 p.m. Petitioner shall use Numbers to identify her Exhibits and the Planning Department shall use Alphabets to identify its' Exhibits;

5. **Prehearing Motions** as deemed necessary by any party shall be due no later than **July 8, 2019** at 4:30 p.m.;

6. **Responses** to any Prehearing Motions due by **July 22, 2019** at 4:30 p.m.;

7. **Replies** due by 4:30 p.m. no later than three (3) business days after service of the Response; and

8. **Hearing** on any Prehearing Motions to be held immediately prior to the commencement of the Contested Case Hearing, **unless an Order ruling on the same is issued prior thereto**.

Any and all of the above-described pleadings shall be served by email or facsimile transmission, with a hard copy served by regular mail, postage prepaid, to all the parties and the Office of Boards and Commissions for the County of Kaua'i. The times set forth above are based upon Hawaiian Standard Time ("HST").

A Further Prehearing Conference may be requested by either party to address any issues or concerns related to this Contested Case.

DATED at Honolulu, Hawaii, December 14, 2018.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kaua'i

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
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Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on December 14, 2018.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: gwk@hawaiilawyer.com Attorneys For Petitioner PATRICIA D. McCONNELL			X
MARYANN SASAKI, ESQ. Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: msasaki@kauai.gov Attorney for Kaʻāina S. Hull, Director, County of Kauaʻi, Department of Planning			X
MATTHEW M. BRACKEN, ESQ. County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: mbracken@kauai.gov ncourson@kauai.gov Attorney for Planning Commission of the County of Kauaʻi			X

/ /

	U.S. Mail	Hand Delivery	Email
ELLEN CHING Administrator Office of Boards and Commissions County of Kauaʻi 4444 Rice Street, Suite 150 Līhuʻe, Kauaʻi, HI 96766 Email: eching@kauai.gov lagoot@kauai.gov			X

DATED at Honolulu, Hawaii, December 14, 2018.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
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	)	HEARING (Scheduled):
	)	Date: ***August 7, 2019***
	)	Time: 9:00 a.m.
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

HEARING OFFICER'S *FIRST AMENDED* SCHEDULING ORDER

On July 5, 2019 at 1:30 p.m. a Prehearing Conference was held herein by telephone pursuant to Rule 1-6-7 of the *Rules of Practice and Procedure of the Kauaʻi County Planning Commission* ("Commission Rules") at the request of Maryann S. Sasaki, Counsel for the PLANNING DEPARTMENT OF THE

COUNTY OF KAUAʻI ("Planning Department"), because she has a scheduling conflict with the present Contested Case Hearing Date of August 6, 2019. Counsel for Petitioner PATRICIA D. McCONNELL ("Petitioner"), Gregory W. Kugle, also has a scheduling conflict with that date. Ms. Sasaki and Joanna C. Zeigler participated in the Prehearing Conference. No other parties appeared.

Based upon the Prehearing Conference the Hearing Officer's Scheduling Order dated December 14, 2018 is hereby amended as follows:

1. **Contested Case Hearing** to be held on ***August 7, 2019***, commencing at 9:00 a.m.;

2. **Prehearing Statement** due no later than ***July 30, 2019*** at 4:30 p.m.;

3. **Witness List** due no later than ***July 30, 2019*** at 4:30 p.m.;

4. **Exhibit List and Exhibits** due no later than ***July 30, 2019*** at 4:30 p.m. Petitioner shall use Numbers to identify her Exhibits and the Planning Department shall use Alphabets to identify its' Exhibits;

5. **Prehearing Motions** as deemed necessary by any party shall be due no later than ***July 9, 2019*** at 4:30 p.m.;

6. **Responses** to any Prehearing Motions due by ***July 23, 2019*** at 4:30 p.m.;

7. **Replies** due by 4:30 p.m. no later than three (3) business days after service of the Response; and

8. **Hearing** on any Prehearing Motions to be held immediately prior to the commencement of the Contested Case Hearing, **unless an Order ruling on the same is issued prior thereto**.

Any and all of the above-described pleadings shall be served by email or facsimile transmission, with a hard copy served by regular mail, postage prepaid, to all the parties and the Office of Boards and Commissions for the County of Kauaʻi. The times set forth above are based upon Hawaiian Standard Time ("HST").

A Further Prehearing Conference may be requested by either party to address any issues or concerns related to this Contested Case.

DATED at Honolulu, Hawaii, July 5, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
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PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on July 5, 2019.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: gwk@hawaiilawyer.com JCZ@hawaiilawyer.com Attorneys For Petitioner PATRICIA D. McCONNELL			X
MARYANN SASAKI, ESQ. Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: msasaki@kauai.gov Attorney for Kaʻāina S. Hull, Director, PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI			X
NICHOLAS COURSON, ESQ. First Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: ncourson@kauai.gov DNakamatsu@kauai.gov Attorney for Planning Commission of the County of Kauaʻi			X

	U.S. Mail	Hand Delivery	Email
ELLEN CHING Administrator Office of Boards and Commissions County of Kauaʻi 4444 Rice Street, Suite 150 Līhuʻe, Kauaʻi, HI 96766 Email: eching@kauai.gov asegreti@kauai.gov			X

DATED at Honolulu, Hawaii, July 5, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

MATTHEW M. BRACKEN 10267
County Attorney
MARYANN SASAKI 10458
Deputy County Attorney
Office of the County Attorney, County of Kaua'i
4444 Rice Street, Suite 220
Līhu'e, Hawai'i 96766
Telephone: (808) 241-4930
Email: msasaki@kauai.gov

Attorney for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	CC-2017-4 TMK: (4) 5-8-005:005 RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; DECLARATION OF MIKE LAURETA; EXHIBITS A-E; DECLARATION OF BRITNI LUDINGTON-BRAUN; EXHIBIT 1; DECLARATION OF COUNSEL; CERTIFICATE OF SERVICE HEARING: Date: August 7, 2019 Time: 9:00 a.m. Hearings Officer: Harlan Y. Kimura, Esq.

RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S MOTION FOR SUMMARY JUDGMENT

Respondent, PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I (the "Planning Department"), by and through its undersigned attorneys, hereby submits this Motion for Summary Judgment on the Petition to Appeal Decision of the Planning Director Relating to the Petitioner's failure to comply with Kauai County Code § 8-18.1(b) on the grounds that there are no genuine issues as to any material fact or matter of law in the above-entitled case.

This motion is made pursuant to the Rules of Practice and Procedure of the Kaua'i Planning Commission Rule 1-6-16 and is supported by the attached Memorandum in Support of Motion for Summary Judgment; Declaration of Mike Laureta; Declaration of Britni Ludington-Braun; Declaration of Counsel, Exhibits, the record and files herein, and such other matters as may be presented at the hearing and considered by the Hearing Officer.

DATED: Līhu'e, Kaua'i, Hawai'i, July 9, 2019

MATTHEW M. BRACKEN
County Attorney

By MSasaki
MARYANN SASAKI
Deputy County Attorney

Attorneys for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	)	
	)	CC-2017-4
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	TMK: (4) 5-8-005:005
	)	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF FACTS

Much as Ordinance 864 was implemented because the County found a compelling need to regulate family transient vacation rentals on Kaua'i to visitor designated areas ("VDA"), because their unregulated growth was causing significant negative impact to certain residential neighborhoods [Ordinance 864, enacted March 7, 2008], Ordinance No. 1002 was passed to address the same issues regarding homestays and prohibiting any homestays from operating outside of VDAs.

In bringing the instant appeal, Patricia D. McConnell ("Petitioner") owner of the subject property located 4813 Ananalu Road, Hanalei, Hawai'i TMK No. (5) 8-005:005 (the "Subject Property") seeks to flout the explicit provisions regarding homestays in the Kaua'i County Code ("KCC" or the "Code") by operating a homestay transient vacation accommodation outside a VDA absent any permits and in direct violation of the Comprehensive Zoning Ordinances Chapter 8, KCC, 1987 as Amended (CZO.) There are no mitigating circumstances here.

As set forth in the Air BnB Evidence Checklist – TVR Inspections and the Investigation Report of Respondent dated January 28, 2016 and January 10, 2017, respectively, prepared by the Planning Department, the Petitioner has never possessed a homestay zoning permit, a nonconforming use certificate and operates outside a visitor designation area in violation of KCC § 8-18.1(b).

On January 11, 2017, the Respondent via a Cease and Desist Letter from the Planning Department, notified the Petitioner that she ought to stop operating the Subject Property as a transient accommodation and cancel all transient accommodation commitments for the Subject Property. The Cease and Desist Letter also informed the Petitioner that she would be subject up to a $10,000 fine, and $10,000 for every day the violation should persist.

On May 23, 2017, via a Notice of Violation & Order to Pay Fines, the Planning Department informed Petitioner that she was in continued breach of the Zoning Compliance Notice, and fines could continue to accrue up to $10,000 per day.

On or around April 12, 2017, a memorandum was prepared contemporaneously with a meeting with Petitioner in which Petitioner stated that she did not see how she was violating the law.

On June 9, 2017 another Investigation Report was prepared by Respondent indicating the Petitioner was continuing operations of her illegal homestay.

III. STANDARD OF REVIEW

The purpose of a motion for summary judgment is to expedite matters where there is no genuine issue of material fact. Flint v. Mackenzie, 53 Haw. 673, 672, 501 P.2d 357, 357 (1972). Here, the Planning Commission should expedite this case and resolve the Petitioner's challenge to the Zoning Compliance Notice and the Notice of Violation and Order to Pay Fees. The Petitioner's argument cannot present a genuine material issue of fact. She is operating her homestay outside of every parameter of the law. There is no factual dispute with respect thereto.

IV. LEGAL ANALYSIS

Where the terms of a statute are plain, unambiguous and explicit, a Court is not at liberty to look beyond that language for a different meaning. Instead, their sole duty is to give effect to the statute's plain and obvious meaning. State v. Stan's Contracting, Inc., 111 Hawai'i 17, 24, 137 P.3d 331, 338 (2006). Here the Code could not have been clearer. "Homestay operations are prohibited outside of the Visitor Destination Area (Ord. 987, June 19,2015; Ord. No. 1002. May 18, 2016). Incidents of continued violation of the law seem to extend from at least January 28, 2016 to March 16, 2017.

V. CONCLUSION

Petitioner must be compelled to cease operations of this homestay, and perhaps more effective than a threatened injunction would be an appropriate fine. In this matter where the behavior has gone on for years and Petitioner persists on flouting the law and admits she is doing so despite all efforts by the Planning Department, Planning Department, pursuant to KCC § 8-

3.5(b)(1)(B)-(C), seeks ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) in fines and an order that the Petitioner Cease and Desist the operation of the her homestay.

DATED: Līhu'e, Kaua'i, Hawai'i, July 9, 2019.

MATTHEW M. BRACKEN
County Attorney

By _____
MARYANN SASAKI
Deputy County Attorney

Attorneys for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	)	CC-2017-4 TMK: (4) 5-8-005:005 DECLARATION OF MIKE LAURETA; EXHIBIT A - E

DECLARATION OF MIKE LAURETA

I, MIKE LAURETA, based upon personal knowledge, do declare under penalty of law, that I have personal knowledge that the following is true and correct:

1. I am employed by the County of Kaua'i, Planning Department as a Program Manager.

2. I am in charge of inspecting for and enforcing violations of the Comprehensive Zoning Ordinance.

3. Pursuant to Hawai'i Rules of Evidence Rule 803(b), I am custodian of records of

the Planning Department.

4. The annexed documents were made at or near the time by someone with knowledge thereof.

5. Making the record is a regular practice of that activity.

6. Annexed hereto as Exhibit A, is a true and correct copy of a Planning Department Air Bnb Evidence Checklist – TVR Inspections dated January 28, 2016.

7. Annexed hereto as Exhibit B, is a true and correct copy of a Planning Department Investigation Report dated January 1, 2017

8. Annexed hereto as Exhibit C, is a true and correct copy of the Zoning Compliance Notice dated January 11, 2017.

9. Annexed hereto as Exhibit D is a true and correct copy of Notice of Violation & Order to Pay Fines dated May 23, 2017.

10. Annexed hereto as Exhibit E, is a true and correct copy of a Planning Department Investigation Report dated after March 12. 2017.

11. The Subject Property is located outside of the visitor designation area, and does not possess a valid permit or non conforming use certificate.

I declare under penalty of perjury under the laws of the State of Hawai'i that the foregoing is true and correct.

DATED: Lihu'e, Hawai'i, July 9, 2019.

Mike Laureta, Program Manager
Declarant

AIRbnb Evidence Checklist – TVR Inspections

TMK: 58005005	Date: 1/28/16
Investigation Type: Request ☐	Complaint ☑
☐ Homestay or ☐ TVR |	☑ single family or ☐ multi-family
Owner Name: PATRICIA D. MCCONNELL	
Operation Name: "THE SONG OF THE JUNGLE" TVR	
Property Address: 4813 ANANALU RD	
Researched by: Bambi	
AIRbnb #:	
Site Manager's Name:	
Contact Phone:	
Contact Email Address:	
Requirements	**Attachments/ Exhibit #**
Was the TVNC & SP #'s listed on AIRbnb?	Yes ☐ No ☐
☐ Planning Dept ☐ NCUC/ TVR permit# / TVNC if any	
Dept. Taxation GET ☑ TAT ☑	# W51707089-01
☐ BREG- Business Registration	#
Internet Advertising (list all found)	
☐ Personal webpage	
☑ Other	vrbo.com/481178 & vrbo.com/130810
☐ Are the TVNC & SP # listed on web?	Yes ☐ No ☐
☑ Real Property Assessment / Classification	VACATION RENTAL
☐ Rental Cars- COK DMV (List License & Date)	Verified? Yes ☐ No ☐
☐ Zoning (ie. VDA, Commercial, Residential)	Open - North Shore Special Planning Area dev. plan
Comments:	

Version 7 AIRbnb

EXHIBIT A

INVESTIGATION REPORT

(X) Web Research ( )COMPLAINT ( )REG/RENEWAL ( )REQUEST

BUS. NAME:"THE SONG OF THE JUNGLE"	UNIT/S:	TYPE:
TMK:58005005	LAND AREA:	TV#:
DIST: Hanalei	LOC: Wailapa	
ZONING: O	OWNER: MCCONNELL, PATRICIA D	
SLUC DIST:	MNGR Co.	
LOG #	SITE ADDR:4813 ANANALU RD	

OWNER:	MANAGING COMPANY:
NAME: PATRICIA D, MCCONNELL	NAME: airbnb
ADDR: 104 ENDLICH DR	ADDR:
SANTA CRUZ, CA 95060	
PHONE:	WEB SITE: airbnb "Lani Oli Hale"
WEB SITE:	"The Song of the Jungle"

NATURE OF VIOLATION:

Transient accommodation operation outside of the Visitor

INSPECTOR: Bambi

DATE: 1/10/17	**ARRIVE:**	**INFORMAL CONTACT:**
	DEPART:	

DESCRIPTION OF INVESTIGATION:

1. Research of online website www.airbnb.com found the subject transient accommodation:

https://www.airbnb.com/rooms/12622481

2. By matching the airbnb's website (https://www.airbnb.com/rooms/12622481) and pictures with Pictometry and cross checking the noted parcel with Real Property Division records (Tax Classification - Vacation Rental) , I was able to determine the Tax Map Key and Property Owner of the transient accommodation operation.

TMK: 58005005, PATRICIA D, MCCONNELL

EXHIBIT B

3. Research Finding:

Transient accommodation operation is located outside of the VDA

Transient accommodation operation does not have and active Non-Conforming Use Certificate (NCU) or an applicable permit.

4. KCC, Sec 8-17.11(b), Advertising of any sort which offers a property as a TVR shall constitute prima facie evidence of the operation of a TVR on said property...

5. Violation Found: K.C.C. Sec-8-17.8:

Single family TVRs are prohibited in all areas not desginated as VDA

6. Violation Found: K.C.C. 1. Sec- 8-8.1(b)

Homestay operations are prohibited outside of theVDA.

Signature: Date: 1/10/17

Bernard P. Carvalho, Jr.
Mayor

Wallace G. Rezentes, Jr.
Managing Director

Michael A. Dahlig
Director of Planning

Ka'āina S. Hull
Deputy Director of Planning

COPY

PLANNING DEPARTMENT
Enforcement Division
County of Kaua'i, State of Hawai'i

4444 Rice Street, Suite A-473, Līhu'e, Hawai'i 96766
TEL (808) 241-4050 FAX (808) 241-6699

ZONING COMPLIANCE NOTICE

JAN 11 2017

CERTIFIED

Patricia D. McConnell
104 Endlich Dr.
Santa Cruz, CA 95060

SUBJECT: Zoning Violation for Transient Accommodation Use at:
4813 Ananalu Rd
TMK: 5-8-005:005

The Planning Department conducted an investigation of the subject property and found the establishment of a vacation rental operation. This is considered a violation of the following provisions of the Comprehensive Zoning Ordinance, Chapter 8, Kaua'i County Code, 1987, as Amended (CZO):

ORDINANCE and VIOLATIONS

1. **Section 8-8.1(b) General Provisions for Homestays**
   Homestay operations are prohibited outside of the Visitor Destination Area (VDA).
2. **Section 8-17.8 Single Family Transient Vacation Rentals.**
   Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, single family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas.

   Violation:
   The unauthorized use of the subject property for Transient Accommodation outside of the designated Visitor Designation Area constitutes a violation.

EXHIBIT C

Pursuant to Chapter 8, Kaua'i County Code, you are directed to comply with the following requirements immediately:

1. **Cease and desist the use of the subject property as a Transient Accommodation(s);**

2. **Cancel all Transient Accommodations commitments for the property.**

Please find attached County Ordinance No. 1002 for your reference. Including but not limited to Section 8-17.8 cited above, Ordinance No. 904 specifically regulates the use and prohibition of homestays on Kauai. (Chapter 8, Kaua'i County Code, 1987, as amended).

Pursuant to County Ordinance No. 919 (also attached), any violation(s) of the Comprehensive Zoning Ordinance (CZO) may result in a fine of up to $10,000.00 and/or up to $10,000.00 per day, should the violation(s) persist. (Chapter 8, Kaua'i County Code, 1987, as amended).

Please contact the Planning Department at 241-4051, or email Bambi Emayo of my staff at aemayo@kauai.gov, within **14** calendar days upon receipt of this letter to provide an acknowledgement of the termination of the subject TVR. Failure to do so provides us with no other alternative but to pursue enforcement action.

KA'AINA S. HULL
Deputy Director of Planning

cc: County Attorney

Attachments

Bernard P. Carvalho, Jr.
Mayor

Wallace G. Rezentes, Jr
Managing Director

Michael A. Dahlig
Director of Planning

Ka'āina S. Hull
Deputy Director of Planning

COPY

PLANNING DEPARTMENT
Enforcement Division
County of Kaua'i, State of Hawai'i
4444 Rice Street, Suite A-473, Līhu'e, Hawai'i 96766
TEL (808) 241-4050 FAX (808) 241-6699

CERTIFIED MAIL

NOTICE OF VIOLATION & ORDER TO PAY FINES

MAY 23 2017

Patricia D. McConnell
104 Endlich Dr.
Santa Cruz, CA 95060

Patricia D. McConnell
4813 Ananalu Rd.
Hanalei, HI 96714

SUBJECT: Zoning Violation for Transient Accommodation Use at:
4813 Ananalu Rd
TMK: 5-8-005:005

On March 31, 2017, you received the Department's Zoning Compliance Notice (ZCN). The ZCN instructed you to immediately Cease and Desist the use of the subject property for transient accommodations. You were instructed to cancel all transient accommodation commitments for the property.

On April 12, 2017, the Department met with you (Patricia McConnell), owner and administrator of the transient accommodation operation. The Planning Department confirmed that the continued transient accommodation operation (Homestay) use at the subject property is a violation of the Comprehensive Zoning Ordinance, Chapter 8, Kaua'i County Code, 1987, as Amended (CZO):

ORDINANCE and VIOLATION

1. **Section 8-18.1(b) General Provisions for Homestays**
   Homestay operations are prohibited outside of the Visitor Destination Area (VDA).

EXHIBIT D

Notice of Violation

Dated; May 23, 2017

Violation:

The Planning Department has confirmed that the subject property is currently being used for a Homestay operation. The continued use of the subject property for a Homestay operation outside of the designated Visitor Designation Area constitutes a violation.

Pursuant to:

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties

(b) Civil Fines

(1) If the Director of the Planning determine that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, by mail or delivery, with an order pursuant to this section. The order may require the party responsible for the violation to do any or all of the following:

(A) Correct the violation within the time specified in the order;

(B) Pay a civil fine not to exceed $10,000 in the manner, at the place, and before the date specified in the order;

(C) Pay a civil fine up to $10,000 per day for each day in which the violation persists, in the manner and at the time and place specified in the order.

(2) The order shall advise the party responsible for the violation that the order shall become final 30 days after the date of its delivery. The order shall also advise that the Director's action may be appealed to the Planning Commission.

(3) The provisions of the order issued by the Director under this section shall become final 30 calendar days after the service of the order. The parties responsible for the violation may appeal the order to the Planning Commission pursuant to its rules. The form of this appeal must conform to the Planning Commission's rules. However, an appeal to the Planning Commission shall not stay any provision of order.

(4) The Director may institute a civil action in any court of competent Jurisdiction for enforcement of any order issued pursuant to this section. Where the civil action has been instituted to enforce the civil fine imposed by said order, the Director need only show that the notice of violation and order were served: that a civil fine was imposed; the amount of the civil fine imposed has not been paid; that either has not been appealed or that if appealed, the order was sustained by the Commission and/or any Court action.

You are herein levied and ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department.

You are hereby ordered to cease and desist the illegal activities being conducted/performed on and from the premises as required by law.

You are hereby ordered to correct the above use violations(s) within 14 days of the date of this notice. Should the violations not be remedied within 14 days from the date of the Notice of Violation & Order to Pay Fines:

- **This matter will be forwarded to the Office of the Prosecuting Attorney;**
- **An additional fine of $10,000 per violation, per day, for each day in which such violation persists shall be levied.**

A written response to the Planning Department within 14 days from the date of this Notice of Violation & Order to Pay Fines to address this issue is mandatory.

Payment of the $10,000 civil fine is also due within 14 days from the date of this notice. Failure to address this issue will provide the Department with no other choice but to continue levying fines each day the violation persists.

This determination may be appealed to the Planning Commission pursuant to Chapter 9 of the Rules of Practice and Procedure of the Planning Commission (RPPPC). The time for any appeal of an action of the Planning Director commences 21 days from the date of the adverse decision (RPPPC Rule1-9-2). An appeal of any action of the Planning Director must contain the requirements of RPPPC Chapter 9 to be considered by the Planning Commission.

The Rules of Practice and procedure of the Planning Commission (RPPPC) are available online through the Planning Department's website at:
http://www.kauai.gov/Government/Departments/PlanningDepartment/tabid/61/Default.aspx.

Should you have any questions, please feel free to contact Supervising Inspector Bambi Emayo (808-241-4051), email at *aemayo@kauai.gov* or call Enforcement Program Manager Michael Laureta (808-241-4071).

KA'AINA S. HULL
Deputy Director of Planning

Cc: Office of the Mayor
County Attorney

INVESTIGATION REPORT

(X) Web Research ( )COMPLAINT ( )REG/RENEWAL ( )REQUEST

BUS. NAME:"THE SONG OF THE JUNGLE"	UNIT/S:	TYPE:
TMK:58005005	LAND AREA:	TV#:
DIST: Hanalei	LOC: Wailapa	
ZONING: O	OWNER: MCCONNELL,PATRICIA D	
SLUC DIST:	MNGR Co.	
LOG #	SITE ADDR:4813 ANANALU RD	

OWNER:	MANAGING COMPANY:
NAME: PATRICIA D, MCCONNELL	NAME: airbnb
ADDR: 104 ENDLICH DR	ADDR:
SANTA CRUZ, CA 95060	
PHONE:	WEB SITE: airbnb "Lani Oli Hale"
WEB SITE:	"The Song of the Jungle"

NATURE OF VIOLATION:

Transient accommodation operation outside of the Visitor

INSPECTOR: Bambi

Notice Of Violation Report 5/16/17

1. Zoning Compliance Notice (ZCN) dated 1/11/17 was issued to Patricia D. McConnell for the establishment of the Transient Accommodation Operation on 4813 Ananalu Rd., TMK: 5-8-005:005, outside of the designated Visitor Designation Area.

2. Meeting response at the Planning Dept. on 4/12/17
   a. Met with Patricia D. McConnell (owner) who conceded to operating a Transient Accommodation at $275 a night.
   b. The Planning Dept. has offered a remedial action plan to rectify the violation. Patricia McConnell has accepted and signed the terms to remediate (Schedule Meeting dated: 4/12/17).

EXHIBIT E

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	)	
	)	CC-2017-4
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	TMK: (4) 5-8-005:005
	)	DECLARATION OF BRITNI LUDINGTON-BRAUN; EXHIBIT 1
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	)	
Respondent.	)	

DECLARATION OF BRITNI LUDINGTON-BRAUN

I, BRITNI LUDINGTON-BRAUN, do declare under penalty of law declare that the following is true and correct.

1. I am an ADU/TVR Enforcement Specialist with the County of Kaua'i Planning Department.

2. On April 12, 2017, the Planning Department met with owner Patricia D. McConnell regarding the operation of her illegal home stay located at 4813 Ananalu Rd.

Wailapa, Hawai'i.

3. Despite being informed orally and in writing that the operation of a homestay outside a visitor designated are is illegal, Ms. McConnell could not see how she had a violation.

4. Although Ms. McConnell made the representation she would comply with the Planning Department, as of the date hereof, she has not.

5. No remedial action plan was agreed upon; Ms. McConnell appeared reluctant to correct the noted violations.

6. Annexed hereto as Exhibit 1, is a memorandum drafted contemporaneously with the meeting, it accurately and fairly reflects the meeting.

I declare under penalty of perjury under the laws of the State of Hawai'i that the foregoing is true and correct.

DATED: Līhu'e, Kaua'i, Hawai'i, July 9, 2019.

Britni Ludington-Braun

Britni Ludington-Braun
CZM Permit Technician
Declarant

Patricia D, McConnell

TMK: 58005005 4813 Ananalu Rd. Wailapa

RE: Meeting to rectify violations on subject property

Date: 4/12/2017

On April 12, 2017 the Planning Department met with the property owner (Patricia D, McConnell) in response to the compliance notice dated January 11, 2017. The following attended; Bambi Emayo, Patricia McConnell, and Britni Ludington-Braun.

The following are notes and observations of said meeting:

- In the meeting Patricia told us that she will be running her operations till March 2018
- Patricia doesn't see how she has a violation because according to her, the government keep changing the laws.
- On a couple accounts in the meeting Patricia threated, "if we stop her from operating she's going to take off her clothes, leave them on the beach, and swim out to the sharks and let them eat her."
- Patricia also made a racist remark implying that the Planning Department are trying to get rid of the haole people.
- Patricia made a comment to Bambi Emayo that he is heartless for stopping her from operating.
- Patricia said she is going to work with the Planning Department toward zoning compliance
- It is noted, no remedial action plan has been agreed upon. The violator (Patricia McConnell) is reluctant to correct the noted violations.

These are my observations noted.

BRITNI LUDINGTON-BRAUN

ADU/TVR Enforcement Specialist

EXHIBIT 1

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	)	CC-2017-4 TMK: (4) 5-8-005:005 DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, MARYANN SASAKI, do declare under penalty of law that the following is true and correct to the best of my knowledge and belief.

1. I am an attorney licensed to practice law in all courts of the State of Hawai'i and the United States District Court for the District of Hawai'i. I am a member in good standing of all of the aforementioned courts.

I declare under penalty of perjury under the laws of the State of Hawai'i that the foregoing is true and correct.

DATED: Līhu'e, Kaua'i, Hawai'i, July 9, 2019.

MARYANN SASAKI
Deputy County Attorney
Declarant

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	) CC-2017-4
	) TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	) CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	
Petitioner,	
vs.	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	
Respondent.	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a copy of the above cited document, was duly served by email and depositing the same in the U.S. mail, postage prepaid, upon the following:

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Hearing Officer for the
Planning Commission of the
County of Kaua'i

DATED: Līhu'e, Kaua'i, Hawai'i, July 9, 2019.

MATTHEW M. BRACKEN
County Attorney

By
MARYANN SASAKI
Deputy County Attorney

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	HEARING OFFICER'S ***SECOND AMENDED*** SCHEDULING ORDER; CERTIFICATE OF SERVICE
	)	HEARING (Scheduled):
	)	Date: ***August 30, 2019***
	)	Time: 9:00 a.m.
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

HEARING OFFICER'S *SECOND AMENDED* SCHEDULING ORDER

On July 19, 2019 at 10:00 a.m. a Prehearing Conference was held herein by telephone pursuant to Rule 1-6-7 of the *Rules of Practice and Procedure of the Kaua'i County Planning Commission* ("Commission Rules") at the request of Gregory W. Kugle, Counsel for Petitioner PATRICIA D. McCONNELL

("Petitioner"), because Petitioner will be unavailable on the present Contested Case Hearing Date of August 7, 2019 due to her Goddaughter's Wedding. At the Prehearing Conference Petitioner was represented by Mr. Kugle and Joanna C. Zeigler, and Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI ("Planning Department") was represented by Maryann Sasaki. No other parties appeared.

Based upon the Prehearing Conference the Hearing Officer's ***First Amended*** Scheduling Order dated July 5, 2019 is hereby amended in its entirety as follows:

1. **Contested Case Hearing** to be held on ***August 30, 2019***, commencing at 9:00 a.m.;

2. **Prehearing Statement** due no later than ***August 23, 2019*** at 4:30 p.m. (1 week before);

3. **Witness List** due no later than ***August 23, 2019*** at 4:30 p.m. (1 week before);

4. **Exhibit List and Exhibits** due no later than ***August 23, 2019*** at 4:30 p.m. (1 week before). Petitioner shall use Numbers to identify her Exhibits and the Planning Department shall use Alphabets to identify its' Exhibits;

5. **Prehearing Motions** as deemed necessary by any party shall be due no later than ***August 1, 2019*** at 4:30 p.m.;

6. **Responses** to any Prehearing Motions due by ***August 15, 2019*** at 4:30 p.m.;

7. **Replies** due by 4:30 p.m. no later than three (3) business days after service of the Response; and

8. **Hearing** on any Prehearing Motions to be held immediately prior to the commencement of the Contested Case Hearing, **unless an Order ruling on the same is issued prior thereto**.

Any and all of the above-described pleadings shall be served by email or facsimile transmission, with a hard copy served by regular mail, postage prepaid, to all the parties and the Office of Boards and Commissions for the County of Kaua'i. The times set forth above are based upon Hawaiian Standard Time ("HST").

A Further Prehearing Conference may be requested by either party to address any issues or concerns related to this Contested Case.

DATED at Honolulu, Hawaii, July 19, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kaua'i

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on July 19, 2019.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: gwk@hawaiilawyer.com JCZ@hawaiilawyer.com Attorneys For Petitioner PATRICIA D. McCONNELL			X
MARYANN SASAKI, ESQ. Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: msasaki@kauai.gov Attorney for Kaʻāina S. Hull, Director, PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI			X
NICHOLAS COURSON, ESQ. First Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: ncourson@kauai.gov DNakamatsu@kauai.gov Attorney for Planning Commission of the County of Kauaʻi			X

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DATED at Honolulu, Hawaii, July 19, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

PLANNING COMMISSION HEARING OFFICER
AGENCY HEARING NOTICE

APPLICANT/PETITIONER:	PATRICIA D. McCONNELL
APPLICATION NO.	PETITION TO APPEAL DECISION OF THE PLANNING DIRECTOR'S DECISION RELATED TO THE NOTICE OF VIOLATION AND ORDER TO PAY FINES FOR THE OPERATION OF AN ILLEGAL TRANSIENT ACCOMMODATION USE FOR PROPERTY SITUATED IN HĀ`ENA, KAUA`I, HAWAI`I, IDENTIFIED BY KAUA`I TMK NO. (4) 5-8-005:005 CONTAINING 26,092 SQUARE FEET; CC-2017-4
DATE OF AGENCY HEARING:	August 30, 2019, 90:00 a.m., Līhuʻe Civic Center, Moikeha Building, Conference Room 3, 4444 Rice Street, Līhuʻe, Kauaʻi, Hawaiʻi 96766

NOTICE IS HEREBY GIVEN pursuant to Section 1-6-5 of the *Rules of Practice and Procedure of the Planning Commission*, and *Hawai`i Revised Statutes* §91-9, that the following is scheduled for a contested case hearing before Hearing Officer Harlan Y. Kimura, Esq.:

> In the Matter of the Petition To Appeal the Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kaua`i, Hawai`i, identified by Kaua`i TMK No. (4) 5-8-005:005 containing 26,092 square feet; CC-2017-4.

This matter concerns an Appeal of the Decision of the Planning Director to issue the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for property located in Hāʻena, Kaua`i, Hawai`i.

The particular sections of the statutes and/or rules involved include, but not limited to: (1) Ordinance Nos. 904, 919, and 1002; (2) Sections 8-1.5, 8-2.4, 8-17.8 and 8-18.1(b) of the *Comprehensive Zoning Ordinance for the County of Kaua'i* ("CZO"); and (3) Chapter 8, Article 17, of the CZO.

Any party may retain counsel if the party so desires, and an individual may appear on his own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

NOTE: Special accommodations and sign language interpreters are available upon request five (5) days prior to the meeting date, to the County Planning Department, 4444 Rice Street, Līhuʻe, Hawaiʻi 96766. Telephone (808) 241-4050.

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Attorney for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	CC-2017-4 TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S REPLY TO PETITIONER PATRICIA MCCONNELL'S MEMORANDUM IN OPPOSITION TO RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S MOTION FOR SUMMARY JUDGMENT; CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S REPLY TO PETITIONER PATRICIA MCCONNELL'S MEMORANDUM IN OPPOSITION TO RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S MOTION FOR SUMMARY JUDGMENT

It is impossible not to envy the man who can dismiss reason, although we know how it must turn out at last. – Charles Sanders Peirce

I. INTRODUCTION

Patricia McConnell ("McConnell") has been operating an illegal bed and breakfast or homestay for many years. As of January 28, 2016, according to the Planning Department's Investigation Report attached as Exhibit A to the Declaration of Mike Laureta, the Planning Department ascertained that McConnell was operating an illegal homestay that was listed on Air BnB in violation of KCC §§ 8-17.11 and 8-17.8. The violation notice dated May 23, 2017 gives McConnell notice she is violating KCC §§ 8.18.1(b) and 8.35 levies a fine of $10,000 plus $10,000 per day for continued violation. It is incontrovertible that McConnell operated January 28, 2016 through May 16, 2017. McConnell herself conceded that she was operating an illegal vacation rental at $275 per night on March 12, 2017. This stretch of illegal activity alone subjects McConnell to a $150,000 fine, ie a continuing violation subject to penalties of $10,000 per day. There is no evidence that Ms. McConnell has ceased operations. There is no evidence that she plans to cease operations.

II. ANALYSIS

A motion for summary judgment must be granted when there is no genuine issue of material fact. In this case there is no dispute regarding the facts or the law. Here were McConnell herself admitted guilt and the Code regulates transient rental stays outside of the visitor destination area, it is impossible for the Hearing Officer to find other than McConnell was operating an illegal transient rental and to fine her accordingly

McConnell's memorandum in opposition contains a litany of petty complaints which do not alter these facts. We will briefly review some of the "issues" raised by McConnell.

A. Admission of Evidence.

Petitioner misunderstands the legal standard regarding the admissibility of evidence in this matter. The documents appended to Mr. Laureta's declaration are subject to the following.

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. Haw. Rev. Stat. Ann. § 626-1, Rule 803 (West).

The Business Exception rule further provides

> (11) Certified records of regularly conducted activity. The original or a duplicate of a domestic or foreign record of regularly conducted activity that would be admissible under rule 803(b)(6), if accompanied by a written declaration of its custodian or other qualified person, certifying that the record was:
>
> (A) Made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) Kept in the course of the regularly conducted activity; and
>
> (C) Made by the regularly conducted activity as a regular practice. Haw. Rev. Stat. Ann. § 626-1, Rule 902 (West)

The "someone" named "Bambi" in McConnell's motion is Bambi Emayo a senior investigator for the Planning Department. McConnell was notified in the Notice of Violation that he should be contacted with respect to the fines levied on McConnell. Mr. Laureta is Bambi Emayo's supervisor and the custodian of such records.

Moreover, the investigative report is sufficient to establish that the instant homestay was outside the VDA. The following hearsay exception applies.

> (8) Public Records. A record or statement of a public office if:
>
> (A) it sets out:

> (i) the office's activities;
>
> (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
>
> (iii) in a civil case or against the government in a criminal case, **factual findings from a legally authorized investigation**; and
>
> (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness. Fed. R. Evid. 803 (emphasis added).

In this case, the declaration authenticates factual findings from a legally authorized investigation. McConnell has not indicated any reason the source of this information might be untrustworthy. The Planning Department has no motive to misrepresent the location of the subject property within the VDA.

> [C]onsidering whether the sources of information recorded are trustworthy, a trial court should also consider whether the sources had a motive to misrepresent the information. Fagan v. Newark, 78 N.J.Super. at 320, 188 A.2d at 441. Warshaw v. Rockresorts, Inc., 57 Haw. 645, 652, 562 P.2d 428, 434 (1977).

The weakness of McConnell's case is also highlighted by McConnell's insistence that a minor inconsistency between the documents taints all the evidence produced. Indeed, it is not material whether or not McConnell signed a remediation agreement. It is clear that in either case, she did not remediate the problem. In any case, Hawai'i courts disagree with McConnell that such irregularities void all evidence.

> [N]ot all mistakes, or allegations of mistake, in a company's business records will render that company's record-keeping practices untrustworthy, and therefore render their records inadmissible. In State v. Forman, the ICA held that "the vague testimony that [a company] 'kept bad paperwork,' without more, [did] not warrant a conclusion that the company's records as a whole were untrustworthy[,] Nationstar Mortg. LLC v. Kanahele, 144 Haw. 394, 404, 443 P.3d 86, 96 (2019).

Moreover,

> The Rule 56(e) requirement of personal knowledge and competence to testify may be inferred from the affidavits themselves. See Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir.1990) (holding that it was proper for court to

> rely on affidavits of defendant's representatives in negotiations because their "personal knowledge and competence to testify are reasonably inferred from their positions and the nature of their participation in the matters to which they swore"); Lockwood v. Wolf Corp., 629 F.2d 603, 611 (9th Cir.1980) (holding that because attorney negotiated and handled legal transactions, it was "reasonable to assume that he had personal knowledge of nonpayment).
>
> Consequently, [the defendants] could attest to facts as to which it could be reasonably inferred they would have personal knowledge as a result of their "positions and the nature of their participation[.]" Barthelemy, 897 F.2d at 1018. [Defendant] stated that he had "been President of Marine Planning International, Inc. the developer of the Maui Isana Resort from 1987 to the present" (declaration signed December 2, 1998). He made the declaration "from personal knowledge." As the president of the development company, it may be reasonably inferred that he had personal knowledge of the operation of the Resort. [Defendant] stated that he "**was the Deputy Planning Director of the County of Maui from 1980 to 1984." He also stated that he was "Planning Director from 1986 to 1991." Thus, from his position as Deputy Planning Director and Planning Director of the County of Maui, it may reasonably be inferred that Hart had personal knowledge of the policy with respect to hotel districts.** Stallard v. Consol. Maui, Inc., 103 Haw. 468, 475–76, 83 P.3d 731, 738–39 (2004).

We also note that according to the Rules of Practice and Procedure 1-6-9, the Presiding Officer shall not order or approve civil style discovery between parties. HRCP 56(f) says that the court **may** order discovery – discovery is not an imperative.

B. Reliable Probative Evidence.

Aside from McConnell's own admission against interest that she was, in fact, conducting an illegal homestay, the Investigation Report dated January 10, 2017 sets forth the evidence determining McConnell's violation. She was found to be advertising on Air BnB and an examination of Pictometry confirmed the property was indeed McConnell's. Thereby, and as usual custom and practice, the investigator was able to determine that McConnell was in violation of the law. That Investigation Report also indicates the specific provisions of the Code that McConnell was violating. Equating that investigation with the statement of an unidentified man (as McConnell does in her motion) is a puerile attempt to ignore the actual evidence.

Discussions with neighbors, discussions with renters and proof of monetary transactions are not necessary. In addition, we note that McConnell does not have a nonconforming use certificate and the Planning Department does not know if she has been paying taxes on her transient vacation rental. McConnell is simply operating outside the law.

Indeed,

> a party moving for summary judgment under Federal Rules of Civil Procedure Rule 56 need not support his or her motion with affidavits or similar materials that negate his or her opponent's claims, but need only point out that there is [an] absence of evidence to support the opponent's claims. For if no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless. Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co., 116 Haw. 277, 301, 172 P.3d 1021, 1045 (2007)

C. The Law.

It is very clear from the Motion for Summary Judgment, particularly the exhibits, which laws McConnell is violating. The Planning Department does not have McConnell's penchant for lugubrious verbiage. Verbatim citations are anathema to a succinct statement of the law and issues. Considering McConnell's own admission, the investigation reports and the various letters addressing her violations, the citation "Homestay operations are prohibited outside of the Visitor Destination Areas pursuant to Ord. 987, June 19, 2015 and Ord. No. 1002, May 18, 2016" should suffice. However, if McConnell requires the text of the laws violated, that is easy to provide. To wit: KCC §8.18(b) provides.

> A property owner that has obtained a homestay zoning permit shall apply to renew the zoning permit annually on the date of issuance of the homestay zoning permit in accordance with the following regulations:
>
> (a) Each application to renew shall include proof that there is currently a valid State of Hawaii general excise tax license and transient accommodations tax license for the homestay operation. Failure to meet this condition will result in the automatic denial of the application for renewal of the homestay zoning permit(s). The applicant may reapply for renewal within the annual time allotment by

presenting a currently valid State of Hawaii general excise tax license and transient accommodation tax license for the homestay operation;

(b) Each application to renew shall include proof that the primary residential structure(s) used for the homestay operation is the owner's primary residence, and the respective owner is benefiting under Sec. 5A-11 of this Code for a homeowner's exemption for the homestay site in the year preceding the date of renewal;

(c) Upon renewal, the Planning Department may initiate re-inspection of properties for compliance with other provisions of this chapter or other pertinent land use laws, and may withhold approval of a renewal application and issue cease and desist notices to the applicant until all violations have been resolved;

(d) The applicant shall pay a renewal fee of seven hundred fifty dollars ($750.00) to the Director of Finance. All renewal fees shall be deposited to the Transient Accommodation Enforcement Account within Fund 251; and

(e) **Enforcement of this section shall be subject to Section 8-3.5 of the Kauai County Code 1987, as amended. (Ord. No. 1002, May 18, 2016)** (emphasis added)

Synopsis: A homestay zoning permit is required. The owner shall provide: a valid GET, proof of primary residence, be subject to inspection; submit a renewal fee. McConnell is in non-compliance with all these provisions. Moreover, enforcement is subject to the following:

KCC §18-18.1(b) provides:

(b) Homestay operations are prohibited outside of the Visitor Destination Area (VDA). (Ord. No. 987, June 19, 2015; Ord. No. 1002, May 18, 2016). (emphasis added).

McConnell is not in compliance with this provision either.

D. Fines.

KCC §8-3.5(b) gives the Planning Department the right to impose fines up to $10,000 per day. The argument that only the Planning Department can impose such fines is specious given the fact that the Motion for Summary Judgment is by the Planning Department. The Planning Department seeks to enforce the fine by obtaining a recommendation from the Hearing Officer

that $150,000 is appropriate given the continuous, willful violation of the law. Moreover, the County could have, and still may, seek injunctive relief from the Fifth Circuit.

III. CONCLUSION

Irrespective of the inappropriate editorial comments and vituperative epithets included by McConnell in her memorandum in opposition, McConnell still fails to make her case. By skirting every detail and ignoring the obvious issue, McConnell seeks to continue to operate her illegal homestay outside the law. That is why McConnell must be ordered to cease operations and pay a fine of $150,000 that shall be levied against her by the Planning Department.

DATED: Līhu'e, Kaua'i, Hawai'i, August 20, 2019.

MATTHEW M. BRACKEN
County Attorney

By _____
MARYANN SASAKI
Deputy County Attorney

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a copy of foregoing document was duly served by email and depositing the same in the U.S. mail, postage prepaid, upon the following:

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Hearing Officer for the
Planning Commission of the
County of Kaua'i

DATED: Līhu'e, Kaua'i, Hawai'i, August 20, 2019.

MATTHEW M. BRACKEN
County Attorney

By _____
MARYANN SASAKI
Deputy County Attorney

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

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Attorney for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	CC-2017-4 TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S PREHEARING STATEMENT; CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL, McConnell, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearings Officer: Harlan Y. Kimura

PLANNING DEPARTMENT'S PREHEARING STATEMENT

Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I (the "Planning Department"), by and through its undersigned attorneys, respectfully submits its Prehearing Statement in response to Petitioner PATRICIA D. McCONNELL's ("McConnell"), Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet. The Notice of Appeal was received by the Planning Commission on June 13, 2017. The contested case hearing on the matter is scheduled for August 30, 2019, at 9:00 a.m. The Department respectfully submits its Prehearing Statement pursuant to Chapter 6 of the Rules of Practice and Procedure of the Kaua'i County Planning Commission, Rule 7 of the Hawai'i Rules of Civil Procedure ("HRCP"), Rule 7 of the Circuit Courts of the State of Hawai'i ("RCCH"), and the exhibits, records, and files herein.

I. INTRODUCTION

In 2008, the Kaua'i County Council concluded that there was "a compelling need to regulate single-family transient vacation rentals on Kaua'i" because "the uncontrolled proliferation of vacation rentals in residential and other areas" outside of designated Visitor Destination Areas (VDAs) "is causing significant negative impacts to certain residential neighborhoods."[1] Accordingly, the Council enacted Ordinance 864 to establish a regulatory framework for the operation of single-family transient vacation rentals (TVRs).[2]

---

[1] Ordinance No. 864, Bill No. 2204, Draft 4, adopted by Council February 21, 2008, and approved by Mayor March 7, 2008.

[2] As set out in Kaua'i County Code ("KCC") § 8-1.5, "Transient Vacation Rental" means a dwelling unit which is provided to transient occupants for compensation or fees, including club fees, or as part of

Pursuant to Ordinance No. 864 beginning on March 7, 2008, TVRs "are prohibited in all areas not designated as Visitor Destination Areas."[3] Notwithstanding this general prohibition, any TVR outside a VDA in lawful use prior to March 7, 2008, was allowed to continue operation "subject to obtaining a Nonconforming Use Certificate."[4] After March 30, 2009, no TVR operations are permitted outside the VDA without a Nonconforming Use Certificate.

Ordinance 864 was implemented because the County found a compelling need to regulate family transient vacation rentals on Kaua'i to VDAs because their unregulated growth was causing significant negative impact to certain residential neighborhoods [Ordinance 864, enacted March 7, 2008], Ordinance No. 1002 was passed to address the same issues regarding homestays and prohibiting any homestays from operating outside of VDAs [Ordinance 1002, enacted June 3, 2006]. After December 31, 2016, unpermitted homestays were not permitted outside the VDA. The Kaua'i County Code ("KCC" or the "Code") § 8-18.1(b) explicitly sets forth the connection between homestays and TVRs. To wit:

(b) Homestay operations are prohibited outside of the Visitor Destination Area (VDA). (Ord. No. 987, June 19, 2015; Ord. No. 1002, May 18, 2016)

McConnell owns and operates a homestay outside of the VDA. McConnell's operation is therefore unlawful. Once notified that she was in violation of the CZO, McConnell openly disregarded the Planning Department's notice to cease and desist operations and continues to do

---

interval ownership involving persons unrelated by blood, with a duration of occupancy of one hundred eighty (180) days or less.

[3] The provision of Ordinance No. 864 barring TVRs outside of the VDA is now codified, as amended, in KCC § 8-17.8 et seq.

[4] The provisions of Ordinance No. 864 relating to the continued operation of lawful TVRs outside the VDA subject to Nonconforming Use Certificates are now codified in KCC § 8-17.10.

so. The Planning Department justifiably issued a Notice of Violation and Order to cease and desist her homestay operations.

II. STATEMENT OF THE CASE

In bringing the instant appeal, McConnell, owner of the subject property located 4813 Ananalu Road, Hanalei, Hawai'i TMK No. (4) 5-8-005:005 (the "Subject Property") seeks to flout the explicit provisions regarding homestays in the Code by operating a homestay outside a VDA absent any permits and in direct violation of the Comprehensive Zoning Ordinances Chapter 8, KCC, 1987 as Amended (CZO.) There are no mitigating circumstances here.

As set forth in the Air BnB Evidence Checklist – TVR Inspections and the Investigation Report of Respondent dated January 28, 2016 and January 10, 2017, respectively, prepared by the Planning Department, McConnell has never possessed a homestay permit and operates outside a visitor designation area in violation of KCC § 8-18.1(b). (See Exhibits A and B, annexed hereto.)

On January 11, 2017, the Respondent via a Zoning Compliance Notice from the Planning Department notified McConnell that she ought to stop operating the Subject Property as a transient accommodation and cancel all transient accommodation commitments for the Subject Property. The Zoning Compliance Notice also informed McConnell that she would be subject up to a $10,000 fine, and $10,000 for every day the violation should persist. (See Exhibit C, annexed hereto.)

On May 23, 2017, via a Notice of Violation & Order to Pay Fines, the Planning Department informed McConnell that she was in continued breach of the Zoning Compliance

Notice, and fines could continue to accrue up to $10,000 per day. (See Exhibit D, annexed hereto.)

On May 23, 2017, another Investigation Report was prepared by the Planning Department indicating McConnell was continuing operations of her illegal homestay. (See Exhibit E, annexed hereto.)

On or around April 12, 2017, a memorandum was prepared contemporaneously with a meeting with McConnell in which McConnell stated that she did not see how she was violating the law. (See Exhibit F, annexed hereto.)

III. POSITION STATEMENT

By McConnell's own admission, she was conducting an illegal homestay, the Investigation Report dated January 10, 2017, sets forth the evidence determining McConnell's violation. She was found to be advertising on Air BnB and an examination of Pictometry confirmed the property was indeed McConnell's. (See Exhibit B, annexed hereto.) Thereby, and as usual custom and practice, the investigator was able to determine that McConnell was in violation of the law. That Investigation Report also indicates the specific provisions of the Code that McConnell was violating.

As to the constitutionality of County ordinances relating to the designation of VDAs and TVRs, state law expressly grants County's the zoning authority to regulate the use of land within the County. See HRS § 46-4. Zoning is "a legislative act subject to the deference given to legislative acts," including a "presumption of validity." Save Sunset Beach Coal. v. City & Cty. of Honolulu, 102 Hawai'i 465, 474, 78 P.3d 1, 10 (2003). McConnell cannot overcome the high bar required to show unconstitutionality of this provision. Under KCC § 8-17.11(b), "Advertising of any sort which offers a property as a transient vacation rental shall constitute

prima facie evidence of the operation of a transient vacation rental on said property and the burden of proof shall be on the owner… to establish that the subject property is not being used as a transient vacation rental or that it is being used for such purpose legally."

Here, it is undisputed that McConnell was advertising her homestay. This constitutes prima facie evidence of unlawful transient vacation rental activity. Having received a Notice of Violation ordering McConnell to cease homestay use of the property, McConnell took no action to carry her burden in establishing that her property was not being used as a TVR.

HRS § 46-4(a) grants the counties the zoning power to enact ordinances governing the areas in which various land uses may take place or otherwise be subject to restriction. This zoning power is to be "liberally construed in favor of the county exercising" it. Id.

Act 186, 1980, provided that "the several counties shall, by amendment of their zoning ordinances, limit the location of time share units, time share plans and other transient vacation rentals, within such areas as are deemed appropriate." 1980 Haw. Sess. Laws Act 186, § 4 at 306.

Pursuant to Act 186, the County Council enacted Ordinance 436 "for the purpose of designating locations, referred to as 'Visitor Destination Area,' in which transient vacation rentals, time share units and time share plans are to be allowed." By extension, following the enactment of Ordinance 436 transient vacation rentals, time share units and time share plans were prohibited outside designated Visitor Destination Areas (VDAs). Maps delineating the boundaries of VDAs in Po'ipū, Līhu'e, Wailua-Kapa'a, and Princeville were incorporated into Ordinance 436. Additionally, Zoning maps containing designated VDAs are available for public viewing at the Planning Department.

In creating these VDAs the County Council enumerated eight specific factors that were considered:

1. The General Plan, Development Plan and Zoning designations for such areas.
2. The suitability of such areas for visitor related uses.
3. The existence in such areas of lands designated for Resort use in the General Plan or having Resort zoning.
4. The availability of public services and facilities in such areas.
5. The potential for conflict with other uses in such areas.
6. The availability in such areas of large numbers of hotel and multifamily dwelling units suitable as accommodations by temporary visitors.
7. The availability in the areas of outdoor or commercial recreational facilities, such as beaches, golf courses, tennis courts, and other facilities.
8. The availability in the areas of tourist related commercial facilities, such as gift shops, food stores, recreational equipment and service shops, tour and transportation service terminals, restaurants, bars, night clubs, cabarets, shopping centers, theaters, auditoriums, and other similar facilities.

[Ord. 436]

When initially enacted in 1982, VDAs only related to the operation of multi-family transient vacation rentals. In 2008, however, Ordinance 864 established a regulatory framework barring the operation of single-family transient vacation rentals outside of established VDAs.

To constitute a deprivation of due process, a civil statute must be "so vague and indefinite as really to be no rule or standard at all." Paul v. Dep't of Transp., State of Hawai'i, 115 Hawai'i 416, 431, 168 P.3d 546, 561 (2007). Uncertainty in a statute "is not enough for it to be unconstitutionally vague; rather, it must be ***substantially incomprehensible***." Id. at 431, 168 P.3d at 561 (internal citations and brackets omitted) (emphasis added).

There is nothing "substantially incomprehensible" about the designation of VDAs by the Kaua'i County Council. They are clearly set out in Ordinance 436, and are currently defined in KCC § 8-1.5 as "those areas designated as Visitor Destination Areas on County of Kaua'i Zoning Maps," which are available to the public at the Planning Department. Even if McConnell never availed herself of the opportunity to view the Zoning Maps containing VDA designations at the Planning Department, persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." Texaco, Inc. v. Short, 454 U.S. 516, 532 (1982), see also Hawaiian Bell Tel. Co. v. Oriental Telephone Co., 6 Haw. 393, 401 (1883) ("Everyone is presumed to know the law."). Moreover, McConnell received direct notice that her home was outside the VDA in the Zoning Compliance Notice she received shortly in January 2017. She chose to ignore this notice and continued homestay operations.

The Hawai'i Supreme Court has held that section 91-10(1), "is intended to direct administrative agencies to admit any and all evidence presented to them 'limited only by considerations of relevancy, materiality and repetition.'" Chock v. Bitterman, 5 Haw. App. 59, 65, 678 P.2d 576, 581 (1984). The purpose of section 91-10(1) is to "free administrative agencies from the bounds of any technical rules of evidence, and its intent was to require agencies to admit evidence that would have been inadmissible in common law trials." Chock v. Bitterman, 5 Haw. App. 59, 65, 678 P.2d 576, 581 (1984) (internal quotes and citations omitted).

Accordingly, the Hawai'i Rules of Evidence, and in particular, the hearsay rules within the Rules of Evidence, do not apply to contested case proceedings. The Hearing Officer is free to admit and consider "any oral or documentary evidence," and it was up to them as the triers of fact to weigh the evidence received.

V. CONCLUSION

McConnell must be compelled to cease operations of this homestay, and perhaps more effective than an injunction in the Fifth Circuit would be an appropriate fine. In this matter where the behavior has gone on for years and McConnell persists on flouting the law and admits she is doing so despite all efforts by the Planning Department, the Planning Department pursuant to KCC § 8-3.5(b)(1)(B)-(C), seeks ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000) in fines and an order that McConnell Cease and Desist the operation of the her homestay.

DATED: Līhu'e, Kaua'i, Hawai'i, August 23, 2019.

MATTHEW M. BRACKEN
County Attorney

By msasaki
MARYANN SASAKI

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	) CC-2017-4
	) TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	) CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	
McConnell,	
vs.	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	
Respondent.	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a copy of RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S PREHEARING STATEMENT, was duly served by email and depositing the same in the U.S. mail, postage prepaid, upon the following:

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Email: hyk@harlankimuralaw.com

Hearing Officer for the Planning Commission
of the County of Kaua'i

DATED: Līhu'e, Kaua'i, Hawai'i, August 23, 2019.

MATTHEW M. BRACKEN
County Attorney

By MSasaki
MARYANN SASAKI
Deputy County Attorney

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

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Attorney for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	CC-2017-4 TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S WITNESS LIST; CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearings Officer: Harlan Y. Kimura

PLANNING DEPARTMENT'S WITNESS LIST

Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I (the "Planning Department"), by and through its undersigned attorneys, respectfully submits its Witness List regarding the above-referenced matter.

WITNESSES

1. Ka'āina S. Hull, Director
   Planning Department, County of Kaua'i
   Clerk to the Planning Commission
   c/o Office of the County Attorney
   4444 Rice Street, Suite 220
   Līhu'e, Hawai'i 96766

This witness is expected to testify as to the processes and procedures of the Department, in general, and as related to this specific case, including, but not limited to, zoning map designations and the practice and procedures of the Department. This witness is expected to testify with regard to the Petitioners' witnesses and/or rebuttal testimony.

2. Mike Laureta, Program Manager
   Planning Department, County of Kaua'i
   c/o Office of the County Attorney
   4444 Rice Street, Suite 220
   Līhu'e, Hawai'i 96766

This witness is expected to testify as to the processes and procedures of the Department, in general, and as related to this specific case, including, but not limited to, zoning map designations and the practice and procedures of the Department. This witness is expected to testify with regard to the Petitioners' witnesses and/or rebuttal testimony.

3. Andres (Bambi) Emayo, Senior Investigator
   Planning Department, County of Kaua'i
   c/o Office of the County Attorney
   4444 Rice Street, Suite 220
   Līhu'e, Hawai'i 96766

This witness is expected to testify as to the processes and procedures of the Department, in general, and as related to this specific case, including, but not limited to, zoning map designations and the practice and procedures of the Department. This witness is expected to testify with regard to the Petitioners' witnesses and/or rebuttal testimony.

4. Joan Ludington-Braun, Inspector
Planning Department, County of Kaua'i
c/o Office of the County Attorney
4444 Rice Street, Suite 220
Līhu'e, Hawai'i 96766

This witness is expected to testify as to the processes and procedures of the Department, in general, and as related to this specific case, including, but not limited to, zoning map designations and the practice and procedures of the Department. This witness is expected to testify with regard to the Petitioners' witnesses and/or rebuttal testimony.

The Department reserves the right to call and hereby name (1) any and all witnesses named, identified or called by the Petitioners in this matter; (2) any and all witnesses named and/or identified as a result of discovery or investigation conducted by any party; and (3) all rebuttal witnesses, as necessary, at the hearing hereof.

DATED: Līhu'e, Kaua'i, Hawai'i, August 23, 2019.

MATTHEW M. BRACKEN
County Attorney

By MSASAKI
MARYANN SASAKI
Deputy County Attorney

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	) CC-2017-4
	) TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	) CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	
Petitioner,	
vs.	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	
Respondent.	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a copy of RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S WITNESS LIST, was duly served by email and depositing the same in the U.S. mail, postage prepaid, upon the following:

Gregory W. Kugle, Esq.
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Hearing Officer for the
Planning Commission of the County of Kaua'i

DATED: Līhu'e, Kaua'i, Hawai'i, August 23, 2019.

MATTHEW M. BRACKEN
County Attorney

By msasaki
MARYANN SASAKI
Deputy County Attorney

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

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Attorney for Respondent
PLANNING DEPARTMENT
OF THE COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	CC-2017-4 TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S EXHIBIT LIST; EXHIBITS A - F; CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearings Officer: Harlan Y. Kimura

PLANNING DEPARTMENT'S EXHIBIT LIST

Pursuant to request of Hearing Officer Harlan Y. Kimura ("Officer"), Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I ("Department"), by and through its undersigned attorneys, respectfully submits its Exhibit List containing Exhibits A – F, in response to Petitioner PATRICIA D. McCONNELL ("Petitioners"), Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, received by the County of Kaua'i Planning Department on June 13, 2017. The contested case hearing on the matter is scheduled for August 30, 2019, at 9:00 a.m.

DATED: Līhu'e, Kaua'i, Hawai'i, August 23, 2019.

MATTHEW M. BRACKEN
County Attorney

By MSasaki
MARYANN SASAKI

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

COUNTY OF KAUA'I PLANNING COMMISSION	EXHIBIT LIST	CC-2017-4 TMK: (4) 5-8-005:005

PETITIONERS	PETITIONERS' ATTORNEY (Name, Address and Tel. No.)
PATRICIA D. McCONNELL	GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, Hawai'i 96813-6452 Telephone: (808) 531-8031
RESPONDENT	RESPONDENT ATTORNEY (Name, Address and Tel. No.)
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I	MARYANN SASAKI, Deputy County Attorney Office of the County Attorney, County of Kaua'i 4444 Rice Street, Suite 220 Līhu'e, Hawaii 96766 Telephone: (808) 241-4930

DATE OF HEARING	HEARING TIME	PREPARING CLERK	DEPARTMENT
August 30, 2019	9:00 a.m.		

EXHIBIT NO. IDENTIFY NO. CODE _PETITIONER √RESPONDENT	OFFERRED FOR IDENTIFI-CATION	RECEIVED IN EVIDENCE	WITHDRAWN	DESCRIPTION OF EXHIBIT	DATE R=RETURNED D=DESTROYED OTHER COMMENTS
A				AIRbnb Evidence Checklist – TVR Inspections dated January 28, 2016	
B				Investigation Report dated January 10, 2017	
C				Zoning Compliance Notice dated January 11, 2017	
D				Notice of Violation & Order to Pay Fines dated May 23, 2017	
E				Investigation Report dated May 23, 2017	
F				Memorandum re Meeting between Planning Department and Property Owner dated April 12, 2017	

FOR OFFICE USE ONLY

AIRbnb Evidence Checklist – TVR Inspections

TMK: 58005005	Date: 1/28/16
Investigation Type: Request ☐	Complaint ☑
☐ Homestay or ☐ TVR |	☑ single family or ☐ multi-family
Owner Name: PATRICIA D. MCCONNELL	
Operation Name: "THE SONG OF THE JUNGLE" TVR	
Property Address: 4813 ANANALU RD	
Researched by: Bambi	
AIRbnb #:	
Site Manager's Name:	
Contact Phone:	
Contact Email Address:	
Requirements	**Attachments/ Exhibit #**
Was the TVNC & SP #'s listed on AIRbnb?	Yes ☐ No ☐
☐ Planning Dept ☐ NCUC/ TVR permit# / TVNC if any	
Dept. Taxation GET ☑ TAT ☑	# W51707089-01
☐ BREG- Business Registration	#
Internet Advertising (list all found)	
☐ Personal webpage	
☑ Other	vrbo.com/481178 & vrbo.com/130810
☐ Are the TVNC & SP # listed on web?	Yes ☐ No ☐
☑ Real Property Assessment / Classification	VACATION RENTAL
☐ Rental Cars- COK DMV (List License & Date)	Verified? Yes ☐ No ☐
☐ Zoning (ie. VDA, Commercial, Residential)	Open - North Shore Special Planning Area dev. plan
Comments:	

Version 7 AIRbnb

EXHIBIT A

INVESTIGATION REPORT

(X) Web Research ( )COMPLAINT ( )REG/RENEWAL ( )REQUEST

BUS. NAME:"THE SONG OF THE JUNGLE"	UNIT/S:	TYPE:
TMK:58005005	LAND AREA:	TV#:
DIST: Hanalei	LOC: Wailapa	
ZONING: O	OWNER: MCCONNELL,PATRICIA D	
SLUC DIST:	MNGR Co.	
LOG #	SITE ADDR:4813 ANANALU RD	

OWNER:	MANAGING COMPANY:
NAME: PATRICIA D, MCCONNELL	NAME: airbnb
ADDR: 104 ENDLICH DR	ADDR:
SANTA CRUZ, CA 95060	
PHONE:	WEB SITE: airbnb "Lani Oli Hale"
WEB SITE:	"The Song of the Jungle"

NATURE OF VIOLATION:

Transient accommodation operation outside of the Visitor

INSPECTOR: Bambi

DATE: 1/10/17	ARRIVE:	INFORMAL CONTACT:
	DEPART:	

DESCRIPTION OF INVESTIGATION:

1. Research of online website www.airbnb.com found the subject transient accommodation:

https://www.airbnb.com/rooms/12622481

2. By matching the airbnb's website (https://www.airbnb.com/rooms/12622481) and pictures with Pictometry and cross checking the noted parcel with Real Property Division records (Tax Classification - Vacation Rental) , I was able to determine the Tax Map Key and Property Owner of the transient accommodation operation.

TMK: 58005005, PATRICIA D, MCCONNELL

EXHIBIT B

3. Research Finding:

Transient accommodation operation is located outside of the VDA

Transient accommodation operation does not have and active Non-Conforming Use Certificate (NCU) or an applicable permit.

4. KCC, Sec 8-17.11(b), Advertising of any sort which offers a property as a TVR shall constitute prima facie evidence of the operation of a TVR on said property...

5. Violation Found: K.C.C. Sec-8-17.8:

Single family TVRs are prohibited in all areas not desginated as VDA

6. Violation Found: K.C.C. 1. Sec- 8-8.1(b)

Homestay operations are prohibited outside of theVDA.

Signature: Date: 1/10/17

Real Property Division Record

Owner and Parcel Information

Owner Name/ Type	MCCONNELL,PATRICIA D / Fee Owner	Today's Date	January 10, 2017
Mailing Address	104 ENDLICH DR SANTA CRUZ, CA 95060	Parcel Number	580050050000
Location Address	4813 ANANALU RD	Project Name	"THE SONG OF THE JUNGLE" TVR
Tax Classification	VACATION RENTAL	Parcel Map	Show Parcel Map
Neighborhood Code	5821-1	Land Area (acres)	0.599
Legal Information	LOT 272 RP 7194 LC AW 11216:5 0.599 AC DES	Land Area (approximate sq ft)	26,092

Assessment Information

Show Historical Assessments

Year	Tax Classification	Total Market Value	Total Assessed Value	Total Exemption	Total Net Taxable Value
2017	VACATION RENTAL	$ 709,400	$ 709,400	$ 0	$ 709,400

Improvement Information

Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1987	1995	1,887	2/2/0	Sketch Building 1

Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1995	1995	164	1/1/0	Sketch Building 2

Other Building and Yard Improvements

Description	Quantity	Year Built	Area
FRAME UTILITY SHED	1	1993	15

Permit Information

Date	Permit Number	Reason	Permit Amount
06/05/2002	0200000847	RENOVATION	$ 63,000
06/05/2002	0200000845	RELOCATION	$ 30,000
09/30/1993	9310002295	P2	$ 100
09/02/1993	9310004746	DEMOLITION	$ 280
09/02/1993	9310004745	DEMOLITION	$ 168
03/20/1987	25474	DWELLING	$ 66,000

Sales Information

Sale Date	Price	Instrument #	Instrument Type	Instrument Description	Date Recorded	Document #	Cert #	Book/Page	Conveyance Tax	Document Type
06/01/2004	$ 830,000	04-127502	FEE CONVEYANCE		06/24/2004				830	

Current Tax Bill Information

2016 Tax Payments
Show Historical Taxes

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2016-2	Real Property Tax	02/20/2017	$ 3,314.77	$ 0.00	$ 3,314.77	$ 0.00	$ 0.00	$ 0.00	$ 3,314.77
2016-2	TRASH: BASE &/OR COLL FEE	02/20/2017	$ 0.00	$ 0.00	$ 108.00	$ 0.00	$ 0.00	$ 0.00	$ 108.00
	Tax bill computed to 01/31/2017		$ 3,314.77	$ 0.00	$ 3,422.77	$ 0.00	$ 0.00	$ 0.00	$ 3,422.77

The Kauai County Tax Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. Website Updated: January 10, 2017

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Kauai County Assessor

Parcel: 580050050000 Acres: 0.599

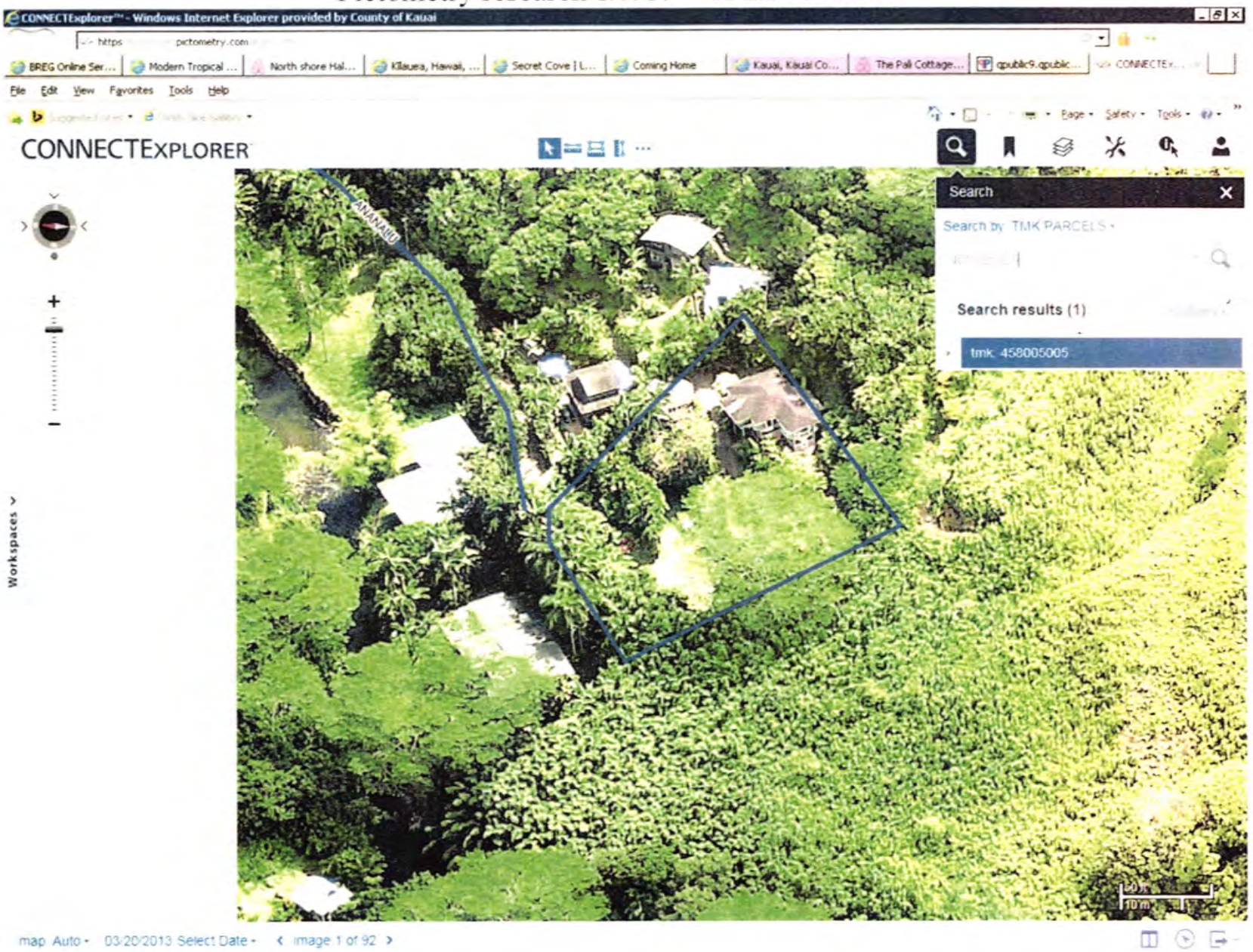
Name	MCCONNELL,PATRICIA D	Land Value	
Site	4813 ANANALU RD	Building Value	
Sale	$830,000 on 2004-06-01 Reason= Qual=	Misc Value	
Mail	104 ENDLICH DR SANTA CRUZ, CA 95060	Just Value	
		Assessed Value	0
		Exempt Value	0
		Taxable Value	0

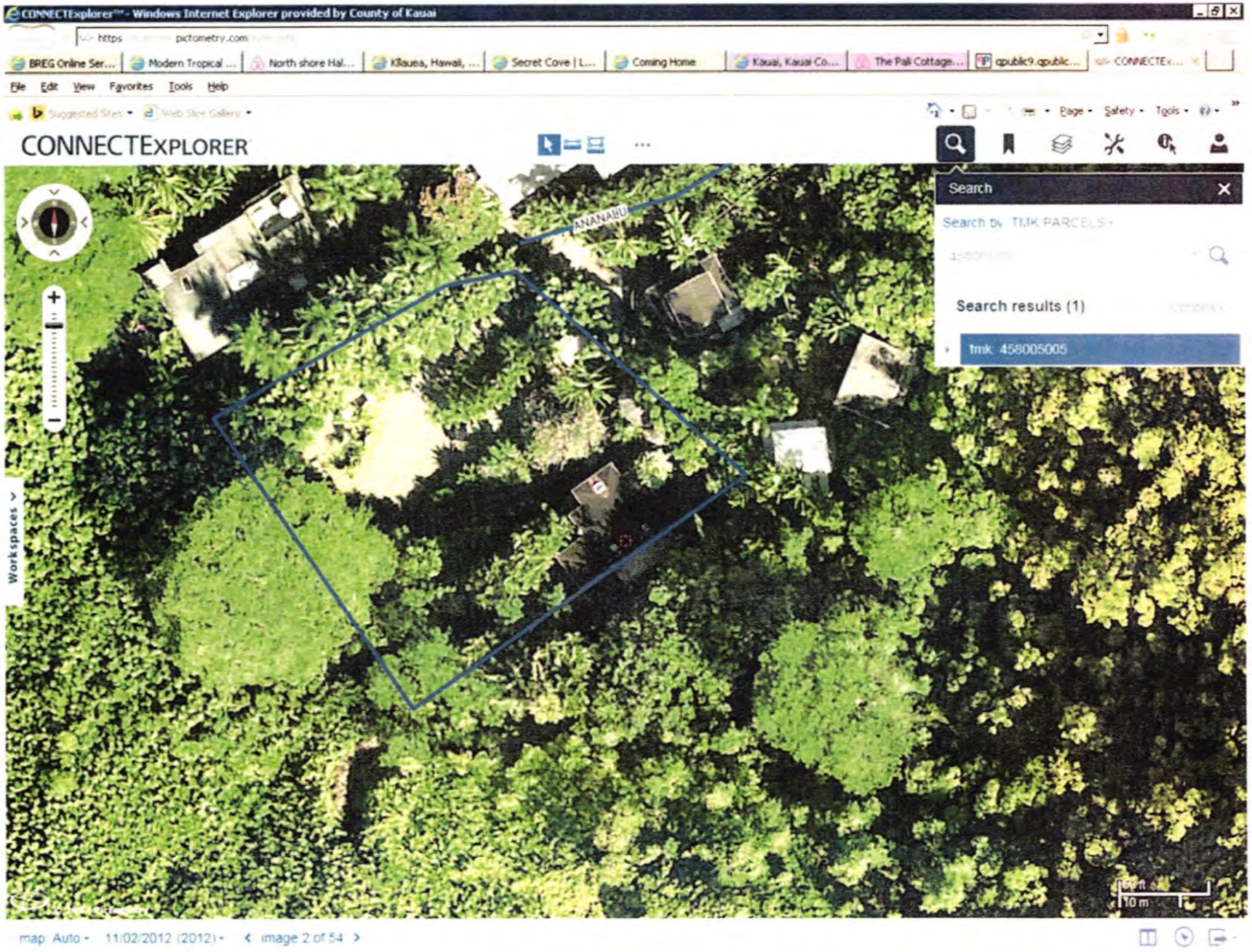
The Kauai County Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. The assessment information is from the last certified taxroll. All data is subject to change before the next certified taxroll. PLEASE NOTE THAT THE PROPERTY APPRAISER MAPS ARE FOR ASSESSMENT PURPOSES ONLY NEITHER KAUAI COUNTY NOR ITS EMPLOYEES ASSUME RESPONSIBILITY FOR ERRORS OR OMISSIONS ---THIS IS NOT A SURVEY---

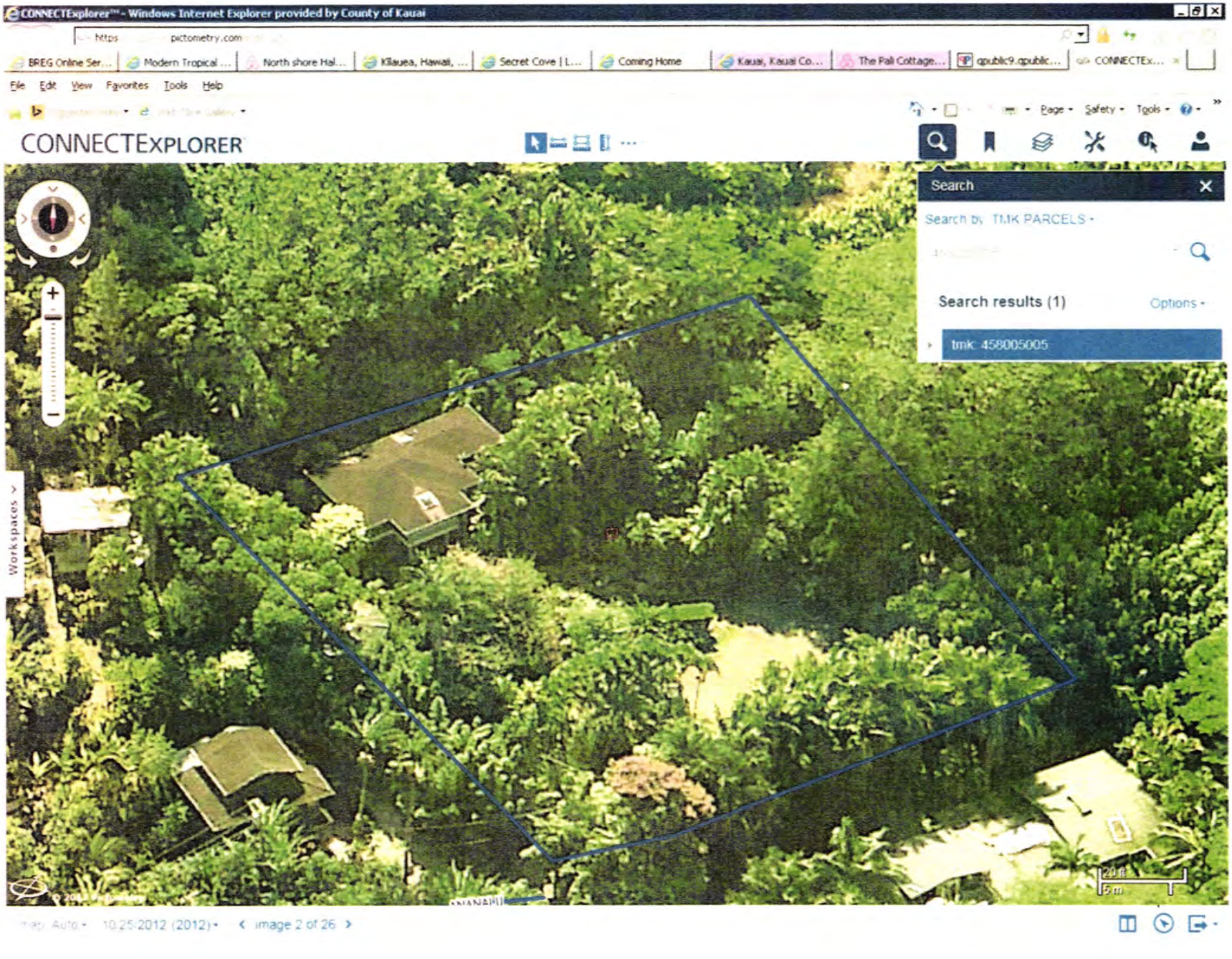
Date printed 01/10/17 13:57:45

Pictometry Image

Pictometry research 1/9/17 TMK 58005005



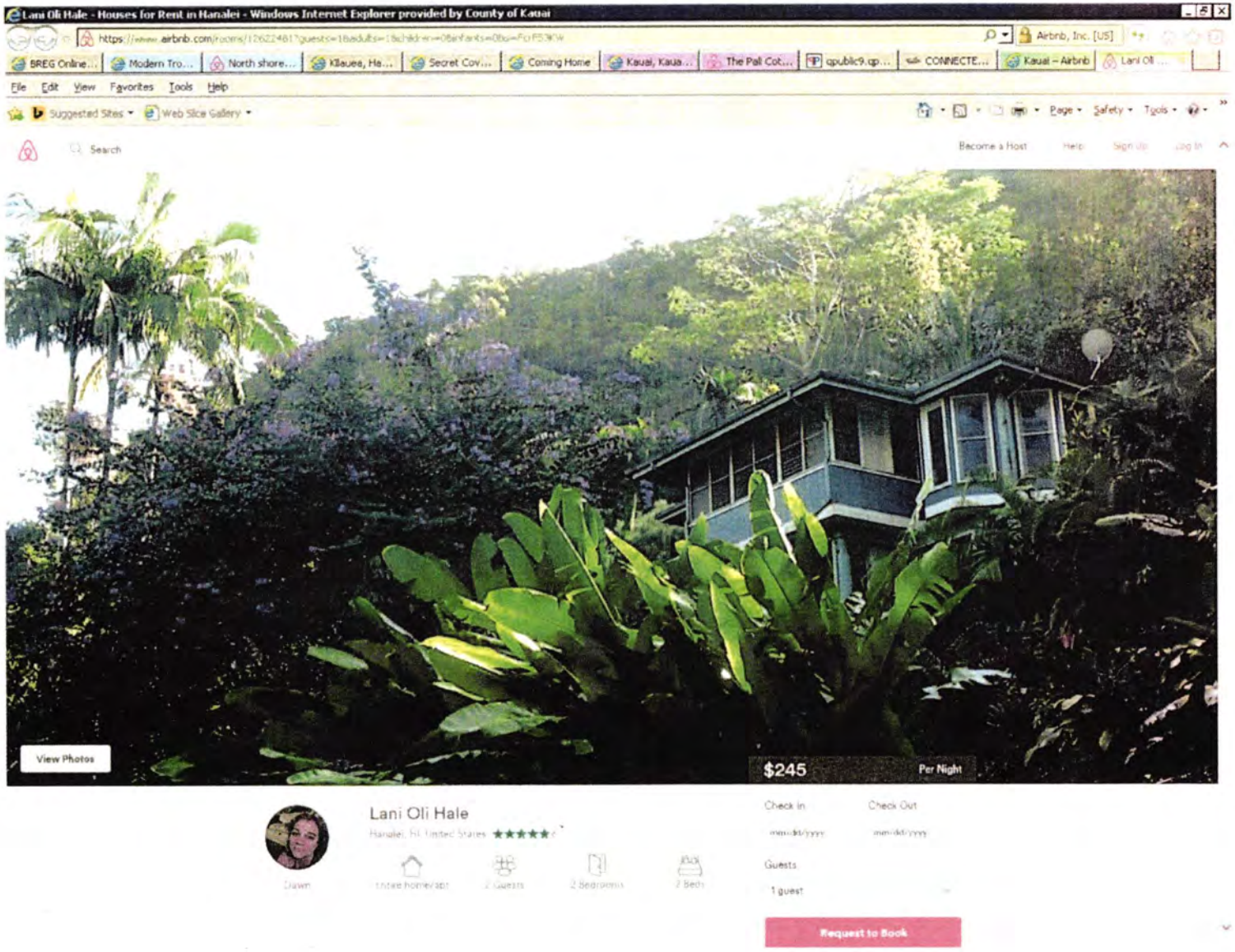

CONNECTExplorer™ - Windows Internet Explorer provided by County of Kauai
https pictometry.com
BREG Online Ser...
Modern Tropical ...
North shore Hal...
Kilauea, Hawaii, ...
Secret Cove | L...
Coming Home
Kauai, Kauai Co...
The Pali Cottage...
qpublic9.qpublic...
CONNECTEx...
File Edit View Favorites Tools Help
Suggested Sites
Web Slice Gallery
Page Safety Tools
CONNECTExplorer
Search
Search by TMK PARCELS
Search results (1)
tmk: 458005005
ANANALU
Workspaces
10 m
map Auto 11/02/2012 (2012) image 2 of 54


CONNECTExplorer™ - Windows Internet Explorer provided by County of Kauai
File Edit View Favorites Tools Help
CONNECTExplorer
Search
Search by TMK PARCELS
Search results (1)
Options
tmk: 458005005
Workspaces
20 ft
6 m
10/25/2012 (2012)
image 2 of 26

Website Information

https://www.airbnb.com/rooms/12622481

TMK 58005005 1/9/17



Lani Oli Hale - Houses for Rent in Hanalei - Windows Internet Explorer provided by County of Kauai

https://www.airbnb.com/rooms/1262248?guests=1&adults=1&children=0&infants=0&s=FcrFS3kw

Airbnb, Inc. [US]

BREG Online... | Modern Tro... | North shore... | Kilauea, Ha... | Secret Cov... | Coming Home | Kauai, Kaua... | The Pali Cot... | qpublic9.qp... | CONNECTE... | Kauai - Airbnb | Lani Oli ...

File Edit View Favorites Tools Help

Suggested Sites | Web Slice Gallery

Page | Safety | Tools

Share: | Save to Wish List

4/30: Luxury bedroom suite with surround views of Jungle and mountains

Show photo list

Lani Oli Hale - Houses for Rent in Hanalei - Windows Internet Explorer provided by County of Kauai

https://www.airbnb.com/rooms/12622481?guests=1&adults=1&children=0&infants=0&s=FcrF53iW

Airbnb, Inc. [US]

BREG Online... | Modern Tro... | North shore... | Kilauea, Ha... | Secret Cov... | Coming Home | Kauai, Kaua... | The Pali Cot... | qpublic9.qp... | CONNECTE... | Kauai - Airbnb | Lani Oli ...

File Edit View Favorites Tools Help

Suggested Sites | Web Slice Gallery

Page Safety Tools

Share: Save to Wish List

19/30: kitchen area

Show photo list

Lani Oli Hale - Houses for Rent in Hanalei - Windows Internet Explorer provided by County of Kauai

File Edit View Favorites Tools Help

$245 Per Night

Request to Book

About this listing

The Lani Oli Hale is a luxury jungle retreat cottage. Built up high on a hill that overlooks the mountains and jungles of Wainiha Valley it offers visitors a rare glimpse into the world of yesteryear Hawaii.

Contact host

The space	Accommodates: **2** Bathrooms: **1.5** Bedrooms: **2** Beds: **2** Check In: **Anytime after 4PM** House Rules	Check Out: **10AM** Pet Owner: **Cat(s)** Property type: **House** Room type: **Entire home/apt**
Amenities	Wireless Internet Kitchen + More	Free parking on premises TV
Prices	Cleaning Fee: **$195** Security Deposit: **$300**	Cancellation: **Super Strict 60 Days** Weekend Price: **$255 / night**

Description

The space

The Lani Oli is built up on a hillside. It is the main portion of the home and is built on pillars over a large outdoor lanai area. It has surround windows with screens and louvers that can be opened to allow optimum airflow from the trade winds.The windows look out over the mountain, valley anf jungles.

$245 Per Night **Request to Book**

Guest access

You will be renting the entire portion of the main home. It is about 1400 sq feet of space and has two bedrooms, a living room, a full kitchen, an enclosed lanai, a full bathroom and an outdoor shower.

Interaction with guests

The owner lives in a separate studio on the property and is available to assist guests with island and home questions and issues. She and /or cleaning staff are also available for daily cleaning if quest requests this.. an additional fee will apply.

The neighborhood

The Lani Oli is located at the end of our street and is about 3/8 mile from the main road. There is a corner grocery, sushi takeout and gift shop at the end of the street. You can walk down to the corner store and to the beach accross the street. You will likely encounter neighbors walking on the street with their children or walking their dogs. It is a friendly neighborhood. Most of the houses are tucked away amidst jungle vegetation. There is heavy junbgle vegetation on the property, along the street and on the neighboring properties. You will know you are in the Jungle!

Getting around

There is a shuttle bus that stops at the corner grocery store. You can take the bus into Hanalei town or all the way to Kapaa and Lihue.

Other things to note

There is a ohana cottage built onto the back of the home. It is on the ground level. It can be rented out as extra space if you need it, or it may be rented out to other guests during your stay. This cottage is completely separate

Lani Oli Hale - Houses for Rent in Hanalei - Windows Internet Explorer provided by County of Kauai

https://www.airbnb.com/rooms/12622487?guests=1&adults=1&children=0&infants=0&s=eFcdFS9W

Airbnb, Inc. [US]

BREG Online... | Modern Tro... | North shore... | Kilauea, Ha... | Secret Cov... | Coming Home | Kauai, Kaua... | The Pali Cot... | qpublic9.qp... | CONNECTE... | Kauai - Airbnb | Lani Oli ...

File Edit View Favorites Tools Help

Suggested Sites | Web Slice Gallery

Page | Safety | Tools

$245 Per Night

Request to Book

House Rules

No smoking

Not suitable for pets

No parties or events

May not be safe or suitable for infants (Under 2 years)

Check-in is after 4PM

Guests are asked to remove shoes before entering.
We are in the valley and there is a amphitheater effect so noise is magnified. We ask guests to refrain from playing loud music or TV as we are offering a jungle experience instead. Since we can't hear traffic noise here.. only the jungle song birds, river and ocean.. we encourage our guests to enjoy this type of experience.

Safety features

Smoke detector

Fire extinguisher

Availability

4 nights minimum stay

View calendar

6 Reviews ★★★★★

Search reviews

Accuracy ★★★★★

Lani Oli Hale - Houses for Rent in Hanalei - Windows Internet Explorer provided by County of Kauai

https://www.airbnb.com/rooms/1262481?guests=1&adults=1&children=0&infants=0&checkin=&checkout=&s=FcrPS3k_w

Airbnb, Inc. [US]

BREG Online... | Modern Tro... | North shore... | Kilauea, Ha... | Secret Cov... | Coming Home | Kauai, Kaua... | The Pali Cot... | qpublic9.qp... | CONNECTE... | Kauai - Airbnb | Lani Oli...

File Edit View Favorites Tools Help

Suggested Sites | Web Slice Gallery

Page | Safety | Tools

$245 Per Night **Request to Book**

Your Host

Dawn

US · Joined in April 2016

Response rate: **100%**
Response time: **within a few hours**

22 Reviews

Contact host

Social Connections

Are you or your friends connected with this host?

f Connect with Facebook

Lani Oli Hale - Houses for Rent in Hanalei - Windows Internet Explorer provided by County of Kauai

https://www.airbnb.com/rooms/12622481?guests=1&adults=1&children=0&infants=0&s=FcrF57Ik

Airbnb, Inc. [US]

BREG Online... | Modern Tro... | North shore... | Kilauea, Ha... | Secret Cov... | Coming Home | Kauai, Kaua... | The Pali Cot... | qpublic9.qp... | CONNECTE... | Kauai - Airbnb | Lani Oli ...

File Edit View Favorites Tools Help

Suggested Sites | Web Slice Gallery

Page Safety Tools

$245 Per Night **Request to Book**

Kaua'i

Listing Location

Hanalei, Hawaii, United States

AIRbnb Evidence Checklist – TVR Inspections

TMK: 58005005	Date: 1/28/16
Investigation Type: Request ☐	Complaint ☑
☐ Homestay or ☐ TVR |	☑ single family or ☐ multi-family
Owner Name: PATRICIA D. MCCONNELL	
Operation Name: "THE SONG OF THE JUNGLE" TVR	
Property Address: 4813 ANANALU RD	
Researched by: Bambi	
AIRbnb #:	
Site Manager's Name:	
Contact Phone:	
Contact Email Address:	

Requirements	Attachments/ Exhibit #
Was the TVNC & SP #'s listed on AIRbnb?	Yes ☐ No ☐
☐ Planning Dept ☐ NCUC/ TVR permit# / TVNC if any	
Dept. Taxation GET ☑ TAT ☑	# W51707089-01
☐ BREG- Business Registration	#
Internet Advertising (list all found)	
☐ Personal webpage	
☑ Other	vrbo.com/481178 & vrbo.com/130810
☐ Are the TVNC & SP # listed on web?	Yes ☐ No ☐
☑ Real Property Assessment / Classification	VACATION RENTAL
☐ Rental Cars- COK DMV (List License & Date)	Verified? Yes ☐ No ☐
☐ Zoning (ie. VDA, Commercial, Residential)	Open - North Shore Special Planning Area dev. plan
Comments:	

Version 7 AIRbnb

Recent Sales in Neighborhood
Recent Sales in Area
Previous Parcel
Next Parcel
Return to Main Search Page
Kauai Home

Owner and Parcel Information

Owner Name	MCCONNELL,PATRICIA D	**Today's Date**	January 27, 2016
Mailing Address	104 ENDLICH DR SANTA CRUZ, CA 95060	**Parcel Number**	580050050000
Location Address	4813 ANANALU RD	**Project Name**	"THE SONG OF THE JUNGLE" TVR
Tax Classification	VACATION RENTAL	**Parcel Map**	Show Parcel Map
Neighborhood Code	5821-1	**Land Area (acres)**	0.599
Legal Information	LOT 272 RP 7194 LC AW 11216:5 0.599 AC DES	**Land Area (approximate sq ft)**	26,092

Assessment Information

Show Historical Assessments

Year	Tax Classification	Total Market Value	Total Assessed Value	Total Exemption	Total Net Taxable Value
2016	VACATION RENTAL	$ 749,100	$ 749,100	$ 0	$ 749,100

Improvement Information

Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1987	1995	1,887	2/2/0	Sketch Building 1

Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1995	1995	164	1/1/0	Sketch Building 2

Other Building and Yard Improvements

Description	Quantity	Year Built	Area
FRAME UTILITY SHED	1	1993	15

Permit Information

Date	Permit Number	Reason	Permit Amount
06/05/2002	0200000847	RENOVATION	$ 63,000
06/05/2002	0200000845	RELOCATION	$ 30,000
09/30/1993	9310002295	P2	$ 100
09/02/1993	9310004746	DEMOLITION	$ 280
09/02/1993	9310004745	DEMOLITION	$ 168
03/20/1987	25474	DWELLING	$ 66,000

Sales Information

Sale Date	Price	Instrument #	Instrument Type	Instrument Description	Date Recorded	Document #	Cert #	Book/Page	Conveyance Tax	Document Type
06/01/2004	$ 830,000	04-127502	FEE CONVEYANCE		06/24/2004				830	

Current Tax Bill Information

2016 Tax Payments Show Historical Taxes

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2015-2	Real Property Tax	02/20/2016	$ 3,162.99	$ 0.00	$ 3,162.99	$ 0.00	$ 0.00	$ 0.00	$ 3,162.99
2015-2	"TRASH FEE"	02/20/2016	$ 0.00	$ 0.00	$ 108.00	$ 0.00	$ 0.00	$ 0.00	$ 108.00
Tax bill computed to 01/31/2016			$ 3,162.99	$ 0.00	$ 3,270.99	$ 0.00	$ 0.00	$ 0.00	$ 3,270.99

Recent Sales in Neighborhood
Recent Sales in Area
Previous Parcel
Next Parcel
Return to Main Search Page
Kauai Home

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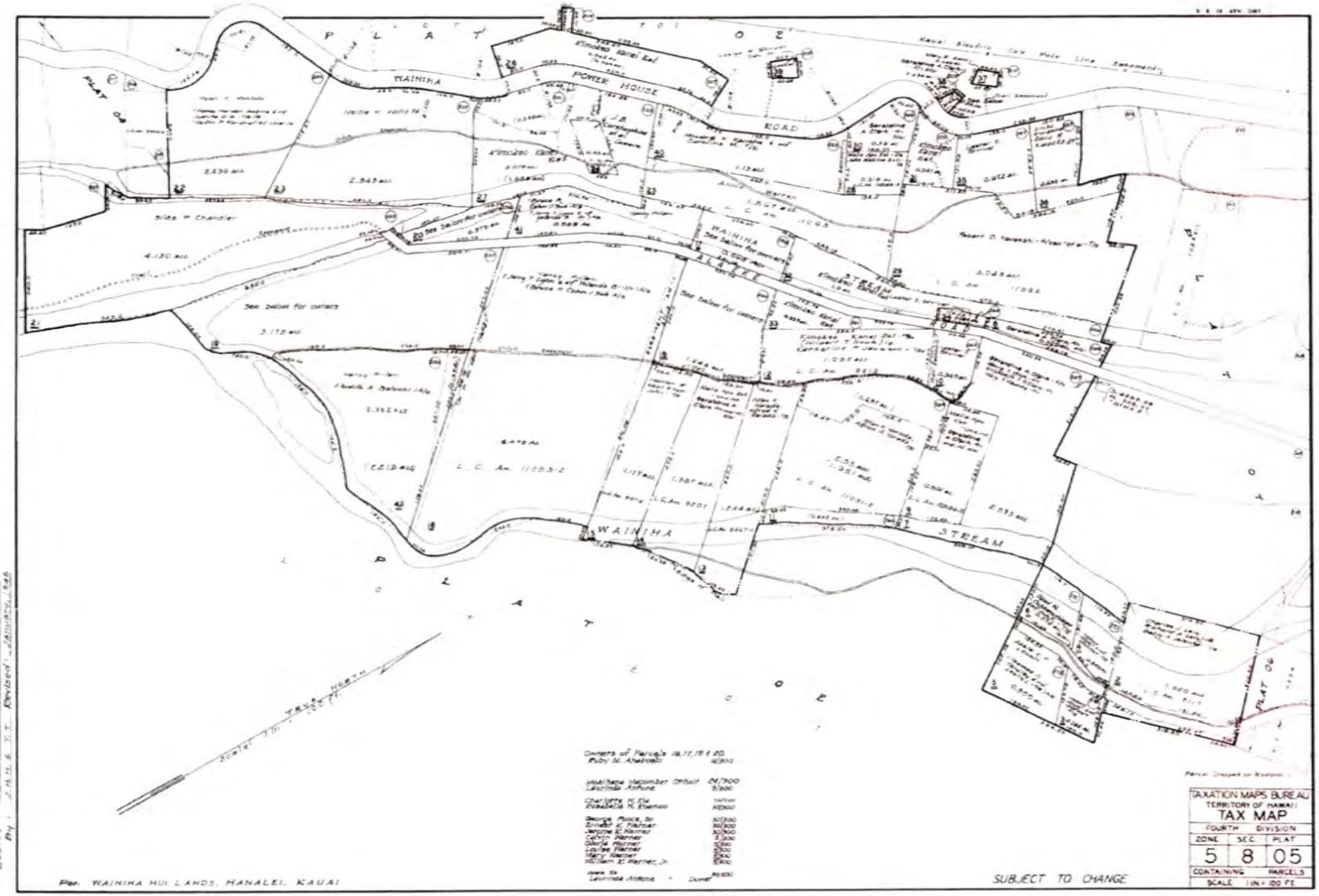


Per. WAINIHA HOI LANDS, HANALEI, KAUAI

Dwg. No.
Source
By

SPECIAL PLANNING AREA

NORTH SHORE

KAUAI COUNTY

ZONING MAP **ZM-WV700**

WAINIHA VALLEY

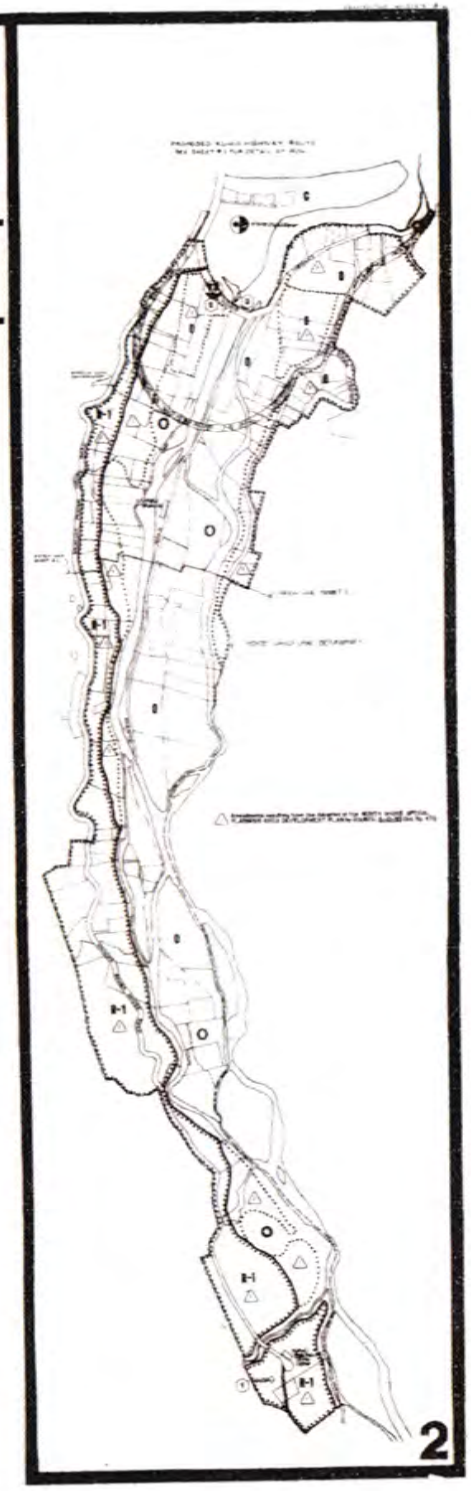
LEGEND

- (C) NATURE CONSERVATION
- O OPEN DISTRICT
- A AGRICULTURE DISTRICT
- I PRESERVATION
- EXISTING PARK
- STATE LAND USE BOUNDARY
- R-2 RESIDENTIAL
- R-4 RESIDENTIAL
- CN NEIGHBORHOOD COMMERCIAL
- RR RESORT
- ST-P SPECIAL TREATMENT
- ST-C SPECIAL TREATMENT
- ST-R SPECIAL TREATMENT

ADOPTED BY COUNTY OF KAUAI

ADOPTED BY COUNTY OF KAUAI

North Shores Development Plan
(Update No 1)



2

Department of Taxation (http://tax.hawaii.gov)

Tax License Search
Hawaii Department of Taxation

License Details

Taxpayer Name:

PATRICIA D. McCONNELL

DBA Name:

Taxpayer ID:

W51707089-01

Former Taxpayer ID:

Business Location:

Tax Type:

Transient Accommodations

Tax Status:

Closed

Business Began:

07/01/2007

Back to Results (searchResults)

New Search (app)

Tax License Search
Hawai'i Department of Taxation

Department of Taxation (http://www.hawaii.gov/tax) State of Hawaii (http://www.hawaii.gov)

Terms of Use (http://portal.ehawaii.gov/terms-of-use.html) Privacy Policy (http://portal.ehawaii.gov/privacy-policy.html)

Contact Info (http://www6.hawaii.gov/tax/a8_contact.htm) Feedback (http://portal.ehawaii.gov/feedback.html?applicationId=109)

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Department of Taxation (http://tax.hawaii.gov)

Tax License Search
Hawaii Department of Taxation

License Details

Taxpayer Name:

PATRICIA D. McCONNELL

DBA Name:

Taxpayer ID:

W51707089-02

Former Taxpayer ID:

Business Location:

Tax Type:

General Excise and Use

Tax Status:

Open

Business Began:

12/04/2015

Back to Results (searchResults)

New Search (app)

Tax License Search
Hawai'i Department of Taxation

Department of Taxation (http://www.hawaii.gov/tax) State of Hawaii (http://www.hawaii.gov)

Terms of Use (http://portal.ehawaii.gov/terms-of-use.html) Privacy Policy (http://portal.ehawaii.gov/privacy-policy.html)

Contact Info (http://www6.hawaii.gov/tax/a8_contact.htm) Feedback (http://portal.ehawaii.gov/feedback.html?applicationId=109)

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https://www.vrbo.com/481178

VRBO

Login Help List Your Property

Hanalei, North Shore, Hawaii

Arrival Depart I don't have dates yet Search

< Browse properties Home USA Hawaii Kauai North Shore Hanalei VRBO Listing #481178

Sea Turtle Cottage

Avg. Nightly $185

Arrival Departure

Minimum stay 4 nights

Get an instant quote

Pay with confidence

Book this property securely on VRBO and get payment protection
Learn more

Save to my favorites

Reviews	13
Sleeps	2
Bedrooms	0
Bathrooms	1
Property type	Cottage

Owner
Member since: 2007
Speaks: English

Send email

Overview Reviews Rates Calendar Location Owner Info Photos

Minimum stay:	4 nights
Internet:	Yes
Pets considered:	No
Wheel chair accessible:	N/A

Response time	**Within a few hours**
Response rate	80%
Calendar last updated	01/25/2016

Show phone number

Property description

This very special treehouse style cottage will have you falling in love with a side of Hawaii rarely seen anymore. Although modern and beautifully architectured it offers the jungle up to you. Every window looks out to tropical lush beauty. A wrap around screened lanai overlooking valley and mountains provides the perfect setting for romantic evening dining or morning coffee and jungle song bird musing. The large kitchenette is well supplied with stay at home cooking in mind. All the most amazing north shore beaches as well as the famous Kalalau Trail are mere minutes away and if you want to feel a little adventurous you can walk to the river for an evening dip in the jungle swimming hole. Take your camera because the river birds are beautiful. Best of all is the big comfy king bed and the star gazing skylight above you. Homestay..#9481 TAT Wo2658273-01

Why VRBO

Build your best vacation ever
From over 1 million rentals worldwide

Escape the confines of a hotel
Enjoy the freedom of a vacation rental

Book with confidence
Relax and enjoy your stay

Personalized experiences
From online to on vacation

Property Type
Cottage 500 sq. ft.

Accommodation Type
Vacation Rental

Meals
Guests Provide Their Own Meals

Onsite Services
Housekeeper Optional

Suitability
Children Welcome Non Smoking Only Pets Not Allowed

Bedrooms: 0 Bedrooms, Sleeps 2, Beds for 2

Bedroom 1: 1 king

Cottage with King bed

Bathrooms: 1 Bathroom

Bathroom 1: toilet, shower

Exotic tigerwood shower and bathroom enclosed but built into the flow of the jungle

Other Amenities

There is a quaint corner store about 1/4 mile at the end of our street and an organic take out burrito store There is a fine dining oceanside resteurant 1+ miles away with a local lua and a coffe shop. Hanalei town is 3 miles away with shopping and multiple restaurants

Entertainment

Books	DVD Player	Television

Theme

Adventure	Budget	Sports & Activities
Away From It All	Romantic	Tourist Attractions

Attractions

Botanical Garden	Library	Recreation Center
Churches	Marina	Restaurants
Health/Beauty Spa	Playground	Theme Parks

Local Services & Businesses

ATM/Bank	Hospital	Medical Services
Groceries	Massage Therapist	

Leisure Activities

Antiquing	Horseback Riding	Shelling
Beachcombing	Luaus	Shopping
Bird Watching	Miniature Golf	Walking
Boating	Paddle Boating	Whale Watching
Eco Tourism	Scenic Drives	

Location Type

Mountain View	Resort: [illegible]	Rural: [illegible] ...more

Sports & Adventure Activities

Cycling	Kayaking	Snorkeling/Diving
Deepsea Fishing	Mountain Biking	Sound/Bay Fishing
Fishing	Mountain Climbing	Spelunking
Fly Fishing	Paragliding	Surf Fishing
Freshwater Fishing	Parasailing	Surfing
Hiking	Sailing	Swimming
Hunting	Scuba Diving Or Snorkeling	Wind-Surfing
Jet Skiing	Snorkeling	

Dining

Dining: [illegible] ...more	Dining Area	Seating for 4 people

General

Air Conditioning:

Clothes Dryer

Hair Dryer

Internet

Iron & Board

Linens Provided

Living Room:

Parking

Telephone

Towels Provided

Washing Machine

Kitchen

Coffee Maker

Dishes & Utensils:

Kitchen:

Oven:

Pantry Items

Refrigerator:

Stove:

Toaster

Outside

Bicycles

Golf:

Kayak / Canoe:

Lanai / Gazebo

Lawn / Garden

Outdoor Grill

Water Sports Gear:

House Cleaning

Housekeeper Optional

Reviews

4.5 ★★★★½ from **13 traveler reviews**

Write a review

Exotic jungle sanctuary

★★★★★

beth
San Francisco, CA/USA

I travel to Kauai a couple times a year and this is one of my favorite spots so far. It's secluded but close to Hanalei, nicely furnished, and surrounded by a lush jungle property. It's a magical place. The sea turtle overlooked the jungle valley, was cozy and clean, and I just felt well taken care of a guest overall. I don't usually write reviews but I just wanted to express my thanks for a great vacation. I can't wait to come back.

Stayed: July 2015 **Submitted:** October 27, 2015 **Source:** VRBO

Recommended for: People with disabilities, Sightseeing, Girls getaway, Adventure seekers, Age 55+, Romantic getaway, Families with teenagers

Was this review helpful? 1 Yes 0 No

Calendar

Last updated: 01/25/2016

← Previous Next →

January 2016

SU	MO	TU	WE	TH	FR	SA
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

February 2016

SU	MO	TU	WE	TH	FR	SA
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29					

March 2016

SU	MO	TU	WE	TH	FR	SA
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

April 2016

SU	MO	TU	WE	TH	FR	SA
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

May 2016

SU	MO	TU	WE	TH	FR	SA
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

June 2016

SU	MO	TU	WE	TH	FR	SA
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

Location

Nearest Airport Lihue Airport	45 Miles	**Nearest Barpub** Tahiti Nui	3 Miles	**Nearest Ferry** Nawiliwili	45 Miles
Nearest Golf Princeville	5 Miles	**Nearest Motorway** Kuhio	1 Miles	**Nearest Restaurant** Mediterranean Gourmet	2 Miles

Owner
Member since: 2007
Speaks: English

Send email

Response time	**Within a few hours**
Response rate	**80%**
Calendar last updated	**01/25/2016**

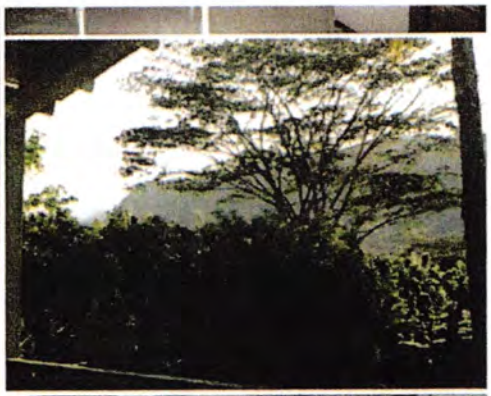
Show phone number

Photos

king bed with surround views to the jungle

mid morning on the lanai

mid morning on the lanai



enclosed outdoor shower

enclosed shower and bathroom

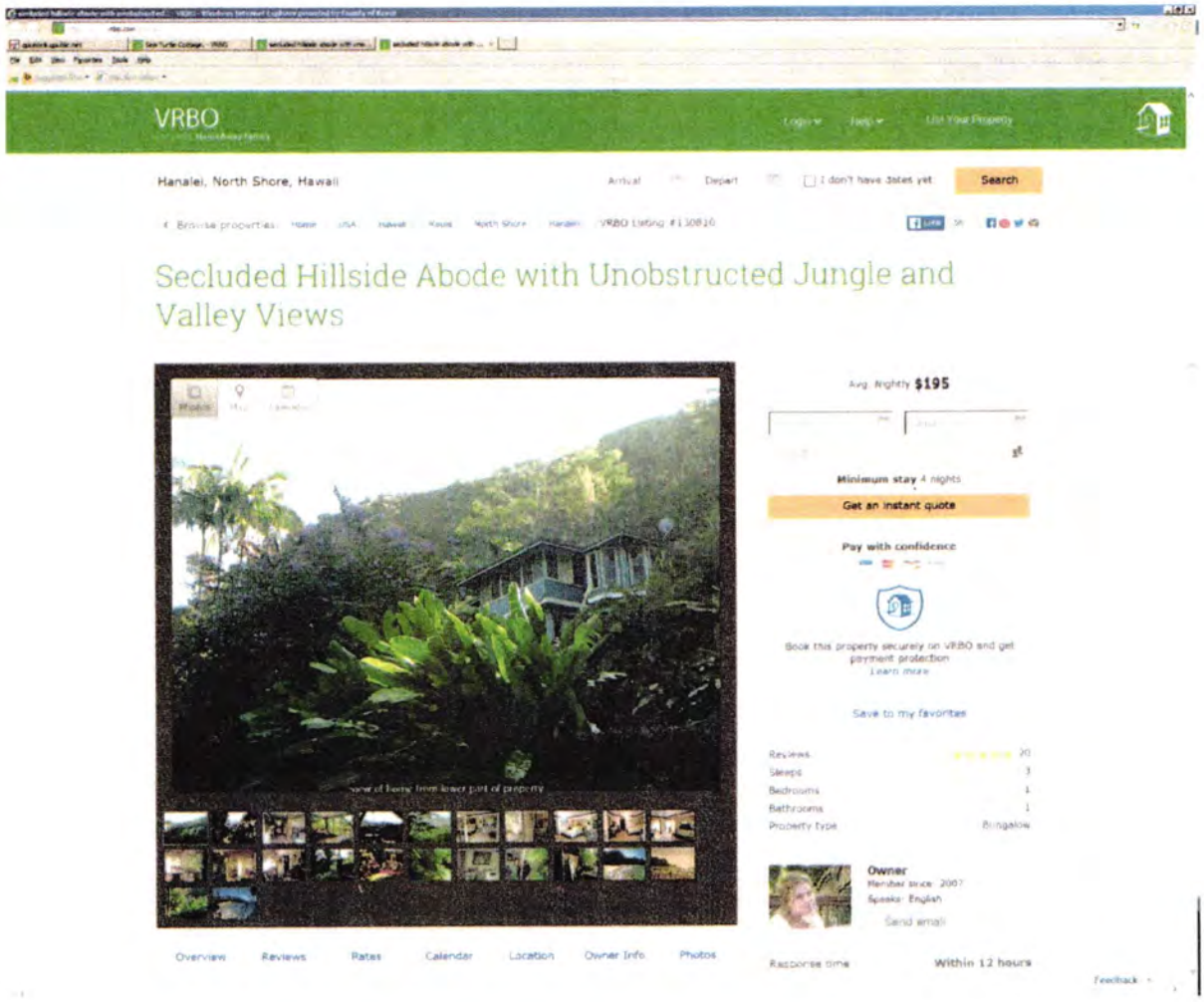
VRBO #481178

This listing was first published here in 2013.

Date last modified - Tuesday, January 26, 2016

‹

http://www.vrbo.com/130810
01/28/16



Minimum stay:	4 nights
Internet:	Yes
Pets considered:	No
Wheel chair accessible:	Yes

Property description

The Song of the Jungle is built high up on the hillside that overlooks the jungles, mountains and valley. It is at located at the end of a county lane and is surrounded by thousands of acres of tropical rainforest. It is 1/4 mile off the main road so is free of traffic noise and the general hum of people noise. You can hear the river below , the ocean waves breaking and the jungle song birds.
The Song of the Jungle is secluded , private and very quiet. It is an 'ohana' cottage unit built at the far side of the main house so is tucked away, safe and cosy. It has it's own entrance and privacy including private garden areas. It looks out onto the jungle, gardens and extensive unobstructed mountain and valley views. It is ideal for one or two persons or a family with a child. It is comprised of about 1000 sq ft and has four rooms plus 2 lanais. There is a large bedroom/sitting area with a queen bed. French doors lead from the bedroom out onto a separate enclosed lanai that overlooks the valley and jungle. This enclosed lanai has a bistro table for romantic dining and daybed for those who wish to sleep watching the stars. The kitchen area is medium sized with a full fridge, hotplate and toaster oven. It has an enclosed outdoor lu'au area as well with a BBQ and propane cook stove/oven. The indoor bathroom has a shower but no tub. There is also a privately located outdoor tigerwood shower in the garden area. The kitchen looks out onto the extensive garden area.
The 'Song' is 1/4 mile from a grocery store hub, sushi girl takeout, gift store and beachfront.
The Song of the Jungle is a quiet and peaceful world that lives up to its name. You wake up to a symphony of tropical birds mingled with the distant sounds of the river below and the ocean waves breaking . The enlcosed lanai is a wonderful place to enjoy your morning breakfast surrounded by the tropical gardens and unobstructed mountain and valley views where white egrets glide midst the palms. A 1/4 mile walk down the county lane takes you to the corner grocery store , sushi girl takeout, and beautiful Wainiha Beach. A quick drive or a 20-30 minute walk will get you to some of the best beaches in the world: Tunnels, Ke'e, Lumahai! as well as the famous Kalalau Trail. Three miles away is Hanalei town where shopping, the restaurants, and even a little night action can be found in a cozy beachtown atmosphere. This property is a homestay. #9481 TAT W02658273-01

Keywords: Private Jungle Ohana with awesome rainforest and mountain views

Property Type

Bungalow 800 sq. ft.

Accommodation Type

Vacation Rental

Meals

Guests Provide Their Own Meals

Onsite Services

Housekeeper Optional Massage

Suitability

Children Welcome Non Smoking Only Pets Not Allowed

Wheelchair Accessible

Bedrooms: 1 Bedroom, Sleeps 3, Beds for 3

Bedroom 1

Sleeping lanai: 1 twin/ single

There is a twin day bed in the enclosed lanai area, Queen size Beds (1), Double Beds (1) small double bed in kitchen area, Baby Cribs (1) fold out crib/ playpen

Other Amenities

The property is a called an Ohana Bungalo which in Hawaii is similar to a mother in law unit. It functions completely on its own though and separate from the main portion of the home. It is at the back portion of the main home so has its own enclosed lanai area as well as its own garden area, bbq area, outdoor shower and washer and dryer

Entertainment

DVD Player	Television	Video Library
Satellite / Cable	VCR	

Theme

Adventure	Romantic	Tourist Attractions
Away From It All	Sports & Activities	

Attractions

Botanical Garden	Health/Beauty Spa	Playground
Churches	Library	Restaurants
Cinemas	Marina	

Local Services & Businesses

ATM/Bank	Hospital	Medical Services
Groceries	Massage Therapist	

Leisure Activities

Antiquing	Horseback Riding	Shelling
Beachcombing	Luaus	Shopping
Bird Watching	Miniature Golf	Sight Seeing
Boating	Paddle Boating	Walking
Eco Tourism	Scenic Drives	Whale Watching
		Wildlife Viewing

Location Type

Mountain View	Rural

Sports & Adventure Activities

Cycling	Mountain Biking	Scuba Diving Or Snorkeling
Deepsea Fishing	Mountain Climbing	Snorkeling
Fishing	Mountaineering	Snorkeling/Diving
Freshwater Fishing	Paragliding	Sound/Bay Fishing
Golf	Parasailing	Spelunking
Hiking	Rafting	Surfing
Jet Skiing	Rock Climbing	Swimming
Kayaking	Sailing	Wind-Surfing

Dining

Dining:	Dining Area	Seating for 4 people

more

General

Air Conditioning: ...more

Broadband Access

Clothes Dryer:

Free Long Distance: ...more

Internet

Iron & Board

Linens Provided

Living Room

Parking: ...more

Parking For RV/Boat/Trailer

Telephone

Washing Machine: ...more

Wireless Internet: ...more

Kitchen

Coffee Maker

Cooking Utensils

Dishes & Utensils

Kitchen: ...more

Microwave

Oven

Pantry Items

Refrigerator

Stove

Toaster

Outside

Bicycles

Deck / Patio: ...more

Golf:

Kayak / Canoe:

Lanai / Gazebo: ...more

Lawn / Garden

Outdoor Grill

Outdoor Grill Gas

Patio

Porch / Veranda

Unscreened Porch / Veranda

Wood Deck

Reviews

4.8 ★★★★★ from **20 traveler reviews**

Write a review

Our Favorite Place on Kauia

★★★★★

Arthur D.
Conroe, TX

We loved Dawn's Song Of the Jungle and look forward to another visit with her in the near future. She has gone to much effort to provide a comfortable and beautiful place for those of us who discover this little piece for paradise. We did not mind the 24 hours of rain in the jungle. My husband says staying at Dawn's place was his favorite part of our two week vacation.

Stayed: March 2015 **Submitted:** May 9, 2015 **Source:** VRBO

Recommended for: Sightseeing, Adventure seekers, Age 55+, Romantic getaway

Was this review helpful? 0 Yes 0 No

It was just what we needed!!

★★★★★

R&T
Grand Forks, BC, Canada

A beautiful secluded location. A variety of beaches nearby, but not so close that we might feel like just another tourist. Peaceful sleeps amid amazing surroundings! Could have spent many more hours relaxing on the quiet deck enjoying the sweet bird songs, the mountain views, the enormous plants and the bright flowering trees. Great clean beach decor inside. A real home away from home. Thank you to Dawn for making our stay in Kauai a wonderful one we will remember forever!

Stayed: March 2015 **Submitted:** April 15, 2015 **Source:** VRBO

Recommended for: Families with young children, Sightseeing, Girls getaway, Age 55+, Romantic getaway

Was this review helpful? 0 Yes 0 No

Rates

Currency Conversion

Rental basis: Per property

Rental rates quoted in: USD *

Dates	Nightly	Weekend Night	Weekly	Monthly *	Event
My Standard Rate 3 night min. stay	$195				

Additional information about rental rates

Fees:

cleaning fee	$175
booking fee	$35
Tax Rate	13.45%

Cancellation policy:

100% refund if canceled at least 90 days before arrival date.

Pay with Confidence

Paying through this free service protects your payment up to $10,000 against listing fraud. If you are not paying through HomeAway Payments always call the owner at the number listed on our website and never use instant money transfer services such as Western Union and MoneyGram.

Don't forget your vacation protection! Get protected now

Adding our Vacation Protection services can make sure your getaway goes smoothly, no matter what. We offer Cancellation Protection, Carefree Rental Guarantee, and Damage Protection so you can truly relax.

- Protect your payments in case you need to cancel.
- Guarantee the rental meets your expectations.
- Ensure you're prepared in case of accidental damage.

Calendar

Last updated: 01/25/2016

Previous Next

January 2016

SU	MO	TU	WE	TH	FR	SA
					1	~~2~~
~~3~~	~~4~~	~~5~~	~~6~~	~~7~~	~~8~~	~~9~~
~~10~~	~~11~~	~~12~~	~~13~~	~~14~~	~~15~~	~~16~~
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~~31~~						

February 2016

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~~28~~	~~29~~					

March 2016

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27	28	29	30	~~31~~		

April 2016

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May 2016

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29	30	31				

June 2016

SU	MO	TU	WE	TH	FR	SA
			1	2	3	4
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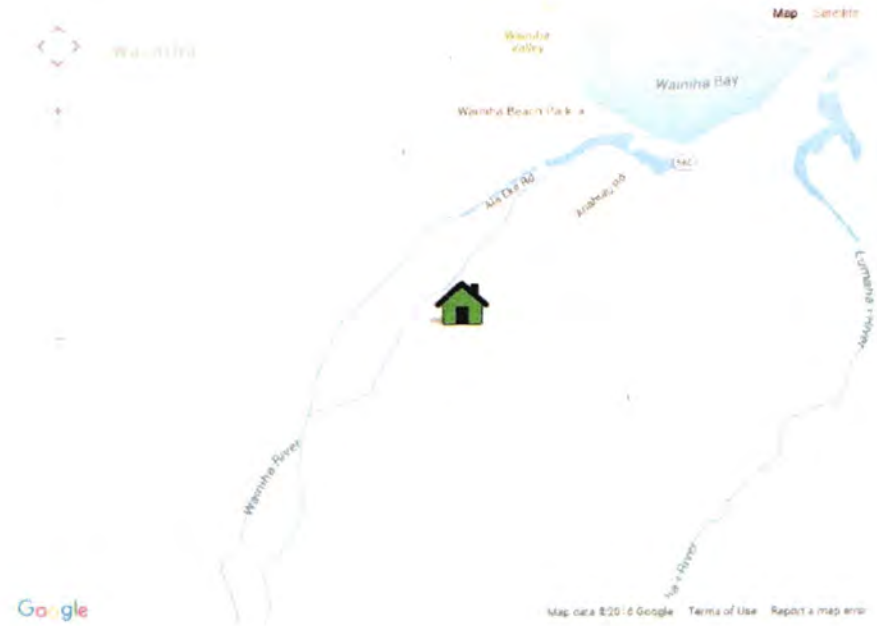
~~12~~	~~13~~	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

23 Available ~~24~~ Unavailable 22 Today 23 Selected dates

Location



Nearest Airport Lihue Airport	40 Miles	**Nearest Barpub** Hanalei	3 Miles	**Nearest Ferry** Nawiliwili	45 Miles
Nearest Golf Prinville	7 Miles	**Nearest Motorway** Kuhio	1 Miles	**Nearest Restaurant** Mediteranea Gourmet (with local lu'au)	2 Miles

Avg. Nightly **$195**

Get an instant quote

Owner info

Year Purchased: 2004

About the owner: .I moved to Kauai with my daughter in 2004 for health reasons. My health greatly improved (Kauai is good for that) and my daughter went back to the mainland to university. This home seemed a bit big for me alone so I began sharing it with travelers , guest house style. I now am blessed to meet amazing people from all around the world. People who chose this place tend to be unique, gentle souls who fit into the local atmosphere with ease and grace. It has been a lot of fun for me.

Why the Owner Chose Hanalei:

I never chose a vacation rental however I chose the house here because I am a world traveller and this place is one of the most amazing places, on many levels , that I have encountered in my life. As the locals say, it has' good mana'

The Unique Benefits at this Bungalow:

I am a writer and a photographer .The possibilities are of what can be captured on film and in words here are , each day, endlessly, timelessly fresh. The ocean, the jungle and the rivers are all right there. And the weather, well, pretty darn easy to take.

Contact us

Speaks: English

Click Here to see All My Rental Listings

Save to my favorites

Owner
Member since: 2007

Send email

Response time	**Within 12 hours**
Response rate	**80%**
Calendar last updated	**01/25/2016**

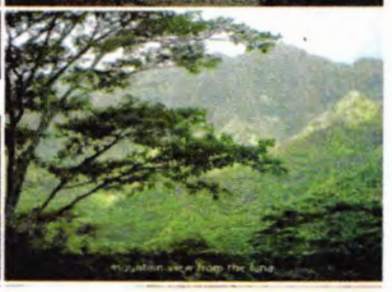
Show phone number

Photos

view of home from lower parking property

driveway up to house

enclosed [illegible] looking out over valley


mountain view from the lanai

[illegible] kitchen out to enclosed lanai

main bathroom with door leading to bathroom

bedroom area with doors to bathroom and lanai

kitchen area with [illegible]

kitchen area

VRBO #130810

This listing was first published here in 2007.

Date last modified - Thursday, January 28, 2016

Andres Emayo

From: Craig Arzadon
Sent: Thursday, May 07, 2015 11:40 AM
To: Andres Emayo
Subject: TMK 5-8-005-005

http://www.vrbo.com/481178 This a link from VRBO for the Round hexagon unit on her property
http://www.vrbo.com/130810 This a link to the main house from VRBO.

Thank you,
Craig Arzadon
Real Estate Appraisal II
County of Kauai- Finance Division
Real Property Assesment Divion
carzadon@kauai.gov
808-241-4231

CONFIDENTIAL COMMUNICATION: This message (and any attachments) is intended only for the use of the designated recipient named above. If the reader of this message is not the intended recipient, you are hereby notified that you have received this document in error, and that any review, dissemination, distribution or copying of this message is strictly prohibited. If you receive this communication in error, please notify us immediately by telephone and delete this message and any attachments. MAHALO.

Bernard P. Carvalho, Jr.
Mayor

Wallace G. Rezentes, Jr.
Managing Director

Michael A. Dahlig
Director of Planning

Ka'āina S. Hull
Deputy Director of Planning

COPY

PLANNING DEPARTMENT
Enforcement Division
County of Kaua'i, State of Hawai'i

4444 Rice Street, Suite A-473, Līhu'e, Hawai'i 96766
TEL (808) 241-4050 FAX (808) 241-6699

ZONING COMPLIANCE NOTICE

JAN 11 2017

CERTIFIED

Patricia D. McConnell
104 Endlich Dr.
Santa Cruz, CA 95060

SUBJECT: Zoning Violation for Transient Accommodation Use at:
4813 Ananalu Rd
TMK: 5-8-005:005

The Planning Department conducted an investigation of the subject property and found the establishment of a vacation rental operation. This is considered a violation of the following provisions of the Comprehensive Zoning Ordinance, Chapter 8, Kaua'i County Code, 1987, as Amended (CZO):

ORDINANCE and VIOLATIONS

1. **Section 8-8.1(b) General Provisions for Homestays**
   Homestay operations are prohibited outside of the Visitor Destination Area (VDA).
2. **Section 8-17.8 Single Family Transient Vacation Rentals.**
   Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, single family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas.

   Violation:
   The unauthorized use of the subject property for Transient Accommodation outside of the designated Visitor Designation Area constitutes a violation.

EXHIBIT C

Pursuant to Chapter 8, Kaua'i County Code, you are directed to comply with the following requirements immediately:

1. **Cease and desist the use of the subject property as a Transient Accommodation(s);**

2. **Cancel all Transient Accommodations commitments for the property.**

Please find attached County Ordinance No. 1002 for your reference. Including but not limited to Section 8-17.8 cited above, Ordinance No. 904 specifically regulates the use and prohibition of homestays on Kauai. (Chapter 8, Kaua'i County Code, 1987, as amended).

Pursuant to County Ordinance No. 919 (also attached), any violation(s) of the Comprehensive Zoning Ordinance (CZO) may result in a fine of up to $10,000.00 and/or up to $10,000.00 per day, should the violation(s) persist. (Chapter 8, Kaua'i County Code, 1987, as amended).

Please contact the Planning Department at 241-4051, or email Bambi Emayo of my staff at aemayo@kauai.gov, within **14** calendar days upon receipt of this letter to provide an acknowledgement of the termination of the subject TVR. Failure to do so provides us with no other alternative but to pursue enforcement action.

KA'AINA S. HULL
Deputy Director of Planning

cc: County Attorney

Attachments

Bernard P. Carvalho, Jr.
Mayor

Wallace G. Rezentes, Jr.
Managing Director

Michael A. Dahlig
Director of Planning

Ka'āina S. Hull
Deputy Director of Planning

COPY

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4444 Rice Street, Suite A-473, Līhu'e, Hawai'i 96766
TEL (808) 241-4050 FAX (808) 241-6699

ZONING COMPLIANCE NOTICE

JAN 11 2017

CERTIFIED

Patricia D. McConnell
104 Endlich Dr.
Santa Cruz, CA 95060

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KA'AINA S. HULL
Deputy Director of Planning

cc: County Attorney

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4444 Rice Street, Suite A-473, Līhu'e, Hawai'i 96766
TEL (808) 241-4050 FAX (808) 241-6699

COPY

CERTIFIED MAIL

NOTICE OF VIOLATION & ORDER TO PAY FINES

MAY 23 2017

Patricia D. McConnell
104 Endlich Dr.
Santa Cruz, CA 95060

Patricia D. McConnell
4813 Ananalu Rd.
Hanalei, HI 96714

SUBJECT: Zoning Violation for Transient Accommodation Use at:
4813 Ananalu Rd
TMK: 5-8-005:005

On March 31, 2017, you received the Department's Zoning Compliance Notice (ZCN). The ZCN instructed you to immediately Cease and Desist the use of the subject property for transient accommodations. You were instructed to cancel all transient accommodation commitments for the property.

On April 12, 2017, the Department met with you (Patricia McConnell), owner and administrator of the transient accommodation operation. The Planning Department confirmed that the continued transient accommodation operation (Homestay) use at the subject property is a violation of the Comprehensive Zoning Ordinance, Chapter 8, Kaua'i County Code, 1987, as Amended (CZO):

ORDINANCE and VIOLATION

1. **Section 8-18.1(b) General Provisions for Homestays**
   Homestay operations are prohibited outside of the Visitor Destination Area (VDA).

Violation:

The Planning Department has confirmed that the subject property is currently being used for a Homestay operation. The continued use of the subject property for a Homestay operation outside of the designated Visitor Designation Area constitutes a violation.

Pursuant to:

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties

(b) Civil Fines

(1) If the Director of the Planning determine that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, by mail or delivery, with an order pursuant to this section. The order may require the party responsible for the violation to do any or all of the following:

(A) Correct the violation within the time specified in the order;

(B) Pay a civil fine not to exceed $10,000 in the manner, at the place, and before the date specified in the order;

(C) Pay a civil fine up to $10,000 per day for each day in which the violation persists, in the manner and at the time and place specified in the order.

(2) The order shall advise the party responsible for the violation that the order shall become final 30 days after the date of its delivery. The order shall also advise that the Director's action may be appealed to the Planning Commission.

(3) The provisions of the order issued by the Director under this section shall become final 30 calendar days after the service of the order. The parties responsible for the violation may appeal the order to the Planning Commission pursuant to its rules. The form of this appeal must conform to the Planning Commission's rules. However, an appeal to the Planning Commission shall not stay any provision of order.

(4) The Director may institute a civil action in any court of competent Jurisdiction for enforcement of any order issued pursuant to this section. Where the civil action has been instituted to enforce the civil fine imposed by said order, the Director need only show that the notice of violation and order were served: that a civil fine was imposed; the amount of the civil fine imposed has not been paid; that either has not been appealed or that if appealed, the order was sustained by the Commission and/or any Court action.

You are herein levied and ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department.

You are hereby ordered to cease and desist the illegal activities being conducted/performed on and from the premises as required by law.

You are hereby ordered to correct the above use violations(s) within 14 days of the date of this notice. Should the violations not be remedied within 14 days from the date of the Notice of Violation & Order to Pay Fines:

- **This matter will be forwarded to the Office of the Prosecuting Attorney;**
- **An additional fine of $10,000 per violation, per day, for each day in which such violation persists shall be levied.**

A written response to the Planning Department within 14 days from the date of this Notice of Violation & Order to Pay Fines to address this issue is mandatory.

Payment of the $10,000 civil fine is also due within 14 days from the date of this notice. Failure to address this issue will provide the Department with no other choice but to continue levying fines each day the violation persists.

This determination may be appealed to the Planning Commission pursuant to Chapter 9 of the Rules of Practice and Procedure of the Planning Commission (RPPPC). The time for any appeal of an action of the Planning Director commences 21 days from the date of the adverse decision (RPPPC Rule1-9-2). An appeal of any action of the Planning Director must contain the requirements of RPPPC Chapter 9 to be considered by the Planning Commission.

The Rules of Practice and procedure of the Planning Commission (RPPPC) are available online through the Planning Department's website at:
http://www.kauai.gov/Government/Departments/PlanningDepartment/tabid/61/Default.aspx.

Should you have any questions, please feel free to contact Supervising Inspector Bambi Emayo (808-241-4051), email at *aemayo@kauai.gov* or call Enforcement Program Manager Michael Laureta (808-241-4071).

KA'AINA S. HULL
Deputy Director of Planning

Cc: Office of the Mayor
County Attorney

INVESTIGATION REPORT

(X) Web Research ( )COMPLAINT ( )REG/RENEWAL ( )REQUEST

BUS. NAME:"THE SONG OF THE JUNGLE"	UNIT/S:	TYPE:
TMK:58005005	LAND AREA:	TV#:
DIST: Hanalei	LOC: Wailapa	
ZONING: O	OWNER: MCCONNELL,PATRICIA D	
SLUC DIST:	MNGR Co.	
LOG #	SITE ADDR:4813 ANANALU RD	

OWNER:	MANAGING COMPANY:
NAME: PATRICIA D, MCCONNELL	NAME: airbnb
ADDR: 104 ENDLICH DR	ADDR:
SANTA CRUZ, CA 95060	
PHONE:	WEB SITE: airbnb "Lani Oli Hale"
WEB SITE:	"The Song of the Jungle"

NATURE OF VIOLATION:

Transient accommodation operation outside of the Visitor

INSPECTOR: Bambi

Notice Of Violation Report 5/16/17

1. Zoning Compliance Notice (ZCN) dated 1/11/17 was issued to Patricia D. McConnell for the establishment of the Transient Accommodation Operation on 4813 Ananalu Rd., TMK: 5-8-005:005, outside of the designated Visitor Designation Area.

2. Meeting response at the Planning Dept. on 4/12/17

   a. Met with Patricia D. McConnell (owner) who conceded to operating a Transient Accommodation at $275 a night.

   b. The Planning Dept. has offered a remedial action plan to rectify the violation. Patricia McConnell has accepted and signed the terms to remediate (Schedule Meeting dated: 4/12/17).

EXHIBIT E

c. Although the owner has agreed to the term to remediate, she has articulated that she will continue the transient accommodation operation until March of 2018.

The owner has made comments that she doesn't intend to cease and desist the use of the subject property as a Transient Accommodation.

3. Letter response on meeting 4/13/17 from Patricia McConnell

a. No documentation submitted to demonstrate that website ads have been terminated.

b. No documentation submitted to demonstrate that all future commitments for use of the property as Transient Accommodation have been terminated.

4. Research of online website www.airbnb.com found the subject transient accommodation still in operation on 5/18/17

https://www.airbnb.com/rooms/12622481

5. Research Finding:

a. Ongoing Homestay operation is located outside of the VDA

b. Ongoing Homestay accommodation operation does not have an applicable permit.

5. Violation Found: K.C.C. 1. Sec- 8-18.1(b)

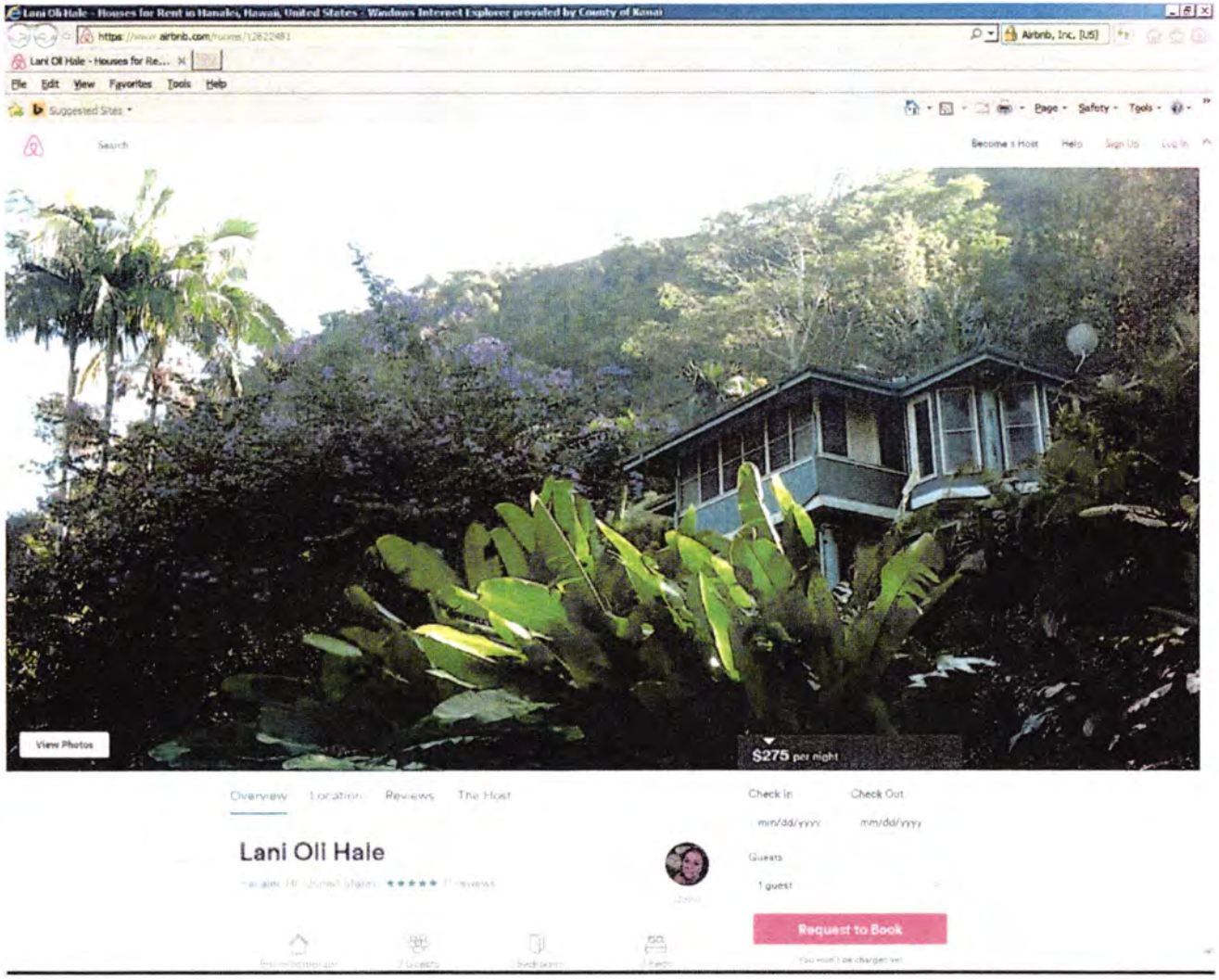
Homestay operations are prohibited outside of the VDA.

Signature:	Date: 5/23/17

Website Information

https://www.airbnb.com/rooms/12622481

TMK 58005005 5/18/17



Lani Oli Hale - Houses for Rent in Hanalei, Hawaii, United States - Windows Internet Explorer provided by County of Kauai

https://www.airbnb.com/rooms/10622481

Airbnb, Inc. [US]

Lani Oli Hale - Houses for Re...

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Page Safety Tools

Overview Location Reviews The Host

About this listing

The Lani Oli Hale is a luxury jungle retreat cottage. Built up high on a hill that overlooks the mountains and jungles of Wainiha Valley. It offers visitors a rare glimpse into the world of yesteryear Hawaii.

Contact host

The space

Accommodates: 2 | Check Out: 10AM

Bathrooms: 1.5 | Pet Owner: Cat(s)

Bedrooms: 2 | Property type: House

Beds: 2 | Room type: Entire home/apt

Check In: Anytime after 4PM

House Rules

Amenities

Kitchen | Family/kid friendly

Internet | Free parking on premises

+ More

Prices

Cleaning Fee: $195 | Weekend Price: $285 / night

Security Deposit: $300

Always communicate through Airbnb
To protect your payment, never transfer money or communicate outside of the Airbnb website or app. Learn more

Description

The space

The Lani Oli is built up on a hillside. It is the main portion of the home and is built on pillars over a large outdoor lanai area. It has surround windows with screens and louvers that can be opened to allow optimum airflow from the trade winds. The windows look out over the mountain, valley and jungles.

Guest access

You will be renting the entire portion of the main home. It is about 1400 sq feet of space and has two bedrooms, a living room, a full
+ More

House Rules

No smoking

$275 per night

Check In: mm/dd/yyyy | Check Out: mm/dd/yyyy

Guests: 1 guest

Request to Book

Save to Wish List

Report this listing

Lani Oli Hale - Houses for Rent in Hanalei, Hawaii, United States - Windows Internet Explorer provided by County of Kauai

https://www.airbnb.com/rooms/12612481

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Lani Oli Hale - Houses for Re...

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Overview Location Reviews The Host

$275 per night

Check In mm/dd/yyyy

Check Out mm/dd/yyyy

Guests

1 guest

Request to Book

You will be charged (...)

Save to Wish List

352 travelers saved this place

Report this listing

Description

The space

The Lani Oli is built up on a hillside. It is the main portion of the home and is built on pillars over a large outdoor lanai area. It has surround windows with screens and louvers that can be opened to allow optimum airflow from the trade winds. The windows look out over the mountain, valley and jungles.

Guest access

You will be renting the entire portion of the main home. It is about 1400 sq feet of space and has two bedrooms, a living room, a full

+ More

House Rules

No smoking

Not suitable for pets

No parties or events

May not be safe or suitable for infants (Under 2 years)

Check in is anytime after 4PM

Guests are asked to remove shoes before entering.
We are in the valley and there is a amphitheater effect so noise is magnified. We ask guests to refrain from playing loud music or TV as we are offering a jungle experience instead. Since we can't hear traffic noise here, only the jungle song birds, river and ocean, we encourage our guests to enjoy this type of experience.

Cancellations

Super Strict 60

Cancel up to 60 days before your trip and get a 50% refund plus service fees back.

View details

Safety features

Smoke detector

Fire extinguisher

Availability

3 nights minimum stay

View calendar

The neighborhood

Dawn's home is located in Hanalei, Hawaii, United States

Overview · Reviews · The Host · Location

$295 per night

Check In mm/dd/yyyy

Check Out mm/dd/yyyy

Guests

1 guest

Request to Book

You won't be charged yet

11 Reviews

Search reviews

Accuracy	★★★★★	Location	★★★★★
Communication	★★★★★	Check In	★★★★★
Cleanliness	★★★★★	Value	★★★★★

Zach
April 2017

Report · Helpful

Awesome spot with magical up close view of the lush landscape of Kauai. Great North Shore location. Quiet and restorative!

Michelle
April 2017

Report · Helpful

Everything in the description is accurate. We had a fantastic stay, can't say enough about the coziness, and good energy we experienced during our stay. I highly recommend.

Save to Wish List

366 travelers saved this place

Report this listing

Search

No time to host? Become a Host Help Sign Up Log In

Hey, I'm Zach!

Palo Alto, California, United States · Joined in April 2013

Report this user

119 Reviews Verified

Verified info

Personal info

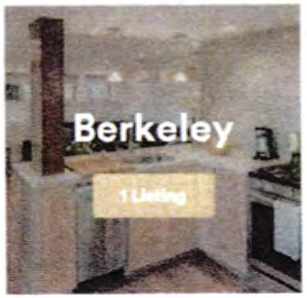
Email address

Phone number

Work email

Learn more »

Wish Lists (2)



Connected accounts

Reviews (119)

Search

No time to host? Become a Host Help Sign Up Log In

Hey, I'm Michelle!

Pennsylvania, United States · Joined in August 2015

Report this user

5 Reviews Verified

Wish Lists (4)

See all

Verified info

Personal info

Email address

Phone number

Learn more »

Reviews (5)

Lani Oli Hale - Houses for Rent in Hanalei, Hawaii, United States - Windows Internet Explorer provided by County of Kauai

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Lani Oli Hale - Houses for Re...

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Suggested Sites

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$275 Per Night

Request to Book

The neighborhood

Dawn's home is located in Hanalei, Hawaii, United States

Open map

Exact location information is provided after a booking is confirmed.

11 Reviews ★★★★★

Search reviews

Accuracy ★★★★★ Location ★★★★★

Letter Response

meeting 4/13/17

April 13th, 2017

17 APR 13 P12:02

RECEIVED

Dear Bambi.

On April 1st , 2017 your currier came to my home at 4813 Ananalu Road, Hanalei, Hi and delivered a letter to me that was from your planning department regarding county ordinances for TVR;s and Homestay B&B's on Kauai and necessary compliance issues,

I'm writing this to acknowledge receipt of that letter and the date it was delivered.

I wish to say mahalo for meeting with me April 12th regarding that letter and the new county ordinances therein. I appreciated the time you gave to me over this issue.

It is my belief , however, that I have not, and have never, been in violation of any of the older county ordinances.

However it is now my understanding that there have been some recent new changes in those county ordinances that may effect my life and property, and that may also require me to make some changes in how I share my home with others.

I have yet to fully research and comprehend all the new ordinances , which I understand are in transition and are still subject to possible ongoing ammendments.

I wish to assure you that i am, and will, make every attempt possible to assure I am in compliance with ordinances that would apply to me and my home here in Kauai.

My Kauai home at 4813 Ananalu Road has been my principle residence since I bought it in 2004.

I will check with the county property tax department in case, as you have informed me, they do not have the correct information regarding my homeowner exemption status and my mailing address.

I did notice that my property taxes have undergone a large increase of late so it is possible they are not applying the appropriate home owner tax exemption for which I qualify,

I am presently seeking advise from sources such as the Mayor's office as to what is required of me and what the procedure is in regards to obtaining use permits and applications for these.

In further information and assistance on this that you can offer would be welcomed and appreciated,

Mahalo Nui Loa

Aloha, Patricia McConnell

808-826-6444

Meeting Notes

date 4/13/17

Schedule Meeting

Date: 4/12/17

17 APR 12 A11:21

RECEIVED

RESPONSE TO:

Zoning Compliance Notice (ZCN), Date: 1/11/17

Notice of Violation and Order to Pay Fines, Date:

TMK: (4) 58005005

Property Address: 4813 ANANALU

Written compliance plan

MET W/ PATRICIA McCONNELL (OWNER)

1) WRITTEN RESPONSE TO ZCN W/ REMEDIAL ACTION PLAN.
2) REMOVE PRIMA FACIE EVIDENCE
3) WORK W/ PLANNING TO RECTIFY VIOLATION

[Removal] SUBMIT BY 4/14/17 TO HOLD FURTHER ENFORCEMENT ACTION.

Time table Date: 4/14/17

____ [Schedule] Site Inspection [Date] ____ [Time] ____

____ [Submission] Zoning Application/ plans/fees Time table Date: ____

____ [Written] Compliance Plan, pending acceptance. Time table Date: ____

Pursuant to County Ordinance No. 919, you are hereby notified that failure to remedy the violation may result in a fine of up to $10,000.00, and/or up to $10,000.00 per day the violation persists, which maybe appealable, pursuant to the rules of the Planning Commission. You may also be subject to criminal prosecution.

Per your signature, failure to comply with your written compliance plan gives this Department no alternative but to issue a Notice of Violation and Order to Pay Fines and refer this matter to the County and Prosecuting Attorney's Office.

PATRICIA D. McCONNELL — Signature

04/12/17 — Date

Planning Department Official

4/12/17 — Date

Patricia D, McConnell

TMK: 58005005 4813 Ananalu Rd. Wailapa

RE: Meeting to rectify violations on subject property

Date: 4/12/2017

On April 12, 2017 the Planning Department met with the property owner (Patricia D, McConnell) in response to the compliance notice dated January 11, 2017. The following attended; Bambi Emayo, Patricia McConnell, and Britni Ludington-Braun.

The following are notes and observations of said meeting:

- In the meeting Patricia told us that she will be running her operations till March 2018.
- Patricia doesn't see how she has a violation because according to her, the government keep changing the laws.
- On a couple accounts in the meeting Patricia threated, "if we stop her from operating she's going to take off her clothes, leave them on the beach, and swim out to the sharks and let them eat her."
- Patricia also made a racist remark implying that the Planning Department are trying to get rid of the haole people.
- Patricia made a comment to Bambi Emayo that he is heartless for stopping her from operating.
- Patricia said she is going to work with the Planning Department toward zoning compliance
- It is noted, no remedial action plan has been agreed upon. The violator (Patricia McConnell) is reluctant to correct the noted violations.

These are my observations noted.

BRITNI LUDINGTON-BRAUN

ADU/TVR Enforcement Specialist

Patricia D. McConnell

TMK: 58005005 4813 Ananalu Rd. Wailapa

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BRITNI LUDINGTON-BRAUN

ADU/TVR Enforcement Specialist

EXHIBIT F

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a copy of RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S EXHIBIT LIST; EXHIBITS A – F, was duly served by email and depositing the same in the U.S. mail, postage prepaid, upon the following:

Gregory W. Kugle, Esq.
Joanna C. Zeigler, Esq.
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Attorney for Planning Commission
of the County of Kaua'i

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Email: hyk@harlankimuralaw.com

Hearing Officer for the
Planning Commission of the County of Kaua'i

DATED: Līhu'e, Kaua'i, Hawai'i, August 23, 2019.

MATTHEW M. BRACKEN
County Attorney

By msasaki
MARYANN SASAKI
Deputy County Attorney

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
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Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **PETITIONER PATRICIA McCONNELL'S PREHEARING STATEMENT; CERTIFICATE OF SERVICE** HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

PETITIONER PATRICIA McCONNELL'S PREHEARING STATEMENT

Petitioner PATRICIA McCONNELL ("Petitioner") by and through her attorneys Damon Key Leong Kupchak Hastert, hereby submits this Prehearing Statement.

I. INTRODUCTION

Petitioner owns a single family home in Wainiha, Kauai, Hawaii, which she bought in 2004 with the intention of renting part of her home for additional income, which was perfectly legal at the time and she continued to do so for many years. It was not until 2016, when the County amended the Kauai County Code, Comprehensive Zoning Ordinance ("CZO") that this type of rental now known as a homestay was ever regulated. At that point, because Petitioner operated a homestay prior to the CZO amendment, the use was nonconforming and she was entitled to continue that lawful use.

Despite the fact that Petitioner represented to the County that she had a nonconforming use, in 2017, the Planning Department proceeded to issue a Notice of Violation ("NOV") and ordered her to pay a $10,000 fine, stating that she violated the new homestay ordinance, which limited homestays to the so-called visitor destination area.

There are two main problems with the Planning Department's issuance of the NOV to Petitioner. First, pursuant to state statute and county ordinance Petitioner is entitled to the continued lawful use of her property that existed prior to the amendment of the CZO. A nonconforming use is also a vested property right protected by the United States and Hawaii Constitution. Thus, the Planning Department cannot disregard Petitioner's property rights by issuing the NOV. Second, the NOV is defective for several reasons: (1) it violates Petitioner's due process rights; (2) it violates CZO § 8-3.5(b)(1); and (3) it attempts to implement an excessive fine.

Therefore, the NOV should be deemed invalid and Petitioner's homestay use recognized as a lawful nonconforming use.

II. BACKGROUND

A. Applicable Provisions And Amendments Of Kauai County Code.

The CZO defines two types of transient accommodations. A transient vacation rental ("TVR") means an entire dwelling is provided to transient occupants for compensation or fees for less than 180-days. CZO § 8-1.5. Whereas a homestay "means an owner occupied dwelling unit which overnight accommodations are provided to transient guests within the same dwelling unit in which the owner resides[.]" *Id.* Transient "means any person who owns, rents, or uses a dwelling unit or a portion thereof for one hundred eighty (180) days or less[.]" *Id.*

Prior to 2008, TVRs and homestays were not regulated. In 2008, the County of Kauai passed Ordinance 864, which limited all new TVRs to the so-called visitor destination area. Ordinance 864 also required registration of all TVRs that were operating prior to the passage of the ordinance and required owners to obtain a nonconforming use certificate ("NCUC"). Ordinance 864 explicitly stated, however, "[t]his bill does not apply to [a] bed and breakfast unit ("Homestay"). It is the intention of the Council to address these units as a separate matter after establishing a regulatory framework for single-family transient vacation rentals."

In 2016, Ordinance 1002 passed, which provided: "The purpose of this bill is to restrict homestay operations to the Visitor Destination Areas (VDAs) and to establish additional standards under which homestays operate." Unlike Ordinance 864 for TVRs, Ordinance 1002 did not require a property owner who operated a homestay prior to the passage of the ordinance to register the nonconforming use or obtain a NCUC for the property. In fact, Ordinance 1002 did not address nonconforming uses at all. Ordinance 1002 only addressed new homestay operations stating:

On a first-come-first-serve basis of applications deemed complete by the Planning Department, no more than ten (10) new applications for homestay operations shall be accepted for review by the Planning Commission in each of the calendar years 2015 and 2016. The limitation on the number of applications shall expire on December 31, 2016, or upon passage of an amendment to this section, whichever occurs first.

Currently, CZO § 8-18.1 provides in pertinent part:

(a) A homestay operation shall operate under the following regulations:
  (1) Transient accommodations are provided for visitors for twenty-nine (29) days or less;
  (2) Homestays shall be limited to no more than three (3) guest rooms per homestay operation;

. . . .

(b) Homestay operations are prohibited outside of the Visitor Destination Area (VDA).

B. Petitioner Bought Her Home With The Intention Of Renting It As A Homestay.

In 2004, Petitioner bought her property located in Wainiha, Kauai with the intention of renting rooms in her home to supplement her income, as Petitioner is disabled and can no longer work as nurse. In 2005, the Planning Department informed Petitioner that all she needed to obtain to lawfully operate her rental was a Transient Accommodation Tax license and a General Excise Tax license, and she did so. In 2006, Petitioner began lawfully renting rooms in her home.

In 2008, when Ordinance 864 passed, Petitioner attempted to obtain a NCUC from the Planning Department, but was informed that she was not eligible because the ordinance did not apply to homestays. Further, because Petitioner already operated her homestay prior to the passage of Ordinance 1002, the newly implemented homestay permitting process did not apply to her.

C. The Planning Department Issued A Notice of Violation.

Despite the fact that Petitioner had lawfully rented rooms in her home prior to the amendment to the CZO and informed the Planning Department of such, Petitioner received a

"Notice of Violation & Order to Pays Fines" ("NOV") dated May 23, 2017. The NOV states: "On April 12, 2017, the Department met with you (Patricia McConnell), owner and administrator of the transient accommodation operation. The Planning Department confirmed that the continued transient accommodation operation (Homestay) use at the subject property is a violation of the Comprehensive Zoning Ordinance, Chapter 8, Kauai County Code," citing CZO § 8-18.1(b). Under the word "Violation," the NOV states, "The Planning Department has confirmed that the subject property is currently being used for a Homestay operation. The continued use of the subject property for a Homestay operation outside the designated Visitor Destination Area constitutes a violation." Finally, the NOV provides:

> You are herein levied and ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department.
>
> You are hereby ordered to cease and desist the illegal activities being conducted/performed on and from the premises as required by law.
>
> You are hereby ordered to correct the above use violations(s) within 14 days of the date of this notice. Should the violations not be remedied within 14 days from the date of the Notice of Violation & Order to Pay Fines:
>
> - This matter will be forwarded to the Office of the Prosecuting Attorney;
> - An additional fine of $10,000 per violation, per day for each day in which such violation persists shall be levied.

Although the NOV notes that the Planning Department met with Petitioner, it disregards the fact that Petitioner informed the Planning Department that she had been renting her property since long before the 2016 amendment to the CZO limiting homestays to the visitor destination area and thus was "grandfathered" in as a nonconforming use. Despite having knowledge of Petitioner's prior use of her property, the Planning Department issued the NOV.

On June 9, 2017, Petitioner timely appealed from the NOV to the Planning Commission.

III. QUESTIONS PRESENTED

1. Does Petitioner have a lawful nonconforming use because she operated her homestay prior to the amendment of the CZO, thereby making the NOV unenforceable?

2. Is the NOV defective such that it is invalid?

IV. ARGUMENT

A. Petitioner's Homestay Operation Is A Nonconforming Use.

The Planning Department disregarded the fact that Petitioner's homestay use is a nonconforming use. Haw. Rev. Stat. § 46-4 "sets forth the general parameters for the exercise of a county's zoning powers." *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw, 343, 352, 949 P.2d 183, 192 (App. 1997). It provides the counties with authority to establish zoning districts and requires the counties to "prescribe rules, regulations, and administration procedures" to enforce the zoning ordinances. Haw. Rev. Stat. § 46-4(a). This enabling act prohibits a county zoning code from preventing a continued lawful use:

> Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses.

Id. (emphasis added).[1]

Consistent with the requirements of Haw. Rev. Stat. § 46-4(a), Kauai's CZO defines a nonconforming use as a use that "may continue to the extent that the use existed on September 1,

[1] It is undisputed that Petitioner's property is not in commercial, industrial, resort or apartment zoned areas. It is also undisputed that the CZO provisions applied to Petitioner's property does not provide for amortization or phasing out of a homestay nonconforming use. Even if the CZO provided for amortization or phasing out of lawful nonconforming homestay use, that provision would violate Haw. Rev. Stat. § 46-4(a) which prohibits the amortization or phasing out of existing premises used for single-family residential purposes, such as Petitioner.

1972 or any amendment thereto." CZO § 8-13.2(a). Not only are nonconforming uses protected by state statute and county ordinance, they are constitutionally protected vested property rights. "[T]he right of a property owner to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction is grounded in constitutional law." *Waikiki Marketplace*, 86 Haw. at 353, 949 P.2d at 193. Further, the Fifth Amendment of the United States Constitution and Article I, § 5 of the Hawaii Constitution both provide that no person shall be deprived of property without due process of law, nor have property rights taken or damaged without compensation. *Id.* "Therefore, due process principles protect a property owner from having his or her vested property rights interfered with and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate." *Id.*

Petitioner used her property as a homestay long before the County amended the CZO in 2016 to limit homestays to the visitor destination area. Thus, Petitioner's homestay use is a nonconforming use and the CZO cannot prohibit the continued lawful use. Like most nonconforming uses on Kauai, the only exception being TVRs, the CZO does not require Petitioner to register her nonconforming use or to obtain an NCUC for her nonconforming use. Given that Petitioner's homestay was a nonconforming use at the time the Planning Department issued the NOV, the NOV was issued in error and is therefore unenforceable.

B. The NOV Is Defective In Many Respects.

1. The NOV violates Petitioner's due process rights.

In addition to the NOV being issued in error because Petitioner's homestay use is a nonconforming use, the NOV itself is defective in many respects. First, it does not provide notice to Petitioner of the specific violation, it only speaks in general terms of what the CZO provides. Both the Federal and State Constitutions provide that "No person shall be deprived of

life, liberty or property without due process of law...." Haw. Const. Art. I, § 5; *see* U.S. Const. amend. XIV cl. 1. Due process provides both substantive and procedural protections. "The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 389, 363 P.3d 224, 237 (2015). "The requirement of procedural due process exists to protect individuals against the state's deprivation of liberty and property interests." *Brown v. Thompson*, 91 Haw. 1, 9, 979 P.2d 586, 594 (1999). The NOV alleges that a violation of the CZO occurred, but provides no specific facts to support the claim. For example, the NOV does not provide a date of when the violation occurred or what specific evidence supports the NOV. Petitioner is entitled to notice of what the Planning Department is basing the NOV on prior to the deprivation of her protected property interests and payment of a substantial fine. Further, because Petitioner was not given discovery and to date her Uniform Information Practices Act ("UIPA") request for documents has gone unanswered by the Planning Department, she has nothing to base her appeal on other than the NOV itself, to present her defense. Because the NOV gives no supporting information, it does not provide Petitioner with proper notice of any violation.

The NOV also violates Petitioner's substantive due process rights. Substantive due process "guards against arbitrary and capricious government action, even when the government takes that action pursuant to a facially constitutional law. To establish an 'as applied' violation of substantive due process, an aggrieved person must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *In re Herrick*, 82 Haw. 329, 349, 922 P.2d 942, 962 (1996). The Planning Department acted erroneously, arbitrarily, and manifestly abused its discretion when it issued the NOV because there is nothing in the NOV that provides support for an actual

violation. The Planning Department further ignored Petitioner's representations that she had rented her property as a homestay prior to the amendment in the CZO limiting homestays to the visitor destination area. Because Petitioner established that she had rented the property prior to the change in the CZO, the burden shifts to the Planning Department to show that the use no longer exists. *See Van Sant v. City of Everett*, 849 P.2d 1276, 1280 (Wash. Ct. App. 1993). Here, the Planning Department disregarded Petitioner's prior use (and thus never attempted to show that it had been abandoned) and instead issued the NOV without consideration of Petitioner's protected property rights.

Furthermore, the Intermediate Court of Appeals has made clear that a notice of violation for an alleged unpermitted transient vacation rental must be supported by "credible evidence of a sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." *Dao v. Zoning Board of Appeals*, 144 Hawaii 28, 44, 434 P.3d 1223, 1239 (App. 2019) (*citing Price v. Zoning Board of Appeals*, 77 Hawaii 168, 883 P.2d 629 (1994)). *Dao* held that a notice of violation for illegal transient vacation rental based on nothing more than an anonymous complaint, and lacking any personal corroborating observations by the investigator, no neighbor confirmation, no investigation or attempt to corroborate the anonymous statement, and no details of a monetary transaction or other indicia of compensation, was insufficient as a matter of law to sustain the violation. *Dao* applies to the subject NOV.

2. The NOV violates CZO § 8-3.5.

Second, the NOV violates the requirements of the CZO, which requires the notice of violation and order be two separate actions. CZO § 8-3.5(b)(1) provides: "If the Director of the Planning Department determines that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, by mail or delivery, with an order pursuant to this Section." Here, Petitioner received a "Notice of

Violation" and "Order to Pay Fines" in one letter. Under the CZO the Planning Department must first give notice of a finding of a violation and then if the violation is not cured enter an order, which may require the payment of a fine.

3. The NOV imposes and excessive fine.

Third, the NOV purports to fine Petitioner $10,000, in violation of both the United States and Hawaii constitutions prohibiting excessive fines. *See* Haw. Const. Art. I, § 12 ("nor excessive fines imposed"); *see also Timbs v. Indiana*, 139 S. Ct. 682 686 (2019) ("the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition."). CZO § 8-17.6 provides that a fine pursuant to Article 17 shall "not be less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000.00) for each offense." Not only does the Planning Department not put Petitioner on notice of what the NOV is based on and thus provides no evidence of any violation, it does not provide any support for imposing the maximum fine under the CZO, especially considering Petitioner has never in the past received a NOV for her property and even more importantly has a vested nonconforming use.

Moreover, *Price v. Zoning Board of Appeals*, 77 Hawaii 168, 883 P.2d 629 (1977) makes clear that a fine cannot be imposed without due process. Further, Haw. Rev. Stat. § 46-1.5(24)(A) makes clear that a county cannot impose a fine for violation of an ordinance unless it has provided reasonable notice and a request to correct. The NOV in this case violates both of these requirements.

Looking beyond the fact that Petitioner has a lawful nonconforming use, given the serious defects of the NOV, it is not enforceable on its face and is therefore invalid.

V. CONCLUSION

Petitioner respectfully requests that the Hearing Officer recommend that the NOV is invalid and unenforceable and Petitioner's property recognized as a nonconforming use.

DATED: Honolulu, Hawaii, August 23, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon the following individuals by emailing and mailing said copy, postage prepaid, to their last known address as follows:

NICHOLAS COURSON
Deputy County Attorney
Office of the County Attorney
4444 Rice Street, Suite 220
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Email: ncourson@kauai.gov
Attorney for the
PLANNING COMMISSION OF THE
COUNTY OF KAUAI

MARYANN SASAKI, ESQ.
Deputy County Attorney
Office of the County Attorney
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Lihue, Hawai'i 96766
Email: msasaki@kauai.gov
Attorney for KAAINA HULL
DIRECTOR, COUNTY OF KAUAI,
DEPARTMENT OF PLANNING

HARLAN Y. KIMURA, ESQ.
220 S King Street, Suite 1600
Honolulu, Hawaii 96813
Email: hyk@harlankimuralaw.com
HEARING OFFICER, PLANNING
COMMISSION OF THE COUNTY OF KAUAI

ELLEN CHING
ANELA SEGRETI
Boards and Commissions
4444 Rice Street, Suite 150
Lihue, Hawaii 96766
Email: asegreti@kauai.gov

DATED: Honolulu, Hawaii, August 23, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

GREGORY W. KUGLE 6502-0
JOANNA C. ZEIGLER 10426-0
1003 Bishop Street, Suite 1600
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http://www.hawaiilawyer.com
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Facsimile: (808) 533-2242

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **PETITIONER PATRICIA McCONNELL'S WITNESS LIST; CERTIFICATE OF SERVICE** HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

PETITIONER PATRICIA McCONNELL'S WITNESS LIST

Petitioner PATRICIA McCONNELL, by and through her attorneys, Damon Key Leong Kupchak Hastert, hereby files this Witness List, identifying the following witnesses she intends to call at the contested case hearing in this matter.

1. Petitioner Patricia McConnell
   c/o Gregory W. Kugle, Esq.
   Joanna C. Zeigler, Esq.
   Damon Key Leong Kupchak Hastert
   1003 Bishop Street, Suite 1600
   Honolulu, HI 963813

2. Michael Laureta
   c/o Maryann Sasaki
   Office of the County Attorney
   4444 Rice St., Suite 220
   Lihue, Hawaii 96766

3. Britni Ludington-Braun
   c/o Maryann Sasaki
   Office of the County Attorney
   4444 Rice St., Suite 220
   Lihue, Hawaii 96766

4. Bambi Emayo
   c/o Maryann Sasaki
   Office of the County Attorney
   4444 Rice St., Suite 220
   Lihue, Hawaii 96766

These witnesses are expected to testify regarding their knowledge of the Petitioner's property and the use of the home thereon, including without limitation, any investigations conducted regarding the property.

The Petitioner also names all witnesses identified in the Planning Department's witness list and all lay witnesses to rebut the testimony of any witnesses designated in the Planning Department's witness list, and any amendments or supplements thereto.

DATED: Honolulu, Hawaii, August 23, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	)	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon the following individuals by emailing and mailing said copy, postage prepaid, to their last known address as follows:

NICHOLAS COURSON
Deputy County Attorney
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4444 Rice Street, Suite 220
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PLANNING COMMISSION OF THE
COUNTY OF KAUAI

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Attorney for KAAINA HULL
DIRECTOR, COUNTY OF KAUAI,
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ELLEN CHING
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4444 Rice Street, Suite 150
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DATED: Honolulu, Hawaii, August 23, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
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Facsimile: (808) 533-2242

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **PETITIONER PATRICIA McCONNELL'S EXHIBIT LIST; EXHIBITS "1" – "5"; CERTIFICATE OF SERVICE** HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

PETITIONER PATRICIA McCONNELL'S EXHIBIT LIST

Petitioner PATRICIA McCONNELL, by and through her attorneys, Damon Key Leong Kupchak Hastert, hereby files this Exhibit List, identifying the following exhibits Petitioner intends to introduce at the contested case hearing in this matter. Petitioner reserves the right to supplement the following exhibits prior to or during the hearing for the purposes of rebuttal.

Exhibit No.	Description of Exhibit
1	Notice of Violation & Order To Pay Fines
2	Ordinance 1002
3	Letter from Petitioner to Planning Department evidencing good faith effort to comply with the law and that Petitioner informed the Planning Department of her lawful homestay use prior to the change in the ordinance.
4	2005 GET Tax Return
5	Tax Return Evidencing GET and TAT continuous rental income between 2007 and 2015

DATED: Honolulu, Hawaii, August 23, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

Bernard P. Carvalho, Jr.
Mayor

Wallace G. Rezentes, Jr
Managing Director

Michael A. Dahilig
Director of Planning

Ka'āina S. Hull
Deputy Director of Planning

PLANNING DEPARTMENT
Enforcement Division
County of Kaua'i, State of Hawai'i
4444 Rice Street, Suite A-473, Līhu'e, Hawai'i 96766
TEL (808) 241-4050 FAX (808) 241-6699

CERTIFIED MAIL

NOTICE OF VIOLATION & ORDER TO PAY FINES

Patricia D. McConnell
104 Endlich Dr.
Santa Cruz, CA 95060

MAY 23 2017

Patricia D. McConnell
4813 Ananalu Rd.
Hanalei, HI 96714

SUBJECT: **Zoning Violation for Transient Accommodation Use at:**
4813 Ananalu Rd
TMK: 5-8-005:005

On March 31, 2017, you received the Department's Zoning Compliance Notice (ZCN). The ZCN instructed you to immediately Cease and Desist the use of the subject property for transient accommodations. You were instructed to cancel all transient accommodation commitments for the property.

On April 12, 2017, the Department met with you (Patricia McConnell), owner and administrator of the transient accommodation operation. The Planning Department confirmed that the continued transient accommodation operation (Homestay) use at the subject property is a violation of the Comprehensive Zoning Ordinance, Chapter 8, Kaua'i County Code, 1987, as Amended (CZO):

ORDINANCE and VIOLATION

1. **Section 8-18.1(b) General Provisions for Homestays**
   Homestay operations are prohibited outside of the Visitor Destination Area (VDA).

EXHIBIT "1"

Violation:

The Planning Department has confirmed that the subject property is currently being used for a Homestay operation. The continued use of the subject property for a Homestay operation outside of the designated Visitor Designation Area constitutes a violation.

Pursuant to:

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties

(b) Civil Fines

(1) If the Director of the Planning determine that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, by mail or delivery, with an order pursuant to this section. The order may require the party responsible for the violation to do any or all of the following:

(A) Correct the violation within the time specified in the order;

(B) Pay a civil fine not to exceed $10,000 in the manner, at the place, and before the date specified in the order;

(C) Pay a civil fine up to $10,000 per day for each day in which the violation persists, in the manner and at the time and place specified in the order.

(2) The order shall advise the party responsible for the violation that the order shall become final 30 days after the date of its delivery. The order shall also advise that the Director's action may be appealed to the Planning Commission.

(3) The provisions of the order issued by the Director under this section shall become final 30 calendar days after the service of the order. The parties responsible for the violation may appeal the order to the Planning Commission pursuant to its rules. The form of this appeal must conform to the Planning Commission's rules. However, an appeal to the Planning Commission shall not stay any provision of order.

(4) The Director may institute a civil action in any court of competent Jurisdiction for enforcement of any order issued pursuant to this section. Where the civil action has been instituted to enforce the civil fine imposed by said order, the Director need only show that the notice of violation and order were served: that a civil fine was imposed; the amount of the civil fine imposed has not been paid; that either has not been appealed or that if appealed, the order was sustained by the Commission and/or any Court action.

You are herein levied and ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department.

You are hereby ordered to cease and desist the illegal activities being conducted/performed on and from the premises as required by law.

You are hereby ordered to correct the above use violations(s) within 14 days of the date of this notice. Should the violations not be remedied within 14 days from the date of the Notice of Violation & Order to Pay Fines:

- **This matter will be forwarded to the Office of the Prosecuting Attorney;**
- **An additional fine of $10,000 per violation, per day, for each day in which such violation persists shall be levied.**

A written response to the Planning Department within 14 days from the date of this Notice of Violation & Order to Pay Fines to address this issue is mandatory.

Payment of the $10,000 civil fine is also due within 14 days from the date of this notice. Failure to address this issue will provide the Department with no other choice but to continue levying fines each day the violation persists.

This determination may be appealed to the Planning Commission pursuant to Chapter 9 of the Rules of Practice and Procedure of the Planning Commission (RPPPC). The time for any appeal of an action of the Planning Director commences 21 days from the date of the adverse decision (RPPPC Rule1-9-2). An appeal of any action of the Planning Director must contain the requirements of RPPPC Chapter 9 to be considered by the Planning Commission.

The Rules of Practice and procedure of the Planning Commission (RPPPC) are available online through the Planning Department's website at:
http://www.kauai.gov/Government/Departments/PlanningDepartment/tabid/61/Default.aspx.

Should you have any questions, please feel free to contact Supervising Inspector Bambi Emayo (808-241-4051), email at *aemayo@kauai.gov* or call Enforcement Program Manager Michael Laureta (808-241-4071).

KA'AINA S. HULL
Deputy Director of Planning

Cc: Office of the Mayor
County Attorney

ORDINANCE NO. 1002 BILL NO. 2619, Draft 2

A BILL FOR AN ORDINANCE AMENDING CHAPTER 8, KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO HOMESTAYS

(County of Kaua'i, Applicant)

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUA'I, STATE OF HAWAI'I:

SECTION 1. Findings and Purpose: The Council finds the 2000 Kaua'i General Plan recognized the need "to develop a clear policy regarding B&Bs and vacation rentals." The General Plan recommended an implementing action to amend the CZO to facilitate the permitting of existing, nonconforming alternative visitor accommodations. The Council complied with the policy of the General Plan and grandfathered existing single-family transient vacation rentals (SFTVRs) that registered and met the prior use requirements established in Article 17 of the CZO.

In Ordinance No. 864, the Council further found that:

> This bill does not apply to a bed and breakfast unit ("Homestay"). It is the intention of the Council to address these units as a separate matter after establishing a regulatory framework for single-family transient vacation rentals. Homestays are presently regulated through the use permit process.

Although the Council bifurcated the issues of homestays and SFTVRs, it is now appropriate to adopt a clear and specific standard and review parameters under which homestay applications can be processed.

The purpose of this bill is to restrict homestay operations to the Visitor Destination Areas (VDAs) and to establish additional standards under which homestays operate.

SECTION 2. Chapter 8, Article 2, Section 8-2.4 of the Kaua'i County Code 1987, as amended, is hereby amended by adding two uses to the "Table of Uses" to read as follows:

EXHIBIT "2"

"ARTICLE 2. DESIGNATION OF DISTRICTS, METHOD AND EFFECT OF ESTABLISHMENT OF DISTRICTS, AND ZONING MAPS

Table 8-2.4 TABLE OF USES

Sec.	USE	ZONING DISTRICT								
		Residential			Commercial		Industrial			
		R-1 to R-6	R-10 to R-20	RR	CN	CG	IL	IG	AG	O
8-2.4(u)(1)	Homestay									
8-2.4(u)(2)	**Homestay located in the Visitor Destination Area (VDA), pursuant to Article 18 of this Chapter**	P	P	P	P	P"				

SECTION 3. Chapter 8, Article 18, Section 8-18.1 of the Kaua'i County Code 1987, as amended, is hereby amended to read as follows:

"Sec. 8-18.1 General Provisions for Homestays

[On a first-come-first-serve basis of applications deemed complete by the Planning Department, no more than ten (10) new applications for homestay operations shall be accepted for review by the Planning Commission in each of the calendar years 2015 and 2016. The limitation on the number of applications shall expire on December 31, 2016, or upon passage of an amendment to this section, whichever occurs first. No homestay may be operated on land located in the State Land Use Agricultural District unless the owner obtains a special permit pursuant to Section 205-6 of the Hawai'i Revised Statutes.]

(a) A homestay operation shall operate under the following regulations:

(1) Transient accommodations are provided for visitors for twenty-nine (29) days or less;

(2) Homestays shall be limited to no more than three (3) guest rooms per homestay operation;

(3) During homestay operations, the owner(s) benefiting under Sec. 5A-11 of this Code for a homeowner's exemption for the homestay site must be physically within the County of Kaua'i, residing at the homestay operation site, and physically available for the needs and concerns of their respective homestay guests; and

(4) No other individual or designated representative may act on the owner(s) behalf to meet the requirements of Sec 8-18.1(a)(3).

(b) Homestay operations are prohibited outside of the Visitor Destination Area (VDA)."

SECTION 4. Chapter 8, Article 18, of the Kaua'i County Code 1987, as amended, is hereby amended by adding a new Section 8-18.2 to read as follows:

"**Sec 8-18.2 Development Standards for Homestays**

Development standards for homestay operations shall be the same as those for residential dwellings in Section 8-4.5 through 8-4.8 of this Code, inclusive, with the following additions:

(a) Each bedroom used for homestay purposes shall require one (1) additional paved and designated off-street parking stall;

(b) At a minimum, the residential structure(s) used for the homestay operation shall be serviced by a septic system approved by the State Department of Health;

(c) The owner(s) benefitting under Sec. 5A-11 of this Code for a homeowner's exemption for the respective homestay site shall be available on a 24-hour, 7-days-per-week basis during homestay operations. The owner(s) shall provide the name and contact information to neighbors adjacent to and directly across the subject homestay, the Planning Department, the Kaua'i Police Department, the Kaua'i Civil Defense Agency, and the Kaua'i Visitors Bureau upon issuance of a homestay zoning permit;

(d) One (1) outdoor sign no larger than one (1) square foot shall be posted in a visible place on a wall, fence, or post immediately inside or on the front boundary of the property where it is easy to see, for the purpose of providing the current homestay zoning permit number and the 24-hour contact information. No other signs shall be allowed and there shall be no direct illumination of the required sign. The numbers on the sign shall be no smaller than two inches (2") in height;

(e) The homestay operator shall provide a list of requirements and information entitled "For the Safety and Comfort of You and Your Neighbors." This shall provide essential information to the visitor and shall seek to reduce negative impacts on the surrounding neighborhood. This information piece shall be provided to the Planning Department at time of application and shall be posted in a conspicuous place in the guest's sleeping quarters along with a copy of the zoning permit number. The list shall include, but not be limited to, suggested curfews, guidance with respect to the character of the neighborhood and gatherings and noise, and what to do in cases of emergency and natural disaster. For those homestays located in the tsunami evacuation zone, renters must be informed that the homestay is located in the tsunami evacuation zone and of the corresponding evacuation procedures;

(f) All print and internet advertising for homestay operations, including listings with a rental service or real estate firm, shall include the zoning permit number and give notice that the homestay operation is located in the tsunami evacuation zone where applicable;

(g) A copy of the zoning permit shall be displayed on the back of the front door of the sleeping quarters; and

(h) A site and floor plan shall be filed with the application."

SECTION 5. Chapter 8, Article 18, of the Kaua'i County Code 1987, as amended, is hereby amended by adding a new Section 8-18.3 to read as follows:

"**Sec. 8-18.3 Renewal of Homestay Zoning Permits**

A property owner that has obtained a homestay zoning permit shall apply to renew the zoning permit annually on the date of issuance of the homestay zoning permit in accordance with the following regulations:

(a) Each application to renew shall include proof that there is currently a valid State of Hawaii general excise tax license and transient accommodations tax license for the homestay operation. Failure to meet this condition will result in the automatic denial of the application for renewal of the homestay zoning permit(s). The applicant may reapply for renewal within the annual time allotment by presenting a currently valid State of Hawaii general excise tax license and transient accommodation tax license for the homestay operation;

(b) Each application to renew shall include proof that the primary residential structure(s) used for the homestay operation is the owner's primary residence, and the respective owner is benefiting under Sec. 5A-11 of this Code for a

homeowner's exemption for the homestay site in the year preceding the date of renewal;

(c) Upon renewal, the Planning Department may initiate re-inspection of properties for compliance with other provisions of this chapter or other pertinent land use laws, and may withhold approval of a renewal application and issue cease and desist notices to the applicant until all violations have been resolved;

(d) The applicant shall pay a renewal fee of seven hundred fifty dollars ($750.00) to the Director of Finance. All renewal fees shall be deposited to the Transient Accommodation Enforcement Account within Fund 251; and

(e) Enforcement of this section shall be subject to Section shall be 8-3.5 of the Kauai County Code 1987, as amended."

SECTION 6. Chapter 8, Article 18, of the Kaua'i County Code 1987, as amended, is hereby amended by adding a new Section 8-18.4 to read as follows:

"**Sec. 8-18.4 Transient Accommodation Enforcement Account**

There is hereby established and created an account to be known as the "Transient Accommodation Enforcement Account" within Fund 251. The fees collected pursuant to Section 8-18.3 are hereby deemed appropriated upon receipt and may be expended to retain independent contractors to assist in the enforcement of illegally operating transient accommodations. The fees may also be expended for materials, supplies, equipment, and training that facilitate inspection and enforcement of such violations. Council notification is required for any single expenditure from this account which exceeds $10,000. Any fines collected when the account has an excess of $250,000.00 in uncommitted funds shall be transferred and deposited into the General Fund at the close of the fiscal year. The Planning Department shall annually report to the Council, as part of the Mayor's budget submittal on March 15 of each year, the expenditures and outcomes of said account."

SECTION 7. If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this Ordinance are severable.

SECTION 8. Ordinance material to be repealed is bracketed. New ordinance material is underscored. When revising, compiling, or printing this ordinance for inclusion in the Kaua'i County Code 1987, the brackets, bracketed material, and underscoring need not be included.

SECTION 9. This Ordinance shall take effect upon its approval.

Introduced by: /s/ MASON K. CHOCK
(By Request)

DATE OF INTRODUCTION:

March 9, 2016

Līhu'e, Kaua'i, Hawai'i
V:\BILLS\2014-2016 TERM\Bill No. 2619, Draft 2 PM_cy.docx

CERTIFICATE OF THE COUNTY CLERK

I hereby certify that heretofore attached is a true and correct copy of Bill No. 2619, Draft 2, which was adopted on second and final reading by the Council of the County of Kaua'i at its meeting held on May 18, 2016 by the following vote:

FOR ADOPTION:	Chock, Kagawa, Kaneshiro, Kuali'i,	TOTAL – 4,
AGAINST ADOPTION:	Hooser, Yukimura, Rapozo	TOTAL – 3,
EXCUSED & NOT VOTING:	None	TOTAL – 0,
RECUSED & NOT VOTING:	None	TOTAL – 0.

Līhu'e, Hawai'i
May 19, 2016

Jade K. Fountain-Tanigawa
County Clerk, County of Kaua'i

ATTEST:

Mel Rapozo
Chairman & Presiding Officer

DATE OF TRANSMITTAL TO MAYOR:

May 19, 2016

Approved this 3rd day of

June, 2016.

Bernard P. Carvalho, Jr.,
Mayor
County of Kaua'i

April 13th, 2017

17 APR 13 P12:32
RECEIVED

Dear Bambi.

On April 1st , 2017 your currier came to my home at 4813 Ananalu Road, Hanalei, Hi and delivered a letter to me that was from your planning department regarding county ordinances for TVR;s and Homestay B&B's on Kauai and necessary compliance issues,

I'm writing this to acknowledge receipt of that letter and the date it was delivered.

I wish to say mahalo for meeting with me April 12th regarding that letter and the new county ordinances therein. I appreciated the time you gave to me over this issue.

It is my belief , however, that I have not, and have never, been in violation of any of the older county ordinances.

However it is now my understanding that there have been some recent new changes in those county ordinances that may effect my life and property, and that may also require me to make some changes in how I share my home with others.

I have yet to fully research and comprehend all the new ordinances , which I understand are in transition and are still subject to possible ongoing ammendments.

I wish to assure you that i am, and will, make every attempt possible to assure I am in compliance with ordinances that would apply to me and my home here in Kauai.

My Kauai home at 4813 Ananalu Road has been my principle residence since I bought it in 2004.

I will check with the county property tax department in case, as you have informed me, they do not have the correct information regarding my homeowner exemption status and my mailing address.

I did notice that my property taxes have undergone a large increase of late so it is possible they are not applying the appropriate home owner tax exemption for which I qualify,

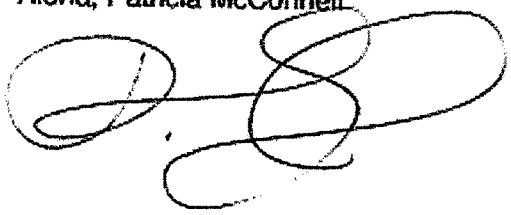
I am presently seeking advise from sources such as the Mayor's office as to what is required of me and what the procedure is in regards to obtaining use permits and applications for these.

EXHIBIT "3"

In further information and assistance on this that you can offer would be welcomed and appreciated,

Mahalo Nui Loa

Aloha, Patricia McConnell



808- 826-6444

FORM G-49 (REV. 2004)

STATE OF HAWAII — DEPARTMENT OF TAXATION
ANNUAL RETURN & RECONCILIATION
GENERAL EXCISE/USE TAX RETURN

DO NOT WRITE IN THIS AREA

YOUR COPY 16

DO NOT FILE

KEEP FOR YOUR RECORDS

FOR CALENDAR YEAR 2005

NAME: PATRICIA MCCONNELL

HAWAII TAX I.D. NO. [redacted]

THIS ANNUAL RETURN MUST BE FILED ON OR BEFORE THE TWENTIETH DAY OF THE FOURTH MONTH FOLLOWING THE CLOSE OF THE CALENDAR OR FISCAL YEAR.

• ATTACH CHECK OR MONEY ORDER AND FORM VP-1G HERE •

SCHEDULE A — ACTIVITIES UNDER CHAPTER 237, HRS — GENERAL EXCISE TAX LAW

BUSINESS ACTIVITIES	BUS. ACT. CODE	VALUES, GROSS PROCEEDS OR GROSS INCOME a	EXEMPTIONS/DEDUCTIONS (EXPLAIN ON REVERSE SIDE) b	TAXABLE INCOME (Column a minus column b) c	RATE	TAXES d	
WHOLESALING	1				.005		1
MANUFACTURING	2				.005		2
PRODUCING	3				.005		3
SUGAR PROCESSING	4				.005		4
PINEAPPLE CANNING	5				.005		5
SERVICES RENDERED FOR, OR TO AN INTERMEDIARY	6				.005		6
INSURANCE COMMISSIONS	7				.0015		7
RETAILING	8				.04		8
SERVICES INCL. PROFESSIONAL	9				.04		9
CONTRACTING	10				.04		10
THEATER, AMUSEMENT AND BROADCASTING	11				.04		11
INTEREST	12				.04		12
COMMISSIONS	13				.04		13
TRANSIENT ACCOMMODATIONS RENTALS	14	[redacted]			.04	[redacted]	14
OTHER RENTALS	15	[redacted]			.04	[redacted]	15
ALL OTHERS	16				.04		16

SCHEDULE B — ACTIVITIES UNDER CHAPTER 238, HRS — USE TAX LAW

IMPORTS FOR RESALE AT RETAIL	17				.005		17
IMPORTS FOR CONSUMPTION	18				.04		18

IF YOU DO NOT HAVE ANY GROSS INCOME AND THE RESULT IS NO TAX DUE, ENTER "0" IN EACH COLUMN OF YOUR BUSINESS ACTIVITY(IES) AND LINES 19 AND 31.

NATURE OF YOUR BUSINESS

19.	TOTAL TAXES (ADD LINES 1 — 18)	[redacted]	19
20a.	PENALTY $		
20b.	INTEREST $		20
21.	TOTAL AMOUNT (ADD LINES 19 AND 20)		21
22.	TOTAL TAXES PAID WITH YOUR MONTHLY, QUARTERLY, OR SEMIANNUAL RETURNS FOR THE PERIOD. EACH MONTHLY, QUARTERLY, OR SEMIANNUAL TAX PAYMENT SHOULD BE LISTED ON THE REVERSE SIDE OF THIS FORM.	22.	
23.	ADDITIONAL ASSESSMENTS PAID FOR THE PERIOD, IF INCLUDED ON LINE 19.	23.	
24.	PENALTIES $ INTEREST $ PAID DURING THE PERIOD.	24.	
25.	TOTAL PAYMENTS MADE (ADD LINES 22 — 24).		25
26.	CREDIT TO BE REFUNDED (LINE 25 MINUS LINE 21).		26
27.	TAXES DUE AND PAYABLE (LINE 21 MINUS LINE 25).		27
28.	**FOR LATE FILING ONLY →**	28a. PENALTY $	
		28b. INTEREST $	28
29.	TOTAL AMOUNT DUE AND PAYABLE (ADD LINES 27 AND 28).		29
30.	PLEASE ENTER AMOUNT OF YOUR PAYMENT (Attach your check or money order payable to "HAWAII STATE TAX COLLECTOR" in U.S. dollars drawn on any U.S. bank AND Form VP-1G to Form G-49. Write "GE", the filing period, and your Hawaii Tax I.D. No. on your check or money order.)		30
31.	GRAND TOTAL EXEMPTIONS/DEDUCTIONS FROM BACK OF FORM.	31.	

DECLARATION: I declare, under the penalties set forth in section 231-36, HRS, that this return (including any accompanying schedules or statements) has been examined by me and, to the best of my knowledge and belief, is a true, correct, and complete return, made in good faith for the tax period stated, pursuant to the General Excise and Use Tax Laws, and the rules issued thereunder. I also reaffirm the statements on my application (as amended).

IN THE CASE OF A CORPORATION OR PARTNERSHIP, THIS RETURN MUST BE SIGNED BY AN OFFICER, PARTNER OR MEMBER, OR DULY AUTHORIZED AGENT.

SIGNATURE TITLE DATE

— MAILING ADDRESS —

HAWAII DEPARTMENT OF TAXATION

P. O. BOX 1425

HONOLULU, HI 96806-1425

THIS SPACE FOR DATE RECEIVED STAMP

FORM G-49 16

EXHIBIT "4"

FORM G-49 Page 2 of 2 **WEB FILL**

Name: PATRICIA DAWN McGinnell

Hawaii Tax I.D. No. W [redacted] Tax Year Ending 2006

GCF082

Last 4 digits of your FEIN or SSN [redacted]

BUSINESS ACTIVITIES	Column a VALUES, GROSS PROCEEDS OR GROSS INCOME	Column b EXEMPTIONS/DEDUCTIONS (Attach Schedule GE)	Column c TAXABLE INCOME (Column a minus Column b)

PART III - INSURANCE COMMISSIONS @ .15% (.0015)

18. Insurance Commissions [redacted]

Enter this amount on line 23, Column (a)

PART IV - CITY & COUNTY OF HONOLULU SURCHARGE TAX @ ½ OF 1% (.005)

19. Oahu Surcharge [redacted]

Enter this amount on line 24, Column (a)

PART V — SCHEDULE OF ASSIGNMENT OF TAXES BY DISTRICT *(ALL taxpayers MUST complete this Part and may be subject to a 10% penalty for noncompliance.)* See Instructions. **DARKEN** the oval of the taxation district in which you have conducted business. IF you did business in MORE THAN ONE district, darken the oval "MULTI" and attach Form G-75.

20. Oahu Maui Hawaii (Kauai) MULTI

PART VI - TOTAL RETURN AND RECONCILIATION

		TAXABLE INCOME Column (a)	TAX RATE Column (b)	TOTAL TAX Column (c) = Column (a) X Column (b)
21.	Enter the amount from Part I, line 7	$ [redacted] .00	x .005	= $
22.	Enter the amount from Part II, line 17	$ [redacted] .00	x .04	= $ [redacted]
23.	Enter the amount from Part III line 18, Column c	$ [redacted] .00	x .0015	= $
24.	Enter the amount from Part IV, line 19, Column c	$ [redacted] .00	x .005	= $

25. **TOTAL TAXES DUE.** Add column (c) of lines 21 through 24 and enter result here. If you did not have any activity for the period, enter "0.00" here [redacted] 25.

26. Amounts Assessed on Periodic Returns PENALTY $ INTEREST $ 26. [redacted]

27. **TOTAL AMOUNT.** Add lines 25 and 26 27.

28. TOTAL PAYMENTS MADE LESS ANY REFUNDS RECEIVED FOR THE TAX YEAR 28. [redacted]

29. CREDIT CLAIMED ON ORIGINAL ANNUAL RETURN. *(For Amended Return ONLY)* 29.

30. NET PAYMENTS MADE. Line 28 minus line 29 30.

31. **CREDIT TO BE REFUNDED.** Line 30 minus line 27 31.

32. **ADDITIONAL TAXES DUE.** Line 27 minus line 30 32.

33. **FOR LATE FILING ONLY →** PENALTY $ INTEREST $ 33.

34. **TOTAL AMOUNT DUE AND PAYABLE** (Add lines 32 and 33) 34.

35. **PLEASE ENTER THE AMOUNT OF YOUR PAYMENT.** Attach a check or money order payable to "HAWAII STATE TAX COLLECTOR" in U.S. dollars to Form G-49. Write "GE", the filing period, and your Hawaii Tax I.D. No. on your check or money order. Mail to: HAWAII DEPARTMENT OF TAXATION, P. O. BOX 1425, HONOLULU, HI 96806-1425 or file and pay electronically at www.ehawaii.gov/efile
If you are NOT submitting a payment with this return, please enter "0.00" here. 35.

36. **GRAND TOTAL OF EXEMPTIONS/DEDUCTIONS CLAIMED.** *(Attach Schedule GE)* If Schedule GE is not attached, exemptions/deductions claimed will be disallowed 36.

ID NO 01

FORM G-45 (REV. 2004)

STATE OF HAWAII — DEPARTMENT OF TAXATION

GENERAL EXCISE/USE TAX RETURN

DO NOT WRITE IN THIS AREA

YOUR COPY **10**

DO NOT FILE

KEEP FOR YOUR RECORDS

NAME: PATRICIA MCCONNELL

SEMIANNUAL PERIOD OF JUL. 2006 - DEC. 2006

(Do not combine your income for more than one filing period on this return.)

HAWAII TAX I.D. NO. W51707089-01

SCHEDULE A — ACTIVITIES UNDER CHAPTER 237, HRS — GENERAL EXCISE TAX LAW

BUSINESS ACTIVITIES	BUS. ACT. CODE	VALUES, GROSS PROCEEDS OR GROSS INCOME a	EXEMPTIONS/DEDUCTIONS (EXPLAIN ON REVERSE SIDE) b	TAXABLE INCOME c (column a minus column b)	RATE	TAXES d	
WHOLESALING	1				.005		1
MANUFACTURING	2				.005		2
PRODUCING	3				.005		3
SUGAR PROCESSING	4				.005		4
PINEAPPLE CANNING	5				.005		5
[illegible]	6				.005		6
INSURANCE COMMISSIONS	7				.0015		7
RETAILING	8				.04		8
SERVICES INCL. PROFESSIONAL	9				.04		9
CONTRACTING	10				.04		10
[illegible]	11				.04		11
INTEREST	12				.04		12
COMMISSIONS	13				.04		13
[illegible]	14	[redacted]			.04	[redacted]	14
OTHER RENTALS	15	[redacted]			.04	[redacted]	15
ALL OTHERS	16				.04		16

SCHEDULE B — ACTIVITIES UNDER CHAPTER 238, HRS — USE TAX LAW

IMPORTS FOR RESALE AT RETAIL	17				.005		17
IMPORTS FOR CONSUMPTION	18				.04		18

IF YOU DO NOT HAVE ANY GROSS INCOME AND THE RESULT IS NO TAX DUE, ENTER "0" IN EACH COLUMN OF YOUR BUSINESS ACTIVITY(IES) AND LINES 19 AND 22.

19.	TOTAL TAXES DUE	[redacted]	19
20a.	PENALTY →		20a
20b.	INTEREST →		20b
21.	TOTAL PAYMENT → PAY IN U.S. DOLLARS		21
22.	GRAND TOTAL EXEMPTIONS/DEDUCTIONS FROM BACK OF FORM		

FOR LATE FILING ONLY →

Attach your check or money order payable to "HAWAII STATE TAX COLLECTOR" in U.S. dollars drawn on any U.S. bank AND Form VP-1G to Form G-45. Write "GE", the filing period, and your Hawaii Tax I.D. No. on your check or money order.

• ATTACH CHECK OR MONEY ORDER AND FORM VP-1G HERE •

I declare, under the penalties set forth in section 231-36, HRS, that this is a true and correct return, prepared in accordance with the provisions of the General Excise and Use Tax Laws and the rules issued thereunder.

IN THE CASE OF A CORPORATION OR PARTNERSHIP, THIS RETURN MUST BE SIGNED BY AN OFFICER, PARTNER OR MEMBER, OR DULY AUTHORIZED AGENT.

SIGNATURE TITLE DATE 04/27/07

FORM G-45 **10**

- DETACH HERE - - -

Form **VP-1G** (Rev. 2004) Tax Year 2005

STATE OF HAWAII — DEPARTMENT OF TAXATION
TAX PAYMENT VOUCHER
GENERAL EXCISE

SEMIANNUAL PERIOD OF JUL. 2006 - DEC. 2006

[redacted]

DO NOT SUBMIT PHOTOCOPIES OF THIS FORM

PATRICIA MCCONNELL 535

DO NOT WRITE OR STAPLE IN THIS SPACE

Print the amount of your payment in the space provided. ATTACH THIS VOUCHER WITH CHECK OR MONEY ORDER PAYABLE TO "HAWAII STATE TAX COLLECTOR" TO FORM G-45. Write "GE", the filing period, and your Hawaii Tax I.D. No. on your check or money order.

Amount of Payment

$

[redacted]

2004444090110 00 0701051 1231057 517070898 01

FORM
N-11
(Rev. 2015)

STATE OF HAWAII — DEPARTMENT OF TAXATION
Individual Income Tax Return
RESIDENT
Calendar Year 2015
OR

JBT151

AMENDED Return

NOL Carryback

Fiscal Year Beginning

and Ending

FOR OFFICE USE ONLY

Do NOT Submit a Photocopy!!

Place an X in applicable box, if appropriate

First Time Filer | Address or Name Change

• ATTACH COPY 2 OF FORM W-2 HERE •

• ATTACH CHECK OR MONEY ORDER AND FORM N-200V HERE •

Place Label Here

Your First Name	M.I.	Your Last Name
Patricia	D	McConnell
Spouse's First Name	M.I.	Spouse's Last Name

Care Of (See Instructions, page 7)

Present mailing or home address (Number and street, including Rural Route)
P.O. Box 641

City, town or post office	State	Postal/ZIP code
Hanalei	HI	96714

If Foreign address, enter Province and/or State | Country

◆ **IMPORTANT — Complete this Section** ◆

Enter the first four letters of your last name. Use ALL CAPITAL letters: MCCO

Your Social Security Number: [redacted]

Enter the first four letters of your Spouse's last name. Use ALL CAPITAL letters

Spouse's Social Security Number

(Place an X in only ONE box)

1 X Single

2 Married filing joint return (even if only one had income)

3 Married filing separate return. Enter spouse's SSN and the first four letters of last name above. Enter spouse's full name here. _____

4 Head of household (with qualifying person). If the qualifying person is a child but not your dependent, enter the child's full name. ➤ _____ ☐

5 Qualifying widow(er) with dependent child. Enter the year your spouse died

CAUTION: If you can be claimed as a dependent on another person's tax return (such as your parents), DO NOT place an X on line 6a, but be sure to place an X above line 2!

6a X Yourself — X Age 65 or over

6b Spouse — Age 65 or over

} Enter the number of Xs on 6a and 6b ➤ 2

If you placed an X on lines 3 and 6b above, see the instructions on page 9 and if your spouse meets the qualifications, place an X here

6c and 6d

Dependents: 1. First and last name (If more than 4 dependents use attachment)	2. Dependent's social security number	3. Relationship

Enter number of your children listed ➤ 6c

Enter number of other dependents ➤ 6d

6e Total number of exemptions claimed. Add numbers entered in boxes 6a thru 6d above ➤ 2

ID NO 20

EXHIBIT "5"

570812392 09/11/2016 2:18 PM

Your Social Security Number [redacted] Your Spouse's SSN

JBT154 Patricia D. McConnell

Name(s) as shown on return

46 Amount of line 45 to be applied to your **2016 ESTIMATED TAX** 46

47a Amount to be **REFUNDED TO YOU** (line 45 minus line 46) if filing late, see page 28 of Instructions 47a

Place an X in this box if this refund will ultimately be deposited to a foreign (non-U.S.) bank. Do not complete lines 47b, 47c, or 47d.

47b Routing number 47c Type: Checking Savings

47d Account number

48 **AMOUNT YOU OWE** (line 36 minus line 41). Send Form N-200V with your payment. Make check or money order payable to the "Hawaii State Tax Collector" 48

49 Estimated tax penalty. (See page 29 of Instructions.) Do not include on line 42 or 48. Place an X in this box if Form N-210 is attached ➤ 49

50 **AMENDED RETURN ONLY** – Amount paid (overpaid) on original return. (See Instructions) (attach Sch. AMD) 50

51 **AMENDED RETURN ONLY** – Balance due (refund) with amended return. (See Instructions) (attach Sch. AMD) 51

52 Did you file a federal Schedule C? X Yes No If yes, enter Hawaii gross receipts
your main business activity Property managem
your main business product , AND your HI Tax I.D. No. for this activity W [redacted]

53 Did you file a federal Schedule E for any rental activity? X Yes No If yes, enter Hawaii gross rents received [redacted]
AND your HI Tax I.D. No. for this activity W See Stmt 2

54 Did you file a federal Schedule F? Yes X No If yes, enter Hawaii gross receipts
your main business activity
your main business product , AND your HI Tax I.D. No. for this activity W

DESIGNEE If designating another person to discuss this return with the Hawaii Department of Taxation, complete the following. This is not a full power of attorney. See page 30 of the Instructions.
Designee's name ➤ Phone no. ➤ Identification number ➤

HAWAII ELECTION CAMPAIGN FUND (See page 31 of the Instructions)
Do you want $3 to go to the Hawaii Election Campaign Fund? Yes No
If joint return, does your spouse want $3 to go to the fund? Yes No
Note: Placing an X in the "Yes" box will not increase your tax or reduce your refund.

PLEASE SIGN HERE
DECLARATION – I declare, under the penalties set forth in section 231-36, HRS, that this return (including accompanying schedules or statements) has been examined by me and, to the best of my knowledge and belief, is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Hawaii Income Tax Law, Chapter 235, HRS.
Your signature Date Spouse's signature (if filing jointly, BOTH must sign) Date
Your Occupation Daytime Phone Number Your Spouse's Occupation Daytime Phone Number

Paid Preparer's Information
Preparer's Signature ➤ Steven Ching Date 09/11/16 Check if self-employed ➤ [X] Preparer's identification number P01427829
Print Preparer's Name ➤ Steven Ching Federal ID No. ➤ [redacted]
Firm's name (or yours if self-employed), Address, and ZIP Code ➤ Steven C. Ching CPA
4-1579 Kuhio Hwy Ste 204
Kapaa, HI 96746-1859
Phone No. ➤ 808-822-7731

ID NO 20

Detail of Accounts

Taxes currently reported on the Statement of Taxpayer include Corporate Income, Franchise, General Excise and County Surcharge, Public Service Company, Rental Motor Vehicle, Tour Vehicle, and Car-Sharing Vehicle, Seller's Collection, Transient Accommodation, Use, and Withholding. If you owe another type of tax or related penalties, the other liabilities remain due and payable to the State of Hawaii.

ANANALU ENTERPRISES LLC

TIN:T-[redacted]

GE-[redacted] General Excise/Use

Period Ending	Tax	Penalty	Interest	Other	Credits	Balance	Interest Through
[1] 06/30/10	[redacted]	[redacted]	[redacted]	0.00	[redacted]	[redacted]	10/20/17
[1] 06/30/15				0.00			10/20/17
[1] 12/31/15				0.00			10/20/17
				0.00			

GE-[redacted] General Excise/Use Reconciliation

Period Ending	Tax	Penalty	Interest	Other	Credits	Balance	Interest Through
[1] 12/31/07	[redacted]	[redacted]	[redacted]	[redacted]	0.00	[redacted]	10/20/17
[1] 12/31/08					0.00		10/20/17
[1] 12/31/09					0.00		10/20/17
[1] 12/31/10					0.00		10/20/17
[1] 12/31/11					0.00		10/20/17
[1] 12/31/12					0.00		10/20/17
[1] 12/31/13					0.00		10/20/17
[1] 12/31/14					0.00		10/20/17
[1] 12/31/15					0.00		10/20/17
					0.00		

TA[redacted] Transient Accommodations

Period Ending	Tax	Penalty	Interest	Other	Credits	Balance	Interest Through
[1] 03/31/15	[redacted]	[redacted]	[redacted]	0.00	0.00	[redacted]	10/20/17
[1] 06/30/15				0.00	0.00		10/20/17
[1] 09/30/15				0.00	0.00		10/20/17
[1] 12/31/15				0.00	0.00		10/20/17
				0.00	0.00		

TA[redacted] Transient Accommodations Reconciliation

Period Ending	Tax	Penalty	Interest	Other	Credits	Balance	Interest Through
[1] 12/31/08	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	10/20/17
[1] 12/31/09							10/20/17
[1] 12/31/10							10/20/17
[1] 12/31/11							10/20/17
[1] 12/31/12							10/20/17
[1] 12/31/13							10/20/17
[1] 12/31/14							10/20/17

28. Select Tax Type(s):	Date Activity Began in Hawaii -OR- Effective Date If Changing Filing Period*	Filing Period Mo. Qtr. Semi	Fee	Fee Due
28a. Withholding			no fee	
28b. General Excise/Use — Select ONLY one type of GE/Use license:				
GET/Use Tax			[redacted]	
GE One-Time Event				
Please enter the name of the One-time Event *(See instructions)*				
Use Tax Only			no fee	
Seller's collection			no fee	
28c. ✓ Transient Accommodations[20]	01/01/2016	✓	✓ 1-5 units [redacted]	[redacted]
			6 or more units -	
28d. Timeshare Occupancy [21]				
		Number of Timeshare Plans represented	x [redacted]	
28e. Rental Motor Vehicle, Tour Vehicle, and Car-Sharing Vehicle[22]				
28f. Liquid Fuel Distributor			no fee	
Produce Refine Manufacture Compound				
28g. Liquid Fuel Retail Dealer [23]			[redacted]	
28h. Liquor [24]	Enter your county liquor license no.			
Manufacturer			[redacted]	
Wholesaler				
28i. Cigarette & Tobacco [25]				
Non-Retail: Dealer Wholesaler				
Retail Tobacco Permit [26]		Number of retail locations	[redacted]	

29. Have you ever been cited for either a tobacco and/or liquor violation? Yes ✓ No

30. Check the appropriate tax type and list the address(es) of your transient accommodations (TA) rental real property; rental motor vehicle, tour vehicle, and/or car-sharing vehicle (RV); Liquid Fuel Retail Dealer's Permit (Fuel); and/or Retail Tobacco Permit (RTP) business locations. For Retail Tobacco locations, if location is a vehicle, include the Vehicle Identification Number (VIN), otherwise include the name of the retail location. *Attach a list if more space is needed.*

TA	RV	Fuel	RTP	Address	Name or VIN

31. **Resort Time Share Vacation Plan Information.** List each resort time share vacation plan represented by you. *Attach a list if more space is needed.*

New	Add	Cancel	DCCA Plan No.	Plan Name	Plan Address

32. **TOTAL REGISTRATION FEE DUE.** See instructions for Forms VP-1 & VP-2. Attach a check or money order made payable to "HAWAII STATE TAX COLLECTOR" in U.S. dollars drawn on any U.S. Bank along with the appropriate Forms VP-1 and/or VP-2. . . . . [redacted]

* NOTE: The requested change will take effect after the current filing period is over. The filing frequency cannot be changed retroactively.

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon the following individuals by emailing and mailing said copy, postage prepaid, to their last known address as follows:

NICHOLAS COURSON
Deputy County Attorney
Office of the County Attorney
4444 Rice Street, Suite 220
Lihue, Hawaii 96766
Email: ncourson@kauai.gov
Attorney for the
PLANNING COMMISSION OF THE
COUNTY OF KAUAI

MARYANN SASAKI, ESQ.
Deputy County Attorney
Office of the County Attorney
4444 Rice Street, Suite 220
Lihue, Hawai'i 96766
Email: msasaki@kauai.gov
Attorney for KAAINA HULL
DIRECTOR, COUNTY OF KAUAI,
DEPARTMENT OF PLANNING

HARLAN Y. KIMURA, ESQ.
220 S King Street, Suite 1600
Honolulu, Hawaii 96813
Email: hyk@harlankimuralaw.com
HEARING OFFICER, PLANNING
COMMISSION OF THE COUNTY OF KAUAI

ELLEN CHING
ANELA SEGRETI
Boards and Commissions
4444 Rice Street, Suite 150
Lihue, Hawaii 96766
Email: asegreti@kauai.gov

DATED: Honolulu, Hawaii, August 23, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	MINUTES OF CONTESTED CASE HEARING; CERTIFICATE OF SERVICE
	)	HEARING (Held):
	)	Date: August 30, 2019
	)	Time: 9:00 a.m.
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

MINUTES OF CONTESTED CASE HEARING

The Hearing on the above-entitled Contested Case were held on August 30, 2019 commencing at 9:00 a.m. in the Līhuʻe Civic Center, Moikeha Building, Conference Room 3, 4444 Rice Street, Līhuʻe, Kauaʻi, Hawaiʻi 96766-1300 ("Contested Case Hearing"). Gregory W. Kugle appeared on behalf

of Petitioner PATRICIA D. McCONNELL ("Petitioner"), who was also present. Maryann Sasaki appeared as Counsel for Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI ("Planning Department"), along with its duly authorized representative Andres "Bambi" Emayo.

Petitioner's Request For Records.

During the Contested Case Hearing testimony was presented by the Planning Department indicating it did not receive Petitioner's Request for Government Records dated July 10, 2019 made pursuant to *Haw. Rev. Stat.* §§ 92F-11 and 12 ("Request For Records"). A copy of the Request For Records is attached as Exhibit 1 to Petitioner Patricia McConnell's Memorandum In Opposition To Respondent Planning Department Of The County Of Kauai's Motion For Summary Judgment dated August 14, 2019 ("Memorandum In Opposition"). Therefore, Petitioner requested leave to submit another Request For Records to the Planning Department, and depending upon the response thereto, may further request the Contested Case Hearing be resumed to receive evidence related to that Request For Records.

Based upon above, and pursuant to Rules 1-6-1(b) and 1-6-3 of the *Rules of Practice and Procedure of the Kauaʻi County Planning Commission* ("Commission Rules"), by 4:30 p.m. on September 30, 2019 Petitioner shall file a Status Report on the Request For Records and whether she requests the Contested

Case Hearing be resumed for further evidence to be taken regarding the same ("Status Report"). Thereafter, a Minute Order will be issued by the undersigned Hearing Officer either: (1) scheduling a Telephone Conference to discuss whether the Contested Case Hearing will be resumed to receive further evidence; or (2) setting forth a briefing schedule for the submittal of Closing Arguments and/or Proposed Findings Of Fact And Conclusions Of Law.

Continuance Of Contested Case Hearing.

Based upon the above, and pursuant to Rule 1-6-3 of the Commission Rules, the Contested Case Hearing is hereby continued until further order of the undersigned Hearing Officer.

Any and all of the above-described pleadings shall be served by email or facsimile transmission, with a hard copy served by regular mail, postage prepaid, to all the parties and the Office of Boards and Commissions for the County of Kaua'i. The times set forth above are based upon Hawaiian Standard Time ("HST").

DATED at Honolulu, Hawaii, August 31, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kaua'i

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on August 31, 2019.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: gwk@hawaiilawyer.com Attorneys for Petitioner PATRICIA D. McCONNELL			X
MARYANN SASAKI, ESQ. Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: msasaki@kauai.gov Attorney for Kaʻāina S. Hull, Director, PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI			X
NICHOLAS COURSON, ESQ. First Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: ncourson@kauai.gov Attorney for Planning Commission of the County of Kauaʻi			X

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/ /

	U.S. Mail	Hand Delivery	Email
ELLEN CHING Administrator Office of Boards and Commissions County of Kauaʻi 4444 Rice Street, Suite 150 Līhuʻe, Kauaʻi, HI 96766 Email: eching@kauai.gov asegreti@kauai.gov			X

DATED at Honolulu, Hawaii, August 31, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	MINUTE ORDER REGARDING PENDING MATTERS; CERTIFICATE OF SERVICE
	)	HEARING (Held):
	)	Date: August 30, 2019
	)	Time: 9:00 a.m.
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

MINUTE ORDER REGARDING PENDING MATTERS

Based upon the Status Report[1] from Counsel for Petitioner PATRICIA D. McCONNELL ("Petitioner") received on September 30, 2019 concerning the

[1] All capitalized terms shall be as defined in the Minutes Of Contested Case Hearing dated August 31, 2019.

Request For Records, Petitioner is directed to provide another Status Report by 4:30 p.m. on October 30, 2019 regarding the compliance by Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI ("Planning Department") with respect to the same. Thereafter, further instructions will be provided to the parties by the undersigned.

DATED at Honolulu, Hawaii, October 9, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on October 9, 2019.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: gwk@hawaiilawyer.com JCZ@hawaiilawyer.com Attorneys for Petitioner PATRICIA D. McCONNELL			X
MATTHEW BRACKEN, ESQ. County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: mbracken@kauai.gov Attorney for Kaʻāina S. Hull, Director, PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI			X
NICHOLAS COURSON, ESQ. First Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: ncourson@kauai.gov Attorney for Planning Commission of the County of Kauaʻi			X

	U.S. Mail	Hand Delivery	Email
ELLEN CHING Administrator Office of Boards and Commissions County of Kauaʻi 4444 Rice Street, Suite 150 Līhuʻe, Kauaʻi, HI 96766 Email: eching@kauai.gov asegreti@kauai.gov			X

DATED at Honolulu, Hawaii, October 9, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	***SECOND*** MINUTE ORDER REGARDING PENDING MATTERS; CERTIFICATE OF SERVICE
	)	HEARING (Held):
	)	Date: August 30, 2019
	)	Time: 9:00 a.m.
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

SECOND
MINUTE ORDER REGARDING PENDING MATTERS

On November 1, 2019 Counsel for Petitioner PATRICIA D. McCONNELL ("Petitioner") submitted a Status Report[1] advising that although the Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI ("Planning Department") has rejected her Request For Records in its entirety, she is inquiring as to the basis of that action. Based upon the Planning Department's rejection of Petitioner's Request For Records presumably pursuant to Rule 1-6-9(b) of the *Rules of Practice and Procedure of the Kauaʻi County Planning Commission (Codified May 2014)* ("Commission Rules"), Petitioner is directed to submit a **Final** Status Report by 4:30 p.m. on December 2, 2019 regarding her Request For Records. In that **Final** Status Report Counsel for Petitioner shall also provide three (3) dates and times they available to participate in a Telephone Conference to be held no later than December 16, 2019 to determine the briefing schedule for submittal of Closing Arguments and/or Proposed Findings of Fact And Conclusions of Law. Within forty-eight (48) hours of submission of that **Final** Status Report, Counsel for the Planning Department shall advise of their availability with respect to those three (3) dates and times. Thereafter, the undersigned Hearing Officer will advise the parties of the date and

[1] All capitalized terms shall be as defined in the Minutes Of Contested Case Hearing dated August 31, 2019.

time for that Telephone Conference, or provide further instructions to the parties based upon the **Final** Status Report.

DATED at Honolulu, Hawaii, November 2, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kaua'i

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on November 2, 2019.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: gwk@hawaiilawyer.com JCZ@hawaiilawyer.com Attorneys for Petitioner PATRICIA D. McCONNELL			X
MATTHEW BRACKEN, ESQ. County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: mbracken@kauai.gov			X
LISA A. BAIL, ESQ. Goodwill Anderson Quinn & Stifel 999 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: lbail@goodsill.com Attorneys for Kaʻāina S. Hull, Director, PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI			X

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	U.S. Mail	Hand Delivery	Email
NICHOLAS COURSON, ESQ. First Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: ncourson@kauai.gov Attorney for Planning Commission of the County of Kauaʻi			X
ELLEN CHING Administrator Office of Boards and Commissions County of Kauaʻi 4444 Rice Street, Suite 150 Līhuʻe, Kauaʻi, HI 96766 Email: eching@kauai.gov asegreti@kauai.gov			X

DATED at Honolulu, Hawaii, November 2, 2019.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

GOODSILL ANDERSON QUINN & STIFEL
A LIMITED LIABILITY LAW PARTNERSHIP LLP

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Attorneys for Respondent
PLANNING DEPARTMENT, COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNT OF KAUA'I

In the Matter of:

Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Ha'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,

PATRICIA D. McCONNELL,

Petitioner,

vs.

PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,

Respondent.

CC-2017-4
TMK: (4) 5-8-005:005

NOTICE OF APPEARANCE OF COUNSEL FOR PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I; CERTIFICATE OF SERVICE

CONTESTED CASE HEARING:
Date: August 30, 2019
Time: 9:00 a.m.
Hearings Officer: Harlan Y. Kimura

NOTICE OF APPEARANCE OF COUNSEL FOR THE PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I

NOTICE IS HEREBY GIVEN of the entry of appearance of John S. Mackey and Christopher P. St. Sure of the law firm of Goodsill Anderson Quinn & Stifel, A Limited Liability Law Partnership LLP, as counsel for Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I ("Respondent") in the above action. Notice and copies of pleadings, papers and other material relevant to this action should be directed and served upon:

JOHN S. MACKEY
jmackey@goodsill.com
CHRISTOPHER P. ST. SURE
cstsure@goodsill.com
First Hawaiian Center, Suite 1600
999 Bishop Street
Honolulu, HI 96813

DATED: Honolulu, Hawai'i, November 13, 2019.

JOHN S. MACKEY
CHRISTOPHER P. ST. SURE

Attorney for Respondent
PLANNING DEPARTMENT, COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNT OF KAUA'I

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Ha'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	CC-2017-4 TMK: (4) 5-8-005:005 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

	U.S. MAIL	HAND DELIVERY	EMAIL
GREGORY W. KUGLE gwk@hawaiilawyer.com JOANNA C. ZEIGLER JCZ@hawaiilawyer.com Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Attorneys for Petitioner PATRICIA D. McCONNELL			X
NICHOLAS R. COURSON ncourson@kauai.gov First Deputy County Attorney County of Kaua'i 4444 Rice Street, Suite 220 Lihu'e, HI 96766 Attorney for Planning Commission, County of Kaua'i			X
ELLEN CHING, Administrator eching@kauai.gov asegreti@kauai.gov Office of Boards and Commissions County of Kaua'i 4444 Rice Street, Suite 150 Lihu'e, HI 96766			X
HARLAN Y. KIMURA hyk@harlankimuralaw.com Central Pacific Plaza 220 South King Street, Suite 1660 Honolulu, HI 96813 Telephone: (808) 564-0811 Hearing Officer Planning Commission, County of Kaua'i			X

DATED: Honolulu, Hawai'i, November 13, 2019.

JOHN S. MACKEY
CHRISTOPHER P. ST. SURE

Attorney for Respondent
PLANNING DEPARTMENT OF THE
COUNTY OF KAUA'I

KAUAʻI PLANNING COMMISSION
CONTESTED CASE HEARING
MINUTES
August 30, 2019

The contested case CC-2017-4 hearing of the Planning Commission of the County of Kaua'i was called to order by Hearings Officer Harlan Y. Kimura at 9:00 a.m., at the Lihue Civic Center, Liquor Control Conference Room 3. The following were present:

Harlan Y. Kimura, Hearings Officer
Greg Kugle, representing the petitioner Patricia McConnell
Patricia Dawn McConnell, petitioner
Maryann Sasaki, representing the Planning Department of the County of Kauaʻi

Petition to Appeal the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accomodation Use for Property Situated in Haena, Kauaʻi, Hawaii, identifeied by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet.

CALL TO ORDER

Mr. Kimura: It is now 9 o'clock. We'll begin the contested case hearing. Patricia D. McConnell vs. the County of Kauaʻi Planning Department. CC-2017-4. Ms. McConnell is appealing the decision of the planning director's decision related to the notice of violation and ordered to pay fines for the operation of an illegal transient accommodation used for property situated in Haʻena, Kauaʻi, Hawaii identified as Kauaʻi TMK Number Island (4)5-8-005-parcel-005. Containing 26,092 sq. ft. May I have your appearances for the record beginning with council for Ms. McConnell.

Mr. Kugle: Good morning, Your Honor. Greg Kugel on behalf of the petitioner, Patricia Dawn McConnell, and Ms. McConnell is present with me this morning.

Mr. Kimura: Okay. Thank you. Mrs...

Ms. Sasaki: Maryann Sasaki, on behalf of the Planning Department of the County of Kauaʻi.

Mr. Kimura: Ms. Sasaki will there be a representative from the planning...

Ms. Sasaki: Yes, there should be two witnesses. I was going to text them but then the buzzer went off so I didn't.

Mr. Kimura: You will have two witnesses for the planning department but …

Ms. Sasaki: Right.

Mr. Kimura: Will there be a representative that will be sitting at your table during the entire course...

Ms. Sasaki: I don't know. I would say no, nobody's said that they were going to come.

Mr. Kimura: Okay. So, uh, we can proceed without a representative present?

Ms. Sasaki: Yes.

Mr. Kimura: Okay. Now, before the evidentiary portion of the hearing takes place, there is the planning department's motion for summary judgment that we need to address. In this regard I do have the motion from the planning department, Ms. McConnell's memorandum and opposition, as well as the reply from the planning department. Are there any other documents that need to be reviewed for the motion?

Ms. Sasaki: No I don't have any.

Mr. Kugle: No.

Mr. Kimura: Mr. Kugle?

Mr. Kugle: No.

Mr. Kimura: Okay. That being the case I will receive brief arguments on the more salient points starting with Ms. Sasaki.

Ms. Sasaki: I think there's really only one salient point in this matter and that is that Ms. McConnell has been operating an illegal homestay over at least the course of the past 9 years. And despite notices from the planning department and meetings with the planning department apprising her of her situation, she continues to operate this transient vacation unit. There's no dispute that that - I don't think there's a dispute in facts, that she met with the planning department, the planning department sent her an NOV. She continues to operate without the requisite permit. So it's the argument.

Mr. Kimura: Okay. Mr. Kugle?

Mr. Kugle: To clarify some of Ms. Sasaki's statements and then I will very briefly argue. The notice of violation was issued in May of 2017. So there is no 9 year history of illegal use, or anything like that. I guess the, you know, we - other

than that, I think our memorandum and opposition set out a number of arguments about why the summary judgment should be denied. I'm not going to repeat those because I know you, you've read that material, but there were a host of reasons why summary judgment should be denied. And then finally as a practical matter I would point out, that one of our arguments is that Ms. McConnell is actually entitled to a contested case hearing under the statute. That's what we're here today to do and therefore, I think, as a practical matter, if for no other reason, the motion should be denied because we're here ready to take testimony and conduct the contested case hearing.

Ms. Sasaki: May I just briefly reply?

Mr. Kimura: Yes Ms. Sasaki

Ms. Sasaki: Okay. I just, I didn't indicate that Ms. McConnell had 9 years of illegal operation. I merely indicated that she's been operating a homestay without a permit for at least 9 years. And I find that information in the petitioner's papers. So that's something Mr. Krugle misstated. She's just been operating without a permit since before the ordinance was passed.

Mr. Kimura: Anything further Ms. Sasaki?

Ms. Sasaki: Nothing.

Mr. Kimura: Mr. Kugle?

Mr. Kugle: I have nothing further other than I think to say that it will be one of the issues that will be decided by the planning commission is the fact that there wasn't a permit requirement before a certain period of time in 2016. So, uh, again, you know, that's the underlying issue.

Mr. Kimura: Okay. Now, as far as the ruling, unlike the contested case hearing where the burden is upon the petitioner, in this motion for summary judgment it's the planning department's burden. And the planning department must establish that there are no genuine issues of material facts and it is entitled to judgment as a matter of law. There are two material facts that need to be established. One is that petitioner's operating a homestay defined in Kaua'i County Code Section 8-1.5 which is defined as quote, "Means an owner occupied running unit in which overnight accommodations are provided to transient guests within the same dwelling unit in which the owner resides and a respective owner currently benefits from Section 5A-11 of the comprehensive zoning ordinance from homeowners exemption for the homestay site," closed. The second point that the planning department is required to establish and that there will be no general issue on is that the property is operated as a homestay in a location that is not in a visitor destination area. Now, the planning

department has submitted declarations of the program manager in charge of inspecting and enforcing violations of the comprehensive zoning ordinance, Mr. Mike Laureta, and also the EVU - I'm sorry, the AVU TVR enforcement specialist, Ms. Britni Ludington-Braun. Now these declarations must affirmatively show that the declarants are competent to testify to the facts stated in them and they have personal knowledge of these facts. The declarations that were submitted met both of these requirements. The planning department has not met its burden establishing there are no general issues of material fact and it is entitled to judgment as a matter of law. Now with respect to the Laureta declaration, Mr. Laureta does not state that he is competent to testify. So this requirement in Hawaii rules of civic procedure Rule 56B is not met. Second, there are many conclusively facts in the Laureta declaration which cannot be utilized in support of the planning department's motion for judgment. According to the GECC Financial Court case reference in petitioner's memorandum in opposition. For instance, the Laureta declaration concludes the subject property is located outside of the visitor designation area and does not possess a valid permit or non-conformity use certificate. I presume it should've been, and this is a typo, graphical error, should've been visitor destination area, instead of visitor designation area.

Ms. Sasaki: That's correct.

Mr. Kimura: Nonetheless, in Mr. Laureta's declaration there is no address of the property. There is no determination of a visitor destination area. There is no reference to what ordinance determines the visitor destination area. And there is no specific facts as to what is a valid permit of a non-conforming use certificate which the petitioner purportedly does not have. Lastly, there are no maps to indicate and identify the visitor destination areas and where the subject property is located in reference to those visitor destination areas to determine whether or not the subject property is in or out of those visitor destination areas. Alternatively, there is no request by the planning department for mandatory judicial notice to acknowledge those visitor destination areas as well as where the subject property is located in reference to those areas. So all of these are genuine issues of material fact. Similarly, the Ludington-Braun declaration does not state that she is competent to testify to the facts set forth in her declaration. So, for those reasons, the planning department's motion for summary judgment is denied. Now there are a few more preliminary matters before the evidentiary portion of the contested case hearing begins. The first order of business is whether there are any interveners and I note for the record none are present in the hearing room. Next, whether there are any members of the general public wishing to be heard on this appeal. And also note for the record there are no individuals from the general public present in this contested case hearing. Now before we begin there is the issue regarding the exhibits that were proposed by petitioner and also the planning department. Beginning with petitioners Exhibits 1 through 5, is there an agreement that

they be stipulated into evidence? Or will there be testimony?

Mr. Kugle: We don't have a stipulation admitting anything into evidence so I presume that we will go ahead and authenticate them and admit them in the normal course of the testimony.

Mr. Kimura: Ms. Sasaki, response?

Ms. Sasaki: Well, I'm fine, if he wants to stipulate to the exhibits but...

Mr. Kimura: Okay. So, Mr. Kugle then would Ms. McConnell be willing to stipulate Exhibits 1 through 5 into evidence?

Mr. Kugle: Um, we...

Mr. Kimura: And, I mean part of your case in chief you can make reference to them.

Mr. Kugle: Yeah, we would stipulate 1 through 5. I have some problems with some of the county's exhibits. Um...

Mr. Kimura: Okay. Well let's take one thing at a time. So...

Mr. Kugle: Okay.

Mr. Kimura: ...first of all, plain- petitioner's Exhibits 1 through 5 will be admitted into evidence by stipulation. Now for the planning department's Exhibits A through F, I presume there's also no agreement, so Mr. Kugle you mentioned that you have objections to one or more of those exhibits?

Mr. Kugle: Yes. So I should, let me eliminate the ones that I don't have an objection to. I don't have an objection to D, and would stipulate that into evidence. I think that's the same as petitioner's Exhibit 1. That is the only that I don't have a problem with. And let me just explain what the problem is. There are, um...

Mr. Kimura: Okay. Well - well first of all...

Mr. Kugle: Sure.

Mr. Kimura: ...okay so, Exhibit D, petitioners of the planning department's exhibit will be admitted into evidence by stipulation and as stated by Mr. Kugle Exhibit D is virtually identical with Exhibit 1. Okay. Now Mr. Kugle starting with Exhibit A, your objection?

Mr. Kugle: Yeah. So my objection is we were not given the opportunity to do discovery in this case. And the remainder of the exhibits, the county Exhibits A, B, C, E

and F, appear to be documents out of the planning department files I presume. We did not get those until August 23, despite the fact that we had submitted a, um, we've been forced in these cases when the county will not - or, the planning department will not agree to do discovery, we've been forced to use the Uniform Information Practices Act request process to obtain a copy of the pertinent county files. And there has been no response to our UIPA request yet. So we've never seen these documents. Portions of some of these documents were attached to the summary judgment motion that was filed a few weeks prior. But there are significant portions of these such as, apparently internet ads and other things in some of the exhibits that we've never seen before. And I think it is, you know, it is unfair and it's trial by surprise to, despite having requested these formally through the UIPA process and not having gotten a response, and no documents being produced through that process, that's my concern with these exhibits.

Mr. Kimura: Okay. Ms. Sasaki?

Ms. Sasaki: Well as Mr. Kugle well knows, discovery in these contested case hearings is by stipulation of the parties. And, uh, he not only has he not made a motion to do discovery, but he's never even suggested to me that he wanted certain documents or he needs certain documents. So, his discovery argument is, uh, come short of the mark I think. As with respect to the element of surprise, these documents were probably available online. Uh, most of the - the ones that he's taking specific issue with. The internal reports are - I believe were attached to the motion for summary judgment, which was filed, uh, well before, uh, look - I'm just see the date. I don't know the, uh, oh okay. So the - it was filed on July 9. So he well had opportunity to examine this material and be aware that this material was going to be introduced into this contested case hearing. And finally evidentiary rules in contested case hearings are flexible. They've been drafted so the maximum amount of information to be used by the hearing officer in determining the cases so I believe that these exhibits are absolutely proper and admissible.

Mr. Kimura: Okay. Mr. Kugle? Any...

Mr. Kugle: I...

Mr. Kimura: ...reply?

Mr. Kugle: Yes. Just real briefly. So, you know, our opposition to the motion for summary judgment on Page 9, we explained that discovery was needed and that was a separate reason for not granting the motion. And we also attached as Exhibit 1, the UIPA request that was served on the planning department on July 10. Seeking exactly the type of documents that were submitted as exhibits for this hearing. Um, and - and I, uh, would just note that one of the

issues that we preserved for appeal, notwithstanding the fact that the planning commission changed its rules to prohibit discovery for which the planning department would never stipulate and never has in any case I've handled, I believe that deprives parties of due process. And so strict adherence to the rules, the rules are what the rules are, but it deprives a party of the ability to defend the allegation and the notice of violation. And so, you know, that's probably an issue for appeal. But, that is one of our arguments.

Mr. Kimura: Okay. So, as far as my ruling, what I am going to be ruling is that the planning department as the present their case in chief, you know, can offer any of these exhibits that they wish to do so, and then appropriate objection at that time can also be made by Mr. Kugle. However, as the parties fully are aware, the rules of evidence do not apply necessarily in a contested case like this according to the commission rules. However I will note that if Mr. Kugle does state a valid reason why possibly this case may need to be continued because there's exhibits that would be admitted that would require additional research or preparation to counter them, I will entertain a request at that time from Mr. Kugle for a continuance if need be. Okay. Now, anything further before we begin the contested case hearing?

Mr. Kugle: Not from us.

Ms. Sasaki: Nothing.

Mr. Kimura: Okay. Now knowing that there were no other parties in the contested case hearing room we did not invoke the witness exclusionary rule. But, if someone does come in during the course of the hearing we will invoke it at that time. So, now we will begin the evidentiary portion of the contested case hearing. Beginning with the petitioner's case in chief followed by the planning department's case in chief. Then if deemed appropriate the petitioner may also have a brief rebuttal case. Now Mr. Kugle, you ready to proceed with your first witness?

Mr. Kugle: We are.

Mr. Kimura: Okay. Mr. Kugle.

Mr. Kugle: Petitioner calls to the stand, Dawn McConnell. Dawn take...

Mr. Kimura: Mr. Kugle?

Mr. Kugle: Yeah.

Mr. Kimura: Please proceed anytime you're ready.

Mr. Kugle: Oh, do you want to put the witness under oath?

Mr. Kimura: Yes, thank you for reminding me. Ms. McConnell could you please stand and raise your right hand? Do you solemnly swear to tell the truth, the whole truth and nothing but the truth?

Ms. McConnell: I do.

Mr. Kimura: Okay. Please be seated.

Mr. Kugle: Good morning Dawn. Just for the record would you state your full name? Excuse me.

Ms. McConnell: Patricia Dawn McConnell.

Mr. Kugle: Okay. And you go by Dawn?

Ms. McConnell: Yes.

Mr. Kugle: Okay.

Mr. Kugle: Dawn, when did you first purchase your home?

Ms. McConnell: 2004.

Mr. Kugle: Okay, and where is it located?

Ms. McConnell: It's located in Wainiha.

Mr. Kugle: Okay, and in, pardon my poor understanding of Kauai geography but is that basically at the end of the road, Kuhio Highway way out toward, um, uh, the end of the road?

Ms. McConnell: It's probably two and a half miles from the end of the road, It's right by the (unintelligible) grocery store.

Mr. Kugle: Okay. Uh, but it's past - you drive through Hanalei to get there?

Ms. McConnell: Yes.

Mr. Kugle: Okay. Now do you reside in the home?

Ms. McConnell: Yes.

Mr. Kugle: And that's your permanent residence?

Ms. McConnell: Yes.

Mr. Kugle: Do you have mail delivery out there?

Ms. McConnell: No we have rural - we have PO box.

Mr. Kugle: Okay. Now when did you begin, um, we're going to use some terms and I want to make sure that - that we all kind of understand and use them the same. So what's your understanding of a homestay?

Ms. McConnell: Uh, that the owner is in the home.

Mr. Kugle: Okay. And that's, a lot of people will refer to that also as a bed and breakfast or B&B. Is that your understanding?

Ms. McConnell: Yes.

Mr. Kugle: So if I use either one of those terms, homestay or B&B or bed and breakfast, I'm referring to the same thing.

Ms. McConnell: Yes.

Mr. Kugle: And - and your understanding for all is that the homeowner lives in the home?

Ms. McConnell: Yes.

Mr. Kimura: Okay. So Ms.McConnell can you speak into the microphone so it picks up?

Ms. McConnell: Is it - the mic's not on. Is it on?

Mr. Kugle: Um, so Dawn when did you begin, um, renting your home as a homestay?

Ms. McConnell: In 2005.

Mr. Kugle: And, um, did you, um, get a transient accommodation tax license?

Ms. McConnell: Yes.

Mr. Kugle: And that's from the State of Hawaii, Department of Taxation?

Ms. McConnell: Yes.

Mr. Kugle: Okay. And did you also get a general excise tax license?

Ms. McConnell: Yes.

Mr. Kugle: Also from the State of Hawaii, Department of Tax?

Ms. McConnell: Yes.

Mr. Kugle: Now when you started this, um, renting in 2005 did you ever speak to anybody at the planning department about what you were doing?

Ms. McConnell: Yes.

Mr. Kugle: Uh, tell me about that.

Ms. McConnell: I just remember going down, to find out what I was supposed to do and, uh, it was a - it was a really nice man, Mario, had told me where to go to get the TAT license and the GE license.

Mr. Kugle: Okay. So Mario told you, um, you explained to Mario that you were wanting to operate your home as a bed and breakfast or a homestay?

Ms. McConnell: Yes.

Mr. Kugle: And you asked Mario whether there was any county permit associated with that?

Ms. McConnell: I asked him what I was supposed to do to be able to do that. And he said get a TAT and a GE.

Mr. Kugle: Okay. And he didn’t tell you that there was some county permitting process associated with that?

Ms. McConnell: No.

Mr. Kugle: Did he tell you basically that yes it’s legal in Kaua‘i to operate a homestay at that time?

Ms. McConnell: I don’t really remember the full conversation. I just was going to rent and I needed to know what to do. So I went down. I was talking to him, um, and - and that - that’s what I wanted to do. And then he said, “Okay. You have to get the TAT and then directed me where to get them.

Mr. Kugle: Okay. And then so as a result of that conversation you got the TAT and the GET tax licenses and you began...

Ms. McConnell: Yes.

Mr. Kugle: ...to rent?

Mr. Kimura: Ms. McConnell, can you move the, um, microphone I guess to your right so when you're facing Mr. Kugle...

Ms. McConnell: Oh.

Mr. Kimura: ...you would be speaking into the microphone?

Ms. McConnell: Okay.

Mr. Kugle: And so, um, just kind of an overview so between 2005 and 2016 you've been continuously operating your homestead?

Ms. McConnell: Yes.

Mr. Kugle: Do you have a name for your homestay? Uh, do you call it something?

Ms. McConnell: Not really.

Mr. Kugle: Okay. Um, now during that time period, 2005 to 2016, did anybody from the county planning department ever tell you that what you were doing was not legal?

Ms. McConnell: No.

Mr. Kugle: Now did it come to your attention that in 2008 the county passed a bill related to transient vacation rentals?

Ms. McConnell: Yes.

Mr. Kugle: You've paid attention to those things?

Ms. McConnell: Yes.

Mr. Kugle: Um, and did you take any action in 2008 to determine, and I'll call that ordinance 864, did you take any steps in 2008 to determine whether Ordinance 864 applied to you and whether you had to go in and get the nonconforming use certificate?

Ms. McConnell: Yes.

Mr. Kugle: What did you do?

Ms. McConnell: I hired, um, a draft person who did the paperwork and came back and said I was homestay and it didn't apply to me.

Mr. Kugle: Okay. So he went down to the planning department and they said, well this is a homestay, so Ordinance 864 doesn't apply to you?

Ms. McConnell: Yes.

Mr. Kugle: And so after that you continued to operate just as you had prior to 2008?

Ms. McConnell: Yes.

Mr. Kugle: Now, did you do you recall when it was in time that you received the first correspondence or communication from the planning department questioning your use of the property?

Ms. McConnell: Yes I recall that.

Mr. Kugle: And do you remember when that was?

Ms. McConnell: Yes. It was April 1st and the server came to my door and, um, 6 in the morning or something. So it's easy to remember 'cause he was bashing the door and then delivered a piece of paper to me.

Mr. Kugle: Okay. And that was April 1, 2017?

Ms. McConnell: Yes.

Mr. Kugle: And let me, um, just have you, um, flip in the exhibit binder in front of you toward the back half there's an Exhibit C.

Ms. McConnell: Yes.

Mr. Kugle: And is that the paper that was delivered to you on April 1st?

Ms. McConnell: Yes it is.

Mr. Kugle: Ms. McConnell I note that it's dated, January 11, 2017. You didn't get it in January did you?

Ms. McConnell: No.

Mr. Kugle: Okay.

Mr. Kugle: First time you saw it was when it was handed to you?

Ms. McConnell: Yes.

Mr. Kugle: I see they sent it certified mail according to the words above your name. Um, did you have to sign for something on - on April 1st when they delivered it?

Ms. McConnell: No it was a server.

Mr. Kugle: Oh.

Ms. McConnell: He just bashed on my door and then just handed it.

Mr. Kugle: Okay. And, um, looks like your mailing address that the county was using is 104 Endlich Drive, Santa Cruz, California.

Ms. McConnell: Yes.

Mr. Kugle: But that's not where you live.

Ms. McConnell: No.

Mr. Kugle: Um, you live at this property in Wainiha?

Ms. McConnell: Yes.

Mr. Kugle: Now, and so you got this paper and you obviously read it.

Ms. McConnell: Yes.

Mr. Kugle: I was confused by reading this, because it says that there's violations of both homestay and single family transient vacation rental. And it refers to two different code sections at the bottom of the page. Do you see that?

Ms. McConnell: Yes.

Mr. Kugle: Did that cause you to wonder what you were being accused of?

Ms. McConnell: Yes.

Mr. Kugle: And what did you do in response to receiving this letter in April?

Ms. McConnell: I made an appointment and went into the planning department.

Mr. Kugle: Okay. Do you remember what day that you went down to the planning department?

Ms. McConnell: Yes. It was, uh, Ap-April 11, 2017.

Mr. Kugle: Okay. And, did you meet with at the planning department?

Ms. McConnell: I met with a man named Bambi and a woman, uh, named I think Joan.

Mr. Kugle: Okay. Joan Ludington Braun?

Ms. McConnell: I remember she had a long last name so that would...

Mr. Kugle: Okay. And, um, just if - if you can kind of tell us in summary how that meeting went or what happened at that meeting?

Ms. McConnell: Well, they take you to the back room. And basically it's like an interrogation. First Bambi was there, just him. And then went out and got the lady. And they just told me I had to give them $10,000 because I was in violation.

Mr. Kugle: And so were they saying that that was a fine or - or they just said you got to pay - pay them or pay the planning department $10,000?

Ms. McConnell: You know, it's hard to remember exactly because it was - it was quite traumatic to be truthful because it was, uh, it was intim- it was so intim- there was a - there was an in- I felt there was an intent to intimidate. So I was intimidated. And so, um, I think it seemed I was being accused of something that I - that I did not believe I - I had done. And I was supposed to give this money.

Mr. Kugle: And did you tell Bambi and Joan that you, um, had been renting your house legally prior to that April meeting?

Ms. McConnell: I told them I was - I was legal and that I was paying all my taxes.

Mr. Kugle: Okay. And after that meeting did you then send a letter to the planning department?

Ms. McConnell: Yeah I took it in the next day.

Mr. Kugle: Okay. And can you just flip in the exhibits to Exhibit 3 which is more toward the front of the binder? Uh, and is that the letter that you, you had - excuse me, hand carried to the planning department on the 13th?

Ms. McConnell: Yes.

Mr. Kugle: And this is your summary in response - summary of that meeting and response

to the zoning compliance notice?

Ms. McConnell: Yes.

Mr. Kugle: And so in kind of the middle of that first page of that letter you say, "It is my believe however that I, um, have not and never have been in violation of any of the, excuse me, older county ordinances." You see that?

Ms. McConnell: Yes.

Mr. Kugle: And by that you meant that, you had been operating a homestay legally before the law was changed to prohibit it in certain areas. Is that - is that what you were conveying with this letter?

Ms. McConnell: Yes.

Mr. Kugle: Um, and then you go on to - to mention in the next paragraph that there'd been some changes in the law. Um, that, uh, so that - that was - is that in reference to, um, the ordinance that the planning department was pointing out and saying that you'd violated?

Ms. McConnell: Yes.

Mr. Kugle: And that was what we'll call the Homestay Ordinance, Ordinance 1002.

Ms. McConnell: Yes.

Mr. Kugle: Did you in that meeting with the planning department clarify with them that you were not operating a single family transient vacation rental where the owner doesn't live on the property?

Ms. McConnell: Yeah I was really clear about that.

Mr. Kugle: Okay.

Ms. McConnell: Because I talked with Bam about the island. We talked - we talked a little about the island and my, you know, my life on the island.

Mr. Kugle: Okay. Now when you went to that meeting and when you wrote this letter, were you represented by an attorney?

Ms. McConnell: No.

Mr. Kugle: Okay. That was just Dawn McConnell from Wainiha goin' down to the planning department and trying to explain things?

Ms. McConnell: Exactly.

Mr. Kugle: And did you think that by going down there and explaining the situation to them that this would resolve everything?

Ms. McConnell: Yes.

Mr. Kugle: Did you get any letter or phone call in response to your April 13th letter?

Ms. McConnell: Nothing. Nothing ever came.

Mr. Kugle: Eventually though you did get a notice of violation, an order to pay fines letter. Do you recall that? A second letter from the planning department?

Ms. McConnell: No I don't recall that actually. I don't recall getting a second letter.

Mr. Kugle: Okay. And...

Ms. McConnell: But I - I just don't remember.

Mr. Kugle: Okay. Let me have you turn to, um, Exhibit 1 in that binder, the very first exhibit. So this is the letter that I was referring to, um, and you say you just don't actually have an actual memory of receiving it.

Ms. McConnell: No, I don't.

Mr. Kugle: Unlike the earlier letter that had been sent to California, this one indicates that they were sending it - it has two addresses for you. Both the Santa Cruz, California address as well as 4813 Ananalu Road, Hanalei, 96714. Correct?

Ms. McConnell: Yes.

Mr. Kugle: But again, you don't get mail delivered down there.

Ms. McConnell: No. It would have to have a PO box or it gets sent back.

Mr. Kugle: Okay. Let me have you, in that same binder in front of you turn to Exhibit 4. And can you just describe for the hearings officer what Exhibit 4 is?

Ms. McConnell: Uh, it's a copy of my tax return reconciliation.

Mr. Kugle: Okay. And so, the first page of Exhibit 4 is for calendar year 2005?

Ms. McConnell: Yes.

Mr. Kugle: And although it has sums, actual numbers blocked out, does that reflect rental income from your homestay operation?

Ms. McConnell: Yes.

Mr. Kugle: And then how about the second page of Exhibit 4? Turn to that one. It says in handwriting up at the top it says, "Tax Year Ending 2006," written in there. Do you see that?

Ms. McConnell: Yes.

Mr. Kugle: And so this, does this also reflect the payment of taxes from rental income from your homestay operation?

Ms. McConnell: Yes.

Mr. Kugle: Third page same thing right? That's a general excise tax, use tax return for 2006.

Ms. McConnell: Yes.

Mr. Kugle: And that also reflects rental income.

Ms. McConnell: Yes.

Mr. Kugle: And do you have similar records for all the years that you were operating?

Ms. McConnell: Yes, I do.

Mr. Kugle: Okay. And ever since you went to the planning department in 2005 and they told you get a GET and TAT license from the state and pay that tax, that's what you've been doing?

Ms. McConnell: Yes.

Mr. Kugle: And so we didn't want to clutter the record with all of that but let me have you turn to Exhibit 5. Um, and the first and second page of Exhibit 5 is a State of Hawaii income tax return for a resident for 2015. Is that right?

Ms. McConnell: Yes.

Mr. Kugle: And this is your tax return.

Ms. McConnell: Yes.

Mr. Kugle: State tax return for 2015. Um, this has underneath your name in the middle of the page it has PO Box 641 Hanalei. Is that your PO Box?

Ms. McConnell: Yes.

Mr. Kugle: So that's where you receive mail?

Ms. McConnell: Yes.

Mr. Kugle: Um, and on the second page of this it shows that you're paying tax, income tax, and it notes the business as property manager. Is, um, I note that this was prepared by Stephen Ching. Who's Stephen Ching?

Ms. McConnell: That's my accountant.

Mr. Kugle: Okay. Um, and so that was his description or your description of what you do when you manager your property?

Ms. McConnell: It's his, it's how he described it.

Mr. Kugle: Okay. And the third and fourth pages of Exhibit 5, is that, um, tax, um, GE tax and TAT tax reconciliation totals for a number of years?

Ms. McConnell: Yes.

Mr. Kugle: Okay. And so, as I look down the columns on the left hand side, there are entries for years ending '07, '08, '09, '10, '11, '12, '13, '14 and '15.

Ms. McConnell: Yes.

Mr. Kugle: Okay, and just so I'm clear, were you continuously using your property as a homestay from 2005 through 2017 when you had your interactions with the county?

Ms. McConnell: Yes.

Mr. Kugle: And, had you ever abandoned or discontinued that use during those years?

Ms. McConnell: No.

Mr. Kugle: You never stopped doing it for 12 months or more?

Ms. McConnell: No.

Mr. Kugle: You were telling me about the location of your house in relation to Hanalei. So you have to drive on Kuhio Highway through Hanalei. Is that correct? And that's the only way to get in.

Ms. McConnell: Yes.

Mr. Kugle: Do you recall the floods and landslides that began in April of 2018?

Ms. McConnell: Yes.

Mr. Kugle: And it's my understanding that the county actually restricted vehicular access, beyond Hanalei for about 14 months. Is that correct?

Ms. McConnell: Yes.

Mr. Kugle: And do you know what a - so you had to have a sticker or a permit to get out there to get to your house. Is that correct?

Ms. McConnell: Yes.

Mr. Kugle: And do you know what agency was administering those permits, those access permits?

Ms. McConnell: The planning department.

Mr. Kugle: The planning department. And did, um, so you obviously had a sticker on your car and you were able to get access?

Ms. McConnell: Yes.

Mr. Kugle: Did the planning department, was it issuing stickers or permits for people who were gonna be staying in transient vacation rentals or homestays out beyond the road closure?

Ms. McConnell: No. They did not.

Mr. Kugle: Okay. And so, you didn't have any rentals during that time period that the highway was closed from April of 2018 until about June of 2019?

Ms. McConnell: No I had no rentals...

Mr. Kugle: Okay.

Ms. McConnell: ...during that time.

Mr. Kugle: Because the planning department wouldn't let anybody come through.

Ms. McConnell: Exactly.

Mr. Kugle: Dawn I have no further questions. Thank you.

Mr. Kimura: Thank you. Ms. Sasaki?

Ms. Sasaki: I have a question about the letter that you sent to the planning department? The return address on that letter was your post office box?

Ms. McConnell: Um, I'd have to look at that (unintelligible). I - I - I actually delivered it to them.

Ms. Sasaki: So they would really have no way of knowing - since you didn't - okay. So...

Ms. McConnell: Yeah but I put the phone number on it too.

Ms. Sasaki: Okay. What is your understanding, I know you said you were, uh, when the TVR ordinance was passed you came down and you asked whether you had to, um, comply with, uh, and - or do any paperwork or get a permit or not with the - when the - when Ordinance 864 is passed. That's correct right?

Ms. McConnell: In 2008.

Ms. Sasaki: Mm-hm. Okay. When Ordinance 1002 is passed, what was your understanding of what you needed to do that time?

Ms. McConnell: I - I didn't - I never even knew it was passed.

Ms. Sasaki: Well how did you know that Ordinance 864 was passed but you didn't know Ordinance 1002 was passed?

Ms. McConnell: Because when they passed Ordinance, what is it, 84...

Ms. Sasaki: 864.

Ms. McConnell: 864, everyone knew. They told us all. They - they gave the information to everyone. They told us who - who - how to go about the process...

Ms. Sasaki: They personally s- told you?

Ms. McConnell: It came...

Ms. Sasaki: Who's th...

Ms. McConnell: ...I...

Ms. Sasaki: First of all let's say who's they?

Ms. McConnell: Um, the - the county planning somehow or another we all knew. Because...

Ms. Sasaki: Well...

Ms. McConnell: ...we got le- certain people got letters I think. And then we passed...

Ms. Sasaki: But did you get a letter?

Ms. McConnell: Um, you know, I don't remember in that time. But I do remember that, um, they told us that - that we all knew. It was either coconut wireless or some - some people got letters and spread the word. And so it was very prevalent and - and who we went between each other. Who do you get to help you with this...

Ms. Sasaki: So is it your position...

Ms. McConnell: ...(unintelligible)...

Ms. Sasaki: ...that the Coconut Wireless failed with respect to Ordinance Number 1002?

Ms. McConnell: Absolutely. It totally failed us.

Ms. Sasaki: And - and do you rely on your, um, obligations under the law with respect to your business on the Coconut Wireless exclusively?

Ms. McConnell: No absolutely not.

Ms. Sasaki: So how do you - how do you - how do you determine whether you're in compliance or not?

Ms. McConnell: Well, you just...

Ms. Sasaki: No.

Ms. McConnell: ...you c...

Ms. Sasaki: ...but you. Not one. You.

Ms. McConnell: Well, I, you know, I would assume that the same process would be in place in

2016 as it was in place in 2018 where - where it was in the paper, it was everywhere that we knew. And it was not like that in 2016.

Ms. Sasaki: Would you be dis- surprised to discover that with respect to Ordinance 1002, um, people who had been operating homestays were permitted to obtain permits at that time?

Ms. McConnell: I remember reading in the paper where the - there - where it said was very obscure and there was nothing specific that he was - I remember it was titled something - or someone told me about the thing that, um, homestays were fine. It was the word was always out homestays were fine. We just always believed we were safe and fine. And not doing anything wrong. And then suddenly I got this.

Ms. Sasaki: So when you were informed that you were in fact in violation of the ordinance, you ceased operations?

Ms. McConnell: When - when Bambi...

Ms. Sasaki: Well when you got the original - when you got the original cease and desist letter, zone - the zone and compliance notice, which that da- well dated January 11th but you said you didn't receive it 'till May?

Ms. McConnell: April 1st.

Ms. Sasaki: April 1st. Okay. At - on April 1st when you had actual notice of that letter, did you cease and desist from renting your property pursuant to the notification of the planning department?

Ms. McConnell: I believed they were in error so I made an appointment and went down and talked to them.

Ms. Sasaki: But you continued renting.

Ms. McConnell: I went and - I went down and talked to them and continued renting because I...

Ms. Sasaki: You continued renting.

Ms. McConnell: ...thought it was in...

Ms. Sasaki: Okay. So despite a zoning compliance notice from the planning department that directed you to stop and provided the sections of the code which you could've then looked up to b- assure yourself you were correct, you continued operating because you thought well, they're not right.

Ms. McConnell: No you're - you're incorrect. Because there was still nothing for homestays.

Ms. Sasaki: Well, let - why don't you turn to - I guess it's my Exhibit C. Um, I'm not sure is it your Exhibit 1? The zoning compliance notice? Is that right?

Mr. Kugle: No.

Ms. Sasaki: Memory serves?

Mr. Kugle: No. Uh, Exhibit 1 was the May cease and desist letter.

Ms. Sasaki: Okay. Well - well then I'd like to show, uh, the witness Exhibit C. The zoning compliance notice if I may?

Mr. Laureta: Oh this is the place. Bambi.

Ms. Sasaki: Uh, Mr. Kimura?

Mr. Kimura: Yes.

Ms. Sasaki: Okay. I'd just like to show you our Exhibit C, respondent's Exhibit C, and perhaps you could read the first paragraph and the second paragraph? Out loud.

Mr. Laureta: Oh thank God.

Ms. McConnell: The planning department conducted investigation...

Mr. Kimura: O- okay, um, could - could we, um, hold on a second okay? So now, let the record reflect that we have Mr. Mike Laureta and his - his...

Mr. Laureta: And Bambi's coming too.

Mr. Kimura: ...well is Mr. Laureta the duly authorized representative of the planning department?

Ms. Sasaki: He's here as a witness today.

Mr. Kimura: Well even though...

Mr. Laureta: Okay.

Mr. Kimura: ...if - even though he's a witness, if he is the duly authorized representative, he can remain.

Ms. Sasaki: Well...

Mr. Laureta: Yes.

Ms. Sasaki: Okay.

Mr. Laureta: Um...

Mr. Kimura: Okay. But - but...

Mr. Laureta: And Bambi too.

Mr. Kimura: ...Bambi - Bambi who is a witness would not be permitted to be...

Ms. Sasaki: I couldn’t have two duly appointed...

Mr. Kimura: No. You can...

Ms. Sasaki: ...authorized representatives?

Mr. Kimura: ...only have one.

Mr. Laureta: Um...

Ms. Sasaki: It’s Bambi.

Mr. Laureta: Yeah Bambi.

Ms. Sasaki: Yeah.

Mr. Laureta: Okay. Okay, you’re gonna be - you’re gonna be the (unintelligible) witness. Okay.

Ms. Segreti: Representative.

Mr. Laureta: Yeah representative. Okay.

((Crosstalk))

Mr. Kimura: Okay. So let the record reflect that Mr. Emayo will be the authorized...

Ms. Sasaki: Representative.

Mr. Kimura: ...representative.

Ms. Sasaki: …of the planning department, yes.

Mr. Laureta: Bambi get your phone. No?

Mr. Emayo: Go bring em.

Ms. Sasaki: Okay. Um, just could you read the first two paragraphs of the zoning notification letter?

Ms. McConnell: Uh, the planning department conducted an investigation of the subject property and found an establishment of a vacation rental operation. This is considered a violation of the following provisions of the comprehensive zoning ordinance of 1987 of Chapter Hawaii Code 1987 as amended - as amended CZO Section 8A, General Provisions of Homestay operations are prohibited are prohibited outside the visitor designation area.

Ms. Sasaki: So when you received this letter you thought the planning department was incorrect with respect to the law?

Ms. McConnell: I thought that their process was incorrect because when 2008 everyone was given the chance to file for a permit...

Ms. Sasaki: Well you said the...

Ms. McConnell: ...and (unintelligible)...

Ms. Sasaki: ...Coconut Wireless w- I mean do you think the planning department is in...

Mr. Kimura: Okay. Ms. - Ms. Sasaki, let, um...

Ms. Sasaki: Her speak.

Mr. Kimura: ...Ms. McConnell...

Ms. Sasaki: Yeah.

Mr. Kimura: ...finish her answer and you can ask your next question.

Ms. McConnell: Um...

Mr. Kimura: Go - go right ahead Ms. McConnell.

Ms. McConnell: Um, where - what was she...

Mr. Kimura: Okay. So, um, Ms...

Ms. Sasaki: You...

Mr. Kimura: ...Sasaki can ask...

Ms. Sasaki: Okay.

Mr. Kimura: ...the question again.

Ms. Sasaki: What, were you under the impression that when the planning department sent the zoning compliance notice and cited the specific provision with respect to homestays outside the visitor destinar- destination area, you - did you th- think - what was your position that they were incorrect?

Ms. McConnell: It was my position that I didn't think they knew what they were doing and the process did not seem appropriate, uh, because I had followed through the 2008 both with myself and with my friend down the road. And, um, that process was kind of pretty cohesive. Whereas this process was suddenly being thrown that oh, some point or another, s- perhaps maybe this ordinance had been changed or was in the process of being changed. And a new system was in place. But it could apply to TVR but maybe not homestay. It - there was nothing very clear and furthermore, the process in 2008 it allowed for people to be grandfathered in. So it wouldn't make any sense whatsoever that you would then say that time in 2008, oh, well later we will deal with homestays later on.

Ms. Sasaki: Did you...

Ms. McConnell: And then suddenly...

Ms. Sasaki: ...(unintelligible).

Ms. McConnell: Excuse me. And then suddenly all of a sudden the homestays weren't even given an opportunity to be grandfathered in. That didn't seem the process to me. Uh, from what I know of the world and the laws, it - this did not make any sense. And it was - even when I talked to, um, one of the people at the planning department besides Bambi, I said, "What - what's the permitting process if we want to apply to get a permit? If we need to apply for the permit like we did in 2008?" "Oh there is none." So everybody tells you something different.

Ms. Sasaki: Are you an attorney?

Ms. McConnell: I don't think you need to be an attorney...

Ms. Sasaki: Are you - are...

Ms. McConnell: ...to understand.

Ms. Sasaki: ...you an attorney?

Ms. McConnell: Excuse me?

Ms. Sasaki: Are you an attorney?

Ms. McConnell: No.

Ms. Sasaki: Did you consider consulting an attorney when you...

Ms. McConnell: I did. I - right away.

Ms. Sasaki: You consulted an attorney when you got the zoning compliance notice?

Ms. McConnell: I - I consulted an attorney after I met with Bambi and then gave the letter to the planning department and they said that there's no permitting process. We don't have one. So then I consulted an attorney to figure out what is going on because there was so many gray areas and so much unclarity and non-clarity.

Ms. Sasaki: S- well, the, uh, I think the gray area - it - gray areas, uh, the law is ver- very clear actually. Homestay operations are prohibited outside of the visitor destination area. I don't know how much clearer that could be.

Mr. Kugle: Objection. Argumentative.

Mr. Kimura: Sustained.

Ms. Sasaki: But, you did it in fact when you re- s- ordered by the planning department to stop operations, in - in 2017, you di- you - although you weren't a lawyer, although you didn't consult a lawyer, you determined that i- this law was inapplicable to you.

Ms. McConnell: It wasn't like that. When I talked to Bambi, he - they just told you give you the $10,000 and go underground. Like don't advertise. But I said what I'm no- but I'm legal. I'm a homestay and I'm legal.

Ms. Sasaki: So is it your testimony that when you met with the planning department, they sought $10,000 from you and for...

Ms. McConnell: No they didn't - I didn't pay.

Ms. Sasaki: They sought. Yeah sought $10,000 from you. And their recommendation was that you continue to operate illegally?

Ms. McConnell: It was - it was like, you just can't ha- you just - yeah. S- I guess. It was kind of like that. But then I was legal in my mind. I was legal. And I also thought that I had every right because all these years here - here I was believing that if the law, if they decided to do homestay down the road, which they said they were going to at some point, that we would be given the same, um, process that they were given in 2008. Which was I believe that, you know, you'd be notified, you have a right to - to apply for a permit, and you would be grandfathered the same as everyone else. I mean the idea - I understood that the idea for the visitor destination area. And I went through paperwork and read it. And the idea is to build on a community. To build the community. To allow people to have their homes and live in their community and not be inundated by a bunch of homes that are not occupied by anyone other than those outside of the community. And so my - we all believed that th- this was - this ordinance was for us, to protect us, to keep us safe, to keep us in our homes, to keep us with building our community. It never occurred to me for a minute that there would be anything other than that, that would occur. So I never thought that - I thought I should be grandfathered in. Of course. Like everyone else was.

Ms. Sasaki: Well, I ha- what is your understanding of how everyone else was grandfathered in?

Ms. McConnell: Um, when everyone in our community applied in 2008 with the TVR's there was - they - they got the draft persons and helped with all the paperwork, who helped them do the applications, then the place then - then they got to buy the permit and then the permit gran- I mean I think out of our community of 400, 80 were grandfathered in as TVR's and they don't live in - in the area.

Ms. Sasaki: Where - where - how do you derive at this system?

Ms. McConnell: That was through a flood independent information. During the flood information that we had meetings and how many people are TVR's that - of people who live outside the island.

Ms. Sasaki: Are you aware that when - when Ordinance 1- 1004 was passed that homeowners had an opportunity to obtain licenses pursuant to that - or, sorry, Ordinance 1002 was passed that o- that homestay owners were - had the opportunity to obtain the necessary permits to - to have a homestay?

Ms. McConnell: Can you repeat that?

Ms. Sasaki: Okay. When - when Ordinance 1002 was passed, were you aware that

homestay owners had the opportunity just this TVR owners had the opportunity when 864 was passed to obtain necessary permitting for them to continue their business?

Ms. McConnell: When I asked the county planning after meeting with Bambi they said there wasn't permit. That I couldn't apply. There was no application.

Ms. Sasaki: Because?

Ms. McConnell: They just said there is none. There was a tall guy, 6'1", (light hair).

Ms. Sasaki: Um, okay. So you testified that from June - April 2018 to June 2019, uh, you - there was no rental owing to, uh, flood damage or - or a consequence of the rain in April?

Ms. McConnell: As a consequence of the federally declared disaster.

Ms. Sasaki: Yes. The rainstorm. Um, in - so now let me ask you, uh, between June ni- 2019 and the present, have you been renting your homestay and advertising your homestay?

Mr. Kugle: Objection. Irrelevant. This, uh, purpose of this hearing is on the May, uh, 2017 notice of violation.

Ms. Sasaki: I disagree. I disagree because the - the clearly the petitioner doesn't understand what the law is and - and - and continues to flout it because she thinks it's wrong. So I mean this just goes to the fact that she's continuing - despite the best efforts of the planning department and they've taken enormous efforts with her, she insists on continuing this - this - this, uh, behavior. And they've been taking enormous efforts to notify her, to give her an opportunity to mediate, to no avail.

Mr. Kimura: Okay. Mr. Kugle, any...

Mr. Kugle: Um, yeah. This is a single violation that was issued, uh, on May of 2017. There's no violation for any continuing violation or anything like that.

Ms. Sasaki: Well the...

Mr. Kugle: So we're - what we're litigating is the May 2017 notice of violation.

Ms. Sasaki: The notice of violation says that you can pay a civil fine not to exceed $10,000 and your liable to pay a civil fine up to $10,000 per day. So that's not a facture there was a single violation. The petitioner was warned not only in person by the planning department personally, but by a letter that ongoing

behavior would be subject to continued - continued fines. And she still didn't believe that that was the law.

Mr. Kimura: Okay. Objection overruled. So you may proceed...

Ms. Sasaki: Okay.

Mr. Kimura: ...Ms. Sasaki.

Ms. Sasaki: Okay. So, between tw- June 2019 and the present, have you been renting out of your homestay?

Ms. McConnell: Um, presently? Um...

Ms. Sasaki: Not presently. From June 2019 to the present, have you ever rented out - have you rented your homestay?

Ms. McConnell: 2019 when they opened the road in June?

Ms. Sasaki: To the present.

Ms. McConnell: Now if it's friends that come can I have friends come stay at my home? I mean am I allowed to have visitor in my home?

Ms. Sasaki: I'm not here to answer the questions. You're here to answer the questions. Have you rented out your o- your house as a homestay or advertised it as a homestay between June 2019 and the present?

Ms. McConnell: I had some friends stay (unintelligible) because I'm still under - I'm still in recovery phase from this federal declared disaster. I have tremendous expenses that have to take care of. So I do have friends who stay with me. Uh, right now no. No not right now.

Ms. Sasaki: So you have. So the answer is yes I've had friends and people stay with me.

Ms. McConnell: I've had friends and people stay with me, um...

Ms. Sasaki: So you - no so you...

Ms. McConnell: ...(unintelligible).

Ms. Sasaki: ...can defray the costs of the damage of the storm.

Ms. McConnell: Yeah. I have to.

Ms. Sasaki: Okay. So that - so then the answer is yes.

Ms. McConnell: Mm-hm.

Ms. Sasaki: Okay. Um, so you've got notice by mail that your operation is illegal. You had notice you were in a meeting with the planning department that your operation is illegal. There was a finding by the planning department that you're subject to $10,000 fine and $10,000 per day because your operation was illegal. What - what will stop you from operating an illegal bed and breakfast? I mean...

Mr. Kugle: Objection. Badgering a witness.

Ms. Sasaki: I - I - I don't think it's badgering but...

Mr. Kimura: It's, um, sustained.

Ms. Sasaki: Okay. What - when will you - okay. Do you currently believe that there's a law in place preventing homestay operating outside a visitor destination area?

Ms. McConnell: Um, it appears that the planning department is putting something in place to prevent people who live in their home from being able to rent their home out as they please. That's my understanding. I...

Ms. Sasaki: Okay. So you disagree...

Ms. McConnell: ...(unintelligible).

Ms. Sasaki: ...with the law. You...

Ms. McConnell: I...

Ms. Sasaki: ...disagree with it.

Ms. McConnell: You know, also do you disagree with the law that we should have the right to be grandfathered if we've been doing business for many, many years? Is that a law? You're a lawyer. Is that a law?

Ms. Sasaki: I'm not here to answer the questions. You're here to answer the questions.

Ms. McConnell: Well you're asking me if I'm disagreeing with the law. And I'm asking you if you are. Because I'm understanding that I have the right to be grandfathered in.

Ms. Sasaki: What - how...

Ms. McConnell: At least given that choice.

Ms. Sasaki: Yeah. The planning department has sent you a notice of violation. The planning department has sent you a - a zoning compliance notice. The planning department has had a meeting with you indicating that this is not against the - this is against the law. So what leads you to think it's not against the law?

Ms. McConnell: Because I have the right to be grandfathered in. Everyone else did. Everyone else had that right. Why wouldn't I?

Ms. Sasaki: Okay. So is it your intention to continue renting out your homestay?

Ms. McConnell: I have a lot to think about because like I said, we just went through 14 months of being traumatized with a financially and psychologically with a disaster. I don't know if you've ever read the international laws around that. But there are guidelines to be followed to help us during recovery. I don't see any help coming for recovery. I have to try and figure out how am I going to recover this. I have loss - huge losses and damages that were not - I got no help, recovery bills. And I don't know what to do. Basically I have to take care of my property. I have to take care of myself. I'm isolated where I'm at. I'm - I have nobody. I'm isolated.

Ms. Sasaki: And in 2017 when you were operating your homestay, that was before the storm so what compelled you to operate the homestay in 2017, uh, versus the notices from the planning department?

Ms. McConnell: To - to keep - to keep my property maintained. To maintain my mortgage payment, my taxes. The county assessor that had increased my taxes to cover the, um, as a hotel. So my taxes had tripled I believe they went from $2000 something, they went to $8000 something. I have so many more expenses. So and also at the assessor's office is charging me that for a hotel when...

Ms. Sasaki: So your position is that you're entitled because you have bills to- that - to break the law.

Mr. Kugle: Ob- I'm going to finally object because I mean it's been asked and answered. She has said...

Ms. Sasaki: Sh...

Mr. Kugle: ...time and time again that she believed that she was grandfathered. And...

Ms. Sasaki: She - but believing you're grandfathered and actually being...

Mr. Kimura: Uh, Ms. - Ms. Sasaki, let Mr...

Ms. Sasaki: All right.

Mr. Kimura: ...Kugle finish.

Mr. Kugle: So she believed - she explained in the meeting with the planning department that she believed she was grandfathered. And that's the answer to these questions. And I don't know how many times - it's getting repetitive. I don't know if you're going to expect a different answer but that's been asked and it's been answered.

Mr. Kimura: Ms. Sasaki?

Ms. Sasaki: Well, what I'm trying to get at is, um, whether your client thinks that her wishes or desires or hopes for what the law ought to be, um, supersede what the law actually is, that's where I - that's what I - what I'd like to know. Because you said she believed it or - and sh- she be- she believed it. She continues to believe it. So how - what - what is the planning department - what - what did - what - what - what are they - how are they obligated to give notice to a person who refuses to understand what the law is?

Mr. Kimura: Okay. Um, the objection is sustained. Um, Ms. McConnell did answer. Um, what you're asking for I guess is her rationale. But - but I think it's clearly...

Ms. Sasaki: I think it...

Mr. Kimura: ...(unintelligible)...

Ms. Sasaki: ...that's clear.

Mr. Kimura: ...already answered the question so...

Ms. Sasaki: Yeah.

Mr. Kimura: ...you can move on...

Ms. Sasaki: I - okay.

Mr. Kimura: ...Ms. Sasaki.

Ms. Sasaki: Uh, I think - actually I think I have nothing further Your - Your Honor.

Mr. Kimura: Okay. Thank you. Mr. Kugle redirect?

Mr. Kugle: Just very briefly some redirect questions. Dawn you were being asked about the difference - your understanding of the difference in the process that occurred in 2008 versus in 2016. Do you recall those questions?

Ms. McConnell: Yes.

Mr. Kugle: And, I think i- and correct me if I'm wrong, your explanation was that you felt that if homestays were going to be rendered illegal outside of the VDA as TVR's had been in 2008, that there would be a similar, non-conforming use process.

Ms. McConnell: Yes.

Mr. Kugle: And I think you mentioned a number of 480 or so TVR's that were grandfathered following the 2008 change in the law.

Ms. McConnell: In - in our particular community, Wainiha.

Mr. Kugle: Okay.

Ms. McConnell: There's - we have like around 400 homes I suppose it is. And I think it's - it's somewhere between 77 and 80 that are TVR's non-owner occupied and most of those homeowners live - all of them live outside of our area but many of them live off the island.

Mr. Kugle: Okay. And, um, I - I - you were being asked, um, you know, what your belief or understanding was. Now you expressed in the meeting with the planning department that you thought that you were legal before the change in the law. And that that should be respected. Is that what you explained to the planning department?

Ms. McConnell: Yes. And I - I actually thought I was still - I thought I was still legal 'cause I - there was no opportunity to - to do a permit or - or processing in place.

Mr. Kugle: Okay. And, um, I - I have no further questions. Thank you.

Mr. Kimura: Okay. Is there any re-cross Ms. Sasaki?

Ms. Sasaki: I have no re-cross.

Mr. Kimura: Okay. Um, thank you Ms. McConnell. Okay.Mr. Kugle your next witness?

Mr. Kugle: We rest. We have no other witnesses.

Ms. Sasaki: I'd like to call Mike Laureta as my first witness.

Mr. Kimura: Okay. Please do.

Ms. Sasaki: Is he outside?

Mr. Emayo: No.

Ms. Sasaki: Oh.

Mr. Emayo: You got to call him up.

Ms. Sasaki: Oh call him?

Mr. Emayo: Yeah.

Ms. Sasaki: Could we - could we take a break while I contact, Mr. Laureta's not outside.

Mr. Kimura: Okay.

Ms. Sasaki: So...

Mr. Kimura: So, we'll take a 5 minute recess.

Recess from 10:13am – 10:24am

Man: (Unintelligible).

Ms. Sasaki: Okay.

Mr. Kimura: (Unintelligible) then.

Man: (Unintelligible)

Mr. Kimura: Okay. Ah, raise your right. Do you please swear to tell the truth, the whole truth, and nothing but the truth?

Mr. Laureta: Yes, I do.

Mr. Kimura: Okay, thank you. Please have a seat.

Ms. Sasaki: Mr. Laureta, what is your position with the Planning Department? What is your posi- what is your...

Mr. Laureta: Okay. Wait, wait, wait. Let me downshift here. My - it's...

Ms. Sasaki: Well let - maybe I can...

Mr. Laureta: ...Planning Program Manager in charge of enforcement.

Ms. Sasaki: Okay. So as Planning Program Manager in charge of enforcement, you are well aware of the rules governing homestays in - on Kaua‘i?

Mr. Laureta: Well aware.

Ms. Sasaki: Right, right, right.

Mr. Laureta: I am aware.

Ms. Sasaki: Okay. So can you tell me basically what ordinance...

Mr. Laureta: Oh boy.

Ms. Sasaki: Okay. Well okay, just tell me what the law is vis-à-vis homestays in Kaua‘i.

Mr. Laureta: As they are now?

Ms. Sasaki: As they are now.

Mr. Laureta: You can only have them in the visitor destination area.

Ms. Sasaki: Right. So operating outside a visitor destination area would be illegal.

Mr. Laureta: Illegal. (Unintelligible)

Ms. Sasaki: When the law changed in 2016, were - were - was there a grandfathering component to that law, or were the people able to get - ah, obtain permits if they were outside the VDA?

Mr. Laureta: No.

Ms. Sasaki: Okay. And the legislature’s quite clear about this?

Mr. Laureta: County Council.

Ms. Sasaki: County Council -- well yes, yes.

Mr. Laureta: Yes.

Ms. Sasaki: Um, okay. Ca- the Song of the Jungle TVR - well okay, I don’t know if that’s

a - ah, 4813 Anan - Ananalu Road, which is the subject property in this - in this hearing, is - is it located outside the visitor destination area?

Mr. Laureta: Yes.

Ms. Sasaki: Okay. How - could you tell us why - how you know that or why that's so?

Mr. Laureta: Ah, we're quite familiar with what's in the VDA and what's not. When the proposed bill came before the County Council, there was a flood of applications trying to beat the deadline. And there - whatever got in under the bell got processed. Everything that came after, we did not process. There was no such thing as grandfathering.

Ms. Sasaki: Okay.

Mr. Laureta: It was you apply or you don't. So once the bill was signed by the powers that be that was the end of homestays outside the VDA.

Ms. Sasaki: So - but homestays had - did have - before the - the - the law, homestays did have the opportunity to be properly permitted.

Mr. Laureta: Yes.

Ms. Sasaki: Yes.

Mr. Laureta: And that's where the rush was, when people...

Ms. Sasaki: Right.

Mr. Laureta: ...realized whoever had a homestay, ah, applied to come in.

Ms. Sasaki: Ah, what - can you describe some of the - or how publicized was the changing of the law? Was it we- well known within the...

Mr. Laureta: Oh, it was in the front page. You - it was - it was dominant because the County Council was trying to get a handle on these transient accommodations. And they were hearing from both sides of the- of the aisle, I mean people for, people against, people who had existing and they were concerned that they were gonna get cut off. It was like all of the planning related matters before the Planning Commission first- - excuse me -- it was well publicized in hearing notices and in the newspapers of what the approach was, the proposed bill, and the deadlines proposed in that bill. And, it was everybody who knew - everybody who wanted consideration applied. But what we found was the same thing that we found in TVRs, that no matter how well it was publicized continuously in the newspaper, on the radio, there were still gonna be people

who were gonna come in and say, "I don't get the newspaper. I don't listen to the radio." Um, and we've had that with TVRs and homestays. We continue to have them.

Ms. Sasaki: Right.

Mr. Laureta: ...that when we cite that when we bust them, they'll say - we'll ask them, "Did you know you had an opportunity to make this legal?"

Ms. Sasaki: Right.

Mr. Laureta: "Oh no, I don't read the newspaper - I don't get the newspaper." I'm like, "Okay."

Ms. Sasaki: Well would you agree that the obligation of a homeowner is to understand - to know and understand the law as it applies to his or her home? Would you agree?

Mr. Laureta: Yes, I would agree.

Ms. Sasaki: Yeah. Okay, Safe Hawaii does too, so. That's all, I just wanted to set the stage because now we (unintelligible). So thank you. Oh you - ah, you (unintelligible).

Mr. Kimura: Okay. Mr. Kugle, cross?

Mr. Kugle: Yeah, I do have some questions. Mr. Laureta, your, um -- hi, Mike.

Mr. Laureta: Hi, Greg.

Mr. Kugle: Good to see you again.

Mr. Laureta: Good seeing you.

Mr. Kugle: Um, your declaration submitted in support of the motion for summary judgment, um, indicates that you're the custodian of records for the Planning Department.

Mr. Laureta: I am the spear point, yes. I like to delegate where possible.

Mr. Kugle: Okay. And did the Planning Department receive a Uniform Information Act request for government records from Ms. McConnell's lawyer relative to this property and this proceeding?

Mr. Laureta: I don't recall that.

Mr. Kugle: Okay. Um, and do you, um - so you would also not recall whether the Planning Department actually produced any records for...

Mr. Laureta: Yes, um, let me also say that in charge of OIP requests it's another planner, Marisa.

Mr. Kugle: And that's Marisa Valenciano?

Mr. Laureta: Yes. She could tell you definitively if we got it and what happened to it because she's quite on point when it comes to deadlines regarding OIP.

Mr. Kugle: Okay. And, so let me - let me just show you what, is Exhibit 1 to the motion for summary judgment. Um, and just let me ask if you had any involvement with handling that or responding to that UIPA request.

Mr. Laureta: If this is twenty-nine- oh, July 10, 2019, that was like pretty recent.

Mr. Kugle: Yeah.

Mr. Laureta: She would have come to me for a file, if one existed. And the only file that would have existed would have been the cite - what do they call that, cita- the citation file. We didn't - there was no application. Internal document communications, there wouldn't have been any since there was no application. Um, so the only file we would have had would be the...

Mr. Kimura: Enforcement file.

Mr. Laureta: ...enforcement file. Okay. Now the other thing to that is because the enforcement file - there was also - this - it also applied to this, not specifically, but enforcement files that are in process, we tend to go through those with a stricter comb because the enforcement process is still in process. So it's not a complete file. But what I'm thinking -- I'm thinking off my feet here -- is that, if letters had been issued, then those would be part of the public file that would have been available. But this one just doesn't ring a bell.

Mr. Kugle: Okay. All right. I'll take that.

Mr. Laureta: And this is - this is pretty recent too.

Mr. Kugle: Ms. Sasaki was asking you about the ordinance - the homestay ordinance. Was that, um - do you know the ordinance number?

Mr. Laureta: I just brought that one, Ordinance #1002.

Mr. Kugle: Okay. And that - ah, what was the effective date of that?

Mr. Laureta: June 3, 2016.

Mr. Kugle: And when you were testifying earlier about the homestay ordinance, that's the one you're referring to.

Mr. Laureta: This is the one that's been out and came onto our radar screen because there was a whole bunch of discussions. And the enforcement guys do not get involved with this stuff. That's - that's the regulatory guys. Whatever their target or their intent was, um, it would have been driven by the regulatory section.

Mr. Kugle: Yeah.

Mr. Laureta: So as this came out, it just, okay, here it is, no more homestays. So the way it was told to me is no more homestays, that's it, outside of VDA. Anybody wants to do it inside of VDA, that's a freebee 'cause it's gonna be outright permitted. But - so the next question that always pops in my mind is can someone apply for it after this date? And I was told no. It's the same with transient vacation rentals, whatever that date was.

Mr. Kugle: Right.

Mr. Laureta: Can you apply for use permit, variance permit in Ag district, or the residential district, or open district? And I was told no. Okay, cool, and we just keep goin' forward.

Mr. Kugle: So you described a process that you could come in apply for a permit under this ordinance. Wasn't it limited to like 10?

Mr. Laureta: That may have been another ordinance, but this is the one that pops up that probably pro- precede- followed that - that - whatever - whatever or number it was. This one doesn't say numbers.

Mr. Kugle: Okay. And, um, but - but that was the process that you were referring to when you were testifying about, um, the bill was out there and people came rushing in to apply.

Mr. Laureta: Well yeah, so whatever the number was that made the application to beat the deadline, whatever the deadline was gonna be based on when it was signed, after that could you apply, and they said you could apply - you could apply, but the Planning Department would not recommend approval. So in theory the one answer could be yes you can, but we're not gonna support it, or the answer is no don't even waste your breath. But since the date - from these date

of signings, we've never had one.

Mr. Kugle: Mm-hm.

Mr. Laureta: Nobody's ever applied for a TVR outside of VDA or a homestay outside of VDA.

Mr. Kugle: And, you were comparing the Ordinance 864 and the TVR restrictions to the homestay. And you , I think you testified, so you'd probably confirm for me, that unlike Ordinance 864 in 2008 for TVRs that had the grandfathering provision or the non-confirming use certificate process...

Mr. Laureta: Right.

Mr. Kugle: ...um, that Ordinance 1008 had none of that. You said no grandfathering.

Mr. Laureta: 1002.

Mr. Kugle: I'm sorry. You're correct -- 1002.

Mr. Laureta: Yeah. Yeah, there was no grandfathering. So there was discussion regarding previous homestays that were approved by the Planning Commission that pre-dated all this. Um, those weren't thrown into this mix. It was just I can confirm what you just said, that there was no non-conf- um, non-conforming consideration.

Mr. Kugle: Okay. And so the Planning Department didn't look at, CZO Section 8-13.2, the general non-conforming use provision and say well that would apply to Ordinance 1002.

Mr. Laureta: I have no idea who did what to whom and where.

Mr. Kugle: Mm-hm.

Mr. Laureta: Yeah, we don't, enforcement section, we weren't asked regarding this intent or deadlines, the numbers.

Mr. Kugle: Mm-hm.

Mr. Laureta: Um, we just get told to enforce. And it's the same thing with development plans. They don't ask us...

Mr. Kugle: Mm-hm.

Mr. Laureta: ...like the potential, what's your ideas, what's your recommendations, it's...

Mr. Kugle: So the, um...

Mr. Laureta: What we get is what we get, and we don't have input on it.

Mr. Kugle: So did, um - does this ordinance supersede Section 8-13.2, the general non-conforming use? You - you're familiar with what I'm talking about when I talk about the general non-confirming use provision?

Mr. Laureta: The non-conforming use provision, yes.

Mr. Kugle: Right. And that says -- and I'll put it my terms or lay terms -- it basically says that, if there's a change in the zoning law, then a previously lawful use can continue, um, and that the new change is not going to, ah, prohibit it. And it's subject to some restrictions.

Mr. Laureta: I get - I get what you're saying. Yeah, I have no clue. I - I don't have a - an idea how that's gonna work. But I know you asked, and I point - I pointed to the County Attorneys.

Mr. Kugle: Okay. And - and by the same token, the State Zoning Enabling Act Chap-Chapter, ah, HRS 46-4, which says, "Counties can't use their zoning power to prohibit a non-confirming use," um, you didn't do any assessment about what - how that applies to this situation to Ordinance...

Mr. Laureta: No.

Mr. Kugle: ...1002?

Mr. Laureta: No.

Mr. Kugle: Other than your testimony today that Ms. Sasaki asked you about this overall scheme and, um, aside from your declaration that you put in in support of the motion for summary judgment, I just want to get clear whether I should be asking these questions to you or - or to, ah - to Bambi, so did you have any other involvement in Ms. McConnell's case with the investigations or the issuance of the notice of violation, um, anything like that?

Mr. Laureta: They - when the inspectors do their -- I call it hunting -- when they hunt the websites, the World Wide Web, and they come up with hits, then we talk about what's the next step. So the research that's done before, um - to - to make the file, they research the file and they research whatever we have in terms of permitting. Historically do we have anything in our cavern of files? And then the decision is made, okay, here's what we got. And once it meets the threshold that there's no permit, they made no application, they are

advertising, and they have, ah, reviews, issue the zoning compliance notice. Once the zoning - once the enforcement process starts, timelines are in play. So you have to respond, call the department to do a remediation plan. If there had been a problem, a consideration such as you mentioned, then the applicant would have or should have said in the reme- in the contact in the remediation process, um, I'm grandfathered. Here's what I have. Do I have any consideration? What are - what are my possibilities? I was - I've been in business since whatever the date was that we could have said, okay, bring that forward, let's give it first - first review, give it to the boss. Let's see what he says. Then he - he would probably say, okay, send it up to the attorneys, let's see what they say. And then we would take it from there. As...

Mr. Kugle: Okay.

Mr. Laureta: ...I recall, there was no - nothing like that came into play.

Mr. Kugle: So for - for Ms. McConnell's case you weren't involved in the remediation process or the meeting at the Planning Department?

Mr. Laureta: I would have been told if something unique had popped up like a claim towards, um, not grandfathering because for all of the enforcement cases that we have that - it's - it - we kind of remember which ones pop up, and we have to consider for the future that I was not involved with the first meeting of the zoning compliance notice.

Mr. Kugle: Mm-hm. And you don't have any recollection of being involved, um, where maybe the inspectors who met with Ms. McConnell as part of the remediation process said she's claiming that this law doesn't apply to her, that she had a prior established use.

Mr. Laureta: I'm not aware of that one.

Mr. Kugle: Okay.

Mr. Laureta: 'Cause I would have told them bring it up the chain though the boss to the Planning Director and the County Attorney. Let's see what they say.

Mr. Kugle: Mm-hm. So other than what you've just described, you didn't have any other, ah - or you don't have any memory, I should say, of having other involvement in Ms. McConnell's enforcement file or violation file?

Mr. Laureta: Other than if - if - to get from zoning compliance notice and then the - for an NOV, notice of violation to be issued, that means there was a failure on the part of the applicant to meet the thresholds of the zoning compliance notice. So - and it could have been - we also take into account that the use did not

cease, that evidence was not - the documentation was not provided, the use was continuing, okay, issue the NOV.

Mr. Kugle: Okay. And, I recall from another case -- and it might have been yourself or it might have been Ms. Ludington-Braun -- um, explaining to me what the zoning compliance notice is as opposed to the - the NOV that you mentioned.

Mr. Laureta: Okay.

Mr. Kugle: Um, and it was explained to me -- and maybe you can confirm this -- that - that the zoning compliance notice is like a warning letter. It says we think this is what's goin' on. It's not a notice of violation. Is that correct?

Mr. Laureta: Right. Right. A notice of - zoning compliance notice gives you the opportunity to come in, sit down, and we talk about it. And then we put everything up on the table, and we can consider it. And if we need to move forward, if we've got hard and fast evidence, then the zoning compliance notice is quite explicit as what has to occur. You have to stop the operation. You have to remove your advertising from World Wide Web. You need to submit that documentation to us. You have to cancel all of your commitments.

Mr. Kugle: Mm-hm.

Mr. Laureta: And if you don't do it within a - whatever the time period is, then NOV.

Mr. Kugle: Mm-hm.

Mr. Laureta: And then we - many, many, many, many cases where people want to slide some dates past their - their timeframe. And people stay there, and they make comments on the website, "Yes, I enjoyed my stay." And it's - right there is the evidence that's prima facie that the use never stopped, especially after the - the date of the ZCN when we expected the requirements to be met.

Mr. Kugle: So I think you were talking in generalities and not Ms. McConnell's case, but, let's be clear. So, are you familiar with what the basis of the evidence for the initial zoning compliance notice and the eventual notice of violation was in Ms. McConnell's case?

Mr. Laureta: For this case?

Mr. Kugle: Yes.

Mr. Laureta: Yes. No.

Mr. Kugle: Okay. And, like for the zoning compliance notice, that - that doesn't trigger

the right to appeal to the Planning Commission or challenge, right? That all...

Mr. Laureta: Yeah.

Mr. Kugle: ...comes from the notice of...

Mr. Laureta: Notice of violation.

Mr. Kugle: You know, I - I was - you'd think I understand this better having done it for a while, but I was a little confu- I was a little confused about the process as I read it in the zoning code versus what seems to be followed in practice. And that is I read the zoning code, and specifically Section 8-3.5 on enforcement, as having a two-step process. It specifically references the issuance of a notice of violation. And then it says, if that's not corrected, the Department can issue a notice of order. Um, and I'm wondering in - in this case that seems to be compressed, um, into one document, one warning, which is a notice of violation and order to pay fines.

Mr. Laureta: It's a two-step process, and it got hammered into us by the attorneys that, in order to preserve the applicant's due process rights, it had to be two steps. So the first step is zoning compliance notice, which - which advises the owner of a problem, and it gives them the opportunity to come in and correct it. And if it can't be corrected within that timeframe, then it's a second step, notice of violation. So the notice of violation then says, okay, um, we're gonna fine you, and you can appeal. But in the zoning compliance step there is no appeal process because it's just a warning letter.

Mr. Kugle: And so just so, I know you said you weren't really involved with this one. But let me show you what's been marked as - or admitted as Petitioner's Exhibit 1. It's also a county exhibit, Exhibit D. That is the notice of violation and - and order that you were referring to.

Mr. Laureta: Okay. So she - Ms. McConnell was told to stop. You were instructed to cancel all transient accommodation commitments. On April 12, the Department met with her, confirmed that the continued transient accommodation use is a violation. So the use didn't stop. So because the use didn't stop, the NOV was issued and the order to pay fines.

Mr. Kugle: Mm-hm.

Mr. Laureta: So the ZCN is very explicit in what it requires, and if anything continues, then the NOV goes.

Mr. Kugle: Okay. And - and I guess I was just - so getting back to my question about the procedures in the ordinance talking about a notice of violation to be followed

by a notice of order, um...

Mr. Laureta: The - notice of order?

Mr. Kugle: Yes. So, in other words, so read, ah, the second page of that notice of violation. Right? It sets out Section 8-3.5.

Mr. Laureta: Okay.

Mr. Kugle: And, it starts off in subparagraph one talking about the Planning Director determines somebody's not complying with a notice of violation, then the Director may have the party responsible for the violation served by mail or delivery with an order pursuant to this section. And then that does certain things, imposes a fine, orders corrections and so forth. Right?

Mr. Laureta: So order is the notice of violation.

Mr. Kugle: Okay. So there is no separate order?

Mr. Laureta: No, it - it's - that's what's called - see, because in 3.5a, correct the violation within time specified. She did not. And then because she did not, then the $10,000 fine was put into play. And then the possibility of a $10,000 per - per day fine is a back end, ah, tool that we can use for the real onerous applicants - owners.

Mr. Kugle: And who determines what the amount of the fine would be, if there's one imposed?

Mr. Laureta: The, um - we start off at 10. If there's any effort towards compliance, we start off at 10, and during the remediation phase without the NOV in the ZCN phase, if there's any effort, any willingness to remediate by providing us documentation, we would say we could reduce the fine depending on how fast you can remediate. So depending on how long it takes to provide us documentation that you've cancelled all your commitments, that you removed your website, we would offer up a reduced fine consideration. If there is no effort to do any of that and the use continues, especially after the ZCN meeting, then it's like, nah, you know, 10. We stay at 10. Let them appeal the 10 because they made no effort to remediate, which includes no effort to cancel the website, cancel future commitments, and try and get into compliance.

Mr. Kugle: Okay. Couple of questions for you on that. Um, so the - the ordinance provides a range from $500 to 10,000 for zoning code violations. Right?

Mr. Laureta: Right.

Mr. Kugle: Um, and so you're telling me it's the Department's policy to start with the maximum and work down.

Mr. Laureta: Yes.

Mr. Kugle: And, um, does the department give any explanation for why it chooses 10,000, or 500, or anything in between? In other words, is there a rationale given or an explanation for why the maximum is, or the minimum, or somewhere in between is chosen.

Mr. Laureta: It depends on the willingness to work with the department. It's - it's more like did you earn a reduction by working with us? And if you didn't, then okay, we'll keep it at 10.

Mr. Kugle: Okay. And is the process that you just described, you were talking specifically about something like this, like a homestay violation or you might have been referring to transient vacation rental too. Is that true for other zoning violations?

Mr. Laureta: Oh yeah. Oh yeah.

Mr. Kugle: So - so every zoning violation you start at 10,000 and work down?

Mr. Laureta: Yes.

Mr. Kugle: Okay.

Mr. Laureta: And we run into people who are very onerous and we're - we are not - we haven't quite put into play the $10,000 a day, but we are. We're starting it now because there are some people who believe what they want to believe, and we just say, well, you know, now that we have a possibility to put a lien on the house, we're gonna play. We'll play hard. And if you don't want to meet whatever the - the zoning code, the requirements, the law, however you want to put that, if you don't want to meet us halfway and we have to go to the NOV, and you keep the use continuing, you keep advertising, and the reviews keep proving you're still in operation, then we will go - we can you with 10. We'll serve up another NOV of 10. And if it still continues and we have cases, then it's like okay, now we go 10,000 per day, and then we're gonna work off a lien. We're gonna put a lien on the property.

Mr. Kugle: And does the, um - when you do that, you know, the daily, um, is that based on any evidence that it was actually being rented in the case of an illegal rental? Um...

Mr. Laureta: I'd rather not disclose. But what - they need evidence. You need evidence to take to procure these steps. And it's in the Inspector's report...

Mr. Kugle: Mm-hm.

Mr. Laureta: ...that whatever evidence they found, however they found it, it'll be in that report.

Mr. Kugle: Okay. All right. Let me just look at my questions. I might be done. Thank you that's all the questions I have...

Mr. Kimura: Okay. Thank you. Um...

Mr. Kugle: ...Mr. Laureta.

Mr. Kimura: ...Ms. Sasaki, you may recross?

Ms. Sasaki: Yes, please. Thank you.

Mr. Kimura: I mean - redirect.

Ms. Sasaki: Thank you. Would you say that in a case such as this where the homestay owner was - if she was notified on January 11, 2017 that she was in violation of a code...

Mr. Kugle: Objection, misstates the evidence.

Ms. Sasaki: It doesn't actually, because according to Ms. McConnell, she did not get this until 2017 - 4-1-2017. But the - according to our records, this was just sent out on January 11, 2017. Now why she didn't get it 'til April, I don't know. But we can't start - that's not when - when the Department first notified her.

Mr. Kimura: According to the testimony so far, the first notice that Ms. McConnell got it was on April 1st because...

Ms. Sasaki: Received.

Mr. Kimura: Received.

Ms. Sasaki: Right.

Mr. Kimura: Because when it was mailed out, it was mailed out to her address, which she testified she does not receive mail at her address. So we'd have to go on that assumption. Okay?

Ms. Sasaki: Okay. Let's go on that assumption- okay. So would you say from a - a person such as Ms. McConnell, who on April 1, 2017 was notified of the zoning compliance notice that she - that she was, ah, in violation of the Section 8 - 8-8.1(b) of the, KCC, who continued through 'til 2017 through some of 2018 through some of 2019, would that be an onerous case?

Mr. Laureta: Yes.

Ms. Sasaki: Okay. So an onerous case warrants the imposition of 10,000 per - dollar per say fine. Ah, would you - is that - is that - if I understood your testimony, that's what I thought you were saying.

Mr. Laureta: Yes.

Ms. Sasaki: Yeah. And, ah, it is the policy now of the Planning Department where people just flout the law, just ignore the law because they don't think the law's right or it doesn't apply to them, we - the Planning Department imposes a $10,000 per day fine?

Mr. Laureta: We can.

Ms. Sasaki: Yeah.

Mr. Laureta: Now the issue - well...

Ms. Sasaki: Yeah, ah...

Mr. Laureta: I won't go there.

Ms. Sasaki: ...okay. I - that's - I'm done.

Mr. Kimura: Okay. Um...

Mr. Kugle: A brief - brief recross.

Mr. Kimura: Okay. Mr. Kugle?

Mr. Kugle: The Planning Department was in charge of the Kuhio Highway passes for homeowners beyond the flood-damaged area. Correct? In April - April...

Mr. Laureta: Oh...

Mr. Kugle: ...2018.

Mr. Laureta: Okay, the flood.

Mr. Kugle: Yeah.

Mr. Laureta: Okay. Okay. Yes, we issued passes.

Mr. Kugle: And how long was that restricted access to the north shore, um, in place?

Mr. Laureta: Not the north shore, just Wainiha and Haena.

Mr. Kugle: Okay.

Mr. Laureta: Um, I couldn't give you the dates, but I can give you the frustration.

Mr. Kugle: You were actually involved in handing out those permits. Right?

Mr. Laureta: Yes.

Mr. Kugle: And, um, you would not have given out any permits to anybody who was going to a transient vacation rental or a homestay. Right? That was just simply prohibited during the time period that access was restricted. Correct?

Mr. Laureta: That was the theory that got put into play. But we heard a lot of conflicting testimony from the residents out there, that illegal TVR - legal and illegal TVRs were getting their people in by boat or by false documentation at our counter, that the homeowner would come in for a - their car -- they would say their car -- and give it to their clients.

Mr. Kugle: Now with respect to Ms. McConnell, you have no evidence that that happened. Right?

Mr. Laureta: No, no, no.

Mr. Kugle: No. Okay. Um, and then that condition was recently...

Mr. Laureta: Well, Greg, wait. Specifically her...

Mr. Kugle: Yes.

Mr. Laureta: ...on my memory banks no, but because I had the rest of my enforcement team there, somebody like - there were one - wait -- Jodi, Chance, Joan, Bambi, Bill, and then Alfred -- six others I oversaw, and they - Joan would know pretty specifically who the illegals were that were sliding in people because she took it - I don't know how - how she had the energy for it, but we dealt with a lot of complaints, and we - we didn't have the energy to chase those.

Mr. Kugle: Okay.

Mr. Laureta: But...

Mr. Kugle: Okay. So it...

Mr. Laureta: ...specifically...

Mr. Kugle: Yeah.

Mr. Laureta: ...me no, but there's five others on that team could or would.

Mr. Kugle: Okay. So they - that person might come in here and testify and tell us, "Yes, Ms. McConnell was one of those violators during that time period," but...

Mr. Laureta: I could go ask if Joan is in - Joan, Bill, Bambi may or may not know, Alfred may or - yeah, he's no longer with the department.

Mr. Kugle: Okay.

Mr. Laureta: ...um, Jodi and Chance. So I can go back and - and, if I find 'em if they say yes, then I'll tell 'em, you go - go to the hearing.

Mr. Kugle: Well then I'd object 'cause they're not on the witness list.

Mr. Laureta: Yeah.

Ms. Sasaki: Well Joan is on the witness list. Joan Ludington Braun is on the witness list.

Mr. Laureta: She is?

Mr. Kugle: Yeah.

Ms. Sasaki: Yes.

Mr. Laureta: Okay.

Mr. Kugle: Yup. All right. Um, just so I understand the process, if somebody disagrees with the notice of violation, an order that they get, um, that says that they've done something the Planning Department believes is in violation of the zoning code, they have the right to appeal that.

Mr. Laureta: Yes.

Mr. Kugle: And that's where we are right now for this case -- right -- in the Planning

Commission appeal process?

Mr. Laureta: Right.

Mr. Kugle: And the Planning Commission will ultimately decide whether the Department was correct.

Mr. Laureta: Well it'll be based on the hearing officer's recommendation.

Mr. Kugle: Yeah.

Mr. Laureta: The hearing officer's recommendation will go to the Planning Commission, and then the Planning Commission will make a decision.

Mr. Kugle: Yeah.

Mr. Laureta: So if there's still any disagreement over whatever the process, whatever the evidence was, then the Planning Commission can request final arguments to hear a vote before they make a decision.

Mr. Kugle: Yeah.

Mr. Laureta: But the best time to resolve an issue would be upon receipt of the zoning compliance notice, no matter when you get it, because whenever you get it, you can always come in and say, "Look, there's a date of this, and I was in Tahiti for five months. I didn't get my mail. I just got back on this date. I can show you my ticket. Um, I need to come in and we talk about this thing because, um, can we - can we reset dates - the requirements?"

Mr. Kugle: Okay.

Mr. Laureta: So it's basically that zoning compliance notice puts you on notice, we found a problem, it's best that you come in. But if you disagree or agree, whatever, that's when you - you come in and sit down and talk with us and tell us.

Mr. Kugle: And, um, just so I understand the Planning Department policy, just so we don't have kind of questions like this, those zoning compliance notices and notices of violation tend to be sent out Certified Mail. Correct? So you have an actual signed receipt so we actually know when somebody received it.

Mr. Laureta: Well because we have so many people playing games on us now on - in the enforcement process, when we have the opportunity, we send out the ZCN, we also email you, if we have an email address. If it's an NOV, we'll email you an advanced copy. If we have - if you have, um, representation, we'll send a email to whoever is your representative plus Certified Mail because

we've had so much problem with Certified Mail previously going strictly to the owner and then the owner won't pick it up that we proposed an administrative change to the law where we don't need to send you certified mail. We can send you Certified Mail. You don't pick it up, it gets returned to us in three to four weeks. Then we're just gonna straight - we can - we have now the opportunity to post the property, to put a notice in the newspaper saying what we tried. Um, those are the two biggest ones...

Mr. Kugle: Yeah.

Mr. Laureta: ...that we - we won't play the game anymore when you don't pick up your mail. We'll just post the property, and that'll count.

Mr. Kugle: Mm-hm.

Mr. Laureta: And when we run a classified ad in a newspaper, that will count. It'll start...

Mr. Kugle: And...

Mr. Laureta: ...the clock.

Mr. Kugle: And so things like the return receipt for the Certified Mail or the emails, if it was emailed to a homeowner, that would be in the Planning Department's files.

Mr. Laureta: Yes.

Mr. Kugle: You'd keep copies of that so that...

Mr. Laureta: Yes.

Mr. Kugle: ...so that...

Mr. Laureta: If we had - if we had an email address on you, that's always...

Mr. Kugle: Mm-hm.

Mr. Laureta: ...part of the - the file.

Mr. Kugle: Okay. Okay. Um, thanks, Mike. I don't have any further questions.

Mr. Laureta: Okay.

Mr. Kimura: Okay. Thank you, Mr. Laureta. Anela, can you turn the air on please?

Ms. Segreti: Yeah. Mm-hm.

Ms. Segreti: (Unintelligible)

Mr. Kugle: Yeah.

Mr. Kimura: Okay. Ah, Ms. Sasaki, your next witness?

Ms. Sasaki: I'd like to call, um, Mr....

Mr. Laureta: Thanks, Greg.

Ms. Sasaki: Andres Bambi Emayo.

Mr. Kugle: See ya.

Mr. Kimura: Okay. Mr. Emayo. Okay. Could you please raise your right hand? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth?

Mr. Emayo: I do.

Mr. Kimura: Thank you. Please be seated.

Ms. Sasaki: Good morning. Good af...

Mr. Emayo: Morning.

Ms. Sasaki: Yeah, good morning still. Could you state your position at the Planning Department?

Mr. Emayo: I am the supervising inspector for the enforcement section of the Planning Department.

Ms. Sasaki: So would it be correct to say that you oversee investigations with respect to illegal TVRs and homestays, and things...

Mr. Emayo: Yes.

Ms. Sasaki: ...things of that nature? Okay. Could you describe to me the sort of timeline, the process of your introduction and interaction with Ms. McConnell? Starting with the zoning comply- well perhaps it - it prece- there was, ah, the investigation that preceded the zoning compliance notice. But, can you just tell me the events that led up to the zoning compliance letters and the NOV?

Mr. Emayo: Okay.

Mr. Kugle: I'm - I'm gonna object, if he's gonna be testifying from documents that I don't have, I'm not sure about that file that just got opened.

Mr. Kimura: Okay, so...

Ms. Sasaki: Well I - I...

Mr. Emayo: Well...

Ms. Sasaki: ...I think he was gonna use this, so I'll - this is - this is our Exhibit B, ah, the investigation report.

Mr. Kimura: Okay, yeah. Okay, so he can use Exhibit B to refresh his recollection. And then if you're gonna be admitting that, then you need to do so.

Ms. Sasaki: Okay.

Mr. Kimura: Um...

Ms. Sasaki: Actually, I'm gonna start with Airbnb evidence checklist dated 1-28. That's Exhibit A. And then I'm gonna go onto Exhibit B, which is the investigation report. I think this is probably what (unintelligible)...

Mr. Emayo: Okay. A report was made on January of 2016 that The Song of the Jungle TVR was fined...

Mr. Kugle: I'm going to object, lack of foundation. He's testifying from a document that's not been admitted.

Mr. Kimura: Okay. So Ms. Sasaki?

Ms. Sasaki: I'd like to admit Exhibit A and Exhibit B - submit Exhibit A and...

Mr. Kimura: Um...

Ms. Sasaki: ...Exhibit B.

Mr. Kimura: ...shouldn't you elicit testimony to determine whether or not it's admissible of coming in authenticated?

Ms. Sasaki: Can you - can you talk to...

Mr. Emayo: Okay.

Ms. Sasaki: Can you tell me about how - how - what these documents are and how they were - how they were drafted?

Mr. Emayo: Okay. Ah...

Ms. Sasaki: And were they drafted in the course of your regular business?

Mr. Emayo: Okay, in our first section, we go according to findings from, prima facie evidence, any kind of advertising from the website. What we did is we pulled one of the findings is, ah, this case, which was found in 2016. We noted it, recorded it, and once it is noted and found that it was a homestay outside of the VDA, we sent a notice of - a - a zoning compliance notice to the property owner.

Ms. Sasaki: Okay. So I'd like to submit Exhibits A, B, and C, which are the Airbnb evidence checklist, the investigation for it, and the zoning compliance notice prepared by the Planning Department.

Mr. Kimura: Ah, Ms. Sasaki, you should do one exhibit at a time.

Ms. Sasaki: Okay.

Mr. Kimura: And first of all, you show the exhibit to the witness, have him or her - have him identify...

Ms. Sasaki: Okay.

Mr. Kimura: ...what it is and if...

Ms. Sasaki: I'm - I'm show...

Mr. Kimura: ...he's familiar with it.

Ms. Sasaki: I - okay. Can you describe to me what Exhibit A is?

Mr. Emayo: Okay. Exhibit A is an Airbnb evidence checklist for TVR inspections. Exhibit A shows Tax Map Key 58005005, using of transient accomodations outside of the VDA.

Ms. Sasaki: This was prepared as a consequence of an investigation made of one Ms. McConnell.

Mr. Emayo: Yes.

Ms. Sasaki: I'd like to submit Exhibit A as evidence that an investigation was performed

on Ms. McConnell.

Mr. Kimura: Okay. Mr. Kugle?

Mr. Kugle: I think that still lacks foundation for admitting this document.

Ms. Sasaki: Well this document was appended to the motion for summary judgment., so as an exhibit to the motion for summary judgment. So it's not a new revelation to Mr. Kugle.

Mr. Kimura: Well, ah, he would - may be - Mr. Kugle may be objecting to is that Mr. Emayo did not acknowledge that this is a true and correct copy of the original of the document in the enforcement file in the Department of Planning.

Ms. Sasaki: Okay. Is this a true and correct copy of a - of the document in the - of the original of the document in the file of the Department of Planning?

Mr. Emayo: I did create this Airbnb evidence checklist, um...

Ms. Sasaki: Right.

Mr. Emayo: ...(unintelligible)...

Ms. Sasaki: So I'd like to submit Exhibit A as respondent's Exhibit A. I'd like to submit the Airbnb evidence checklist TVR inspections as respondent's Exhibit A.

Mr. Kimura: Okay. Ah, Mr. Kugle?

Mr. Kugle: No, objection.

Mr. Kimura: Okay. Exhibit A is received into evidence.

Ms. Sasaki: Could you - could you, ah, say whether this investigation report is a true and correct copy of an investigation report prepared by you, the original of which is in the Planning Department?

Mr. Emayo: This is an investigation report submitted 1-10-2017 prepared by myself findings of an illegal operation outside of the VDA of homestay...

Ms. Sasaki: And it's a true and correct copy...

Mr. Emayo: ...transient accommodation.

Ms. Sasaki: ...of the original report?

Mr. Emayo: Yes.

Ms. Sasaki: I'd like to submit respondent's Exhibit B as a true and correct copy of the investigation report prepared by Mr. Emayo.

Mr. Kugle: I am going to renew the objection that I made earlier on the record for this one, which is there's significant number of pages of this that we've never seen before. And I mean, in fact, aside from portions of it being attached to the summary judgment motion, we got this on August 23, not withstanding an un-responded to UIPA request that's out there. So, that's back to my element of unfair surprise.

Ms. Sasaki: Well Mr. Kugle knows that generally there's no discovery contested case hearings on absolute agreement of the parties. And, um, let me just, ah - just I have one - just bear with me. Okay. The Hawaii Supreme Court has held that Section 91-10(1) is intended to direct administrative agencies to admit any and all evidence presented to them limited only by considerations of relevancy, materiality, and repetition. And that's Chalk v. Bitterman, 5 Hawaii Appeals Court 59 - ah, 65 at - at Page 59. The purpose of 91-10 (1) is to free administrative agencies from the bounds of any technical rules of evidence. And it's intent was to require agencies to admit evidence that would have been admissi- inadmissible in common law trials. It - um, so I - so I submit that the contested case hearings have relaxed evidentiary standard and that pursuant to the holding of the Hawaiian court, ah - the Hawaiian I guess it's the Circuit Court - okay - no, Appellate Court, ah, I say. Um, these documents ought to be admitted.

Mr. Kimura: Okay. So Ms. Sasaki, before I move on Exhibit B, I don't believe the witness authenticated the remaining pages of Exhibit B aside from just the first two pages.

Ms. Sasaki: Well I was just using the pages on the, um - of the - of the, ah - I - I have - would have to go get the re- I mean you ca- I can give - I can take the remaining pages, but I - but I just was gonna use these, the ones attached to the motion of summary judgment.

Mr. Kimura: Wait. Okay. So I guess - okay. So then my question is are you just requesting only Page 1 and 2 of Exhibit B to be admitted into evidence?

Ms. Sasaki: No, actually I want all the - all of the exhibit admitted into evidence. So if you can...

Mr. Kimura: You mean all the pages of Exhibit B.

Ms. Sasaki: Right.

Mr. Kimura: Right. So shouldn't the witness authenticate the other pages in Exhibit B.

Ms. Sasaki: Right. But - well then I - then I'd ask for a - a brief break so I can go and get them. I don't have them with me. I thought we would stipulate to the admission of the evidence, so...

Mr. Kimura: Okay. Um, yes, okay, so I guess you need to get, um...

Ms. Sasaki: I'll - I'll get - I'll get the - the exhibits.

Mr. Kimura: Okay.

Ms. Sasaki: Okay.

Mr. Kimura: Why - why don't you get your exhibits then?

Ms. Sasaki: Okay. Okay.

Mr. Kimura: Okay. So we'll take a break.

Recess from 11:19am-11:27am

Ms. Sasaki: Okay.

Mr. Kimura: Okay. So, well, Ms. Sasaki, you're gonna show the exhibits to...

Ms. Sasaki: Okay.

Mr. Kimura: ...Mr. Kugle first.

Mr. Kugle: I- is that the...

Ms. Sasaki: It's...

Mr. Kugle: ...the same Exhibit B that - that, ah...

Ms. Sasaki: That's, ah...

Mr. Kugle: ...you sent me that...

Ms. Sasaki: ...submitted...

Mr. Kugle: ...last week?

Ms. Sasaki: Yeah.

Mr. Kugle: Okay.

Ms. Sasaki: It's Exhibit B.

Mr. Kimura: Okay. You can go ahead, Ms. Sasaki.

Ms. Sasaki: Okay. So, just could you authentic - this is the, a true and correct copy of the, of the original, which is kept at the Planning Department of an investigation report and, ah, this supporting materials with respect to that report?

Mr. Emayo: I acknowledge that this investigation report Exhibit B is findings that I've submitted January 10, 2017, along with all of the supporting pages for Exhibit B.

Ms. Sasaki: For the investigative report? The petitioner would like to submit the investigation report and supporting documents at Exhibit B.

Mr. Kimura: Okay. Ah, Mr. Ku...

Ms. Sasaki: (Unintelligible)...

Mr. Kugle: Um...

Ms. Sasaki: ...respond (unintelligible)...

Mr. Kugle: ...I don't, um, have an objection as to the foundation that was laid, but I do, reiterate my objection that we asked for discovery. Discovery's not agreed to by the Planning Department. We're forced to serve a UIPA request on the Planning Department. And as of today, we still haven't gotten documents produced. So I think it's unfair surprise and should be excluded for that basis.

Ms. Sasaki: Well if Mr. Kugle wants, we can continue this hearing until he has copies of all the documents until the UIPA report is given to him, if this request for documents is are rendered to him, if that's the case.

Mr. Kimura: Okay. I will admit Exhibit B over objections of the planning - of the petitioner. And as I did mentioned earlier, you know, if Mr. Kugle needs additional time after questioning Mr. Emayo and looking at Exhibit B, you know, I will entertain a request at that point in time for a continuance of this hearing. So, with that ruling, we'll proceed, Ms. Sasaki.

Ms. Sasaki: I would like you to authenticate whether this is the zoning compliance notice. It was sent to, ah, Ms. McConnell in January of 2017, received by her in April

2017.

Mr. Kimura: Okay, is that part of Exhibit B?

Ms. Sasaki: That's Exhibit C. That's Exhibit C.

Mr. Kimura: Oh, Exhibit C.

Mr. Emayo: I acknowledge that Exhibit C is a zoning compliance notice that was date stamped January 11, 2017. Zoning compliance notice to Patricia McConnell – Patricia McConnell.

Ms. Sasaki: Respondent respectfully requests to submit Exhibit C, the zoning compliance notice from the Planning Department to Ms. McConnell.

Mr. Kimura: Okay, Exhibit...

Ms. Sasaki: C.

Mr. Kimura: ...C is...

Mr. Kugle: I - I just...

Mr. Kimura: ...already admitted into...

Mr. Kugle: ...renew...

Mr. Kimura: ...evidence by stipulation.

Mr. Kugle: ...renew my objection. Oh, I don't think we did do Exhibit C. I think we did Exhibit D.

Ms. Sasaki: D.

Mr. Kimura: Oh, I'm sorry. Exhibit D?

Ms. Sasaki: D is the same as...

Mr. Kugle: As - as one. D and one are the same.

Mr. Kimura: Oh, okay, okay. My, ah - okay. So anyway, Mr., ah, Kugle?

Mr. Kugle: Um, yeah, my objection is to the late disclosure and the UIPA request alone. And so if maybe we can expedite things. If I have that running objection for the other exhibits that we'll get to, then I won't repeat that, if your ruling is

going to be as it was for Exhibit B.

Mr. Kimura: Okay. So, I will admit Exhibit C over objections of the petitioner and note for the record that Mr. Kugle on behalf of the petitioner will have a running objection on all of the other exhibits offered into evidence by the Planning Department, and note that for the record.

Ms. Sasaki: So should I submit - submit the rest of the exhibits for the record? Should I - I should - or is he su- is he accepting the rest of the exhibits, or should I submit them?

Mr. Kimura: No. Well you still have to authentic all the...

Ms. Sasaki: Authenticate, okay.

Mr. Kimura: ...other exhibits.

Ms. Sasaki: Okay.

Mr. Kimura: So Exhibit C is admitted.

Ms. Sasaki: Okay. D I think we already agreed. Could you authentic Exhibit E, the investigation report dated 5-16-17?

Mr. Emayo: I acknowledge Exhibit E which was submitted by myself on my investigation report for the notice of violation. It's a notice of violation report dated 5-16-17 for ongoing homestay operation outside of the VDA.

Mr. Kimura: Ah, as well as the, ah, other doc...

Mr. Emayo: As we as the - along with the...

Ms. Sasaki: Supporting documents here.

Mr. Emayo: ...supporting documents.

Mr. Kimura: Okay. So Exhibit E will be admitted into evidence over the running objection of the petitioner as previously stated.

Ms. Sasaki: Um, okay. Well as I indicated earlier, could you please just describe the process of the investigation and investigation of this homestay, this illegal homestay and the steps that the Planning Department took with respect to enforcing the law, you know, with respect there too? So if you need these, I can give...

Mr. Kugle: Ah, I would like to - I guess it's not an objection, but we didn't deal with Exhibit F to which I would have a different objection, and that was that Mr. Emayo did not prepare...

Ms. Sasaki: Uh-huh. That's why I didn't...

Mr. Kugle: ...Exhibit F.

Ms. Sasaki: ...authentic it. That's why I didn't submit it.

Mr. Kugle: Okay.

Mr. Kimura: Okay. So, um...

Ms. Sasaki: So, just being, if you can review the procedure with respect to the investigation of this illegal homestay...

Mr. Kugle: I - the - I do - I'm sorry to interrupt again. Ms. Ludington-Braun's statement which is Exhibit F, is also - appears to be perhaps the final page of Exhibit E and since Mr. Emayo did not prepare that, that should not, if that is, in fact, the last page of Exhibit E as well as an independent Exhibit F, it should not come in.

Ms. Sasaki: I think that was inadvertent error of my secretary. So I'm more than willing to not include the letter from Britni Ludington-Braun that's cited as Exhibit F but is contained in Exhibit E.

Mr. Kimura: Okay. So, um, for Exhibit E, it will not include the last page, which would be the note to file dated April 12, 2017...

Ms. Sasaki: Correct.

Mr. Kimura: ...by Ms. Ludington-Braun.

Ms. Sasaki: Correct.

Mr. Kimura: Okay, Ms. Sasaki.

Ms. Sasaki: Mr. Emayo, could you recap for the hearing the process by which you investigate illegal operating homestays?

Mr. Emayo: The process is basically - what we have done in this case, we, ah - we found, ah, homestay use on the website, prima facie evidence of operation. Ah, and then what we did is in - in January of 2017 we sent out a zoning compliance notice to Patricia McConnell. The establishment of findings of a transient

accommodation operation on 4813 Ananalu Road, Tax Map Key 58005005, the use of transient accommodation operation outside of the designated VDA. Then a meeting for a response by Patricia McConnell was held on April 12, 2017.

Ms. Sasaki: Let me just stop you here for one second.

Mr. Emayo: Okay.

Ms. Sasaki: So at the meeting of April 12, 2017, did you discuss the zoning compliance notice?

Mr. Emayo: Yes.

Ms. Sasaki: And what did you tell Ms. McConnell with respect to that notice?

Mr. Emayo: We reiterated the zoning compliance notice dated January 20...

Ms. Sasaki: Well it's August 4's proceeding.

Mr. Emayo: ...January 2017.

Ms. Sasaki: Yeah.

Mr. Emayo: Which is - I don't have the zoning compliance notice I think.

Ms. Sasaki: You don't?

Mr. Emayo: No.

Ms. Sasaki: I could give it to you. It should be in there. Right? Here it is. Exhibit C, zoning compliance notice.

Mr. Emayo: We went over the homestay operation, which was prohibited outside of the VDA destination, ah, visitor destination area. The unauthorized use of the subject property for transient accommodation outside of the designated VDA constituted a violation.

Ms. Sasaki: And, ah, this zoning compliance notice asks the homeowner to take which - what kind of action? What do they want the homeowner to do?

Mr. Emayo: I got 'em on the zoning complaints list.

Ms. Sasaki: (Unintelligible)

Mr. Emayo: Pursuant to Chapter 8, Kaua‘i County code, Ms. McConnell was directed to comply with the following requirements. Immediately cease and desist the use of the subject property as transient accommodations. Cancel all transient accommodation commitments for the property.

Ms. Sasaki: So she was ordered to cease, ah - cease...

Mr. Emayo: Cease and desist the use...

Ms. Sasaki: ...the use. And, did she, in fact, cease and desist using it as a homestay - a - a illegal homestay?

Mr. Emayo: According to our findings, we found that the - the use of transient accommodations homestay has been continued.

Ms. Sasaki: So she didn’t stop upon notification, ah...

Mr. Emayo: Until March of 2018.

Ms. Sasaki: Okay, so as a consequence of Ms. McConnell’s cease - failing to cease operations, was a notice of violation and order to pay fines transmitted to her?

Mr. Emayo: Because of the findings of the use, in 5-16-17, Planning Department sent a notice of violation in order to pay fines on May 23, 2017.

Ms. Sasaki: Okay. So basically from May - no, from April of 2017 through March of 2018 there were continual operations of this homestay?

Mr. Emayo: I believe - well, it says that she has articulated that she was gonna keep operating in our meeting through March. Our findings for the notice of violation is up ‘til 5-16-17.

Ms. Sasaki: But pursuant to that notice of violation was another notice of violation rendered?

Mr. Emayo: The notice of violation that we submitted to her was on...

Ms. Sasaki: Is this all - this all - that’s all one?

Mr. Emayo: On May 23, 2017.

Ms. Sasaki: Okay. So it’s your understanding then that Ms. McConnell’s in violation of the law because she is operating a homestay outside the VDA and continues - has - has refused up to this point to cea- stop operating one?

Mr. Emayo: The notice of violation in order to pay fines was sent out to her because of the findings of the continued use of homestay operation outside of the VDA up to the point of May 23, 2017.

Ms. Sasaki: And then was another investigation held in - in May of 2017?

Mr. Emayo: We have continued opera- um, continued, ah, ah, investigations on the pro- property as long as the operation continued.

Ms. Sasaki: Okay, so has - has Ms. McConnell ever attempted to remediate the issue within her - with her homestay?

Mr. Emayo: We have no, ah..

Ms. Sasaki: No evidence?

Mr. Emayo: ...evidence of that.

Ms. Sasaki: Okay. All right. I'm - that's fine. Thank you.

Mr. Kimura: Okay. Ah, Mr. Kugle?

Mr. Kugle: Thank you. Good morning, Mr. Emayo. Is that...

Mr. Emayo: Yes.

Mr. Kugle: ...pronouncing? Okay. Thank you. And you go by Bambi as...

Mr. Emayo: Yes.

Mr. Kugle: ...your first - nickname. Okay. Um, the first exhibit that you authenticated and that we looked at was Exhibit A, which was the Airbnb evidence checklist. Do you recall that, or do you have a copy of that in front of you?

Mr. Emayo: Yes.

Mr. Kugle: And you prepared that document?

Mr. Emayo: I did.

Mr. Kugle: Okay. 'Cause it says, "Researched by Bambi."

Mr. Emayo: Yeah.

Mr. Kugle: So, now I was trying to, ah, the second line, it's - so it's dated January 28,

2016. Correct?

Mr. Emayo: Okay.

Mr. Kugle: Which means you did this research on or about that time.

Mr. Emayo: Yes.

Mr. Kugle: And what specifically were you doing in terms of research?

Mr. Emayo: This was, ah, ah, earlier when Mr. Laureta was explaining one of the methods used to find illegal operations. He called it hunting I believe. While we were researching the internet, the World Wide Web for transient accommodations on the island of Kaua'i.

Mr. Kugle: Okay. And so on second line it - there's - it has investigation type with a check off box of either request of complaint. You checked off complaint.

Mr. Emayo: Okay.

Mr. Kugle: What does that mean?

Mr. Emayo: One of the ways that we were taking in possible illegal operations was 1) through the Internet and - and always through the Internet to verify. But sometimes we would get, what I call. "complaints" through people or in this case I believe it was through real property assessments who assessed this property as a vacation rental.

Mr. Kugle: Okay. So is that saying then that somebody complained about it?

Mr. Emayo: Ah, we could have got it from outside or from our real property, which we still do.

Mr. Kugle: Okay.

Mr. Emayo: We still, um...

Mr. Kugle: So do you know where this one came from?

Mr. Emayo: This was - this was a real property check.

Mr. Kugle: Okay. So in other words, somebody in the real property tax section...

Mr. Emayo: We will periodically get assessments from the real property, if they're doing vacation rentals to match up with our legal non-conforming uses outside of the

VDA.

Mr. Kugle: Okay. And so you heard, ah -- or maybe you didn't -- but Ms. McConnell testified earlier that the county had increased her real property taxes and was assessing her at a hotel rate. Is that consistent with what would happen if somebody's operating some type of a transient vacation?

Mr. Emayo: I have no idea of their operations.

Mr. Kugle: Okay. Um, well let's go, um - sticking with Exhibit A, it looks like you determined that she did, in fact, have a GE tax and a transient accommodation tax license. Yes?

Mr. Emayo: Yes. The numbers is over the - the number is W51707089-01.

Mr. Kugle: Okay. And, on the first line it's - was the TV- oh, oh, that's w- strike that question. And then you have Internet advertising, if found, and you've checked other. Correct?

Mr. Emayo: Yes, I checked...

Mr. Kugle: And...

Mr. Emayo: ...other, being it VRBO.com #481178 and VRBO.com #130810.

Mr. Kugle: Okay. And then in the next line down you checked real property tax assessment classification as vacation rental.

Mr. Emayo: Yes.

Mr. Kugle: So the tax people assess vacation rentals as vacation rentals, and that's a higher tax rate than say residential. Is that your understanding?

Mr. Emayo: I have no understanding of that.

Mr. Kugle: Okay. So you just got that word vacation rental from the real property tax department?

Mr. Emayo: No. I got a real property assessment classification off the Internet. We have the, um - what - what do they call it? They have checks or - or some kind of sheet - spreadsheet on each property...

Mr. Kugle: Mm-hm.

Mr. Emayo: ...on the real property (unintelligible). And their assessment of it was vacation

rental I guess.

Mr. Kugle: So - so the - the county's online property records...

Mr. Emayo: Yeah.

Mr. Kugle: ...um, is what you - that database you checked. And it had - um, it's...

Mr. Emayo: Vacation rental.

Mr. Kugle: ...listed down as vacation rental.

Mr. Emayo: Yeah.

Mr. Kugle: Um, and so you - you don't know how the tax department works, but that's what they're calling it.

Mr. Emayo: Yes. And the reason it's complaint - we use it as a complaint is because whatever they assess as vacation rental, we cross check it with our database on who's a legal, non-conforming use TVR or use permit homestays. And if they're not in there, we do further research to verify the illegal use.

Mr. Kugle: Okay. And then - and just so I understand the rest of this form and - you check off boxes where you've done things or found things, and then you don't check 'em if they don't apply. So...

Mr. Emayo: Yes.

Mr. Kugle: So in this case you didn't go out and - or check for rental cars, um, 'cause that box isn't checked off. So...

Mr. Emayo: Yes, we did.

Mr. Kugle: Okay. And it's - this is a kind of a form you fill out when you're doing, like you said, the hunting or just online...

Mr. Emayo: Online checks, yes.

Mr. Kugle: Yeah. And so this was January 28, 2016. That's before Ordinance 1002 was passed -- correct -- which was June 3...

Mr. Emayo: Yes.

Mr. Kugle: ...2016.

Mr. Emayo: Correct.

Mr. Kugle: So I was gonna ask you why didn't you issue a zoning compliance letter on January 28, 2016?

Mr. Emayo: Could be verification - we needed more verification. Ah, the investigation wasn't complete. Along with this World Wide Web check we have to complete a investigation report, which would be Exhibit B.

Mr. Kugle: Okay. But that wasn't done until a year later in January...

Mr. Emayo: Yes.

Mr. Kugle: ...2017.

Mr. Emayo: Yes.

Mr. Kugle: Was the reason why you didn't do the next step, which was the investigation report, because on January 28, 2016 what Ms. McConnell was doing wasn't illegal?

Mr. Emayo: Not at all. Ah, we just had a - we have a whole bunch like this. And then we put it on the side until we get to it. And then when the next one comes up, then we do the investigation for it.

Mr. Kugle: Okay. All right. So it wasn't a question of the Planning Department waiting until Ordinance 1002 was passed six months later.

Mr. Emayo: We had no idea if it was gonna pass or not or what.

Mr. Kugle: Okay. But it was - apparently it was well publicized that it was coming up.

Mr. Emayo: Yeah. But we don't focus on that.

Mr. Kugle: Mm-hm. Okay. Um, let's talk about Exhibit B, which is, I think you test-testified that that was your investigative report.

Mr. Emayo: Yes.

Mr. Kugle: And so you in addition to filling out the first two pages, you collected the backup material that is kind of tabbed and sectioned in the back. Is that correct?

Mr. Emayo: Ah, supporting the...

Mr. Kugle: So the in- in...

Mr. Emayo: ...supporting the face page, yes.

Mr. Kugle: Yeah. Okay, and so what did you do in terms of an investigation, which generated this report? What was your process?

Mr. Emayo: To find evidence for the property, to verify if the property was an illegal use - illegal, transient accommodations use outside of the VDA.

Mr. Kugle: Okay. And so for this one it looks like you looked at Airbnb.com.

Mr. Emayo: Ah, for the prima facie evidence, yes.

Mr. Kugle: And when you say prima facie evidence, just so we understand what you're talking about, that means that you're searching the Internet looking for an advertisement, which you then deem to be evidence that there's an illegal operation.

Mr. Emayo: Evidence of the operation - ah, transient accommodation operations, yes.

Mr. Kugle: So for in this investigative report, you didn't, um - it was based on just that evidence of the Airbnb advertisement?

Mr. Emayo: Compilation of all of the different evidence we have. According to this case, we had Airbnb, we had VRBO, we had GET taxes, and TAT taxes, along with real property assessment as vacation rental.

Mr. Kugle: And just so I'm clear, who does the real property tax assessment? Is that the state of Hawaii or the County of Kaua‘i?

Mr. Emayo: It is the County of Kaua‘i.

Mr. Kugle: So a year later - a year before this you had a VRBO site, but in January of 2017 it was Airbnb?

Mr. Emayo: Yes.

Mr. Kugle: And so other than that, other than the things you just described, the existence of a GE tax license, a TAT tax license, the Airbnb ad, and the fact that the county classified this as vacation rental for real property tax purposes, that was what this investigative report was based on?

Mr. Emayo: Along with the maps of the - the Tax Map Keys and zoning maps to show that the property is outside of the VDA.

Mr. Kugle: Okay. I didn't see within Exhibit B in the back up pages, the zoning map.

Mr. Emayo: I believe is - I didn't, um - I didn't page it, but it's in there. It's in there after the real property page after the Airbnb website page.

Mr. Kugle: Mm-hm.

Mr. Emayo: It's towards the end of the...

Mr. Kugle: Okay. So that's the one that says, "Special planning area north shore...

Mr. Emayo: Yes.

Mr. Kugle: ...Wainiha Valley"?

Mr. Emayo: It would show - it would show the property outside of the VDA.

Mr. Kugle: I'm looking at that map. I don't see the VDA designated on it.

Mr. Emayo: The VDA designation is not on it. There was no VDA around that area.

Mr. Kugle: Okay. And when you refer to the VDA map, you're talking about the maps that exist in the county that have the timeshare boundary. Is that right? A - a line des...

Mr. Emayo: Yeah, they used to call them the timeshare boundaries.

Mr. Kugle: Yeah.

Mr. Emayo: Yes.

Mr. Kugle: And that's what it's still on. the maps today it's labeled timeshare...

Mr. Emayo: Yeah, VDA.

Mr. Kugle: ...boundary?

Mr. Emayo: Yes.

Mr. Kugle: So as part of the investigation which resulted in Exhibit B you didn't actually talk to Dawn McConnell at that point in January of 2017?

Mr. Emayo: Not yet.

Mr. Kugle: And, you didn't talk to any neighbors of hers?

Mr. Emayo: No.

Mr. Kugle: Um, you didn't go out to the property?

Mr. Emayo: No.

Mr. Kugle: You didn't talk to any people who claimed to have been renting her rooms?

Mr. Emayo: I don't - it would have been in the report.

Mr. Kugle: It - it would be in the report, if you did.

Mr. Emayo: It's not in the report.

Mr. Kugle: Yeah, so you didn't at that point go out and observe rental cars in the driveway or receive a log of rental cars from neighbors or somebody else?

Mr. Emayo: In this case, no.

Mr. Kugle: And, you didn't find any evidence of an actual financial transaction like an actual rental, rental contract, payments, checks, anything like that?

Mr. Emayo: No.

Mr. Kugle: So as a result of doing that investigation and completing that report, it looks like the following day you issued the zoning -- well when I say you, I'm talking about the Planning Department -- issued the zoning compliance notice or at least dated the zoning compliance notice. Is that right?

Mr. Emayo: Okay, yes.

Mr. Kugle: And that's Exhibit C. Now I did have some questions about that as well. You usually stamp that on the date it's prepared, so that January 11, 2017 date is the date is was prepared?

Mr. Emayo: The stamp is the day that the secretary sends - send it...

Mr. Kugle: Okay.

Mr. Emayo: ...the actual date of, ah, that it's sent - it's sent out.

Mr. Kugle: In Exhibits A and B I saw that, um, the reports listed both an address for Ms. McConnell in Santa Cruz, California as well as the Wainiha property address.

Do you know why this Exhibit C, the zoning compliance notice was sent only to Ms. McConnell in Santa Cruz, California?

Mr. Emayo: The reason why it's sent to only to Patricia McConnell, 104 Endlich Drive, Santa Cruz, California is that it's the address given on the real property contact person. And that is the, um - how we get the address to...

Mr. Kugle: Mm-hm.

Mr. Emayo: ...send our - all of our notices out. That is our first, ah - yes, yes, it's - this - this is the first address that we get on the ownership of the property. And the - according to what we have is the owner, who is Patricia D. McConnell, 104 Endlich Drive, Santa Cruz, California 95060.

Mr. Kugle: Okay. And, we don't have any copy of a return receipt or anything else indicating the date it was received by Ms. McConnell.

Mr. Emayo: Ah, we have a copy of that. However, we didn't put 'em in the evidence. Ah, I don't know if it went to this property, but we usually have the green card, which we can we have the numbers for it, and they can - they'll pop up on the - on the computers, ah, on the date of...

Mr. Kugle: The - the tracking number.

Mr. Emayo: Tracking number - tracking number of...

Mr. Kugle: Okay.

Mr. Emayo: ...who received it, when or where.

Mr. Kugle: Okay. But - so that may exist, but we don't have that in, ah...

Mr. Emayo: Yeah.

Mr. Kugle: ...the evidence here.

Mr. Emayo: Yeah, I don't.

Mr. Kugle: Um, the - you heard - maybe you heard. Were you present this morning when Ms. McConnell testified that she actually received it on April 1st of 2017?

Mr. Emayo: Yes.

Mr. Kugle: Okay. And you have no reason to disbelieve that?

Mr. Emayo: No.

Mr. Kugle: Would the Planning Department use a process server or somebody like that to physically go hand a zoning compliance notice to a homeowner at the street address?

Mr. Emayo: We do.

Mr. Kugle: Okay. So the process she described could have happened here.

Mr. Emayo: Could have.

Mr. Kugle: Um, would your records indicate whether you had to use that process instead of the registered mail? Would that be in the file?

Mr. Emayo: Yeah. Um, sometimes we put 'em in, sometimes we don't.

Mr. Kugle: Okay, now I had a question. So you did your investigation. And the report was Exhibit B. Um, and this is alleging that there might be two different violations, Section 8-8.1(b) and Section 8-17.8. You see that?

Mr. Emayo: Yes.

Mr. Kugle: Um, and one relates to homestay, and the other relates to single family transient vacation rental.

Mr. Emayo: Yes.

Mr. Kugle: Um, well what was it that the Planning Department was claiming that Ms. McConnell was doing that was unauthorized?

Mr. Emayo: Ah, we said the violation was the unauthorized use of the subject property for transient accommodations outside of the VDA, meaning, um, ah, both uses.

Mr. Kugle: Okay. And which one - based on your investigation, which one did you believe she was doing at the time?

Mr. Emayo: At the time we must have seen both, a house and a portion of the house, which is a house, which will be transient vacation rental and, the portion of the house, which would be a homestay.

Mr. Kugle: Okay. But if it was a house, she could be living in the house, and that would then just be homestay.

Mr. Emayo: She could rent out the house and live in the house or whatever. That would be

a transient vacation rental. The whole house would be a transient vacation rental. A portion of the house, would be a roo- like a room or something that.

Mr. Kugle: Okay. So - so in other words, if I...

Mr. Emayo: That would be homestay.

Mr. Kugle: ...if I try to understand the difference between a single family transient vacation rental and a homestay, a homestay you're renting out a portion of the house or rooms while you remain on the premises versus a single family transient vacation rental there's no requirement that the owner be on the premises, and the whole house...

Mr. Emayo: That doesn't matter

Mr. Kugle: Yeah.

Mr. Emayo: (Unintelligible) where the home is.

Mr. Kugle: Okay.

Mr. Emayo: Transient accommodation is for a single family residence...

Mr. Kugle: Mm-hm.

Mr. Emayo: ...house, yeah.

Mr. Kugle: So you were just being safe and covering all the bases saying it's either a homestay or a transient vacation...

Mr. Emayo: I think what happened was the, VRBO showed it was a house not clarifying the specific rooms, and the Airbnb pointed out to us that it was a homestay operation.

Mr. Kugle: Now...

Mr. Emayo: Being - both of 'em being transient accommodation outside of the VDA, we cited both sections, 8-8.1, which is a homestay, and 8-17.8, which is a TVR, sections of the CZO.

Mr. Kugle: Okay. The second page - so just so I'm clear, Exhibit C is not complete. You sent more than just this two-page letter. Is that right? And I ask that because on the second page it says, "We've attached Ordinance 1002 for your reference."

Mr. Emayo: I believe so, yes.

Mr. Kugle: And that 1002 is the one that we've been referring to previously in this hearing. That was the June 3, 2017 -- I'm sorry -- June 3, 2016 ordinance that said no homestays outside the VDA that Mr. Laureta testified about.

Mr. Emayo: Yes.

Mr. Kugle: And you would agree with Mr. Laureta that Ordinance 1002 has no mention of nonconforming use process?

Mr. Emayo: I don't agree with him. And I'm not sure.

Mr. Kugle: Well let me ask it this way, and you can look at that, but, um, let me ask it this way. You're familiar with the, um, Ordinance 864 that was past in...

Mr. Emayo: Yes.

Mr. Kugle: ...2008. And, ah, it's probably been part of your job to, ah, deal with those TVRs that got nonconforming use certificates under that ordinance from 2008. Correct?

Mr. Emayo: Yes.

Mr. Kugle: And so it is your understanding that Ordinance 1002 relative to homestays is very different than Ordinance 864 dealing with transient vacation rentals because the homestay ordinance doesn't have that nonconforming use certificate registration process like the TVR ordinance did?

Mr. Emayo: Yes. The Ordinance 1002, the homestay ordinance did not - to my understanding they did not make an opening for people coming to certify the grandfather use because it was always open for anybody to go in to get a - what they used to call it a B&B use through a use permit process. So it was - it - you could always go in and - for a use permit. And we do have some use permits from before the ordinance for B&Bs.

Mr. Kugle: Okay. And was there ever a time that the Planning Department would tell a B&B owner that there is no permitting process from a county standpoint for a B&B or a homestay?

Mr. Emayo: Well at the time we didn't have a process for homestay because the terminology wasn't in existence. So we had. But B&B was always open. Ah, you could come in and get a use permit for a B&B, which they entertain a few before.

Mr. Kugle: Okay. And so, if somebody like Ms. McConnell had come in in 2005 and talked to the Planning Department and said I bought this house, I want to operate a bed and breakfast or a homestay, whatever the term you want to use what would she have been told?

Mr. Emayo: She would have been directed to the use permit process to get a B&B use permit.

Mr. Kugle: Okay. And there would - I would of course, be able to go back into the 2005 version of the zoning code and find a reference to a B&B use permit.

Mr. Emayo: No. That is why you could get a usage - you could try for a use permit because there is no, um - it's not permitted in any of the zones. So that would - that would – anything not permitted or cited somehow, you could try and get a use permit process.

Mr. Kugle: Okay. So if Ms. McConnell went and looked at the zoning code, she wouldn't have found any reference to a bed and breakfast permit or a homestay permit in 2005?

Mr. Emayo: There wouldn't be.

Mr. Kugle: Now, Ms. McConnell eventually contacted you after receiving the zoning compliance notice. Correct?

Mr. Emayo: I believe she contacted Britni Ludington-Braun who was working with us as a contract hire to do these, these World Wide Web searches. Ah, so who I believe she created the meeting dates.

Mr. Kugle: Okay. And if I remember, Britni, her real name is Joan or - or...

Mr. Emayo: No.

Ms. Sasaki: No, just...

Mr. Emayo: Britni is a different person. That's Joan's daughter.

Mr. Kugle: Okay. Okay. So, Britni set up a meeting, but you had a meeting - you and - well initially you and Ms. McConnell alone had a meeting on what, I guess that was April 12th of 2017.

Mr. Emayo: Um, myself, and, ah, Ms. McConnell, and Britni was in the meeting.

Mr. Kugle: Okay. And can you just describe to me, um, how that - obviously the purpose of that was to come in in response to the zoning compliance notice that...

Mr. Emayo: Yes.

Mr. Kugle: ...says, "Contact our office in 14 days." Right?

Mr. Emayo: Uh-huh.

Mr. Kugle: And so how did that meeting transpire? What went on in that meeting?

Mr. Emayo: We - the - at the meeting we offered clarification for remedial action for the zoning compliance notice sent on January of 2017. We basically had three directions to remedy the situation. Number 1, which would be a written response to the zoning compliance notice with our some kind of remedial action plan. Number 2 was to remove the prima facie evidence. Number 3 was to work with the Planning Department to rectify the violation. And the submission to the - to the remedial action plan would be on April 14, 2017.

Mr. Kugle: Okay. And, um, so after that meeting, Ms. McConnell did prepare a letter and submit that on April 13, 2017.

Mr. Emayo: Okay. Yes, I think so.

Mr. Kugle: Ah, yeah, and that's part of - part of your file of Exhibit E.

Mr. Emayo: Okay.

Mr. Kugle: Um, and I'm assuming that in that meeting on April 12th she told you and Britni that she didn't believe that she believed she was legal under the prior laws and that she should be grandfathered under Ordinance 1002. Is that a fair summary of her position?

Mr. Emayo: I think she was trying to prove that point, yes.

Mr. Kugle: And, did you or Britni ask her to submit some evidence of that as a result of that meeting?

Mr. Emayo: Ah, that could have - um, I remember her saying that. That could have been just write it down as part of your remedial action plan that you would submit before April 14 of 2017.

Mr. Kugle: Okay. And so when she submitted her letter on April 13th - when she hand carried that down here. Right?

Mr. Emayo: Mm-hm.

Mr. Kugle: Um, and that was in response to your meeting on April 12th the next day (unintelligible)...

Mr. Emayo: Yes.

Mr. Kugle: And she was explaining in that letter again how, I think she said in her words, "It is my belief, however, that I have not and would never been in violation of any of the older county ordinances." And then she explains that there's been this change in the law. Right?

Mr. Emayo: Mm-hm. Yes.

Mr. Kugle: And did, um - did you or Britni kick this upstairs to Mike Laureta - and I don't mean physical upstairs, I'm not sure where his office is. but talk that over with him, and say that she's claiming she's nonconforming or she's grandfathered?

Mr. Emayo: No, I don't think so.

Mr. Kugle: And your report on the first page of Exhibit E, says that,"Planning Department offered a remedial action plan to rectify the violation. Pat McConnell has accepted and signed the terms to remediate." You see that at the bottom of Exhibit E?

Mr. Emayo: Yes.

Mr. Kugle: And, I'm looking at the last page of Exhibit E which begins at the top of the, page, scheduled meeting. Do you see that? It's actually - you may have a letter from Britni Ludington Braun. That wasn't part of Exhibit E. So go to the second to the last page, which is scheduled meeting. You see that one?

Mr. Emayo: Scheduled meeting?

Mr. Kugle: Yeah, it's a page that begins at the top. It says scheduled meeting, and then it has the date, and it has some compliance plan terms.

Mr. Emayo: Yes.

Mr. Kugle: Ah, and so did you, um - did you ever, ah, talk to Britni about how that meeting went?

Mr. Emayo: I was in that meeting.

Mr. Kugle: Okay. Did...

Mr. Emayo: This is my writing.

Mr. Kugle: Um, did Britni ever tell you that Ms. McConnell did not sign a remedial action plan or agree to one?

Ms. Sasaki: Objection (unintelligible).

Mr. Kimura: Um, the rules of evidence don't necessarily apply.

Ms. Sasaki: Okay.

Mr. Emayo: What was the question?

Mr. Kugle: The question was did Britni tell you and also, this is admission by a party opponent, did Britni tell you that she didn't think Ms. McConnell ever signed that action plan?

Mr. Emayo: No. I didn't - I - I cannot recall anything. She did si- um, I - this is her signature I believe.

Mr. Kugle: Okay. Did you ever read a meeting report that Britni prepared about that April 12th meeting?

Mr. Emayo: I think I did.

Mr. Kugle: Okay. And...

Mr. Emayo: Ah, I...

Mr. Kugle: ...do you...

Mr. Emayo: ...I cannot find that report though, that letter.

Mr. Kugle: Yeah. And do you recall whether Britni said in that letter that Ms. McConnell didn't sign the remedial action plan?

Mr. Emayo: No. No, I don't remember.

Mr. Kugle: Um, you - you've been handed something. Does that refresh your recollection?

Mr. Emayo: No, but I see - I - I see it.

Mr. Kugle: Okay. Okay. So - so you - Britni might have thought she didn't sign that.

Mr. Emayo: Okay.

Mr. Kugle: Um, so earlier you were telling us about the things that you wanted Ms. McConnell to do as part of her remedial action plan. And you ticked off three items. Those are the ones that are listed on this page that's titled scheduled meeting dated April 12, 2017. Correct?

Mr. Emayo: Okay, yes.

Mr. Kugle: Which is a written response - so first a written response to the zoning compliance notice with a remedial action plan.

Mr. Emayo: Yes.

Mr. Kugle: And then secondly, remove prima facie evidence, which you explained to us means the Airbnb advertising.

Mr. Emayo: Yes.

Mr. Kugle: And then third, work with Planning to rectify the violation.

Mr. Emayo: Yes.

Mr. Kugle: Um, I just - I didn't understand the last one. If she - if she did - if she removed the prima facie evidence and did a written response what more is there to do to rectify the violation?

Mr. Emayo: We didn't, um - we didn't note what further actions we would need to come into compliance.

Mr. Kugle: Okay. And so after the date of this form and this meeting, she did, in fact, submit a written response to the zoning compliance notice and addressed her concerns about it. Right?

Mr. Emayo: Yes. Yes.

Mr. Kugle: And did she, um, remove the prima facie evidence?

Mr. Emayo: Not at that time, no.

Mr. Kugle: Okay. And, after you folks received her written letter on - ah, that was delivered on the 13th, did, um - what was the next step from the Planning Department?

Mr. Emayo: To get compliance.

Mr. Kugle: And - and by that you mean you did another investigation...

Mr. Emayo: Yes.

Mr. Kugle: ...which ultimately ended up in the issuance of the notice of violation and order.

Mr. Emayo: Yes.

Mr. Kugle: And, that is Exhibit E, right? That was done in - in May after the meeting.

Mr. Emayo: Yes.

Mr. Kugle: And just so I understand, and that was dated May 23, 2017.

Mr. Emayo: Yes.

Mr. Kugle: And, in that investigative report, similar to the questions I asked you before on the zoning compliance notice, the evidence that you relied on to generate the notice of violation was a continuing Airbnb ad that was present on May 18, 2017.

Mr. Emayo: Yes.

Mr. Kugle: And, as part of this investigation you didn't go out and talk to any of Ms. McConnell's neighbors.

Mr. Emayo: No.

Mr. Kugle: And, you didn't go out to the property itself.

Mr. Emayo: Nope.

Mr. Kugle: You did not observe any rental cars or have reports or logs of rental car activity at the site.

Mr. Emayo: Instead of logs or reports, what we do is we have reviews of people who stayed on the property using the third party host website to review on the property.

Mr. Kugle: So a comment posted on Airbnb or...

Mr. Emayo: Yes.

Mr. Kugle: ...VRBO.

Mr. Emayo: Yes.

Mr. Kugle: And do you contact the person who posted that on the Internet?

Mr. Emayo: According to - um, we've made a contact with Airbnb. And according to Airbnb, people who can put their reviews onto the website are only the people who rented the property through that third party host - third party hosting companies.

Mr. Kugle: Okay. So - but you don't do anything to verify whether that's a real person or whether they actually stayed there?

Mr. Emayo: No.

Mr. Kugle: Um, and by like terms you don't have any evidence of any actual financial transaction or rental, exchange of money in exchange for a room.

Mr. Emayo: Again we use the th- um, ah, when - when talking to Airbnb the people who put reviews have to do the transactions through the third party host, meaning VRBO, or Airbnb, or whatever.com.

Mr. Kugle: And so who - who talked to Airbnb and VRBO?

Mr. Emayo: I myself did once on - on one of the meetings that we had.

Mr. Kugle: And when was that?

Mr. Emayo: Oh, I'm cannot remember the date. It was a general information meeting on the phone.

Mr. Kugle: And do you know who you spoke with?

Mr. Emayo: No.

Mr. Kugle: Ah, let me then have you look at Exhibit D, which was, um, titled, "Notice of Violation and Order to Pay Fines."

Mr. Emayo: I don't have it. Okay

Ms. Sasaki: You do.

Mr. Emayo: A, B, C, I don't have D.

Mr. Kugle: I'll give you a copy of D, if I may approach.

Mr. Kimura: Ah, yes you may.

Mr. Emayo: I do, I do, I do have it.

Mr. Kugle: Okay. And that's the one with the date stamp of May 23, 2017?

Mr. Emayo: Yes.

Mr. Kugle: Now this, um - did you prepare this? I - I know it's not your signature on it. But did you prepare that notice of violation?

Mr. Emayo: I did.

Mr. Kugle: And, unlike the zoning compliance notice, this one is addressed to Patricia McConnell both at the Wainiha address as well as the Santa Cruz address.

Mr. Emayo: Yes.

Mr. Kugle: Okay. And, was this one sent Certified Mail?

Mr. Emayo: Yes, all of our documents that are sent are sent by Certified Mail.

Mr. Kugle: Okay. Do you know when it was received by Ms. McConnell?

Mr. Emayo: I don't think so.

Mr. Kugle: Okay. Um, 'cause we don't have the return receipt or anything in the - in these exhibits.

Mr. Emayo: I don't think we put it in.

Mr. Kugle: Yeah. So in the second paragraph of the notice of violation and order to pay fines, the part that starts off on April 12th talking about your meeting, it goes on to say the Planning Department confirmed that the continued transient accommodation operation (homestay) - you said the subject property is a violation. Um, and - and what was that determination based on?

Mr. Emayo: Ah, an investigation on...

Mr. Kugle: Well maybe I can help you. That was based on the investigation report that you did that was dated May 23, 2017 and that we looked at as...

Mr. Emayo: Yes.

Mr. Kugle: ...Exhibit E.

Mr. Emayo: Yes, Exhibit - what was - C?

Mr. Kugle: E.

Ms. Sasaki: E.

Mr. Emayo: Okay. Yes, that's the one.

Mr. Kugle: Okay. And so, but Exhibit E was not sent to Ms. McConnell as part of the notice of violation.

Mr. Emayo: No.

Mr. Kugle: So she doesn't know what, um - what other - what evidence there was to support the conclusion. She just gets the determination that it was being violated on that day.

Mr. Emayo: Yes.

Mr. Kugle: And I think you've testified earlier about that day. It was either May 16 or May 17 of 2017. Correct?

Mr. Emayo: Yes.

Mr. Kugle: Um, unlike the zoning compliance notice, this one says she's only violating Section 8-18.1 on the homestays.

Mr. Emayo: Yes.

Mr. Kugle: And why - how - what changed between the time you issued the zoning compliance notice and this notice of violation, um, for you to go from the two violations to the one?

Mr. Emayo: I sent the notice of violation according to the notice of violation investigation, which is Exhibit C. C, yeah?

Mr. Kugle: No.

Mr. Emayo: E. E.

Mr. Kugle: E.

Mr. Emayo: E -- which is Exhibit E. Ah, the findings were the continued operation of a

homestay. Ah, we didn't know if the TVR violation had ceased or not. We had no evidence of continued use. So the notice of violation went only towards continued use of the noted, the notation from Exhibit E.

Mr. Kugle: Okay. And - and that's what you then explain -- violation -- the Planning Department has confirmed that the subject property is currently being used for a homestay operation. Continued use of the subject property for a homestay operation outside of the designated VDA constitutes the violation.

Mr. Emayo: Yes.

Mr. Kugle: I was a little confused because that letter goes on to quote the enforcement section of the Zoning Code 8.3.5 that talks about first there's an - ah, it says that if somebody's not complying with a notice of violation, the Director may have that party served with an order, and the order may require the party to correct the violation, pay a civil fine, ah, or pay civil fines per day. Correct?

Mr. Emayo: Yes.

Mr. Kugle: So I was confused because that - that is what this - this letter does both. Right? It is a notice of violation saying she's done a violation. And then it is an order that she pay a $10,000 fine to the Planning Department.

Mr. Emayo: No. Ah, the - the first letter that we sent was the zoning compliance notice, and they may call it something else in 8.3.5. Ah, but the first letter that we sent is the zoning compliance notice that was sent in January of 2017, which specifically states that a violation of Section 8.18.1, homestay, is illegal outside of the VDA.

Mr. Kugle: Okay. And the, um - this, ah, Exhibit D then levies and orders a fine of $10,000 for that violation. Correct?

Mr. Emayo: Yes.

Mr. Kugle: And how did the Planning Department determine that it should be - isn't there a range of fines available for zoning code violations?

Mr. Emayo: Yes.

Mr. Kugle: And the minimum being?

Mr. Emayo: Five hundred to...

Mr. Kugle: And the ma...

Mr. Emayo: ...$10,000.

Mr. Kugle: Okay. And how did, um, the Director or the Department determine that it should be 10,000 and not, um, something less?

Mr. Emayo: We have a fine schedule actually, which is in-house, that was created to guide is in, um - on the ways that we are allowed to fine them.

Mr. Kugle: Okay. And, does that fine schedule talk about different fines for different types of zoning violations?

Mr. Emayo: Yes.

Mr. Kugle: And does it talk about some factors or some criteria that the director would consider as to when a lesser or a greater fine should be imposed?

Mr. Emayo: Yes, basically our fine schedule shows the specific sections that we fine on. And it's, a range of when the remedial action is taken.

Mr. Kugle: So in other words there's - there are fines associated with each provision of the zoning code, like the homestay provision or like building setback provision.

Mr. Emayo: Yes.

Mr. Kugle: And so what is the fine or the range of fines for a violation like this, which is of the homestay ordinance?

Mr. Emayo: The continued use, not cease, there's no cease and desist of the illegal operation, continued use is the maximum, which is $10,000. It can be ongoing according to what we have, which we've never used is $10,000 per day for continued use.

Mr. Kugle: Mm-hm. And, um - and just so I'm clear, Mrs. McConnell was never issued a - a prior notice of violation say for this same thing. This was the first time.

Mr. Emayo: I believe this is the first notice of violation in order to pay fines, yes.

Mr. Kugle: And does the fine schedule provide for like, you know, repeated violations that you have an increasing amount of a fine or...

Mr. Emayo: The fine goes up to $10,000. Ah, how many times is something else. But according to what we have is the fine is from 500 to $10,000.

Mr. Kugle: And, in this case the final page of the notice of violation, it, informs Ms.

McConnell of her right to if she disagrees with this determination, to appeal it to the Planning Commission. Correct?

Mr. Emayo: Yes.

Mr. Kugle: And, I notice that the appeal period referenced in this letter is 21 days. But, it's my understanding that the actual appeal period is 30 days. Is that your understanding as well?

Mr. Emayo: I have no understanding of that. That's, um...

Mr. Kugle: So in other words, this one references a rule of the planning commission, and it says you have 21 days from the date of the adverse decision. And you don't know if that's been changed, or if it's now 30 days, or anything like that?

Mr. Emayo: No, this is just the part that the attorneys put in for us.

Mr. Kugle: Just give me one minute to review my notes. I might be through. I'm sorry. I do have, I think one more question. You have not issued any more notices of violation to Ms. McConnell since the one that we are discussing, Exhibit D. Is that correct?

Mr. Emayo: I believe we have a zoning compliance notice that was sent out for the same violation, but it's not in none of these though.

Mr. Kugle: And do you recall when that was?

Mr. Emayo: I have no idea. It wasn't sent by me. Ah, it was sent be, I believe it was Vil - Vil Balisacan.

Mr. Kugle: Okay.

Mr. Emayo: I only know that because it came across my desk.

Mr. Kugle: Okay. I have got no further questions. Thank you.

Mr. Kimura: Okay. It's 12:40. How much more do we have to go?

Ms. Sasaki: Well I have Joan Ludington-Braun, is going to testify.

Mr. Kimura: Okay.

Ms. Sasaki: And, we have, with respect to the Freedom of Information Act or the, the information requested, we have somebody that can testify with respect to that. It's Marisa Valenciano. I'm - I can - I would move that she be able to testify,

since that's been such a big subject of conversation during this hearing. According to Marisa the Department never received a request.

Mr. Kimura: Well okay - well no. I mean talking about for planning purposes, so we're gonna break for lunch.

Ms. Sasaki: Mm-hm.

Mr. Kimura: Um, and then we still have the redirect of...

Ms. Sasaki: Right.

Mr. Kimura: ...ah, Ms. Emayo - Mr. Emayo.

Ms. Sasaki: And Joan Ludington-Braun, another witness.

Mr. Kimura: Right.

Ms. Sasaki: And I would respectfully request that Marisa Valenciano be able to testify because she can testify with respect to the - if - if, um, information were UIPA -- I always get confused -- UIPA request that Mr. Kugle has been referring to.

Mr. Kimura: Okay. Well...

Mr. Kugle: I don't have an objection to having her come in for that.

Mr. Kimura: Okay. And then...

Ms. Sasaki: Okay.

Mr. Kimura: ...after that the Planning Department would rest. And then Mr. Kugle, are you gonna have a rebuttal or rest for the evening?

Mr. Kugle: I think it would be a very brief rebuttal, yes. So I don't think there's much more time after lunch.

Mr. Kimura: Okay. So why don't we break now, and let's resume at 1:15 (unintelligible), yeah.

Lunch Recess 12:41pm
Contested Case Hearing Resumed at 1:15pm

Mr. Kimura: So, um, Mr. Emayo, you're still under oath, and you're gonna begin with the redirect by Ms. Sasaki.

Mr. Emayo: Thank you.

Ms. Sasaki: One second. I just want to go back to the meeting of April 12, 2017 with Ms. McConnell - with Britni, you, and Ms. McConnell. And I just, were you clear with Ms. McConnell that the operation of her homestay was in violation of the KC- the Kaua‘i County code?

Mr. Emayo: In April?

Ms. Sasaki: April 12th.

Mr. Emayo: Yes.

Ms. Sasaki: Yes. Okay. Did she give you any indication whatsoever that she would stop?

Mr. Emayo: The inquiry was to what was this about. So we offered remedial and - a remedial action plan.

Ms. Sasaki: Okay. But as far as you know, she never took the remedial action plan. She never - she never did - did the remedial - the remedial?

Mr. Emayo: Ah, as far as what we have is the evidence of continued operation.

Ms. Sasaki: Okay. Did Ms. McConnell threaten if you tried to stop her, that she would run off into the ocean and take off her clothes, be eaten by sharks? Is that true? Is it? That’s what it says here. If we stop her from operating, she’s gonna take off her clothes, leave ‘em on the beach, and swim out to the shark and let them eat her. Do you recollect that?

Mr. Emayo: When we come into, um, ah, these remedial action meetings...

Ms. Sasaki: Mm-hm.

Mr. Emayo: ...um, people are sometimes, without understanding what’s going on.

Ms. Sasaki: Mm-hm.

Mr. Emayo: Ah, sometimes, um - so - but specifically I had - I don’t remember ‘cause everybody reacts differently.

Ms. Sasaki: Right. Okay.

Mr. Emayo: But I had seen all kind extremes. But I don’t remember specifically what...

Ms. Sasaki: But my point - but Ms...

Mr. Emayo: I believe she could have been, um - I remember I was - she - she probably was upset at the - at the violation there.

Ms. Sasaki: Um, but your general sense of the meeting is that she was reluctant to, she was reluctant to comply with any remedial action or to change her business as she was performing it at that time.

Mr. Emayo: The evidence we have is the continued operation of the illegal...

Ms. Sasaki: Right.

Mr. Emayo: ...operation.

Ms. Sasaki: I have no further questions.

Mr. Kimura: Okay. Mr. Kugle, recross?

Mr. Kugle: No, I don't' have any further questions.

Mr. Kimura: Okay. Thank you, Mr. Emayo.

Ms. Sasaki: If you'd just give me a minute, I'll call Marisa. She needs to be here in person.

Mr. Kimura: So you're gonna have Marisa as your next witness?

Ms. Sasaki: Yeah, because Joan is - is - had an appointment, but she's coming back. So I thought I would call out of order...

Mr. Kimura: Okay.

Ms. Sasaki: ...just for, ah...

Mr. Kimura: Is that okay with you, Mr. Kugle?

Mr. Kugle: That's fine. Yes.

Ms. Sasaki: I'm trying to be...

Mr. Emayo: Was I pau for the day or...

Ms. Sasaki: No. Well you - you should sit.

((Crosstalk))

Ms. Sasaki: Hi. We're ready. Yes, thanks. Bye. Thank you, bye. She'll be here in a second.

Mr. Kimura: Oh, she's at the o- in the other building?

Ms. Sasaki: She's just around - she's where we usually are. You know, what our - she's like in that - that section.

Mr. Kimura: What section?

Ms. Sasaki: Marisa. You know, she's in the Planning Department building, which is near...

Mr. Kimura: Oh okay, okay.

Ms. Sasaki: ...where our usual...

Mr. Kimura: Right, right, Moikeha.

Ms. Sasaki: ...you know.

Mr. Kimura: Right. Yeah, yeah. Okay? So can you remain standing and raise your right hand? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth?

Ms. Valenciano: Yes.

Mr. Kimura: Okay, please be seated.

Ms. Sasaki: Hi. Could you state your name for the record?

Ms. Valenciano: Marisa - is it on?

Ms. Sasaki: I think so.

Ms. Valenciano: Marisa Valenciano.

Ms. Sasaki: And what's your position with the Planning Department?

Ms. Valenciano: I'm a long range planner.

Ms. Sasaki: And one of your tasks as a long range planner is to answer information requests from - I always forget - is it called OPA, O-I, U-I?

Ms. Valenciano: Office of Information Practices, yes.

Ms. Sasaki: Now earlier on in this hearing Mr. Kugle had repeatedly indicated that he had made a request and that it went unanswered. And since you're in charge of that section I thought it would behoove us to have - to speak to you and ask what you received and when - if you answered it, when you answered it.

Ms. Valenciano: So should I talk about general procedures and what we do...

Ms. Sasaki: Yeah. How...

Ms. Valenciano: ...about things?

Ms. Sasaki: Yeah.

Ms. Valenciano: Okay. So general procedures is when we get a request, um, you know, we can receive a request either by mail or email, um, over the counter. Either way it typically flows just through myself. Um, you know, and then from there I sign off to the division heads depending on the type of request that is received. Um, from there, you know, then we got ahead. By law we have 10 days - business days to then respond to that whether or not we can grant that request or not or if we can deny in part and/or grant with certain exceptions based on, I think, it's 92F. And so with that said, we have 10 business days to respond to the applicant at that point. And from there, depending on what the ultimate conclusion is with that request, in the case of if we are able to grant it, then we would work with the applicant to grant it, to process it. Um, if it's denied - we have to send a response at the end of the day. And so usually that's within 10 business days. And that's typically the procedure we are obliged to follow by law.

Ms. Sasaki: Okay. So was Mr. Kugle's request denied or was it received?

Ms. Valenciano: Um, you know, to my recollection, the last request that I received was back in June 2019, and that was related to I believe a separate case, that was for James's TVR.

Ms. Sasaki: Okay.

Ms. Valenciano: Anything, I haven't received anything prior - or anything after that. That was the last request I received.

Ms. Sasaki: I think Mr. Kugle said that he made the request somewhere around July 3, so that obviously...

Ms. Valenciano: I haven't received any.

Ms. Sasaki: ...follows June.

Ms. Valenciano: No. I haven't received any. The last request I received was in June 2019. That was related to the James's file.

Ms. Sasaki: Is there any chance that somebody else would have gotten the request or...

Ms. Valenciano: Well I don't know who. Again, I don't know what the request - who it was addressed to within the Planning Department. But, typically like, if it is OIP, procedure is for it to be sent to me or someone. And so I haven't seen anything that crossed my desk related to this particular case...

Ms. Sasaki: Okay.

Ms. Valenciano: ...around that date.

Ms. Sasaki: All right. Okay. Thank you.

Mr. Kimura: Okay. Mr. Kugle?

Mr. Kugle: Yeah. Hi, Ms. Valenciano. Let me have you just take a look at the page we've been talking about. I'm gonna hand you what's been marked as Exhibit 1 to the memo and op to the motion for summary judgment.

Ms. Valenciano: Okay.

Mr. Kugle: Does that refresh your recollection about whether the Planning Department received such a letter on or about July 10?

Ms. Valenciano: No, I have never seen this request.

Mr. Kugle: Okay. And who is that addressed to?

Ms. Valenciano: It's addressed to Kaaina Hull.

Mr. Kugle: And in the normal procedure that you described, do requests come in addressed to yourself, or are they normally addressed to the Director of the Planning Department?

Ms. Valenciano: It just depends on who they give the request - who they request it to, but it's usually the Planning Department.

Mr. Kugle: Okay. And would, if it went to Director Hull, would he then route it to you? Is that what would happen, if it did go to him?

Ms. Valenciano: It could - correct. It would filter to myself.

Mr. Kugle: And so as far as you know, this one has not made it to your desk?

Ms. Valenciano: No.

Mr. Kugle: And if it would get to your desk, would, in a case like this where it involves an enforcement action, would the Planning Department's response be to provide a copy of the file or would it be to deny the request?

Ms. Valenciano: Well we're - we would treat all - all requests equally under the law. It would be - it would all go under 92F. And so if the requests were made, we would have to go through that process and, you know, determine at that point whether we can disclose the cause, allow it for inspection based on the exceptions that are provided through OIP. So I cannot make a statement like that where it would go one or the other. It just depends again on the case and, you know, what the applicant would be asking for information wise.

Mr. Kugle: Okay. So like it might be the frustration exception to 92F?

Ms. Valenciano: That's one of 'em.

Mr. Kugle: And if a letter was sent by Certified Mail...

Ms. Valenciano: Mm-hm.

Mr. Kugle: ...um, as this one appears to be and is directed to Director Hull, would it be received and signed off by him, or would it just come in the regular Planning Department mail and the Certified return receipt be signed by anybody?

Ms. Valenciano: That I have no idea who does that. And I don't - I guess on this paper and what I'm looking in front of me there's no indication that it was sent Certified.

Mr. Kugle: Okay. At the top of the first page right where it says Director...

Ms. Valenciano: Okay. It says Certified Mail.

Mr. Kugle: Yeah.

Ms. Valenciano: But I don't see any receipt...

Mr. Kugle: Yeah.

Ms. Valenciano: ...or I don't see...

Mr. Kugle: Yeah.

Ms. Valenciano: ...any - the green card that usually comes with it. So I see - I see the Certified Mail, but I don't see the other receipts or the other parts of it that would indicate...

Mr. Kugle: Yeah.

Ms. Valenciano: ...it was Certified Mail.

Mr. Kugle: No, the receipts not there, so...

Ms. Valenciano: Right.

Mr. Kugle: Um, I'm hoping to get it any second now. But, ah...

Ms. Valenciano: Okay.

Mr. Kugle: ...um, I don't, and I don't want to keep you any longer. So, basically you're not in the process of sorting through or responding to that because you've never seen it before today.

Ms. Valenciano: No. And if I received it, you know, we would. again like all requests, we would process it accordingly.

Mr. Kugle: Yes, you've done that before for me.

Ms. Valenciano: I have done requests for you, so you know the procedure.

Mr. Kugle: I do. Ah...

Ms. Valenciano: We - we are pretty diligent about responding, making sure you get a response.

Mr. Kugle: You are.

Ms. Valenciano: Okay.

Mr. Kugle: I don't have any further questions.

Mr. Kimura: Okay. Any redirect?

Ms. Sasaki: No.

Mr. Kimura: Okay. Thank you.

Ms. Valenciano: Thank you.

Ms. Sasaki: I'm gonna call Joan Ludington-Braun. Ah, and she should...

Mr. Kimura: Is it Joan, or is it Britni?

Ms. Sasaki: No, Joan Ludington-Braun is on my exhibit list - Joan.

Mr. Kimura: Oh, okay.

Ms. Sasaki: Um, Britni's her daughter as we (unintelligible)...Well this - this - she's a very important witness. Um, and she isn't answering, so let me - okay, I'm texting her. Okay. Somebody's going to get her.

Mr. Kimura: I'm sorry?

Ms. Sasaki: Somebody's going to get Joan Ludington-Braun.

Mr. Kimura: Oh okay.

Ms. Sasaki: Okay. She was supposed to have been back by 2 o'clock - I mean 1 o'clock, but she doesn't seem to have gotten back yet. Now I'd really like to call her as a witness. Could we wait for her? Is that possible?

Mr. Kimura: Okay. Um...

Ms. Sasaki: I mean it should be not too long. She should be coming back within 5 or 10 minutes.

Mr. Kimura: Okay. Mr. Kugle?

Mr. Kugle: Um, so are we gonna just take a recess? I mean I'm not sure what she's gonna testify about, and she hasn't been involved in any of the proceedings that - ah, or any of the documents that we've looked at. So I'm not sure, um...

Mr. Kimura: Okay. Well, Ms. Sasaki, why don't you provide an offer of proof?

Ms. Sasaki: Okay. Um, that's what she'll testify about?

Mr. Kimura: What she would testify to.

Ms. Sasaki: She, Ms. Ludington-Braun's prepared to testify to the fact that Ms. McConnell did, in fact, rent her homestay during the time that she purportedly didn't because of the flooding or the rain in April 2018. Um, so I don't - that's all I - I know.

Mr. Kugle: So, again I don't think that's relevant to the notice of violation that we're litigating today. Um...

Ms. Sasaki: It's directly in opposition to what the witness said. And it's...

Mr. Kimura: Well - well...

Ms. Sasaki: ...it goes to the...

Mr. Kimura: ...Ms. - Ms. Sasaki...

Ms. Sasaki: ...credulity of...

Mr. Kimura: ...Ms. Sasaki, let Mr. Kugle finish, and then you can respond.

Mr. Kugle: Well yeah, that's it, it's irrelevant to the May 23, 2017 notice of violation that's on appeal. So I would just say it's irrelevant.

Ms. Sasaki: But...

Mr. Kimura: Okay, now Ms. Sasaki.

Ms. Sasaki: I'm sorry. Yeah. And I apologize again. Um, well it's proof of continued use, and I think that it undermines the credibility of the witness and given that that's a question, the - what - what else - other things that she might have testified to maybe as well be questioned - in question.

Mr. Kimura: Okay. So in terms of she testifying, she would have personal knowledge to the investigation being done by the Planning Department.

Ms. Sasaki: Yes.

Mr. Kimura: But she did not have any personal contact with Ms. McConnell.

Ms. Sasaki: I don't know that actually. I don't know the answer to that.

Mr. Kimura: Okay. Well why don't we take a recess, and we'll resume at 1:45 and see if...

Ms. Sasaki: Okay.

Mr. Kimura: ...ah, Ms. Ludington-Braun...

Ms. Sasaki: Oh, she's coming. She's coming right now.

Mr. Kimura: Oh, she's coming now?

Ms. Sasaki: Do you want to still take the recess or...

Mr. Kimura: Ah, no, no. We'll just wait for her.

((Crosstalk))

Ms. Sasaki: She said she was heading over.

Mr. Kimura: She knows it's in this room (unintelligible)...

Ms. Sasaki: Liquor commission, yeah.

Mr. Kimura: Moikeha - she knows that?

Ms. Sasaki: Yeah.

Mr. Kimura: Yeah. Okay.

Ms. Sasaki: Just in case. They said she was coming from her department, so - yeah, Joan, hello? Y- ah, yeah, is Joan there? (Unintelligible) I'm gonna just check the other room. Okay? Is that okay?

Ms. Segreti: She - she knows it's here.

Ms. Sasaki: She does know it?

Ms. Segreti: She came here earlier.

Ms. Sasaki: Oh okay.

Mr. Kimura: Okay.

Ms. Segreti: She came with Mike earlier.

Ms. Sasaki: Oh okay, with Mike, okay.

((Crosstalk))

Mr. Kimura: Okay.

Ms. Sasaki: Oh. Hi.

Ms. Ludington: Hello.

Ms. Sasaki: Hi.

Mr. Kimura: Hi. Okay. So, could you remain standing and raise your right hand? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth?

Ms. Ludington: Yes.

Mr. Kimura: Okay. Thank you. Please be seated.

Ms. Sasaki: Good afternoon.

Ms. Ludington: Good afternoon.

Ms. Sasaki: Could you state your name?

Ms. Ludington: I'm Joan Ludington.

Ms. Sasaki: And could you say your position with the Planning Department?

Ms. Ludington: I'm a Planning Inspector for the Enforcement Division.

Ms. Sasaki: Now today we're, um - the contested case hearing concerns Ms. Patricia D. McConnell and with the property - her property in Hanalei. Are you familiar with this investigation?

Ms. Ludington: I am familiar with her property...

Ms. Sasaki: Mm-hm.

Ms. Ludington: ...um, and a little bit with the investigation.

Ms. Sasaki: Okay. Well I - um, it was Ms. McConnell's testimony earlier that during the period, that the road to Hanalei was closed -- and I - I think I wrote that down - ah, June - April 2018 to June 2019 she did not have any rentals in her, ah - in her homestay. Um, do you have - do you have any knowledge of rentals in her homestay during that period?

Ms. Ludington: Okay. Because I'm an enforcement inspector, so I monitor the Web constantly. I was also one of the, ah - we issued those passes in Wainiha and as I say, I monitor the Web. And I had came across Ms. McConnell's website advertisement. And I did notice that she did have a review in the month of May of 2018. Now because I'm in enforcement I did do clippings of this, ah, review that came in on May of 2018. So yes, I do have paper evidence of a review that came in on May of 2018.

Ms. Sasaki: And advertising on the Web is prima facie evidence...

Ms. Ludington: Correct.

Ms. Sasaki: ...of - ah, and do you know anything about how the issuance of passes - how that might have been accomplished or...

Ms. Ludington: I also received complaints of Ms. McConnell having passengers within her vehicle. Now these were only hearsay from the complaints that were put into the department.

Ms. Sasaki: Mm-hm.

Ms. Ludington: Did not see it, but there was a complaint with them being in her vehicle with her.

Mr. Kugle: Move to strike the hearsay.

Ms. Sasaki: Rules of evidence don't apply. I've...

Mr. Kimura: Overruled.

Ms. Sasaki: So basically you are here today to discuss this period of time and what you know about this period of time and that there was evidence on the Web of Ms. McConnell's renting her homestay...

Ms. Ludington: Right.

Ms. Sasaki: ...as evidenced by a review. Yeah?

Ms. Ludington: Right.

Ms. Sasaki: And, the department received complaints that there were more than one pa-passenger in the car. Were the cars - were they supposed to only have one passenger or...

Ms. Ludington: Um, we did not regulate how many people were in the vehicles.

Ms. Sasaki: Okay.

Ms. Ludington: But I guess she - people know Ms. McConnell within the Wainiha area and did make a complaint that...

Ms. Sasaki: Okay.

Mr. Laureta: ...she had people in her vehicle.

Ms. Sasaki: Okay. Um, thank you. I am done.

Mr. Kimura: Okay. Mr. Kugle?

Mr. Kugle: Thank you. So, Ms. Ludington-Braun when did you review this website that you mentioned?

Ms. Ludington: My clippings was taken on July 10, 2018.

Mr. Kugle: And you mentioned that there was a comment that was posted. Who posted the comment?

Ms. Ludington: I have the evidence right here. I printed it up from my computer. It was a guest that stayed at her property, and it was left on the reviews.

Mr. Kugle: Okay. And, who was the person?

Ms. Ludington: Mm, it does not say who the person was.

Mr. Kugle: Okay. So that was an anonymous posting?

Ms. Ludington: I don't know. This was what was on VRBO.

Mr. Kugle: And, Ms. Braun, did it say that - that rental occurred in March of 2018?

Ms. Ludington: It was submitted June 3, 2018, and it was a stay from May 2018. That's what the website advertisement indicated.

Mr. Kugle: Okay. So it said May?

Ms. Ludington: Yes, May 2018. So at that time the road was closed.

Mr. Kugle: Right. That's why I'm...

Ms. Ludington: Um...

Mr. Kugle: ...having trouble understanding how...

Ms. Ludington: Correct.

Mr. Kugle: ...somebody - because I...

Ms. Ludington: Well we searched the World Wide Web - I - every day.

Mr. Kugle: Yeah.

Ms. Ludington: I constantly search for new illegals and also for existing illegals.

Mr. Kugle: So - so yeah, my question I guess is this. I mean there was a physical choke point on the road that would have physically prevented anybody who did not either live in the area affected...

Ms. Ludington: Mm-hm.

Mr. Kugle: ...um, or long-term renters who had had a prior rental contact, and it was actually the Planning Department that was monitoring that. Is that right?

Ms. Ludington: I monitor everyone. I monitor, as I say, all illegals and legals.

Mr. Kugle: No, no, I'm talking about the actual access down Kuhio Highway.

Ms. Ludington: Ah, we issued the passes to the residents at that time.

Mr. Kugle: Mm-hm.

Ms. Ludington: Yes.

Mr. Kugle: Okay. And so are you saying that the Planning Department issued a pass to a guest or a tenant of Ms. McConnell's?

Ms. Ludington: Ah, no, because we had to verify with residents and license plates. The - the - whoever was coming to get passes needed to provide proper documentation for the Planning Department. I'm not sure how this person got in. As I say, we also got complaints of people being in Ms. McConnell's vehicle. Um, I just know that I was at that time clipping reviews.

Mr. Kugle: Okay. And so do you know who the person or people were that was - was in Ms. McConnell's vehicle or when that was?

Ms. Ludington: No, I don't. No, I don't.

Mr. Kugle: And, I have, um - oh, and just so I'm clear, you didn't actually contact that person who posted that thing on the Internet. You don't have any way to contact that person.

Ms. Ludington: No.

Mr. Kugle: And did you, um - so this - ah, the time period you're talking about in May of 2018 would have literally been three weeks after, ah, the landslides and flood.

Ms. Ludington: Right.

Mr. Kugle: Um, and wasn't the road like virtually actually physically impassible, not just because the Planning Department, you know, was monitoring who came and went. But I mean I've seen the pictures of the landslides, and some of those parts were literally obstructed. Right?

Ms. Ludington: It was accessible to local residents only...

Mr. Kugle: From...

Ms. Ludington: ...at that point.

Mr. Kugle: From what day?

Ms. Ludington: From the day we started issuing passes, which was when DOT gave us the okay to go ahead. We down at the Hanalei Colony issuing passes out there.

Mr. Kugle: Yeah. And - but that was how many days or weeks after the April 14, 15, 16 storms and landslides, um, did you begin issuing passes?

Ms. Ludington: Ah, you know, I can't really remember. I think it was - I know we were down - we were brought in by Michael Dahilig to issue passes down at the Colony.

Mr. Kugle: Mm-hm.

Ms. Ludington: I would want to say a week or so after the - and when they started opening up the roads. 'Cause we were actually transporting people in and out with the county vehicles.

Mr. Kugle: Mm-hm.

Ms. Ludington: And that was in April.

Mr. Kugle: It was in April that you were taking people in county vehicles. And then it was in May that you began issuing...

Ms. Ludington: No, no, it was April.

Mr. Kugle: ...passes.

Ms. Ludington: It was April that we were issuing the passes.

Mr. Kugle: Okay.

Ms. Ludington: The minute DOT opened up the road to the public we started issuing passes that exact day. I was down at the Colony issuing the passes.

Mr. Kugle: And you're pretty sure it wasn't like May 9?

Ms. Ludington: No, not - no.

Mr. Kugle: Okay. And was, um - you said you were familiar with Ms. McConnell's property. Was it damaged in the rain and the flooding?

Ms. Ludington: I did not go up - I did not physically look at her property. I just know her property through the website advertisements. And then we were stationed down in Wainiha. You know, I remember Ms. McConnell coming in and to complain about people turning around in her driveway. She came down to the Colony and talked to Michael Dahilig.

Mr. Kugle: Yeah. And...

Ms. Ludington: So actually being at her property, I have not seen the damage that she sustained, no.

Mr. Kugle: And, her complaint was that it was county vehicles coming and turning around in her driveway and front yard.

Ms. Ludington: It was with Michael Dahilig.

Mr. Kugle: Oh.

Ms. Ludington: I was not part of the conversation, but I do know that she made a complaint with - to Michael Dahilig.

Mr. Kugle: Okay. Okay. I don't have any further questions.

Mr. Kimura: Okay. Any redirect, Ms. Sasaki?

Ms. Sasaki: No, I don't have anything.

Mr. Kimura: Okay. Thank you very much.

Ms. Ludington: Would you like me to submit my, ah...

Mr. Kimura: Um, that would be up to the County's attorney.

Ms. Sasaki: Um, well I think this is a pertinent piece of evidence, so...

Mr. Kugle: I...

Ms. Sasaki: ...let's see.

Mr. Kugle: And I - I would object. I've never seen that before today.

Ms. McConnell: It's also not true, so that's not fair to me...

Ms. Sasaki: The - the - so...

Ms. McConnell: ...'cause it's not true.

Ms. Sasaki: ...I would offer the clipping day - the - okay, so you got the website information on this date.

Ms. Ludington: Mm-hm.

Ms. Sasaki: Okay. So the website information was obtained 7-10-2018. And the review was...

Ms. McConnell: (Unintelligible)

Mr. Kugle: (Unintelligible)

Ms. McConnell: (Unintelligible)

Ms. Sasaki: Okay.

Ms. McConnell: (Unintelligible)

Ms. Sasaki: Okay. So - and the date of review...

((Crosstalk))

Ms. Ludington: ...day was...

Ms. Sasaki: May 2018. So this is - I - I just think that this calls into question - it's very significant 'cause it calls into question Ms. McConnell's credibility. And I think it's definitive proof that she has never intended to cease operations. She just is going to continue operations irrespective of the law or any conditions whatsoever. So I offer website information of 7-10-2018 into evidence.

Mr. Kimura: Okay. So, Ms. Sasaki, please show it to Mr. Kugle.

Ms. Sasaki: Oh okay.

Ms. McConnell: There's no way. I didn't rent it. So how could (unintelligible)? The road was completely closed. It's not even...

Mr. Kugle: Okay.

Ms. McConnell: ...possible. I know I didn't. I know 100% (unintelligible)...it wasn't. (Unintelligible) and they can review it a year later. She could have (unintelligible)...could have been them writing it. (Unintelligible) it's just (unintelligible)...That's when they - that's when she posted. That's not when she stayed. That's when she posted. People can post a year later. There's no name, and it's - they always put their name. They have to because then I have to respond.

Mr. Kugle: So, I still object to this for the reason I stated, and then depending on your ruling, I would - as this is the first time I've seen this right now, I would like the opportunity to cross examine the witness based on the document, if over my objection it's admitted.

Mr. Kimura: I will admit the evidence over the plaintiff's objection - over the petitioner's objections. But yes, Mr. Kugle, you can always question Ms. Ludington-Braun on that.

Mr. Kugle: Ah, so Ms. Braun, you testified that - that you performed this Internet search of VRBO.com on July 10, 2018. And why did you do that that day?

Ms. Ludington: As I say, I search the Web every day constantly. So I monitor illegals. Um, and I know the road is closed, ah, but I still monitored the Wainiha area as well as the rest of the island. And when I came across the review, I did notify my director of the findings. But nothing was ever done. So I put it into my case file, and that's where it's been.

Mr. Kugle: Okay. And is that separate from the, a separate file than the regular Planning Department files about this enforcement case?

Ms. Ludington: Um, as I say, I monitor the Web, and any time I find some type of a situation, I'll go ahead and clip it and put it into my files.

Mr. Kugle: Okay. But so would this go into Planning Department files such that, if there was a Uniform Information Practices Act request to the county to produce everything related to Dawn McConnell or her property, would that be one of the files that would be reviewed and either produced or objected to?

Ms. Ludington: Um, at the time, because the director said we were not enforcing Wainiha, I just kept that particular file on my computer and - and a copy of it in the file, yes.

Mr. Kugle: Okay. And - and why was it that you -- excuse me -- chose to, um, search for Ms. McConnell's on July 10?

Ms. Ludington: I - I search everyone. I search all the illegals. I'm constantly hitting the sites. It's just a - a routine thing that I do when I get in.

Mr. Kugle: Mm-hm. And so you referred to an anonymous comment, which I think I'm looking at on the - on the final page, that again, you said it was submitted on June 3. Um, do you know what day this person, um, actually stayed in the unit?

Ms. Ludington: No.

Mr. Kugle: And there was no, um, follow up to go find out who stayed out there, to go out...

Ms. Ludington: It says, "Stayed in May," and the review was in June - was submitted in - online in June.

Mr. Kugle: I - I understand that that's what somebody typed in to the Internet somewhere. I mean my skepticism is I don't trust the Internet all that much because anybody can post anything, you know. And, so, for instance, is it your understanding of the Internet that, ah, I can post something online out there somewhere and call myself Jim Doe or John Doe, and I could say untrue things about something, and there's no fact checker.

Ms. Ludington: Well working with VRBO and Airbnb, I do know that the guests that stay at the residence are the ones that make the reviews. I've had cases in other cases where, um, I've had situations, and it was confirmed that the guests did stay at the - the people's residence. So yeah, it comes from the guests who stay. They have a opportunity to post after their stay of their stay. And they're the ones that will post.

Mr. Kugle: Mm-hm. Um, and so you are - are trusting what somebody put when they say their stay was in May of 2018, but you didn't independently confirm that at all?

Ms. Ludington: I - I trust whatever was put onto the Web...

Mr. Kugle: Okay.

Ms. Ludington: ...from that people that stayed at the residence.

Mr. Kugle: Well but how do you know that this person stayed at that residence on that date? And I mean there is not even a date listed here. Right?

Ms. Ludington: Ah, well this is the information that I collected.

Mr. Kugle: Yeah. So you're saying it was posted on June 3, but there's no date or dates in May that are identified.

Ms. Ludington: Um, you know, because I clipped that, I only printed what I had at that time. I - I would have to go back to the rest of my clippings to see if there was an actual calendar. I only clipped the review and the evidence of it being on that website.

Mr. Kugle: Okay.

Ms. Ludington: I could probably go back and obtain the calendar also. I'm - I would have to go back to my - my file.

Mr. Kugle: I have no further, ah, questions for this witness.

Mr. Kimura: Okay.

Ms. Sasaki: Okay one - one quick question. Is it your understanding that anybody can post on Ver- VRBO or B- Airbnb, anybody in the world can post whatever they want? Could you just describe the procedure or - or as you know it or as it's been explained to you?

Ms. Ludington: So from my understanding is, if you're gonna be a guest of mine, we have our communication through VRBO or Airbnb.

Ms. Sasaki: Mm-hm.

Ms. Ludington: Once you stay at my residence, there is an option or opportunity for you to comment on your stay at my residence. And then that is posted online through my website...

Ms. Sasaki: I see.

Ms. Ludington: ...for Airbnb or VRBO. So someone else couldn't come in and post or get into that connection of yours and my connection.

Ms. Sasaki: So it's limited to - it...

Ms. Ludington: Right.

Ms. Sasaki: ...ah, they do a job of trying to limit it...

Ms. Ludington: Right.

Ms. Sasaki: ...to each...

Ms. Ludington: Right.

Ms. Sasaki: ...like and compartmentalize it (unintelligible).

Ms. Ludington: Right.

Ms. Sasaki: Okay. Thank you. I have nothing further.

Mr. Kugle: A little redirect on that - or recross. Um, where - you said that's your understanding of how Airbnb and VRBO work. Where did you get that understanding from?

Ms. Ludington: Ah, from other cases that I've had to deal with getting evidence or information that they have shut down their website and what their requirements were with Airbnb or VRBO.

Mr. Kugle: Okay. So do you - you spoke with somebody at Airbnb or VRBO about that?

Ms. Ludington: Not at Airbnb or VRBO, but I've, ah...

Mr. Kugle: Okay.

Ms. Ludington: ...talked with the people that had their listings on those sites, VRBO and Airbnb.

Mr. Kugle: Okay, so...

Ms. Ludington: They're led to provide information to me.

Mr. Kugle: And you have no, you know, written instructions, or terms and conditions, or privacy policies - policies or anything else from any hosting platforms that, describe for you in writing what you just told us? So you gathered that just from talking with their people.

Ms. Ludington: That had listings with Airbnb or VRBO.

Mr. Kugle: Okay.

Ms. McConnell: (Unintelligible)

Mr. Kugle: I have...

Ms. McConnell: (Unintelligible)

Mr. Kugle: I have no further questions.

Mr. Kimura: Okay. Thank you.

Ms. Sasaki: Okay. Thank you so much. Thank you.

Mr. Kugle: Um, since this is the only copy, I'm not sure what...

Ms. Sasaki: I'll...

Mr. Kimura: Okay. I...

Mr. Kugle: ...we do.

Mr. Kimura: I was just gonna explain how we're gonna take care of that. Okay. So in regards to Exhibit G, what I request Ms. Sasaki that you do a subsequent filing, do a supplemental exhibit list, include Exhibit G, and email it to all the parties as well as mail a hard copy, like the regular procedures.

Ms. Sasaki: Okay.

Mr. Kugle: I'll ask who wrote these.

Ms. McConnell: Okay, yeah.

Ms. Sasaki: Okay. I will do that.

Mr. Kimura: And - and your next witness, Ms. Sasaki?

Ms. Sasaki: That's - we're done.

Mr. Kimura: Okay. So you rest?

Ms. Sasaki: We rest, Your Honor.

Mr. Kimura: The County rests. Ah, so Mr. Kugle, will there be any rebuttal?

Mr. Kugle: Yes, brief rebuttal testimony by Ms. McConnell.

Mr. Kimura: Okay, go right ahead. So Ms. McConnell, you already under oath, so you can proceed, Mr. Kugle.

Mr. Kugle: Ah, Ms. McConnell, you heard, ah, what Ms. Ludington-Braun said about both her VRBO search as well as who you were traveling with in vehicles and as well as when the road was open and closed. Do you recall that? Let's start with the road closure. You lived out at the end. So you had to deal with that every day. Is that right?

Ms. McConnell: Yes (unintelligible)...

Mr. Kugle: And what is your understanding or recollection of when private vehicles were allowed through the Planning Department checkpoint?

Ms. McConnell: Well what I remember was that we were completely closed and couldn't get in other than by boat. I thought it was like May 6 to like May 9 they actually opened it that we were allowed to get into town, because we were getting food, you know, shipped into us. And, um, I didn't leave my home. You couldn't leave your home.

Mr. Kugle: Okay. And, eventually when they did open the road to private vehicles such as yours, you obtained a pass from the Planning Depart- excuse me...

Ms. McConnell: Yeah.

Mr. Kugle: ...the Planning Department.

Ms. McConnell: We went down to the - like she said, to the Hanalei Colony. You took your vehicle, and then they wrote you up and put the sticker on your car. And they put a distinct sticker on my car that said, "No visitors." So they would have - if I would have had a visitor that wasn't allowed to come in, they would have checked my vehicle 'cause they distinctly did that to me and a few other people that were TVRs.

Mr. Kugle: Okay. And did at some point did you, well let me ask you first about the damage to your property. What kind of damage did you sustain, you know, during the flooding and storm?

Ms. McConnell: The - the - um, one big mudslide came down on one portion of my property. Um, the road coming into my property had a big, huge sinkhole, and I had to fill it with rocks. That's why I didn't want the county co- you know, coming into- running over my sinkholes making them deeper and gouging it. I had - my whole driveway's very steep. It turned into a waterfall, so all the - so all

the asphalt and everything came out. And my roof was leaking, and my whole bottom part of my house was filled with mud, and I was by myself and cleaning it up by myself. And for her to sit there and say I'm bringing in visitors, like my God. I (unintelligible) with - you don't even know how hard this thing was for us. So they sit in the other side and don't even check or even - I'm sorry. It's just like wow. I just think wow.

Mr. Kugle: Okay. So your property was damaged and your house was flooded and damaged as well.

Ms. McConnell: Yeah, the - the hill mud came rushing in the bottom part. And then the insurance said, "Well we don't do ground water." So the whole thing was filled with mud. My one whole lower floor was filled with mud...

Mr. Kugle: Okay.

Ms. McConnell: ...this thick.

Mr. Kugle: Okay.

Ms. McConnell: And it's still - I cleaned it up, but the driveway's still ruined. My roof is still leaking, and I still have - you know, I nev- I had to - the county never came and helped me. They told me they would help me with the driveway when - 'cause they could see they were driving in there. They said they'd help me. But they never did. I did it all by myself.

Mr. Kugle: Okay.

Ms. McConnell: I got the gravel put in, and I got the shovel, and I filled all those sinkholes with stones and everything by myself.

Mr. Kugle: Okay. Now you heard Ms. Ludington-Braun also testify that you had gone into the Planning Department office at - where they were issuing the permits and complained about vehicles turning around on your property.

Ms. McConnell: I actually called the Department of Transportation and said that they keep coming in. Because I'm at the very end of the road, I'm isolated way off in the jungle. And they're - I'm at the very end of the road. So if people come down, there's nowhere for them to go. So they come onto my property and turn around and go back out. So they were doing this constantly, the big trucks and everything like that. And so I called the Department of Transportation and said, "My road is getting really - it was bad, but it's really exacerbating here. And then they came, sent a guy out. I've got his name written down. I just forget it. And he came out. He was the guy that was on the - on the - on the thing with the mudslides here 'cause he was telling me what it was like that

night. And he said, "Oh yeah, I could see what you're talking about." And he took pictures, and he said, "As soon as we're - as soon as we're done, we'll, ah, fix this." But then they told me to go down and talk to Michael Dahilig, go down and talk to him because he could be the one that or- can orchestrate getting it fixed now or something. And then when I went and talked to Michael, he just sat there and said, "Well if you sign your property over us, the - then we'll fix it." He was very -- what's the words where you're -- disrespectful.

Mr. Kugle: Okay. And so your concern was it was county and state vehicles that were coming out and turning around and...

Ms. McConnell: Yeah, other people did too, but the county and state vehicles were the worst because they were bigger and heavier.

Mr. Kugle: Mm-hm. Okay. Um, now...

Ms. McConnell: They still do.

Mr. Kugle: Okay. Now, um - and they still haven't come out and fixed it for you.

Ms. McConnell: No.

Mr. Kugle: Let's talk about how VRBO works and your understanding of that, and how this comment that we just looked at, what's the significance of that.

Ms. McConnell: Yeah, this woman is - I - this is disturbing for me because she's making judgments about people, and she doesn't understand this process. She's getting information that's not accurate. VRBO - with the VRBO system you can - you can pay a yearly fee, and you can do your rentals all on your own. They'll - they'll go through them, so it's verified so people feel safe and you feel safe, but, um, somebody could post something with VRBO three years later. Like sometimes, you know, people just don't get around to it or somethin' like that or whatever. And - and you could - so say somebody booked through some other website, 'cause a lot of people have multiple websites. So they - that person from that other website could contact VRBO and say - write the letter to say oh, I stayed at this particular - but I never, ever knew that they can use an anonymous letter. That's - that wouldn't happen because when they do it, then the name has to go there because, if a person writes a review that's negative, you can respond more positive. You can respond and say something to it. So she's got wrong information. It's not like that. She - if someone wanted to trap someone, they could just go in and write whatever they want. If someone's mad at someone, they could go and say this is a horrible place.

Mr. Kugle: And was - during this time of the flood and the landslides between April of, um, 2018 and when the road was reopened, did you ever then have to go to the mainland?

Ms. McConnell: Ah, yeah, I had to go to the mainland to get a job because I couldn't pay the - make the payment.

Mr. Kugle: Okay. And - and do you remember the dates - the approximate dates that you were on the mainland?

Ms. McConnell: Yeah. It'll be like - it was either mid-July or end of July.

Mr. Kugle: Okay. And then when did you come back?

Ms. McConnell: And I came back April.

Mr. Kugle: Okay. Okay. So you were gone for three-quarters of a year. Um, okay. And did you have to have a friend house sit your house for you?

Ms. McConnell: Yes.

Mr. Kugle: Okay.

Ms. McConnell: And I got permission from the mayor for that.

Mr. Kugle: Okay. You had to go get a special dispensation to have somebody stay in your house while you were on the mainland.

Ms. McConnell: Yeah, 'cause they wouldn't let me have any permits for anybody. They wouldn't let me have permits to bring in people to fix things or - I had to go through the mayor, 'cause the one place was filled with bees. And I had to go through the mayor to even get the beekeeper out to take care of it.

Mr. Kugle: Okay. I have no further questions.

Mr. Kimura: Okay. Cross examination, Ms. Sasaki?

Ms. Sasaki: I have no cross-examination.

Mr. Kimura: Okay. No question. Thank you.

Mr. Kugle: I have no further witnesses.

Mr. Kimura: Okay. No further witnesses, okay. So now, Mr. Kugle, I did mention earlier that, you know, based upon the contested case hearing and the exhibits

admitted, you know, if there is any need to continue this hearing because there is additional preparation you need to do for some of the exhibits that were introduced. Do you have any inclination on that issue?

Mr. Kugle: Well, what I would like to do is to get to the bottom of my UIPA request and - and get a copy, not of the self-selected exhibits that the Planning Department wanted to use, but, a copy of all of that file. And if there's anything else significant for me in that, you know, I would want the opportunity to be able to submit that.

Mr. Kimura: Okay. Now you've heard the testimony of Ms. Valencia that she didn't get the request. So I presume you're gonna be originating another one and sending it directly to her, and then she would respond within the time period required. So, how much time would you need before the determination could be made?

Mr. Kugle: Well, they usually, as she said, they have to respond in a fairly tight window or short window of time. And if her testimony was 10 days, that's probably right because...

Mr. Kimura: Mm-hm.

Mr. Kugle: ...she knows that job. So, I think that it would be fairly quick assuming they actually produce the records for me. So if I get a response to the UIPA request when I get back to the office, we will resend the one that was submitted on July 10. It's not gonna change. So I think she said that they respond within 10 days - um, you know, I just want to make sure that there's nothing else that I don't have access to that I wanted to use for today. And if I can make that determination then that's all I need. So I would guess that that's probably two to three weeks.

Mr. Kimura: Okay. Two to three weeks -- so assuming that there's additional documents that are produced that you wish to have introduced or because of that, have the further evidentiary hearing on the case you would need to make a separate request. So what I'll do is I won't close the hearing. And I will give you 30 days to respond either with a request for a continued contested case hearing based upon the documents that the Planning Department would produce to you, if they do produce documents, or request that the contested case hearing be closed at that point. Now this is a little unusual because it's not really contemplated by the rules. But I believe as the hearing officer, you know, I do have the opportunity and authority to modify it in certain situations. So that's, my original inclination, ah...

Mr. Kugle: That would be fine with us.

Mr. Kimura: Okay, and then within 30 days you would provide your response. And based

upon your response, I would issue a minute order accordingly setting forth dates and times depending on what kind of response I get from the petition. Ms. Sasaki, do you have any comment to that procedure?

Ms. Sasaki: Well I just want the opportunity like to respond, if Mr. - I mean are we gonna - is Mr. Kugle intending to brief the issues or I mean - or just continue the hearing and - I don't understand. I don't - I'm just unclear about what the process would be. If he - say he got - say he got, um, disclosure and he thought that there was something that further needed to be examined at an evidentiary hearing. What would the process be then?

Mr. Kimura: Okay. And at that - well depending on what Mr. Kugle says in response, at that point in my minute order I may then schedule another pre-hearing and then we can talk about whether we're gonna have to have a continued hearing and then do supplemental briefings, do additional exhibits, and in whatever...

Ms. Sasaki: Okay.

Mr. Kimura: ...times it takes. So that's the first step.

Ms. Sasaki: Okay. That's - that's...

Mr. Kimura: So that's why...

Ms. Sasaki: ...I just want to have - make sure we have the opportunity to do that, if that's the case.

Mr. Kimura: Well - well depending upon what Mr. Kugle...

Ms. Sasaki: Yeah.

Mr. Kimura: ...replies, yes.

Ms. Sasaki: Okay. That's fine.

Mr. Kimura: Okay. Is that satisfactory?

Mr. Kugle: That's fine.

Mr. Kimura: Okay. So I will issue the minutes based upon today's contested case hearing set for the procedures I just mentioned, and I'll have the specific date in there. So 30 days would take you to September 30th, which is a Monday. Okay?

Mr. Kugle: That's fine.

Mr. Kimura: So, you could do response via email and also mail the hard copies. You know in the proper format, you know, just state a request or statement. Ah, well you - you know. You can just...

Mr. Kugle: Yes.

Mr. Kimura: ...draft something up.

Mr. Kugle: Yeah, okay. Yes.

Mr. Kimura: And then based upon that, you know, I will issue a minute order about what we will do after that.

Mr. Kugle: Okay. Yes, understood. And so conceivably if there was nothing further that needed to be done, we'd notify you of that, and you'd follow kind of, ah, the normal, ah, process that you've done with submissions, and proposed findings, and closing arguments. Or if there is - if I am making such request, I think, Ms. Sasaki would have the change to respond to it, and we'd deal with that...

Mr. Kimura: Yes.

Mr. Kugle: ...next step.

Mr. Kimura: And, um, depending upon your response, we would then have to order the transcripts for the contested case hearing. And if there will be no further, I will close it, then we'll get the, ah, transcripts out and in the normal process, you know, either within 14 days after receipt of the transcript or 30 days, whichever's longer, would be when the petitioner's proposed findings of fact and conclusions of law and closing arguments would be due then 14 days after that...

Ms. Sasaki: Mm-hm.

Mr. Kimura: ...in the Planning Department. And then 7 days would be the reply.

Mr. Kugle: That's fine.

Mr. Kimura: Okay?

Ms. Sasaki: Yes.

Mr. Kimura: Is that acceptable?

Ms. Sasaki: Acceptable.

Mr. Kugle: Yes. Yes.

Mr. Kimura: Okay, thank you.

Ms. Sasaki: Okay, thank you.

Mr. Kimura: Okay. So, ah, contested case hearing is continued until further notice.

This transcript has been reviewed with the audio recording submitted and it is an accurate transcription.

Respectfully submitted by:

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BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **PETITIONER'S CLOSING ARGUMENTS; PROPOSED HEARING OFFICER REPORT AND RECOMMENDATION; CERTIFICATE OF SERVICE** CONTESTED CASE HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

PETITIONER'S CLOSING ARGUMENTS

This case should be decided based on basic principles of zoning and land use law: lawful uses of property in effect prior to a change in ordinance, may continue. Here, Petitioner Patricia McConnell ("Petitioner") lawfully operated a homestay in her home on the North Shore of Kauai prior to a change in the Kauai County Code that prohibited homestays outside the visitor destination area. Despite the fact that Petitioner represented to the Planning Department that her homestay is a nonconforming use, in 2017, the Planning Department proceeded to issue a Notice of Violation ("NOV") and ordered her to pay a $10,000 fine, stating that she was in violation of the new homestay ordinance.

The Planning Department urges the Hearing Officer to ignore the law regarding nonconforming uses and deem Petitioner's homestay use illegal based on the passing of Ordinance 1002 in 2016. However, the Planning Department did not present any evidence to dispute Petitioner's showing that she operated her homestay prior to the change in ordinance or that Petitioner in any way did not have a nonconforming use.

Furthermore, the Notice of Violation cannot stand, not only because of Petitioner's nonconforming use, but because it contained several flaws serious enough to deem it invalid. First, it did not give Petitioner proper notice of what evidence the alleged violation was based on or a date or time the alleged violation occurred. This is a violation of due process. Second, the Kauai County Code requires that a notice of violation and an order be two separate actions. CZO § 8-3.5(b)(1). The NOV violates this provision because it provides the notice of a violation and the order to pay a fine in one letter. Third, the NOV imposes the maximum fine with no explanation. A $10,000 fine for a first-time violation is excessive and Petitioner was never given a reasonable time to correct the alleged violation prior to the fine being imposed. *Price v. Zoning Bd. of Appeals*, 77 Haw. 168, 833 P.2d 629 (1977).

Therefore, Petitioner respectfully requests that the Hearing Officer determine her homestay use is a nonconforming use and that the Notice of Violation was issued in error.

DATED: Honolulu, Hawaii, January 15, 2020.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	)	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **PROPOSED HEARING OFFICER REPORT AND RECOMMENDATION** <u>CONTESTED CASE HEARING</u>: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

PROPOSED HEARING OFFICER REPORT AND RECOMMENDATION

I. INTRODUCTION

The Hearing for this contested case was held on August 13, 2019 before Hearing Officer Harlan Y. Kimura, Esq. Gregory W. Kugle, Esq. appeared on behalf of Petitioner PATRICIA D. MCCONNELL ("Petitioner"), who was present at the contested case hearing. Maryann Sasaki, Esq. appeared on behalf of Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAI ("Planning Department"). Bambi Emayo was present as the Planning Department representative.

II. PROCEDURAL HISTORY

The Hearing Officer's First Amended Scheduling Order dated July 5, 2019, set the dates for prehearing motions and the prehearing statement, exhibit lists and witness lists. Pursuant to the Order, the Planning Department filed a prehearing motion for summary judgment arguing that Petitioner violated Kauai County Code, Comprehensive Zoning Ordinance ("CZO") 8-18.1(b) when she rented her home as a homestay outside the visitor destination area. Petitioner filed a memorandum in opposition arguing that the Planning Department did not meet its burden of proof to show that a violation existed and nonetheless there was no violation because Petitioner's homestay use is a lawful nonconforming use.

Prior to the commencement of the contested case hearing, the Hearing Officer heard arguments with regard to the Planning Department's motion. Thereafter, the Hearing Officer orally denied the motion and proceeded to the evidentiary contested case hearing.

III. FINDINGS OF FACT

1. In 2004, Petitioner bought her property located in Wainiha, Kauai with the intention of renting rooms in her home to supplement her income.

2. In 2005, the Planning Department informed Petitioner that all she needed to obtain to lawfully operate her rental was a Transient Accommodation Tax license and a General Excise Tax license. Petitioner obtained these licenses.

3. In 2006, Petitioner began lawfully renting rooms in her home, while she also lived there.

4. In 2008, when Ordinance 864 passed, Petitioner attempted to obtain a nonconforming use certificate from the Planning Department, but was informed that she was not eligible because the ordinance did not apply to homestays.

5. Petitioner received a "Notice of Violation & Order to Pays Fines" ("NOV") dated May 23, 2017.

6. The NOV states: "On April 12, 2017, the Department met with you (Patricia McConnell), owner and administrator of the transient accommodation operation. The Planning Department confirmed that the continued transient accommodation operation (Homestay) use at the subject property is a violation of the Comprehensive Zoning Ordinance, Chapter 8, Kauai County Code." The NOV cites CZO § 8-18.1(b) as being violated.

7. Under the word "Violation," the NOV states, "The Planning Department has confirmed that the subject property is currently being used for a Homestay operation. The continued use of the subject property for a Homestay operation outside the designated Visitor Destination Area constitutes a violation." Finally, the NOV provides:

> You are herein levied and ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department.
>
> You are hereby ordered to cease and desist the illegal activities being conducted/performed on and from the premises as required by law.
>
> You are hereby ordered to correct the above use violations(s) within 14 days of the date of this notice. Should the violations not be remedied within 14 days from the date of the Notice of Violation & Order to Pay Fines:
>
> - This matter will be forwarded to the Office of the Prosecuting Attorney;
> - An additional fine of $10,000 per violation, per day for each day in which such violation persists shall be levied.

8. The NOV does not state on what date the alleged violation occurred or on what basis the Planning Department alleged the violation.

9. Prior to the issuance of the NOV, Petitioner met with the Planning Department and informed the Planning Department she had been renting her property since long before the 2016 amendment to the CZO, which limited homestays to the visitor destination area, and thus her homestay use was a "grandfathered" nonconforming use.

10. On June 9, 2017, Petitioner timely appealed from the NOV to the Planning Commission.

IV. CONCLUSIONS OF LAW

Applicable County Ordinances

1. The CZO defines two types of transient accommodations. A transient vacation rental ("TVR") means an entire dwelling is provided to transient occupants for compensation or fees for less than 180-days. CZO § 8-1.5.

2. A homestay "means an owner occupied dwelling unit which overnight accommodations are provided to transient guests within the same dwelling unit in which the owner resides[.]" *Id.*

3. Transient "means any person who owns, rents, or uses a dwelling unit or a portion thereof for one hundred eighty (180) days or less[.]" *Id.*

4. Prior to 2008, TVRs and homestays were not regulated. In 2008, the County of Kauai passed Ordinance 864, which limited all new TVRs to the so-called visitor destination area. Ordinance 864 also required registration of all TVRs that were operating prior to the passage of the ordinance and required owners to obtain a nonconforming use certificate ("TVNCU"). Ordinance 864 explicitly stated, however, "[t]his bill does not apply to [a] bed and breakfast unit ("Homestay"). It is the intention of the Council to address these units as a separate matter after establishing a regulatory framework for single-family transient vacation rentals."

5. In 2016, Ordinance 1002 passed, which provided: "The purpose of this bill is to restrict homestay operations to the Visitor Destination Areas (VDAs) and to establish additional standards under which homestays operate." Unlike Ordinance 864 for TVRs, Ordinance 1002 did not require a property owner who operated a homestay prior to the passage of the ordinance

to register the nonconforming use or obtain a nonconforming use certificate for the property. Ordinance 1002 did not address nonconforming homestays.

6. Ordinance 1002 only addressed new homestay operations stating:

> On a first-come-first-serve basis of applications deemed complete by the Planning Department, no more than ten (10) new applications for homestay operations shall be accepted for review by the Planning Commission in each of the calendar years 2015 and 2016. The limitation on the number of applications shall expire on December 31, 2016, or upon passage of an amendment to this section, whichever occurs first.

7. Currently, CZO § 8-18.1 provides in pertinent part:

(a) A homestay operation shall operate under the following regulations:
  (1) Transient accommodations are provided for visitors for twenty-nine (29) days or less;
  (2) Homestays shall be limited to no more than three (3) guest rooms per homestay operation;

. . . .

(b) Homestay operations are prohibited outside of the Visitor Destination Area (VDA).

Petitioner's Homestay Use Is A Lawful Nonconforming Use

8. Haw. Rev. Stat. § 46-4 "sets forth the general parameters for the exercise of a county's zoning powers." *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw, 343, 352, 949 P.2d 183, 192 (App. 1997). It provides the counties with authority to establish zoning districts and requires the counties to "prescribe rules, regulations, and administration procedures" to enforce the zoning ordinances. Haw. Rev. Stat. § 46-4(a).

9. Haw. Rev. Stat. § 46-4(a) prohibits a county zoning code from preventing a continued lawful use:

> Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing

> out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses.

Id. (emphasis added).[1]

10. Kauai's CZO defines a nonconforming use as a use that "may continue to the extent that the use existed on September 1, 1972 or any amendment thereto." CZO § 8-13.2(a).

11. Not only are nonconforming uses protected by state statute and county ordinance, they are constitutionally protected vested property rights. "[T]he right of a property owner to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction is grounded in constitutional law." *Waikiki Marketplace*, 86 Haw. at 353, 949 P.2d at 193.

12. Further, the Fifth Amendment of the United States Constitution and Article I, § 5 of the Hawaii Constitution both provide that no person shall be deprived of property without due process of law, nor have property rights taken or damaged without compensation. *Id.* "Therefore, due process principles protect a property owner from having his or her vested property rights interfered with and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate." *Id.*

13. Petitioner used her property as a homestay long before the County amended the CZO in 2016 to limit homestays to the visitor destination area.

14. Petitioner's homestay use is a nonconforming use.

15. The CZO regulating homestays does not require Petitioner to register her nonconforming use or to obtain a nonconforming use certificate for her nonconforming use.

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[1] It is undisputed that Petitioner's property is <u>not</u> in commercial, industrial, resort or apartment zoned areas. It is also undisputed that the CZO provisions applied to Petitioner's property does not provide for amortization or phasing out of a homestay nonconforming use. Even if the CZO provided for amortization or phasing out of lawful nonconforming homestay use, that provision would violate Haw. Rev. Stat. § 46-4(a) which prohibits the amortization or phasing out of existing premises used for single-family residential purposes, such as Petitioner.

The NOV Does Not Provide Proper Notice

16. Both the Federal and State Constitutions provide that "No person shall be deprived of life, liberty or property without due process of law...." Haw. Const. Art. I, § 5; *see* U.S. Const. amend. XIV cl. 1.

17. Due process provides both substantive and procedural protections. "The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 389, 363 P.3d 224, 237 (2015). "The requirement of procedural due process exists to protect individuals against the state's deprivation of liberty and property interests." *Brown v. Thompson*, 91 Haw. 1, 9, 979 P.2d 586, 594 (1999).

18. The NOV alleges that a violation of the CZO occurred, but provides no specific facts to support the claim. It does not provide a date of when the violation occurred or what specific evidence supports the NOV.

19. Petitioner is entitled to notice of what the Planning Department is basing the NOV on prior to the deprivation of her protected property interests and payment of a substantial fine. Further, because Petitioner was not given discovery and her Uniform Information Practices Act ("UIPA") request for documents went unanswered by the Planning Department, she had nothing to base her appeal on other than the NOV itself, to present her defense.

20. Substantive due process "guards against arbitrary and capricious government action, even when the government takes that action pursuant to a facially constitutional law. To establish an 'as applied' violation of substantive due process, an aggrieved person must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *In re Herrick*, 82 Haw. 329, 349, 922 P.2d 942, 962 (1996).

21. The Planning Department acted erroneously, arbitrarily, and manifestly abused its discretion when it issued the NOV because there is nothing in the NOV that provides support for an actual violation. The Planning Department further ignored Petitioner's representations that she had rented her property as a homestay prior to the amendment in the CZO limiting homestays to the visitor destination area.

22. Because Petitioner established that she had rented the property prior to the change in the CZO, the burden shifts to the Planning Department to show that the use no longer exists. *See Van Sant v. City of Everett*, 849 P.2d 1276, 1280 (Wash. Ct. App. 1993).

23. The Planning Department disregarded Petitioner's prior use (and thus never attempted to show that it had been abandoned) and instead issued the NOV without consideration of Petitioner's protected property rights.

24. Furthermore, the Intermediate Court of Appeals has made clear that a notice of violation for an alleged unpermitted transient vacation rental must be supported by "credible evidence of a sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." *Dao v. Zoning Board of Appeals*, 144 Hawaii 28, 44, 434 P.3d 1223, 1239 (App. 2019) (*citing Price v. Zoning Board of Appeals*, 77 Hawaii 168, 883 P.2d 629 (1994)).

25. The Planning Department did not submit credible evidence sufficient to support that a violation occurred in this case.

The NOV Violates CZO § 8-3.5

26. CZO § 8-3.5(b)(1) provides: "If the Director of the Planning Department determines that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, by mail or delivery, with an order pursuant to this Section."

27. Petitioner received a "Notice of Violation" and "Order to Pay Fines" in one letter.

28. Under the CZO the Planning Department must first give notice of a finding of a violation and then if the violation is not cured enter an order, which may require the payment of a fine.

29. The NOV therefore violates CZO § 8-3.5.

The NOV Imposes an Excessive Fine

30. CZO § 8-17.6 provides that a fine pursuant to Article 17 shall "not be less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000.00) for each offense."

31. The Planning Department did not provide any support for imposing the maximum fine of $10,000 under the CZO in light of the fact that Petitioner never in the past received a NOV for her property.

32. Moreover, *Price v. Zoning Board of Appeals*, 77 Hawaii 168, 883 P.2d 629 (1977) makes clear that a fine cannot be imposed without due process. Further, Haw. Rev. Stat. § 46-1.5(24)(A) makes clear that a county cannot impose a fine for violation of an ordinance unless it has provided reasonable notice and a request to correct. The NOV in this case violates both of these requirements.

33. The Planning Department imposed an excessive fine. *See* Haw. Const. Art. I, § 12 ("nor excessive fines imposed"); *see also Timbs v. Indiana*, 139 S. Ct. 682 686 (2019) ("the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.").

V. DECISION AND ORDER

Given that Petitioner's homestay was a nonconforming use at the time the Planning Department issued the NOV and the NOV itself contained several substantial defects, the NOV was issued in error and is therefore unenforceable. It is recommended that the Planning Commission VACATE the decision of the Planning Director to issue the Notice of Violation dated May 23, 2017. Petitioner met her burden of proof that her property is a nonconforming use and was not in violation of CZO § 18-8.1 and therefore the Planning Department's decision was based on erroneous findings of material fact and the Planning Director acted in an arbitrary and capricious manner, and manifestly abused his discretion.

DATED: Honolulu, Hawaii, _____.

_____
HARLAN Y. KIMURA
Hearing Officer for the Planning Commission
Of the County of Kauai

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	)	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon the following individuals by emailing and mailing said copy, postage prepaid, to their last known address as follows:

NICHOLAS COURSON
First Deputy County Attorney
Office of the County Attorney
4444 Rice Street, Suite 220
Lihue, Hawaii 96766
Email: ncourson@kauai.gov
Attorney for the
PLANNING COMMISSION OF THE
COUNTY OF KAUAI

JOHN S. MACKEY, ESQ.
CHRISTOPHER P. ST. SURE, ESQ.
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999 Bishop Street
Honolulu, Hawaii 96813
Email: jmackey@goodsill.com
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Attorneys for KAAINA HULL, DIRECTOR,
COUNTY OF KAUAI, DEPARTMENT OF PLANNING

HARLAN Y. KIMURA, ESQ.
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HEARING OFFICER, PLANNING
COMMISSION OF THE COUNTY OF KAUAI

ELLEN CHING
ANELA SEGRETI
Boards and Commissions
4444 Rice Street, Suite 150
Lihue, Hawaii 96766
Email: asegreti@kauai.gov

DATED: Honolulu, Hawaii, January 15, 2020.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

GOODSILL ANDERSON QUINN & STIFEL
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Attorneys for Respondent
PLANNING DEPARTMENT, COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Ha'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	CC-2017-4 TMK: (4) 5-8-005:005 RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S SUPPLEMENTAL EXHIBIT LIST; EXHIBIT G; CERTIFICATE OF SERVICE CONTESTED CASE HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearings Officer: Harlan Y. Kimura

RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I'S SUPPLEMENTAL EXHIBIT LIST

Pursuant to the direction of Hearing Officer Harlan Y. Kimura at the contested case hearing on August 30, 2019, Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I ("Department") hereby submits its Supplemental Exhibit List and Exhibit G.

DATED: Honolulu, Hawai'i, January 17, 2020.

JOHN S. MACKEY
CHRISTOPHER P. ST. SURE

Attorney for Respondent
PLANNING DEPARTMENT, COUNTY OF KAUA'I

COUNTY OF KAUA'I PLANNING COMMISSION	EXHIBIT LIST (SUPPLEMENTAL)	CC-2017-4 TMK (4) 5-8-005:005

PETITIONERS	PETITIONER ATTORNEY (Name, Address and Email)
PATRICIA D. McCONNELL	GREGORY W. KUGLE, ESQ. JOANNA C. ZEIGLER, ESQ. Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, Hawai'i 96813 Email: gwk@hawaiilawyer.com
RESPONDENT	RESPONDENT ATTORNEY (Name, Address and Email)
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I	JOHN S. MACKEY, ESQ. Goodsill Anderson Quinn & Stifel LLP 999 Bishop Street, Suite 1600 Honolulu, HI 96813 Email: jmackey@goodsill.com

DATE OF HEARING	HEARING TIME	PREPARING CLERK	DEPARTMENT
August 30, 2019	9:00 a.m.		

EXHIBIT NO. IDENTIFY NO. CODE _PETITIONER √RESPONDENT	OFFERRED FOR IDENTIFI-CATION	RECEIVED IN EVIDENCE	WITHDRAWN	DESCRIPTION OF EXHIBIT	DATE R=RETURNED D=DESTROYED OTHER COMMENTS
A		X		AIRbnb Evidence Checklist – TVR Inspections dated January 28, 2016	
B		X		Investigation Report dated January 10, 2017	
C		X		Zoning Compliance Notice dated January 11, 2017	
D		X		Notice of Violation & Order to Pay Fines dated May 23, 2017	
E		X		Investigation Report dated May 23, 2017	
F				Memorandum re Meeting between Planning Department and Property Owner dated April 12, 2017	
G		X		Investigation Report dated July 10, 2018	

INVESTIGATION REPORT FOR FILE

(X) Web Research ()COMPLAINT ( )REG/RENEWAL ( )REQUEST			
NAME: McConnell, Patricia D.		UNIT/S:	**TYPE: Illegal TVR**
TMK: 458005005	**LAND AREA: 26,092 s.f.**		**TV#: None**
DIST: Hanalei	**LOC ADDRESS:** 4813 Ananalu Road		
ZONING: Open			
SLUC DIST: Rural	**ADVERTISEMENT: "Romantic honeymoon jungle and**		
LOG #	**mountain view cottage"**		

	MANAGING COMPANY:
NAME: McConnell, Patrica D.	NAME:
	ADDR:
ADDR: PO Box 641	
Hanalei, HI 96714	PHONE:
	WEB SITE:

NATURE OF VIOLATION:

Illegal Transient Vacation Rental Outside of the Visitor Destination Area Area (VDA)

INSPECTOR: Joan Ludington-Braun

DATE: 07/10/2018	ARRIVE: N/A	INFORMAL CONTACT:
	DEPART: N/A	

DESCRIPTION OF INVESTIGATION

1. On July 10, 2018 conducted research of online website www.vrbo.com found the subject Illegal Transient Vacation Rental Operation:

https://www.vrbo.com/481178

Romantic honeymoon jungle and mountain view cottage

(EXHIBIT A)

2. By matching the exterior and interoir photos from the above Transient Vacation Rental operation website with photos from Pictometry ***(EXHIBIT B)*** then cross checking

with Real Property Division's records ***(EXHIBIT C)***, I was able to determine the Tax Map Key Number of the subject property and Property Owner:

Tax Map Key Number: 458005005

Property Owner: McConnell, Patricia D.

3. Research Finding:

a. Transient Vacation Rental Operation is located outside of the Visitor Destination Area (VDA);

b. Transient accommodation operation does not have an active Non-Conforming Use Certificate (NCU).

4. VIOALTIONS:

a. Kaua'i County Code, Sec 8-17.11(b), Advertising of any sort which offers a property as a Transient Vacation Rental (TVR) shall constitute prima facie evidence of the operation of a TVR on said property.

b. Section 8-17.8 Single Family Transient Vacation Rentals.

Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, single family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas

Signature: [illegible] Date: 7/10/18

Real Property Division Records

(EXHIBIT C)

County of Kaua'i
State of Hawai i

Parcel Information

Parcel Number	580050050000
Location Address	4813 ANANALU RD HANALEI HI 96714
Project Name	THE SONG OF THE JUNGLE TVR
Tax Classification	RESIDENTIAL (Note: This is for tax purposes only. Not to be used for zoning.)
Neighborhood Code	5821-1
Legal Information	LOT 272 RP 7194 LC AW 11216:5 0.599 AC DES
Zoning	OP
Non Taxable Status	
Land Area (acres)	0.5990
Land Area (approximate sq ft)	26,092

View Map

Owner Names
MCCONNELL,PATRICIA D Fee Owner

Mailing Address
MCCONNELL,PATRICIA D
PO BOX 641
HANALEI HI 96714 0641

Generate Owner List by Radius

Distance:

100 Feet

Show address of: Owner Property

Download format:

Address labels (5160)

International mailing labels that exceed 5 lines are not supported on the Address labels (5160). For international addresses, please use the xlsx, csv or tab download formats.

Download

Additional owner options:

All Owners

Additional mailing label options:

Show parcel id on label

Skip labels: 0

Assessment Information

Show Historical Assessments

Year	Property Class	Total Market Value	Total Property Assessed Value	Total Property Exemption	Total Net Taxable Value
2019	RESIDENTIAL	$644,100	$644,100	$0	$644,100

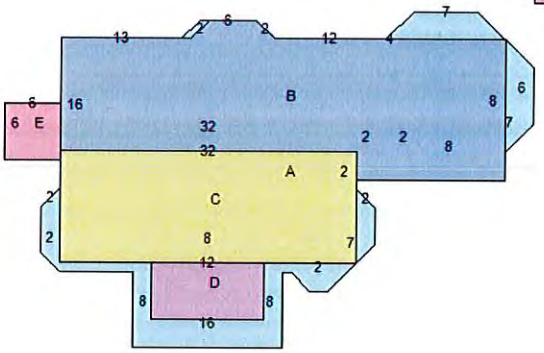
How to calculate real property taxes

Improvement Information

Building Number	1	Bedrooms	2
Year Built	1987	Full Bath	2
Eff Year Built	1995	Half Bath	0
Living Area	1,887	Percent Complete	

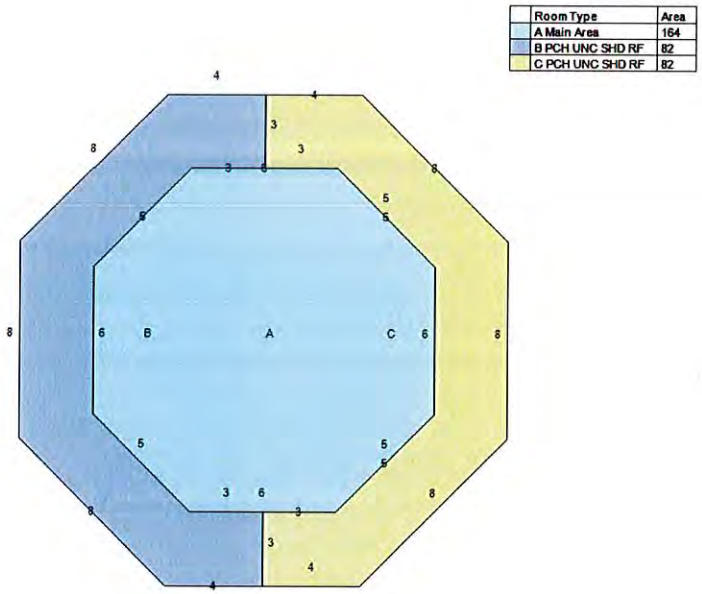
Building Number	2	Bedrooms	1
Year Built	1995	Full Bath	1
Eff Year Built		Half Bath	0
Living Area	164	Percent Complete	

Sketches



	Room Type	Area
	A Main Area	1249
	B Basement: BSMNT FIN	638
	C Basement: BSMT OPEN	384
	D Basement: BASMENT GARAGE	72
	E PCH CD SHED RF - MAS	36

Building 1



	Room Type	Area
	A Main Area	164
	B PCH UNC SHD RF	82
	C PCH UNC SHD RF	82

Building 2

Other Building and Yard Improvements

Description	FRAME UTILITY SHED	Area	15
Quantity	1	Percent Complete	0%
Year Built	1993		

Permit Information

Date	Permit Number	Reason	Permit Amount
6/5/2002	0200000847	RENOVATION	$63,000
6/5/2002	0200000845	RELOCATION	$30,000
9/30/1993	9310002295	ALTERATION	$100
9/2/1993	9310004746	DEMOLITION	$280
9/2/1993	9310004745	DEMOLITION	$168
3/20/1987	25474	DWELLING	$66,000

Conveyance Information

Sale Date	Price	Instrument #	Instrument Type	Date Recorded	Document Number	Cert #	Book/Page	Conveyance Tax	Document Type
06/01/2004	$830,000	04-127502	FEE CONVEYANCE	06/24/2004				830	Warranty Deed

Recent Sales In Area

From: 2016-09-04 To: 2019-09-04

Sales by Neighborhood

Sales by Distance 1500 Feet

Current Tax Bill Information

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2019-2	Real Property Tax	02/20/2020	$1,948.40	$0.00	$1,948.40	$0.00	$0.00	$0.00	$1,948.40
2019-2	- TRASH: BASE &/OR COLL FEE	02/20/2020	$0.00	$0.00	$108.00	$0.00	$0.00	$0.00	$108.00
	Tax Bill with Interest computed through 08/31/2019		$1,948.40	$0.00	$2,056.40	$0.00	$0.00	$0.00	$2,056.40

Historical Tax Information

Year	Tax	Payments and Credits	Penalty	Interest	Other	Amount Due
2019	$4,112.81	($2,056.41)	$0.00	$0.00	$0.00	$2,056.40
2018	$7,432.12	($7,432.12)	$0.00	$0.00	$0.00	$0.00
2017	$6,494.20	($6,494.20)	$0.00	$0.00	$0.00	$0.00
2016	$6,845.54	($6,845.54)	$0.00	$0.00	$0.00	$0.00
2015	$6,541.98	($6,541.98)	$0.00	$0.00	$0.00	$0.00
2014	$4,285.23	($4,285.23)	$0.00	$0.00	$0.00	$0.00
2013	$3,925.78	($3,925.78)	$0.00	$0.00	$0.00	$0.00
2012	$2,898.99	($2,898.99)	$0.00	$0.00	$0.00	$0.00
2011	$2,721.31	($2,721.31)	$0.00	$0.00	$0.00	$0.00
2010	$2,079.55	($2,079.55)	$0.00	$0.00	$0.00	$0.00
2009	$2,339.87	($2,339.87)	$0.00	$0.00	$0.00	$0.00
2008	$3,118.67	($3,118.67)	$0.00	$0.00	$0.00	$0.00
2007	$3,849.28	($3,849.28)	$0.00	$0.00	$0.00	$0.00
2006	$3,489.28	($3,489.28)	$0.00	$0.00	$0.00	$0.00
2005	$2,474.78	($2,474.78)	$0.00	$0.00	$0.00	$0.00
2004	$1,469.48	($1,469.48)	$0.00	$0.00	$0.00	$0.00
2003	$964.52	($964.52)	($96.46)	($84.87)	$0.00	$0.00
2002	$4,044.88	($4,044.88)	($404.50)	($1,534.58)	$0.00	$0.00
2001	$823.96	($823.96)	($82.40)	($163.15)	$0.00	$0.00

Map

Map image

No data available for the following modules: CPR/Condo/Apt Unit Information, Appeal Information, Commercial Improvement Information.

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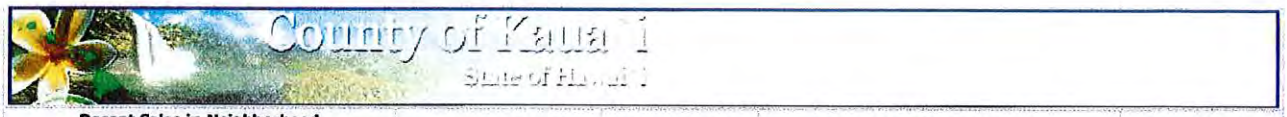

Recent Sales in Neighborhood
Recent Sales in Area | Previous Parcel | Next Parcel | Return to Main Search Page | Kauai Home

Owner and Parcel Information

Owner Name/ Type	MCCONNELL,PATRICIA D / Fee Owner	**Today's Date**	January 10, 2017
Mailing Address	104 ENDLICH DR SANTA CRUZ, CA 95060	**Parcel Number**	580050050000
Location Address	4813 ANANALU RD	**Project Name**	"THE SONG OF THE JUNGLE" TVR
Tax Classification	VACATION RENTAL	**Parcel Map**	Show Parcel Map
Neighborhood Code	5821-1	**Land Area (acres)**	0.599
Legal Information	LOT 272 RP 7194 LC AW 11216:5 0.599 AC DES	**Land Area (approximate sq ft)**	26,092

Assessment Information Show Historical Assessments

Year	Tax Classification	Total Market Value	Total Assessed Value	Total Exemption	Total Net Taxable Value
2017	VACATION RENTAL	$ 709,400	$ 709,400	$ 0	$ 709,400

Improvement Information

Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1987	1995	1,887	2/2/0	Sketch Building 1

Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1995	1995	164	1/1/0	Sketch Building 2

Other Building and Yard Improvements

Description	Quantity	Year Built	Area
FRAME UTILITY SHED	1	1993	15

Permit Information

Date	Permit Number	Reason	Permit Amount
06/05/2002	0200000847	RENOVATION	$ 63,000
06/05/2002	0200000845	RELOCATION	$ 30,000
09/30/1993	9310002295	P2	$ 100
09/02/1993	9310004746	DEMOLITION	$ 280
09/02/1993	9310004745	DEMOLITION	$ 168
03/20/1987	25474	DWELLING	$ 66,000

Sales Information

Sale Date	Price	Instrument #	Instrument Type	Instrument Description	Date Recorded	Document #	Cert #	Book/Page	Conveyance Tax	Document Type
06/01/2004	$ 830,000	04-127502	FEE CONVEYANCE		06/24/2004				830	

Current Tax Bill Information 2016 Tax Payments Show Historical Taxes

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2016-2	Real Property Tax	02/20/2017	$ 3,314.77	$ 0.00	$ 3,314.77	$ 0.00	$ 0.00	$ 0.00	$ 3,314.77
2016-2	- TRASH: BASE &/OR COLL FEE	02/20/2017	$ 0.00	$ 0.00	$ 108.00	$ 0.00	$ 0.00	$ 0.00	$ 108.00
Tax bill computed to 01/31/2017			$ 3,314.77	$ 0.00	$ 3,422.77	$ 0.00	$ 0.00	$ 0.00	$ 3,422.77

Recent Sales in Neighborhood
Recent Sales in Area | Previous Parcel | Next Parcel | Return to Main Search Page | Kauai Home

The Kauai County Tax Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. Website Updated: January 10, 2017

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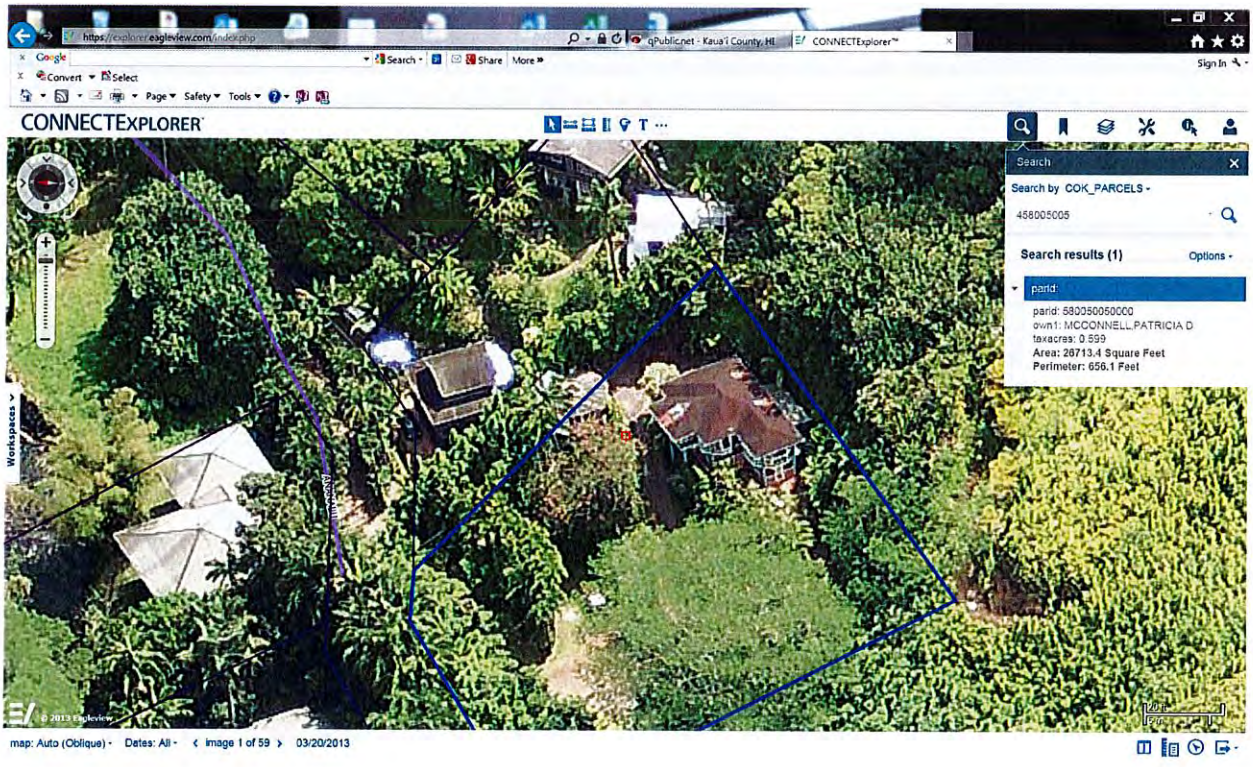
Pictometry

TMK: 458005005

(EXHIBIT B)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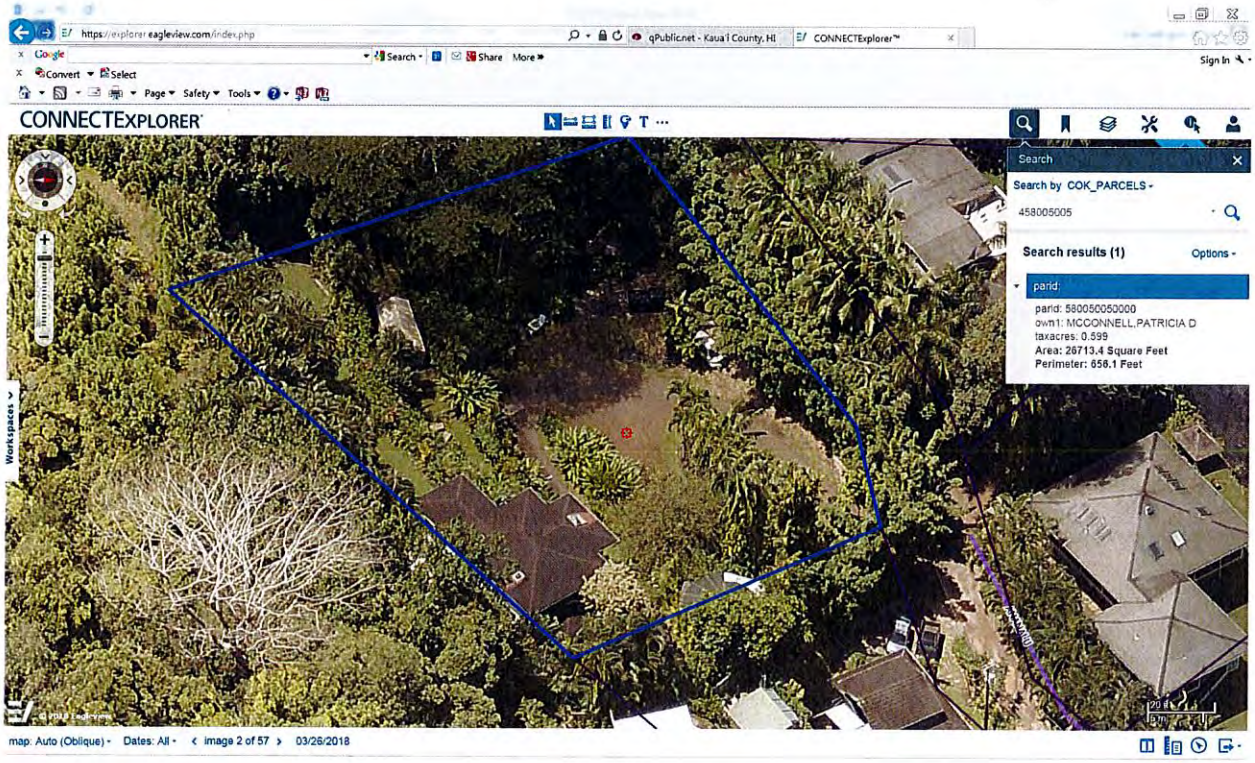
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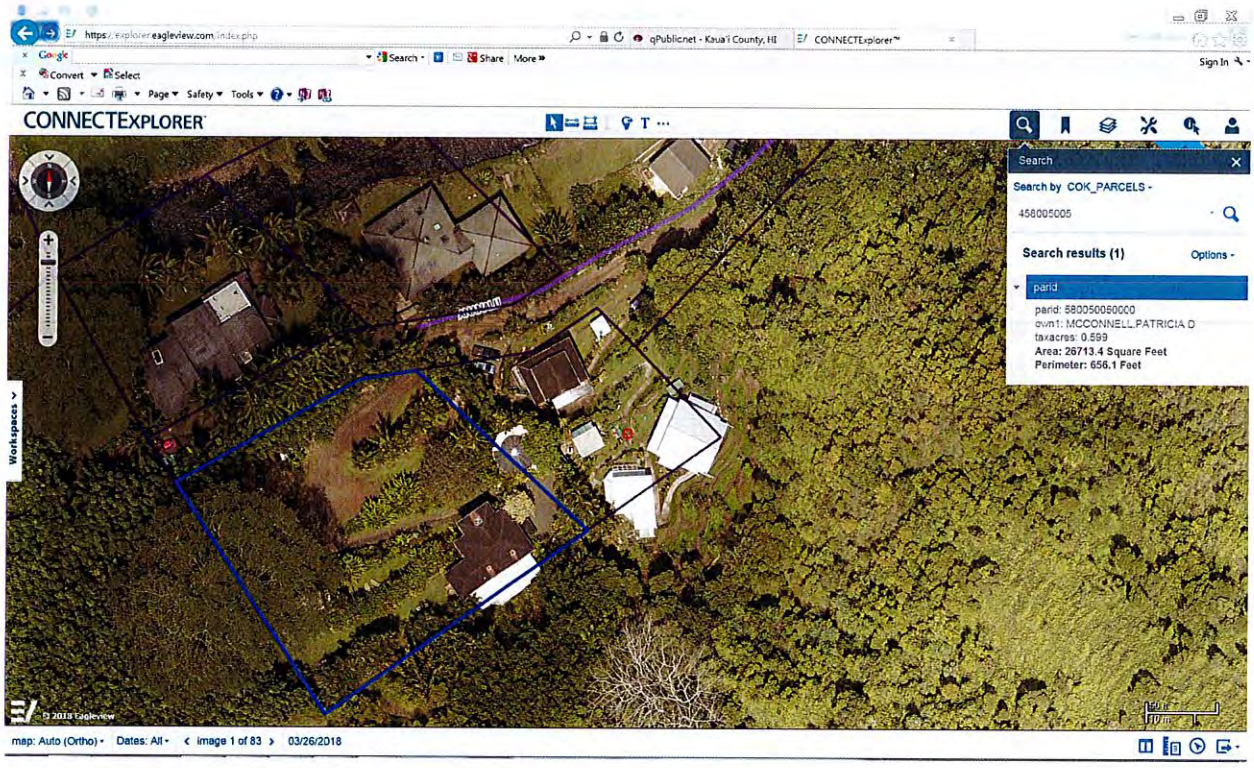
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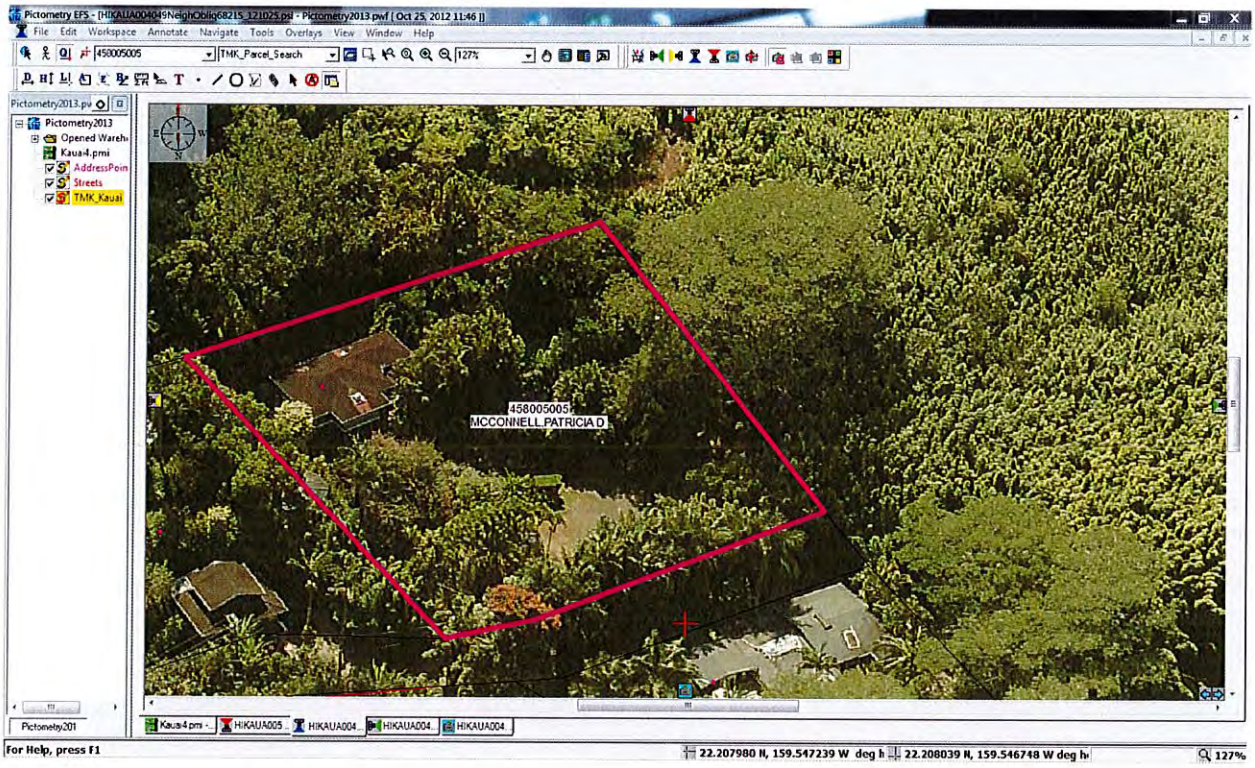
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127%

Website Information
7/10/2018

https://www.vrbo.com/481178

TMK: 458005005

Romantic honeymoon jungle and mountain view cottage

EXHIBIT A

https://www.vrbo.com/481178

VRBO
Part of the HomeAway Family

Trip Boards | Login | Help | List your property

Where
Hanalei, HI, USA

Search

$195 avg/night

29 Reviews
Excellent 4.5/5

Enter dates for accurate pricing

Check In | Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

Overview | Amenities | Reviews | Map | Rates & Availability

Romantic honeymoon jungle and mountain view cottage

Feedback

https://www.vrbo.com/481178

Overview | Amenities | Reviews | Map | Rates & Availability

Romantic honeymoon jungle and mountain view cottage

Hanalei, HI, USA

Cottage	Bedrooms	Sleeps	Bathrooms	Half Baths	Minimum Stay
500 sq. ft.	Studio	2	1	0	3 nights

Cosy, Romantic Stand alone Cottage With Jungle And Mountain Views

This very special treehouse style cottage will have you falling in love with a side of Hawaii rarely seen anymore. Although modern and beautifully arcitectured it offers the jungle up to you. Every window looks out to tropical lush beauty. A wrap around screened lanai overlooking valley and mountains provides the perfect setting for romantic evening dining or morning coffee and jungle song bird musing. The large kitchenette is well supplied with stay at home cooking in mind. All the most amazing north shore beaches as well as the famous Kalalau Trail are mere minutes away and if you want to feel a little adventurous you can walk to the river for an evening dip in the jungle swimming hole. Take your camera because the river birds are beautiful. Best of all is the big comfy king bed and the star gazing skylight above you.

Homestay..#9481

View less

Owner

Pacific In Vitro
Since 1985, We've Helped Fill Homes With The Sound of Kids' Laughter
Website | Facebook | Google+ | Map

Overview Amenities Reviews Map Rates & Availability

home cooking in mind. All the most amazing north shore beaches as well as the famous Kalalau Trail are mere minutes away and if you want to feel a little adventurous you can walk to the river for an evening dip in the jungle swimming hole. Take your camera because the river birds are beautiful. Best of all is the big comfy king bed and the star gazing skylight above you.

Homestay..#9481

View less

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

Website Facebook Google+ Map

Owner

Dawn McConnell
Member Since 2007

Ask Owner a Question

Response rate:	Response time:	Speaks:	Calendar last updated:
80%	Within One Day	English	Jul 09, 2018

Amenities

Internet	Washer & Dryer	No Smoking
Air Conditioning	Kids Welcome	
TV	Parking	

Overview Amenities Reviews Map Rates & Availability

Notes

There is a quaint corner store about 1/4 mile at the end of our street and an organic take out burrito store There is a fine dining oceanside restaurant 1+ miles away with a local lua and a coffe shop. Hanalei town is 3 miles away with shopping and multiple restaurants

House Rules

Check-in: 4:00 PM **Check-out:** 10:00 AM

Cancellation Policy

Canceled bookings will not receive a refund

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

29 Reviews

★★★★½ *Excellent 4.5/5*

1 - 6 of 29 ›

The accommodations had everything we needed for a lovely stay.

5/5 ★★★★★ Stayed May, 2018

This is the perfect location for waking up to the songs of lovely tropical birds and total tranquility.

Overview Amenities Reviews Map Rates & Availability

$195 avg/night

★★★★½ 29 Reviews
Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

Bedrooms

1 Bedrooms, Sleeps 2

Bedroom 1
1 king

Cottage with King bed

Bathrooms

1 Bathroom

Bathroom 1
toilet, shower, Exotic shower built to feel like an outdoor shower

Exotic tigerwood shower and bathroom enclosed but built into the flow of the jungle

Location Type

Resort
5 miles from Princeville resort

Rural
3 miles past Hanalei town towards the Na Pali Coast (2 miles from Na Pali Coast and Kalalau Trail)

Mountain View

Theme

Overview Amenities Reviews Map Rates & Availability

$195 avg/night

★★★★½ 29 Reviews
Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

groceries

massage therapist

Sports & Adventure Activities

swimming	surfing	snorkeling
sailing	hunting	sound/bay fishing
cycling	deepsea fishing	spelunking
fishing	fly fishing	surf fishing
wind-surfing	freshwater fishing	kayaking
mountain biking	hiking	parasailing
paragliding	jet skiing	snorkeling/diving
scuba diving or snorkeling	mountain climbing	

Notes

There is a quaint corner store about 1/4 mile at the end of our street and an organic take out burrito store There is a fine dining oceanside restaurant 1+ miles away with a local lua and a coffe shop. Hanalei town is 3 miles away with shopping and multiple restaurants

House Rules

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Overview | Amenities | Reviews | Map | Rates & Availability

Theme

Romantic
Budget
Tourist Attractions
Away From It All
Sports & Activities
Adventure

Meals

Guests provide their own meals

General

Telephone
Washing Machine
Towels Provided
Air Conditioning
not necessary. Good trade wind air flow and ceiling fan
Clothes Dryer
Iron & Board
Parking
Hair Dryer
Linens Provided
Internet
Living Room
studio with living room and bedroom combined

Kitchen

Refrigerator
full sized refridgerator
Oven
toaster oven and propane oven
Pantry Items
Stove
convection toaster oven and propane stove
Coffee Maker
Dishes & Utensils
blender, and cookware and utensils
Toaster
Kitchen

$195 avg/night
★★★★½ 29 Reviews
Excellent 4.5/5

Enter dates for accurate pricing

Check In | Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

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Overview | Amenities | Reviews | Map | Rates & Availability

Entertainment

Television
DVD Player
Books

Outside

Lawn / Garden
Bicycles
Water Sports Gear
some snorkeling gear available, also can be boaught or rented in Hanalei
Kayak / Canoe
can be rented in Hanalei town
Outdoor Grill
Lanai / Gazebo
Golf
nearby golf course

Attractions

botanical garden
marina
theme parks
churches
playground
restaurants
library
recreation center
health/beauty spa

Leisure Activities

walking
bird watching
boating
horseback riding
luaus
miniature golf
antiquing
paddle boating
shelling

$195 avg/night
★★★★½ 29 Reviews
Excellent 4.5/5

Enter dates for accurate pricing

Check In | Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

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Property # 481178

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Overview Amenities Reviews Map Rates & Availability

Canceled bookings will not receive a refund

$195 avg/night

★★★★½ 29 Reviews
Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

29 Reviews

★★★★½ *Excellent 4.5/5*

1 - 6 of 29

The accommodations had everything we needed for a lovely stay.

5/5 ★★★★★ Stayed May, 2018

This is the perfect location for waking up to the songs of lovely tropical birds and total tranquility.

Submitted Jun 03, 2018

Counting days until we can come back

5/5 ★★★★★ Stayed Mar, 2018

Ryan H.

I stayed for a week in this cute cottage. Dawn was great and assisted in anything we needed. We flew in late and when we got to the cottage she had the lights on waiting for us. Its a short walk down the road to the Ocean and a very short drive maybe 1-2 miles to the end of the road. Also there is taxi services and was a 14 dollar cab ride in to town. Thanks again Dawn for the great stay!

Ryan and Jaron

Submitted Mar 29, 2018

Feedback
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Overview Amenities Reviews Map Rates & Availability

Submitted Mar 29, 2018

$195 avg/night

★★★★½ 29 Reviews
Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

What a special place!!

4/5 ★★★★ Stayed Jan, 2018

Ann Catherine N.

We had such a wonderful time in this little jungle getaway. The view was spectacular and we enjoyed our morning coffee out on the deck watching birds and butterflies in the lush trees and vines. The big room is very well designed and the bathroom and shower tucked away outside were also pleasantly appointed. The towels and linens were high quality. It is also located at the special end of the island, lots to see.

Submitted Feb 05, 2018

Felt like home

5/5 ★★★★★ Stayed Jan, 2018

Troy N.

We enjoyed our stay and could not have been happier. Was the perfect place to relax for a few days after hiking the Kalalau trail. Had some of the best sleeps in my life there.

Submitted Feb 02, 2018

Loved the property it was nice to experience going from the beach to hiding out back in the jungle

5/5 ★★★★★ Stayed Sep, 2017

Brandon Y.

My wife and I loved staying at the Sea Turtle Cottage for our honeymoon. We loved relaxing up in the jungle after

Feedback
10:33 AM 7/10/2018

Overview Amenities Reviews Map Rates & Availability

Loved the property it was nice to experience going from the beach to hiding out back in the jungle

5/5 ★★★★★ Stayed Sep, 2017

Brandon Y.

My wife and I loved staying at the Sea Turtle Cottage for our honeymoon. We loved relaxing up in the jungle after long days hiking or on the beach. The cottage is very private and we loved the setup. The caretaker Matty was very accommodating and helped to make our stay even better. The location is perfect as it is, in my opinion, minutes away from the best part of the island.

I recommend this stay to anyone and would love to make it back someday!

Submitted Jan 20, 2018

Cozy cottage in a lush setting

4/5 ★★★★ Stayed Dec, 2017

Leslie L.

We enjoyed our stay in the cottage while our daughter and her family were in the main house. A few minor repairs would improve staying the cottage — the refrigerator needs a new lightbulb and the door to the back deck leading to the outdoor bath is very hard to latch closed. The location is great, very private but close to beaches, hiking and town.

Submitted Jan 08, 2018

1 - 6 of 29

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

Overview Amenities Reviews Map Rates & Availability

Submitted Jan 08, 2018

Beautiful area. More rustic than expected.

3/5 ★★★☆☆ Stayed Dec, 2017

Laura M.

The area was pretty and bungalow well decorated. Though a rain forest, expected a little better upkeep. Rust on the fridge and mildew on the rubber trim. No light inside. Rusted hot plate. Plenty of cooking equipment but no wrap or foil even after mentioned to owner. Ran out of propane so cold shower on second day. Quickly replaced once notified care taker. This could be a beautiful spot but more attention needs to get paid to the details. A more reflective description would have given us an opportunity to chose a more appropriate setting for our planned vacation. This was our 6th trip to Hawaii, and have rented many VRBO places. This was not a favorite.

Submitted Jan 01, 2018

Beautiful location on Kauai

5/5 ★★★★★ Stayed Nov, 2017

George W.

The sea turtle cottage was a great place to stay. Your own little jungle cottage with a comfortable ocean breeze ever present. Matty was great to deal with and helped me to feel at home and get me anything I needed. If you want a secluded little getaway on the beautiful far north side of Kauai, this is your place!

Submitted Nov 14, 2017

Home away from home

5/5 ★★★★★ Stayed Oct, 2017

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

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Overview Amenities Reviews Map Rates & Availability

Submitted Nov 14, 2017

Home away from home

5/5 ★★★★★ Stayed Oct, 2017

Laura Y. Prescott, AZ

Our honeymoon stay was fantastic. The house had everything we needed for the most part, including beach chairs, snorkeling gear, and boogie boards. Ask Matty to take you surfing! You won't regret it. This girl for one loves an outdoor shower, and this one did not disappoint. And, go to Sushi Girl down the street. Aloha!

Submitted Oct 27, 2017

Waking up to the rain was AMAZING

4/5 ★★★★ Stayed Oct, 2017

Jordin K. Canby, OR

A nice little get away. A bit grimy in some places and you definitely need to bring your bug spray but all amenities are included (though slightly limited) and the outdoor shower is awesome! We stayed a week here and that was about my limit for the small space. Overall nice stay, though.

Submitted Oct 20, 2017

‹ NaN - 29 of 29

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

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Overview Amenities Reviews Map Rates & Availability

Map

Hanalei, HI, USA

We are central to numerous sandy white beaches, some of which offer uncrowded privacy, mOst of which are excellent for snorkeling and surfing and swimming

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

Feedback
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Overview | Amenities | Reviews | Map | Rates & Availability

Rates & Availability

July 2018

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13 $195	14 $195
15 $195	16 $195	17	18	19	20	21 $195
22 $195	23 $195	24 $195	25 $195	26 $195	27 $195	28 $195
29 $195	30 $195	31 $195				

August 2018

Su	Mo	Tu	We	Th	Fr	Sa
			1 $195	2 $195	3 $195	4 $195
5 $195	6 $195	7 $195	8 $195	9 $195	10 $195	11 $195
12	13	14	15	16	17	18
19 $195	20 $195	21 $195	22 $195	23	24	25
26	27 $195	28 $195	29 $195	30 $195	31 $195	

September 2018

Su	Mo	Tu	We	Th	Fr	Sa
						1 $195
2 $195	3 $195	4 $195	5 $195	6 $195	7 $195	8 $195
9 $195	10 $195	11 $195	12 $195	13 $195	14 $195	15 $195

October 2018

Su	Mo	Tu	We	Th	Fr	Sa
	1 $195	2 $195	3 $195	4 $195	5 $195	6 $195
7	8	9	10 $195	11 $195	12 $195	13 $195
14	15	16	17 $195	18 $195	19 $195	20 $195

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In | Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

For booking assistance, call **888-640-7927**
Property # 481178

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Overview | Amenities | Reviews | Map | Rates & Availability

September 2018

Su	Mo	Tu	We	Th	Fr	Sa
						1 $195
2 $195	3 $195	4 $195	5 $195	6 $195	7 $195	8 $195
9 $195	10 $195	11 $195	12 $195	13 $195	14 $195	15 $195
16 $195	17 $195	18 $195	19 $195	20	21	22
23	24 $195	25 $195	26 $195	27	28	29
30						

October 2018

Su	Mo	Tu	We	Th	Fr	Sa
	1 $195	2 $195	3 $195	4 $195	5 $195	6 $195
7	8	9	10 $195	11 $195	12 $195	13 $195
14	15	16	17 $195	18 $195	19 $195	20 $195
21 $195	22 $195	23 $195	24 $195	25 $195	26 $195	27 $195
28 $195	29 $195	30 $195	31 $195			

Taxes and fees are additional

$195 avg/night

★★★★½ 29 Reviews

Excellent 4.5/5

Enter dates for accurate pricing

Check In | Check Out

Guests
1 guest

Request to Book

Ask Owner a Question

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Additional information about rental rates

Cleaning fee	$140

rates may vary with seasons and length of stay

You might like these similar properties

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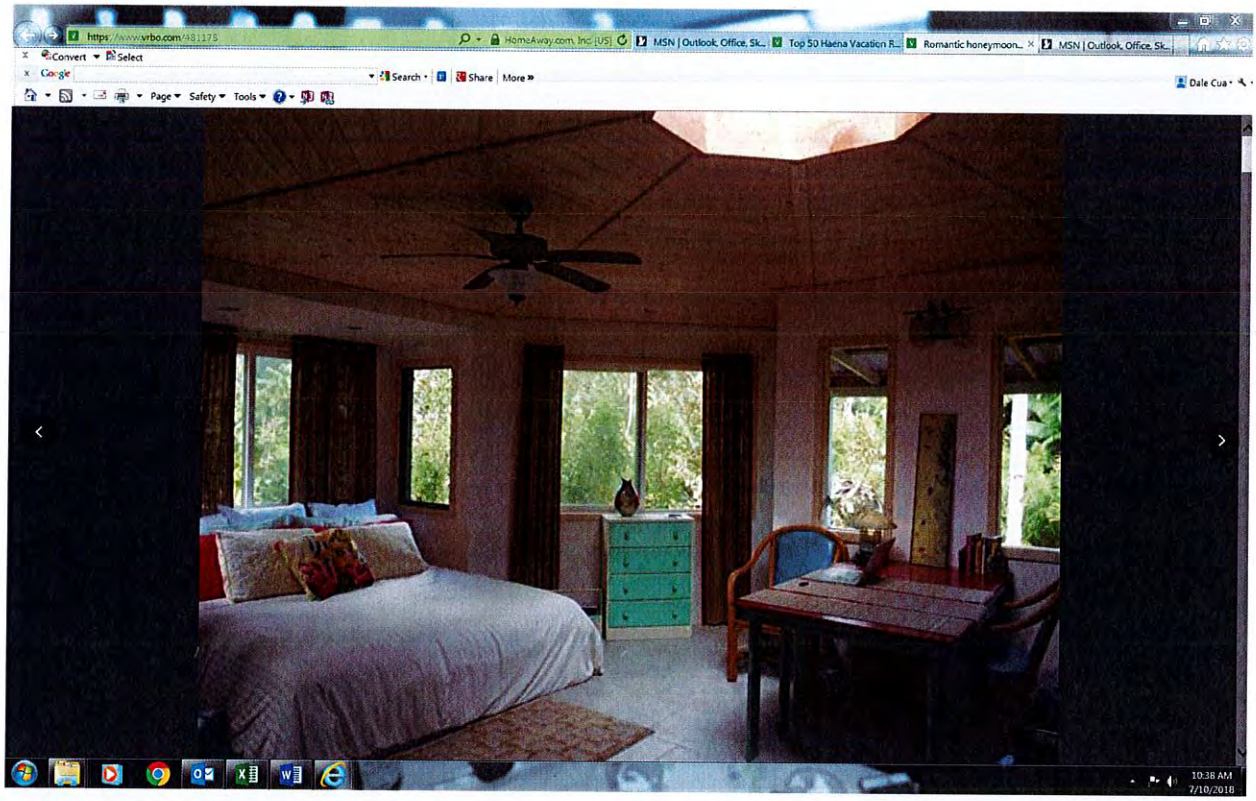
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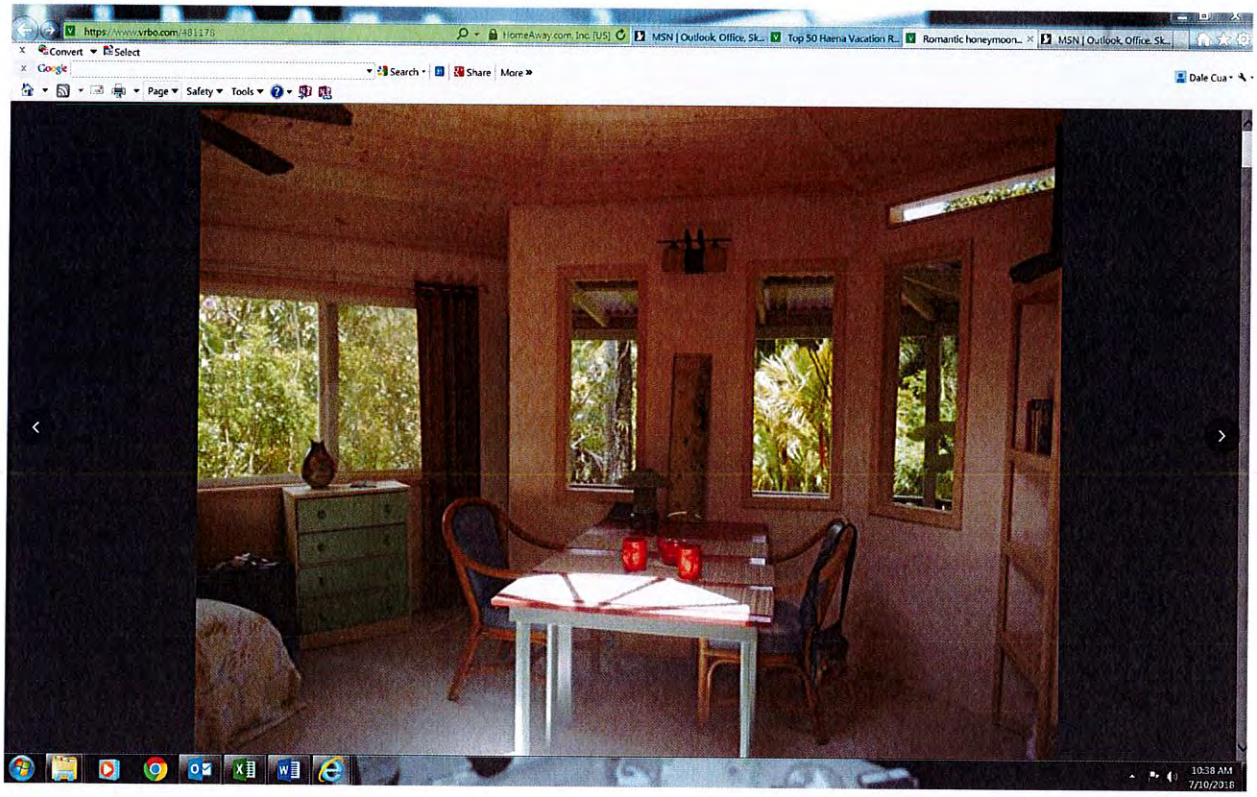
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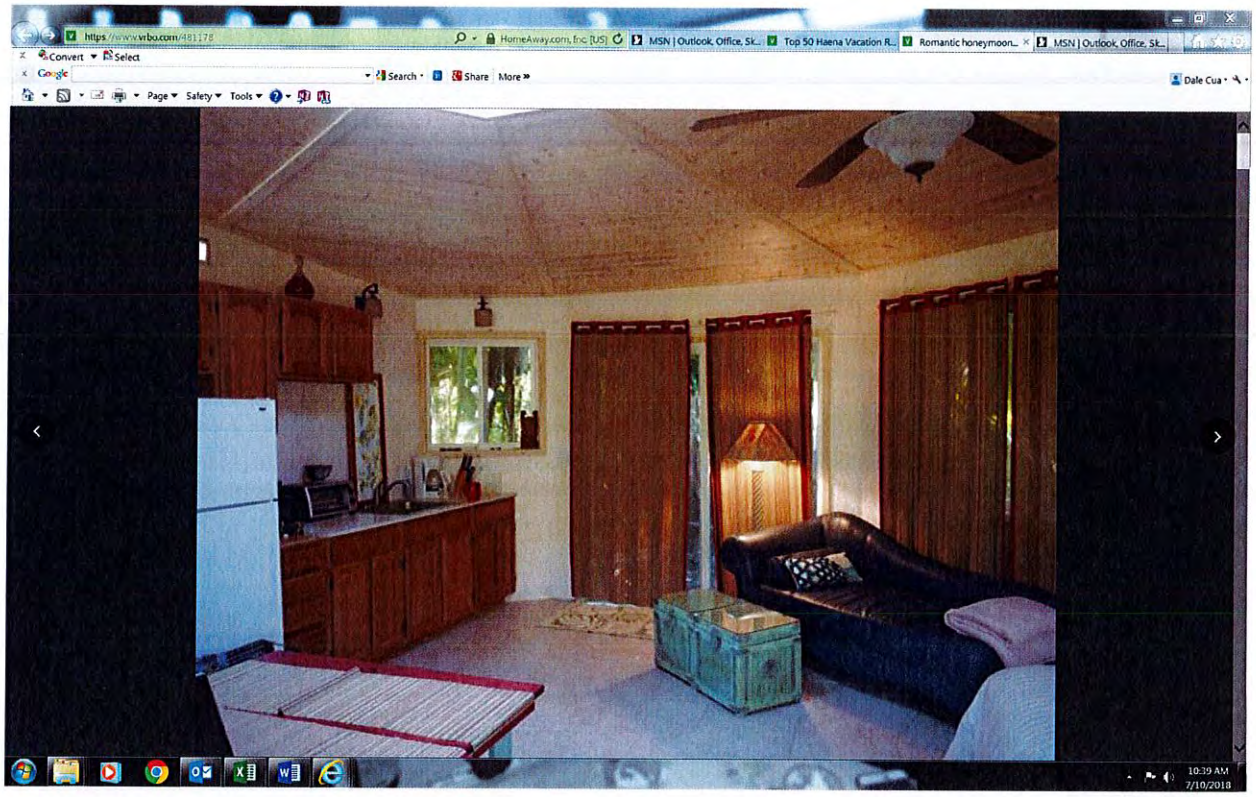
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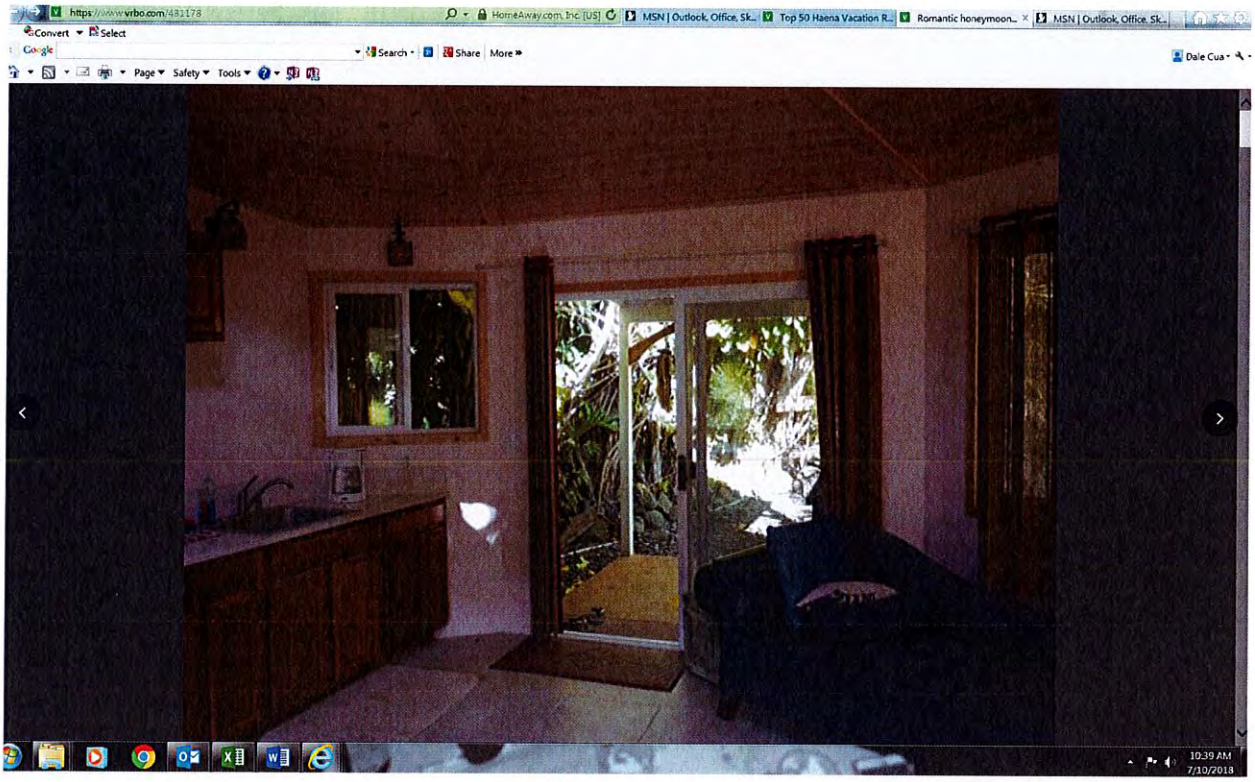
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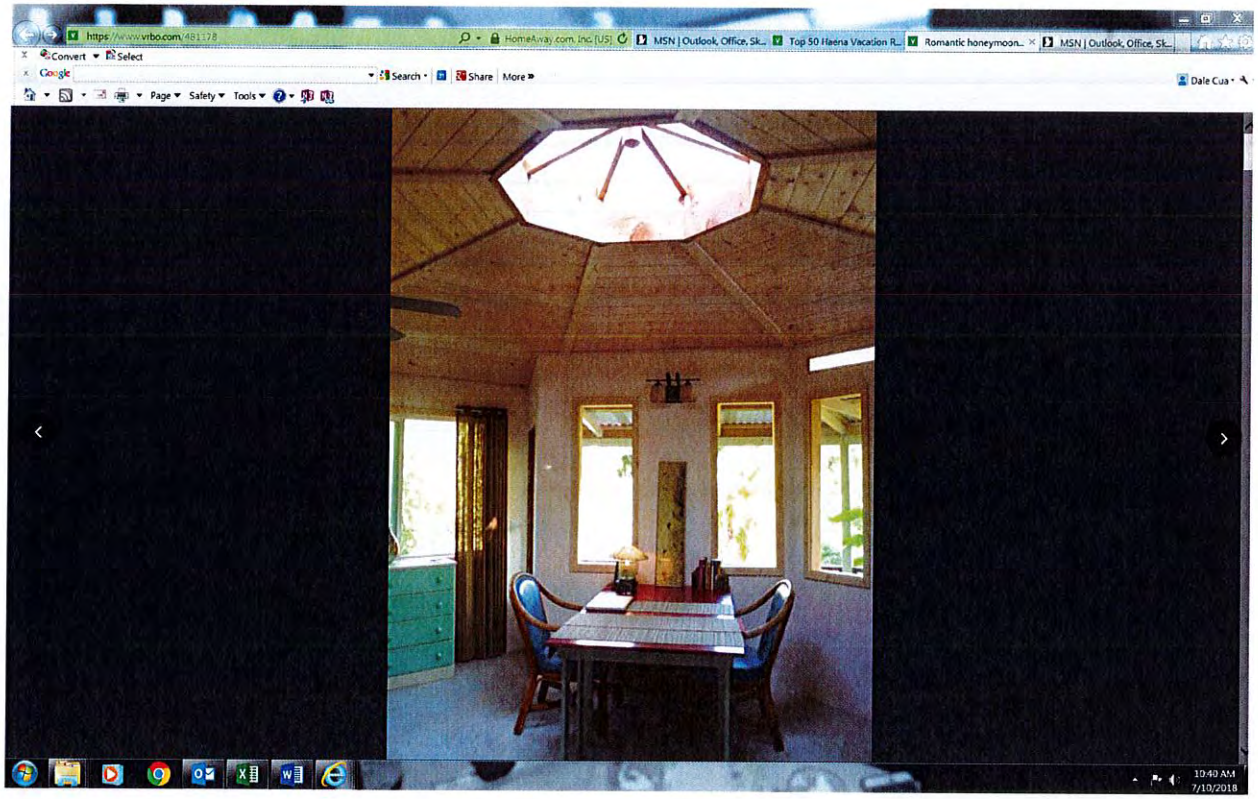
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Hawai‘i State Tax Department

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State of Hawaii
Hawaii Tax Online

Search Tax Licenses

Home > Search Tax Licenses

Department of Taxation | About Hawaii Tax Online | Frequently Asked Questions | Video Tutorials

Tax License Search

Search

Use the fields to search for your Hawaii Tax license(s) and status(es).

Customer ID (new format)	Customer ID (W#)	Taxpayer Name	DBA Name	
		McConnell, Patricia D		Search

What does a "Pending Revoke" status mean?
A "Pending Revoke" status means that the Department **has not received a return from you in the last seven (7) years** and that the Department **intends to revoke the license due to abandonment.** Revocation of a license due to abandonment has no effect on (1) liabilities for payment of taxes, fees, penalties, or interest incurred or imposed, (2) returns due, or (3) any potential audit action.

The "Pending Revoke" status was **updated on July 1, 2019** and will be posted for 90 days. **After September 30, 2019, "Pending Revoke" licenses will be ceased.** (See Hawaii Administrative Rules 18-231-3-14.17)

What do I need to do if my license status is "Pending Revoke"?
1. If you do not need to retain this license, do nothing. This license will be ceased after September 30, 2019.
2. If you want to KEEP this license, file the missing returns or submit a written petition (letter) to the Director explaining why this license should not be revoked by September 30, 2019. Mail the letter to: Director of Taxation, P.O. Box 259, Honolulu, HI 96809-0259.

More information about Tax Licenses is available HERE

Search Tax Licenses

Filter

New Account ID	Name	Address	Old Account ID	Account Type	Business Start	Business End	Status

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INFORMATION	POLICIES
Contact Us	Terms of Use
Department of Taxation	Accessibility
	Privacy Policy

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNT OF KAUA'I

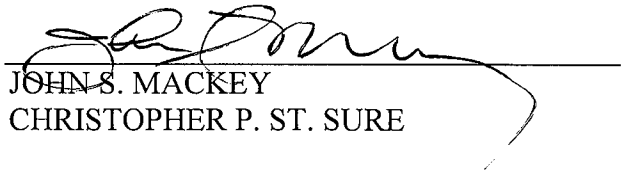
In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Ha'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent.	CC-2017-4 TMK: (4) 5-8-005:005 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

	U.S. MAIL	HAND DELIVERY	EMAIL
GREGORY W. KUGLE gwk@hawaiilawyer.com JOANNA C. ZEIGLER JCZ@hawaiilawyer.com Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Attorneys for Petitioner PATRICIA D. McCONNELL	X		X
NICHOLAS R. COURSON ncourson@kauai.gov First Deputy County Attorney County of Kaua'i 4444 Rice Street, Suite 220 Lihu'e, HI 96766 Attorney for Planning Commission, County of Kaua'i	X		X
ELLEN CHING, Administrator eching@kauai.gov asegreti@kauai.gov Office of Boards and Commissions County of Kaua'i 4444 Rice Street, Suite 150 Lihu'e, HI 96766	X		X
HARLAN Y. KIMURA hyk@harlankimuralaw.com Central Pacific Plaza 220 South King Street, Suite 1660 Honolulu, HI 96813 Telephone: (808) 564-0811 Hearing Officer Planning Commission, County of Kaua'i	X		X

DATED: Honolulu, Hawai'i, January 17, 2020.



JOHN S. MACKEY
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BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Haʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI, Respondent.	CC-2017-4 TMK: (4) 5-8-005:005 RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S CLOSING ARGUMENTS; PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW; CERTIFICATE OF SERVICE <u>CONTESTED CASE HEARING</u>: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S CLOSING ARGUMENTS

The Hearings Officer should recommend that the Planning Commission AFFIRM the Planning Director's issuance of the Notice of Violation and Order to Pay Fines dated May 23, 2017 ("NOV") to Petitioner Patricia McConnell because:

1. Petitioner *admitted* to running a homestay operation;

2. Petitioner's property falls outside the Visitor Destination Area ("VDA");

3. Petitioner did not have a homestay use permit;

4. Kaua'i County Code ("KCC") § 8-18.1(b) expressly prohibits homestay operations outside of the VDA;

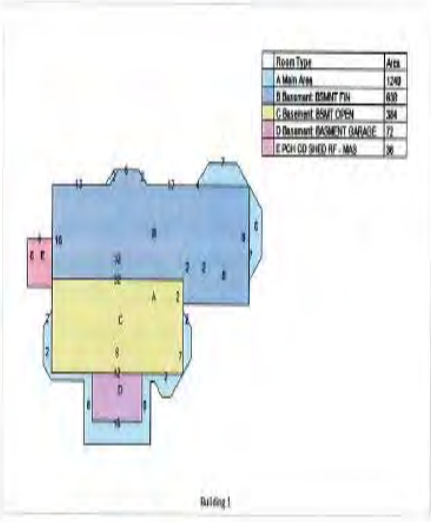
5. Article 18 of the KCC does not contain a nonconforming use provision. To the extent that Petitioner asks the Hearing Officer to rewrite the Code to allow for "grandfathering," such request is beyond the scope of this Appeal;

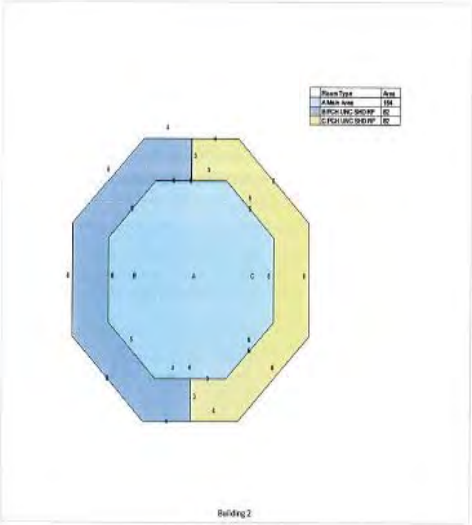
6. Prior to the enactment of Ordinance 1002, Petitioner's homestay use was not a lawful use because she was operating without a Use Permit pursuant to KCC § 8-3.2(b) ("[n]o person shall undertake . . . any activity for which a Use Permit is required. . .without first obtaining a Use Permit"); and

7. Assuming, arguendo, that prior to Ordinance 1002, KCC § 8-13.2 could "grandfather" prior homestay uses without a Use Permit, Petitioner has failed to prove that she was *continuously operating a valid homestay*. The record shows that she habitually advertised a dwelling that she, as the owner, was not also staying in.

Petitioner owns the property at 4813 Ananalu Road, Hanalei, Kaua'i 96714 (the "Subject Property"). *See* Ex. "B," at 4. The Subject Property is located outside of the VDA. Hearing Transcript ("Tr.") at 71-72. The Subject Property is comprised of two structures—a main house and a separate octagonal unit, as reflected in Ex. "G":

Improvement Information				
Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1987	1995	1,887	2/2/0	Sketch Building 1
Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
1995	1995	164	1/1/0	Sketch Building 2



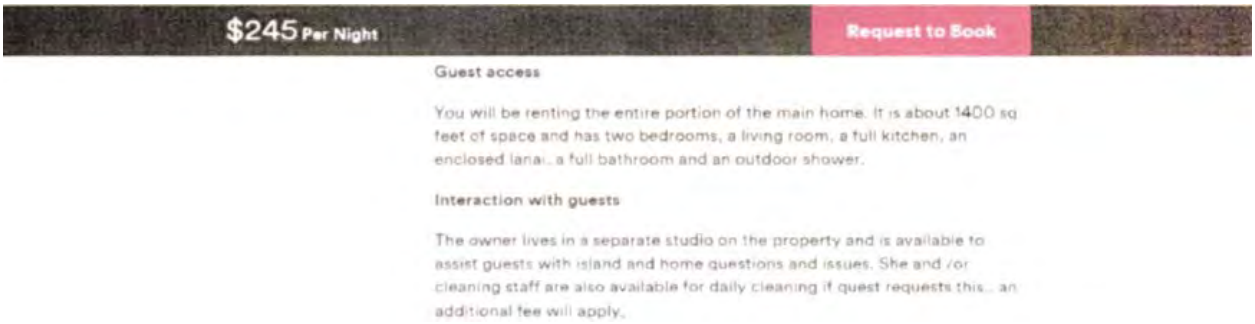


These two structures can also be seen on the Pictometry images:

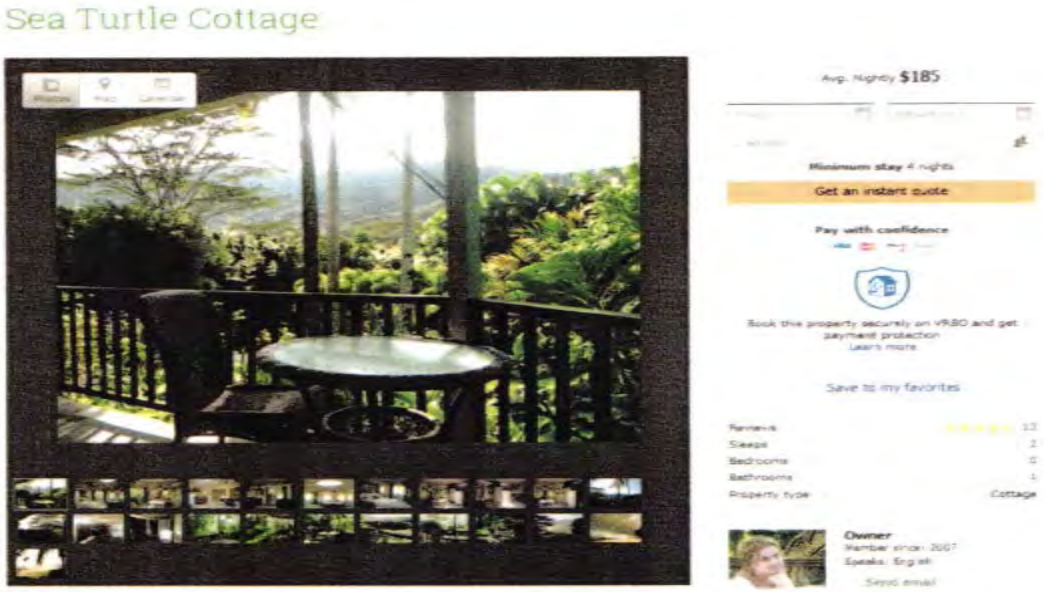
Exhibit "G".

At the Contested Case hearing, Petitioner claimed "continuous" homestay use at the Subject Property since 2005. *See* Hearing Tr. at 11. In contradiction, the evidence shows that Petitioner was running a much larger short-term rental operation. In fact, Petitioner offered the main house for rent on a short term basis <u>and</u> also offered the separate octagonal structure for rent on a short term basis. Specifically, in her Airbnb advertisement, Petitioner offered to rent the main house for $245 per night. *See* Ex. "B."

The ad specifically informed prospective tenants they will be renting the entire home and that the owner lives in a separate studio:



The Planning Department's investigation file also includes Petitioner's VRBO advertisement which also offers the separate octagonal structure for rent on a short term basis ($185 per night) as the "Sea Turtle Cottage."



See Ex. "B." The photos included in this advertisement show the unmistakable octagonal structure of the ceiling/roof of the Sea Turtle Cottage:

Based upon its investigation, the Planning Department properly concluded that Petitioner was in violation of Sections 8-18.1(b) and 8-17.8. Section 8-18.1(b) prohibits homestays outside of the VDA. KCC § 8-18.1(b). Petitioner also violated Section 8-17.8 because she advertised a single family vacation rental outside of the VDA. *See* KCC § 8-17.8(a) ("Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, single family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas."). Petitioner's advertisements establish these violations. *See* Section 8-17.11(b) ("[a]dvertising of any sort which offers a property as a transient vacation rental shall constitute prima facie evidence of the operation. . .").

Thereafter, the Planning Department issued Petitioner a Zoning Compliance Notice dated January 11, 2017 (the "Zoning Compliance Notice"). *See* Exhibit "C." The Zoning Compliance Notice clearly informed Petitioner of her violations. *Id.* Petitioner testified that she

received the Zoning Compliance Notice on April 1, 2017 and scheduled a meeting with the Planning Department. Hearing Tr. at 12-13.

On April 12, 2017, Petitioner met with Andres "Bambi" Emayo and Britni Ludington-Braun of the Planning Department on April 12, 2017. At this meeting, they discussed the Zoning Compliance Notice and how the violation could be remedied. *See* Hearing Tr. at 64. Petitioner admitted to the homestay use and said she would continue. *See* Ex. "E" (last page). Record evidence shows that she did continue. *See* Exhibit "E" at 2 (May 18, 2017 investigation showing ongoing homestay operation outside of the VDA without an applicable permit). Ex. "G" also shows that Petitioner continued to offer short term rentals at Petitioner's "Romantic honeymoon jungle and mountain view cottage" from October 2017 through May 2018, e.g.:

The accommodations had everything we needed for a lovely stay.
5/5 ★★★★★ Stayed May, 2018

This is the perfect location for waking up to the songs of lovely tropical birds and total tranquility.

Submitted Jun 03, 2018

Counting days until we can come back
5/5 ★★★★★ Stayed Mar, 2018
Ryan H.

I stayed for a week in this cute cottage. Dawn was great and assisted in anything we needed. We flew in late and when we got to the cottage she had the lights on waiting for us. Its a short walk down the road to the Ocean and a very short drive maybe 1-2 miles to the end of the road. Also there is taxi services and was a 14 dollar cab ride in to town. Thanks again Dawn for the great stay!

Ryan and Jaron

However, Petitioner testified that she did not have any rentals during the time the highway was closed from April of 2018 until about June of 2019. Hearing Tr. at 19.

As a result of Petitioner's willful defiance, the Planning Department correctly issued the NOV and clearly stated Petitioner's admitted violation: "[t]he Planning Department has confirmed that the subject property is currently being used for a homestay operation." Exhibit "D". The NOV levied a fine of ten thousand dollars ($10,000.00) and ordered her to cease and desist. *Id.*

Here, Petitioner has not carried her burden to show that the Planning Director's decision was wrong. The evidence proves the opposite. Petitioner **admitted** that she was conducting a homestay operation at the Subject Property. *See* Hearing Tr. at 9. Petitioner also did not contest the Planning Department's determination that the Subject Property was **outside of the VDA**. Instead, Petitioner argues that the NOV was improper because her homestay operation was a nonconforming use under KCC § 8-13.2.

Petitioner's argument lacks evidence and legal support. KCC § 8-18 does not allow grandfathering of prior non-conforming uses outside of the VDA. Mike Laureta, the County's Division Program Manager in charge of enforcement, testified that the Council was clear when it passed Ordinance 1002: "you can only have [homestays] in the visitor destination area" and "there was no grandfathering component." *See* Hearing Tr. at 36. Mr. Laureta further explained that while there was no grandfathering, homestays did have the opportunity to become properly permitted before the new law. *See* Hearing Tr. at 37. The County received a "flood of applications." *Id.* Petitioner was not one of the applicants. The County's interpretation and enforcement of this ordinance should be afforded deference. *See Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (Haw. 1984) ("[a]n agency's interpretation of its rules receives deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose").

In addition, even if KCC § 8-13.2 applied, Petitioner's homestay operation was not a nonconforming use because she never obtained a Use Permit prior to enactment of Ordinance 1002. *See* KCC § 8-1.5 (a nonconforming use "means a **lawful use** of a building or land . . .) (emphasis added); *see also* Hearing Transcript (Mr. Emayo: "Ordinance 1002, the homestay ordinance did not . . . make an opening for people coming to certify the grandfather use because it was always open for anybody to go in to get a . . . B&B use through a use permit

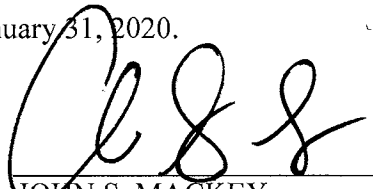
process.”). Moreover, Petitioner failed to introduce *credible* evidence of a continuous valid homestay operation. Aside from her own testimony as to continuous use (which should be found self-serving and not credible), there is substantial evidence introduced by the Planning Department that Petitioner was, at times, not operating within the definition of a homestay because she advertised dwellings, one of which is a 164 sq. ft. room, that was not a “owner occupied dwelling unit”). *See* KCC § 8-1.5 (Homestay “means an owner occupied dwelling unit in which overnight accommodations are provided to transient guests within the same dweling unit in which the owner resides . . .”). Without any other evidence (i.e., accommodation records, booking statements, payments, etc.) to corroborate her inconsistent testimony, Petitioner has not established that her homestay operation was a nonconforming use prior to the prohibition of homestays outside the VDA.

There also is no constitutional due process violation resulting from issuances of the NOV. *See, e.g., Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai‘i 217, 243, 953 P.2d 1315, 1341 (1998) (“The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”). Petitioner *admitted* to receiving a copy of the January 11, 2017 Zoning Compliance Notice and scheduled a meeting with the Planning Department to discuss the nature of her violations. Petitioner has not been deprived of due process. *See* Sullivan, 87 Hawaii at 243, 953 P.2d at 1341 (Due process requires only notice and an opportunity to be heard). Rather, she was merely unsuccessful in convincing the Planning Department to make an exception for her prior unlawful use of the Subject Property. Thereafter, Petitioner failed to comply with the Zoning Compliance Notice and, in fact, continued homestay operations (*see* Exhibit “E”). Accordingly, the Planning Department correctly issued the NOV.

Lastly, the $10,000 fine levied by the Planning Department was within its discretion and authority under KCC § 8-3.5(b). *See* KCC § 8-3.5(b) ("The order may require the party responsible for the violation to do any or all of the following: (A) correct the violation within the time specified in the order; (B) pay a civil fine not to exceed ten thousand dollars ($10,000.00) in the manner, at the place, and before the date specified in the order; (C) pay a civil fine up to ten thousand dollars ($10,000.00) per day for each day in which the violation persists. . .). The Planning Department's fine of $10,000 and the additional fine of $10,000 per violation, per day, were within its discretion to do so and should be affirmed. *See Kilakila 'O Haleakala v. Bd. of Land*, 138 Hawai'i 383, 401, 382 P.3d 195, 213 (2016) ("A determination made by an administrative agency *acting within the boundaries of its delegated authority* will not be overturned unless 'arbitrary, or capricious, or characterized by a clearly unwarranted exercise of discretion.")

Petitioner has not met her burden to prove that the Planning Director acted erroneously, arbitrarily, or manifestly abused his discretion when he issued the NOV to Petitioner. Respectfully, the Planning Department's issuance of the NOV should be affirmed and Petitioner's Appeal should be dismissed.

DATED: Honolulu, Hawai'i, January 31, 2020.



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Attorney for Respondent
PLANNING DEPARTMENT, COUNTY OF KAUA'I

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Haʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI, Respondent.	CC-2017-4 TMK: (4) 5-8-005:005 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER <u>CONTESTED CASE HEARING</u>: Date: August 30, 2019 Time: 9:00 a.m. Hearings Officer: Harlan Y. Kimura

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, <u>DECISION AND ORDER</u>

I. INTRODUCTION

This Contested Case arises from the Notice of Violation & Order to Pay Fines dated May 23, 2007 ("NOV") issued by Respondent COUNTY OF KAUAʻI PLANNING DEPARTMENT ("Planning Department"), to Petitioner PATRICIA D. McCONNELL ("Petitioner"). *See* Exhibit "A."[1]

The Notice of Violation advised Petitioner that, among other things, she was in

[1] All Exhibits referenced numerically were introduced by Petitioner and all Exhibits identified alphabetically were submitted by the Planning Department by stipulation at the August 30, 2019 Kauai Planning Commission Contested Case Hearing.

breach of the Zoning Compliance Noticed issued to her on January 11, 2017, ordered her to pay a fine of $10,000.00 and notified her that fines would continue to accrue up to $10,000 per day, for each day in which such violation persists. *See* Exhibit "D."

II. PROCEDURAL HISTORY

On June 13, 2017, Petitioner filed her *Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Ha'ena, Kaua'i, Hawai'i, identified by TMK No. (4) 5-8-005:005 containing 26,092 square feet* (the "Appeal"). *See* Petitioner's Appeal. By Order of the Planning Commission, Contested Case No. CC-2017-4 ("Contested Case") was assigned to Hearing Officer Harlan Kimura, Esq. ("Hearing Officer"). Thereafter, pursuant to the *Hearing Officer's First Amended Scheduling Order dated July 5, 2019*, the contested case hearing was set for August 30, 2019.

On July 9, 2019, the Planning Department filed Plaintiff Department of the County of Kaua'i's Motion for Summary Judgment ("Planning Department's MSJ"). The Planning Department's MSJ requested judgment in its favor pursuant to Rule 1-6-16 of *The Rules of Practice and Procedure of the Kaua'i Planning Commission* ("RPPPC") affirming the Planning Department's Zoning Compliance Notice and the Notice of Violation. In response, on August 14, 2019, Petitioner filed her *Memorandum in Opposition to Respondent Planning Department of the County of Kaua'i's Motion for Summary Judgment* ("Opposition").

On August 23, 2019, Petitioner filed *Petitioner Patricia McConnell's Prehearing Statement* and *Petitioner Patricia McConnell's Exhibit List* with *Exhibits 1-5*. On August 23, 2019, the Planning Department filed its *Respondent Planning Department of the County of Kaua'i's Prehearing Statement* and *Respondent Planning Department of the County of Kaua'i's Exhibit List*, together with Exhibits A-F. On January 17, 2020, the Planning Department

submitted *Respondent Planning Department of the County of Kaua‘i's Supplemental Exhibit List*, together with Exhibit G, as permitted by the Hearing Officer at the Contested Case Hearing. *See* Hearing Transcript at 112.

On August 30, 2019, prior to the commencement of the Contested Case Hearing and after hearing argument from counsel, the Hearing Officer orally denied the Planning Department's MSJ.

III. PRELIMINARY MATTERS

The Contested Case Hearing ("Hearing") of the Planning Commission of the County of Kaua‘i took place on August 30, 2019 at 9:00 a.m., at the Lihue Civic Center, Liquor Control Conference Room 3. *See* Hearing Transcript, page 1. Greg Kugle, Esq. represented Petitioner who was also present. *Id*. Maryann Sasaki, Esq. represented the Planning Department and Mr. Michael Laureta was also present as its authorized representative. *Id*.

Petitioner and the Planning Department stipulated to admit Exhibits "1"-"5" and "D" in each party's respective pre-hearing briefs into evidence. *Id*. at 5. During the Hearing, Planning Department's Exhibits "A," "B," "C," and "G" were admitted into evidence. *See* Hearing Transcript at pages 55-63 and page 108 for Exhibit "G." Planning Department's Exhibit "E" was admitted into evidence without the last page. Hearing Transcript at 63.

Petitioner submitted Closing Arguments and/or Proposed Findings of Fact and Conclusions of Law by January 15, 2020 as required by the *Minute Order Regarding Telephone Conference filed December 12, 2019*. In turn, the Planning Department submits these Closing Arguments and/or Proposed Findings of Fact and Conclusions of Law. Both of those filings were timely received.

IV. FINDINGS OF FACT

A. The Parties and the Subject Property.

1. Petitioner is the owner of the real property that is the subject of this Contested Case located at 4813 Ananalu Road, Hanalei, Hawaii 96714, TMK No. (4) 8-005:005 ("Subject Property").

2. The Subject Property is located outside of the Visitor Destination Area. *See* Hearing Transcript at 36-37.

3. The Planning Department is the governmental agency responsible for enforcing, among other things, the provisions of the Comprehensive Zoning Code set forth in Chapter 8 of the Kaua‘i County Code.

B. Notice of Violation And Order To Pay Fines For The Operation Of An Illegal Transient Accommodation Use For Property Situated In Ha‘ena, Kaua‘i, Hawai‘i, Identified By TMK No. (4) 5-8-005:005 Containing 26,092 Square Feet.

4. Petitioner admitted to conducting a homestay operation at the Subject Property. *See* Hearing Transcript at 11.

5. The Subject Property is Petitioner's permanent residence. *See* Hearing Transcript at 9.

6. On January 10, 2017, the Planning Department found that Subject Property was operating a homestay operation located outside of the Visitor Destination Area and prepared an Investigation Report regarding the Subject Property ("January 10th Report"). *See* Exhibit B. The January 10th Investigation Report was prepared by Mr. Andres ("Bambi") Emayo ("Emayo"). *Id.*

7. The January 10th Report detailed the investigation process undertaken by the Planning Department and subsequent findings:

> 1. Research of online website www.airbnb.com found the subject transient accommodation:
>
> https://www.airbnb.com/rooms/12622481
>
> 2. By matching the airbnb's website (https://www.airbnb.com/rooms/12622481) and pictures with pictometry and cross checking the noted parcel with Real Property Division records (Tax Classification- Vacation Rental), I was able to determine the Tax Map Key and Property owner of the transient accommodation operation.
>
> TMK: 58005005, PATRICIA D. MCCONNELL
>
> 3. Research Finding:
>
> Transient accommodation operation is located outside of the VDA
>
> Transient accommodation operation does not have an[ ] active Non-Conforning Use Certificate (NCU) or an applicable permit.

See Exhibit "B" at 2 (emphasis added).

8. The January 10th Report contained a clipping from an Airbnb advertisement for the Subject Property that disclosed: "[t]he owner lives in a separate studio on the property and is available to assist guests with island and home questions and issues." *Id.* at 15.

9. The Pictometry and the Kaua'i Real Property Division Records for the Subject Property demonstrate that there are two dwellings on the Subject Property—the main house and a separate octagonal structure. *Id.* at 3-9.

10. Based on this investigation, the Planning Department determined that Petitioner was in violation of two ordinances:

> ORDINANCE and VIOLATIONS
>
> **1. Section 8-8.1(b) General Provisions for Homestays**
> *Homestay operations are prohibited outside of the Visitor Destination Area (VDA).*

> **2. Section 8-17.8 Single Family Transient Vacation Rentals.**
> *Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, single family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas.*
>
> **Violation:**
> **The unauthorized use of the subject property for Transient Accommodation outside of the designated Visitor Designation Area constitutes a violation.**

Exhibit "C."

11. Mr. Emayo further clarified that the Planning Department's determination was based on, among other things, the 2016 Checklist, the Airbnb advertisement, the existence of a GE tax license, a TAT tax license, and the "Tax Map Keys and zoning maps that show that the property is outside the VDA." *See* Hearing Transcript at 71.

12. By letter dated January 11, 2017, entitled "Zoning Compliance Notice," the Planning Department advised Petitioner that it had conducted an investigation of the Subject Property and found that she was operating a vacation rental operation outside of the Visitor Designation Area in violation of Section 8-8.1(b) (General Provisions for Homestays) and Section 8-17.8 (Single Family Transient Vacation Rentals). *See* Exhibit "C". Petitioner was ordered to (1) cease and desist the use of the subject property as a Transient Accommodation, and (2) cancel all Transient Accommodations commitments for the property. *Id.*

13. The Zoning Compliance Notice further advised Petitioner that pursuant to County Ordinance No. 919, any "violation(s) of the Comprehensive Zoning Ordinance (CZO) may result in a fine up to $10,000.00 and/or up to $10,000.00 per day, should the violation(s) persist." *Id.* at 2.

14. Plaintiff acknowledged receipt of the Zoning Compliance Notice on April 1, 2017. *See* Hearing Transcript at 12-13.

15. Following the receipt of the Zoning Compliance Notice, Petitioner made an appointment with the Planning Department for April 12, 2017. *See* Hearing Transcript at 78.

16. On April 12, 2017, Petitioner met with Planning Department representatives Bambi Emayo and Britni Ludington-Braun regarding the Zoning Violation Notice (the "April 12th Meeting"). *See* Hearing Transcript at 78.

17. At the April 12th Meeting, Petitioner and the representatives of the Planning Department discussed the Zoning Compliance Notice and how the notice could be remedied. *See* Hearing Transcript at 64.

18. Mr. Emayo testified that they informed Petitioner that "[w]e basically had three directions to remedy the situation. Number 1, which would be a written response to the zoning compliance notice with some kind of remedial action plan. Number 2 was to remove the prima facie evidence. Number 3 was to work with the Planning Department to rectify the violation." *See* Hearing Testimony at 79.

19. At the April 12th Meeting, Petitioner admitted that she was operating a homestay. *See* Exhibit "E" at 1. Petitioner further stated that "she will continue the transient accommodation operation until March of 2018" and "made comments that she doesn't intend to cease and desist the use of the subject property as a Transient Accommodation." *Id.* at 2.

20. On April 13, 2017, Petitioner responded to the Planning Department stating that:

> "[i]t is my belief, however, that I have not, and have never, been in violation of any of the older county ordinances
>
> However, it is now my understanding that there have been some recent new changes in those county ordinances that may effect [sic] my life and property, and that may also require me to make some changes in how I share my home with others."

Exhibit "3" at 1.

21. Petitioner's response did not state that she would comply with the Zoning Violation Notice or cancel all Transient Accommodations commitments for the property. *Id.*

22. Despite receiving the Zoning Violation Notice, Petitioner continued to rent out rooms in the Subject Property as a homestay operation outside of the Visitor Destination Area. *See* Exhibit "E" at 2.

23. On May 18, 2017, the Planning Department conducted another investigation and discovered that the Subject Property was being advertised on Airbnb without an applicable permit to do so. Exhibit "E" at 2.

24. Accordingly, the May 23, 2017 Notice of Violation & Order to Pay Fines ("NOV"), concluded that the Subject Property was still being used for a Homestay operation. *See* Exhibit "D."

25. The NOV stated, among other things, that:

> The Planning Department has confirmed that the subject property is currently being used for a Homestay operation. The continued use of the subject property for a Homestay operation outside of the designated Visitor Designation Area constitutes a violation.
>
> [. . .]
>
> **You are herein levied and ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department**.
>
> You are hereby ordered to cease and desist the illegal activities being conducted/performed on and from the premises required by law.
>
> You are hereby ordered to correct the above use violations(s) [sic] within 14 days of the date of this notice. Should the violations not be remedied within 14 days from the date of the Notice of Violation & Order to Pay Fines:

Exhibit "D," at 2-3.

26. In addition, Petitioner was notified that an additional fine of $10,000

would accrue per violation, per day, for each day in which such violation persists. *Id.*

27. As explained by Mr. Laureta, the Planning Department uses a two-step process before a fine can be issued: "first step is zoning compliance notice, which – which advises the owner of a problem, and it gives them the opportunity to come in and correct it. And if it can't be corrected within that timeframe, then it's a second step, notice of violation." *See* Hearing Transcript at 45.

28. The Planning Department's fines start with $10,000. From there, the Planning Department considers whether efforts to return to compliance should reduce the fine. *See* Hearing Transcript at 46.

29. Petitioner did not dispute that she operated a homestay operation outside of the Visitor Destination Area. Instead, Petitioner argued that the Planning Department should recognize that her use as a homestay operation under a nonexistent grandfathering provision.

C. <u>Petitioner's Appeal Of Planning Department's NOV</u>.

30. By letter dated June 9, 2017 addressed to the Kaua'i Planning Department, Petitioner submitted *Petitioner's Notice of Appeal and Demand for Contested Case Hearing from Zoning Violation for Transient Accommodation Use at: 4813 Ananalu Road; TMK: 5-8-00, pursuant to Chapter 9 of the Rules of Practice and Procedure of the Kaua'i Planning Commission* ("Notice of Appeal"). *See* Notice of Appeal at 1. The Notice of Appeal focused primarily on the arguments that: (1) the Kaua'i County Council arbitrarily banned homestays in Petitioner's neighborhood through Ord. No. 987, June 19, 2015 and Ord. No. 1002, May 18, 2016, codified as Sec. 8-18.1 of the CZO; and (2) the Homestay Ordinance does not contain a grandfathering provision to cover preexisting operations and does not provide guidance on preexisting legal uses.

D. <u>Petitioner's Continued Violation Of County Ordinances</u>.

31. In the month of May of 2018, Ms. Ludington-Brown discovered that there were reviews from guests that stayed at the 164 square foot cottage at the Subject Property in May of 2018. Hearing Transcript at 103; *see also* Exhibit "G."

32. The Investigation Report dated July 10, 2018 shows that Petitioner was operating an illegal transient vacation rental outside of the Visitor Destination Area from October 2017 through May 2018. *See* Exhibit "G" at 19-22.

33. The advertisement for the Subject Property was observed on VRBO and described the rental as being a 500 foot studio that sleeps two and has a "kitchenette". *Id.* at 13.

34. One of the comments for a stay in September of 2017 stated, in part, "The cottage is very private and we loved the setup. The caretaker Matty was very accommodating and helped to make our stay even better." *Id.* at 22.

35. Another comment for a stay on November 2017 observed: "Matty was great to deal with and helped me to feel at home and get me anything I needed." *Id.* at 23.

36. Based upon Ms. Ludington-Braun's investigation, there was prima facie evidence presented by the Planning Department that Petitioner was continuing to operate a Transient Vacation Rental operation at the Property. *See* KCC § 8-17.11(b) ("[a]dvertising of any sort which offers a property as a transient vacation rental shall constitute prima facie evidence of the operation of a transient vacation rental on said property and the burden of proof shall be on the owner . . . to establish that the subject property is not being used as a transient vacation rental or that it is being used for such purpose legally.").

E. <u>Relevant Authorities and Pertinent Legislative History</u>.

37. **Haw. Rev. Stat. § 46-4** provides in pertinent part:

(a) This section and any ordinance, rule, or regulation adopted in accordance with this

section shall apply to lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.

Zoning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner. Zoning in the counties of Hawaii, Maui, and Kauai means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district to carry out the purposes of this section. In establishing or regulating the districts, full consideration shall be given to all available data as to soil classification and physical use capabilities of the land to allow and encourage the most beneficial use of the land consonant with good zoning practices. The zoning power granted herein shall be exercised by ordinance which may relate to:

. . .

(2) The areas in which residential uses may be regulated or prohibited;

. . .

(4) The areas in which particular uses may be subjected to special restrictions;

(5) The location of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered;

. . .

(12) Other regulations the boards or city council find necessary and proper to permit and encourage the orderly development of land resources within their jurisdictions.

The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

. . .

The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole. This section shall not be construed to limit or repeal any powers of any county to achieve these ends through zoning and building regulations, except insofar as forest and water reserve

> zones are concerned and as provided in subsections (c) and (d). [This paragraph shall hereafter be referred to as the "**Liberal Construction Provision.**"]
>
> **Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect**; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses. Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262. [This paragraph shall hereafter be referred to as the "Continued Lawful Use Provision."]

Haw. Rev. Stat. § 46-4 (emphasis added).

38. **Act 186** provided that "the several counties shall, by amendment of their zoning ordinances, limit the location of time share units, time share plans and other transient vacation rentals, within such areas as deemed appropriate." 1980 Haw. Sess. laws Act 186 § 4 at 306.

39. Pursuant to Act 186, the County enacted **Ordinance 436** "for the purpose of designating locations, referred to as "Visitor Destination Area," in which transient vacation rentals, time share units and time share plans are to be allowed." By extension, following the enactment of Ordinance 436, transient vacation rentals, time share units and time share plans were prohibited outside of designated Visitor Destination Areas.

40. **Ordinance 1002**, adopted by the Council on May 18, 2016, provided the express purpose of the Bill as follows:

> The Council finds the 2000 Kaua'i General Plan recognized the need "to develop a clear policy regarding B&Bs and vacation rentals." The General Plan recommended an implementing action to amend the CZO to facilitate the permitting of existing, nonconforming alternative visitor accommodations. The Council complied with the policy of the General Plan and grandfathered existing single-family transient vacation rentals (SFTVRs) that

registered and met the prior use requirements established in Article 17 of the CZO.

In Ordinance No. 864, the Council further found that:

This bill does not apply to a bed and breakfast unit ("Homestay"). It is the intention of the Council to address these units as a separate matter after establishing a regulatory framework for single-family transient vacation rentals. **Homestays are presently regulated through the use permit process**.

Although the Council bifurcated the issues of homestays and SFTVRs, it is now appropriate to adopt a clear and specific standard and review parameters under which homestay applications can be processed.

The purpose of this bill is to restrict homestay operations to the Visitor Destination Areas (VDAs) and to establish additional standards under which homestays operate.

(emphasis added).

41. Ordinance 1002 invited applications for homestay operations:

On a **first-come-first-serve basis** of applications deemed complete by the Planning Department, no more than ten (10) new applications for homestay operations shall be accepted for review by the Planning Commission in each of the calendar years 2015 and 2016. The limitation on the number of applications shall expire on December 31, 2016, or upon passage of an amendment to this section, whichever occurs first.

(emphasis added).

42. **KCC § 8-18.1** provides, in relevant part:

(a) A homestay operation shall operate under the following regulations:

(1) Transient accommodations are provided for visitors for twenty-nine (29) days or less;

(2) Homestays shall be limited to no more than three (3) guest rooms per homestay operations;

. . .

> (**b) Homestay operations are prohibited outside of the Visitor Destination Area (VDA).**

Ordinance 1002 (with emphasis).

43. H**omestay** "means an **owner occupied dwelling unit** in which overnight accommodations are provided to transient guests **within the same dwelling unit in which the owner resides** and the respective owner currently benefits under Sec. 5A-11 of this Code for a homeowner's exemption for the homestay site. A guest house may not be used as accommodations for transient guests in a homestay operation. *See Section 8-1.2 of the KCC* (emphasis added).

44. A Dwelling Unit "means any building or any portion thereof which is designed for occupancy by one (1) family or persons living together or by a person living alone and providing complete living facilities, within the unit for sleeping, recreation, eating and sanitary facilities including installed equipment for only one (1) kitchen." *Id*.

45. Transient "means any person who owns, rents, or uses a dwelling unit or a portion thereof for one hundred eighty (180) days or less[.]" *Id*.

46. **Section 8-3.5 of the *KCC*** provides for penalties as follows:

> (1) If the Director of the Planning determines that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, **by mail or delivery**, or by posting on the property which address is the most current address reflected in the Real Property tax records, or by publishing such notice in a newspaper of general circulation in the County of Kauai should previous notification efforts not be accepted, with an order pursuant to this section. **The order may require the party responsible for the violation to do any or all of the following.**
>
> **(A) Correct the violation within the time specified in the order;**
>
> **(B) Pay a civil fine not to exceed $10,000 in the manner, at the**

> **place, and before the date specified in the order;**
>
> **(C) Pay a civil fine up to $10,000 per day for each day in which the violation persists, in the manner and at the time and place specified in the order.**
>
> (2) The order shall advise the party responsible for the violation that the order shall became final 30 days after the date of its delivery. The order shall also advise that the Director's action may be appealed to the Planning Commission.
>
> (3) The provisions of the order issued by the Director under this section shall become final 30 calendar days after the service of the order. The parties responsible for the violation may appeal the order to the Planning Commission pursuant to its rules. The form of this appeal must conform to the Planning Commission's rules. However, an appeal to the Planning Commission shall not stay any provision of order.

KCC §8-3.5 (emphasis added).

47. **KCC § 8-13.2**, adopted by the Council on November 14, 2012, as part of Ordinance No. 935 to update the Comprehensive Zoning Code, provides in pertinent part:

> (a) A nonconforming use of land, buildings, or other structures may continue to the extent that the use existed on September 1, 1972 or any amendment hereto, as provided in this Section, provided that the Planning Commission may, after hearing, order the termination of a nonconforming use that creates substantial danger to public health or safety.
>
> (b) If any nonconforming use ceases for any reason for continuous period of twelve (12) calendar months or for one (1) season if the use be seasonal, then the use shall not be resumed and any use of the land or building thereafter shall be in full conformity with the provisions of this Chapter

…

48. Under ***KCC* § 8-17.11(b)**, "[a]dvertising of any sort which offers a property as a transient vacation rental shall constitute prima facie evidence of the operation of a transient vacation rental on said property and the burden of proof shall be on the owner. . . to establish that the subject property is not being used as a transient vacation rental or that it is

being used for such purpose legally."

49. If any Finding of Fact herein should be designated as a Conclusion of Law, the same shall be deemed to have been identified as such.

V. CONCLUSIONS OF LAW

A. The Planning Department's Zoning Compliance Notice and NOV Was Proper .

1. An executive branch government agency possesses only the authority granted to it by the legislative branch. *See, e.g., Paul's Elec. Serv., Inc. v. Befitel*, 104 Hawai'i 412, 417, 91 P.3d 494, 499 (2004) ("Administrative agencies are created by the legislature, and the legislature determines the bounds of the agency's authority. An administrative agency can only wield powers expressly or implicitly granted to it by statute. Thus, before we can determine whether an agency abused its discretion pursuant to HRS § 91-14(g)(6), we must determine whether the agency determination under review was the type of agency action within the boundaries of the agency's delegated authority.") (internal quotation marks and citations omitted). *See also Morgan v. Planning Dept., County of Kauai*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004) (applying same principles to county agency).

2. Here, the legislative branch is the County Council, and the Planning Department is an agency of the County's executive branch. *Kaua'i County Charter*, Art. III, § 3.01 ("The legislative power of the county shall be vested in and exercised by the county council[.]"); Art. VI, § 6.01 (executive branch).

3. The County Charter establishes the fundamental structure of county government; outlines how a bill becomes a law; and creates its executive branch agencies. Art. I, § 1.03 (elections); Art. IV, § 4.02 (passage of ordinances); Articles X-XVIII; XXVIII-XXXI (departments, commissions, and agencies)

4. Among these County agencies is the Planning Department, which is tasked with (among other things) reviewing and enforcing the county's zoning ordinances. County Charter Art. XIV, § 14.01 ("There shall be a planning department consisting of a planning commission, a zoning board of appeals, a planning director, and the necessary staff."); Art. XIV § 14.03(A)-(H) (duties and functions of the planning commission). In enforcing the county's zoning laws, the Charter specifies that variances can be granted "pursuant to provisions established by the council by ordinance." Art. XIV § 14.03(D).

5. Neither the Department nor the Commission has the authority to offer a variance from the requirements of the zoning code unless that variance was first enacted into law as an ordinance by the County Council. *Id.*

6. The agency cannot act beyond its delegated authority and thus the Commission cannot have erred in determining it did not possess the authority to ignore the prohibition of homestay operations outside of the Visitor Destination Area in § 8-18.1(b).

7. In fact, respecting the limits of its delegated authority is precisely what the agency should do. *See* HRS § 91-14(g)(2) (agency acting in "excess of the statutory authority or jurisdiction" is grounds for reversal or modification of agency decision); *Kilakila 'O Haleakala v. Bd. of Land*, 138 Hawai'i 383, 401, 382 P.3d 195, 213 (2016) ("A determination made by an administrative agency *acting within the boundaries of its delegated authority* will not be overturned unless 'arbitrary, or capricious, or characterized by a clearly unwarranted exercise of discretion.") (citations, internal quotation marks, brackets and ellipses omitted)

8. The express language of **KCC § 8-18.1(b)** unambiguously prohibits the operation of a homestay outside of the Visitor Destination Area.

9. Michael Laureta, the County's Division Program Manager in charge of

enforcement, testified that the Council was clear when it passed Ordinance 1002: "you can only have [homestays] in the visitor destination area" and the County's interpretation was that "there was **no grandfathering component**." *See* Hearing Transcript at 36 (emphasis added).

10. The County's interpretation and enforcement of this ordinance should be afforded deference. *See Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (Haw. 1984) ("[a]n agency's interpretation of its rules receives deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose").

11. Any violation of Article 18 "shall be subject to Section 8-3.5 of the Kaua'i County Code, as amended." *See* KCC § 8-18.3(e).

12. Petitioner had "the burden of proof, including the burden of producing evidence as well as the burden of persuasion" under a preponderance of the evidence standard to demonstrate that she had not violated KCC § 8-18.1(b). *See* HRS § 91-10(5).

13. Under **KCC § 8-17.11(b)**, "advertising of any sort which offers a property as a transient vacation rental shall constitute prima facie evidence of the operation of a transient vacation rental on said property."

14. Petitioner did not present any evidence to rebut this prima facie evidence that she was engaged in a homestay operation outside of the Visitor Destination Area.

15. Petitioner failed to present any evidence that the Subject Property was outside of the Visitor Destination Area.

16. It is further undisputed that Petitioner advertised the Subject Property on two separate websites, Airbnb and VRBO, and continued to do so after receiving the Zoning Compliance Notice. *See* Exhibits "B," "E," and "G."

17. Due to the Planning Department's unrebutted evidence, the Planning

Department was correct to issue its Zoning Compliance Notice dated January 11, 2017. *See* Exhibit "C."

18. Petitioner admitted to receiving a copy of the Zoning Compliance Notice by at least April 1, 2017. *See* Hearing Transcript at 12.

19. The Zoning Compliance Notice specifically required Petitioner to: (1) cease and desist the use of the subject property as a Transient Accommodation; and (2) cancel all Transient Accommodations commitments for the property. *See* Exhibit "C."

20. Petitioner failed to present any evidence that she complied with the Zoning Compliance Notice.

21. **KCC § 8.3(b) provides**, in pertinent part, for the following action to be taken when any person fails to comply with a notice of violation:

> (1) If the Director of the Planning determines that any person, firm or corporation is not complying with a notice of violation, **the Director may have the party responsible for the violation served, by mail or delivery**, or by posting on the property which address is the most current address reflected in the Real Property tax records, or by publishing such notice in a newspaper of general circulation in the County of Kauai should previous notification efforts not be accepted, with an order pursuant to this section. **The order may require the party responsible for the violation to do any or all of the following**.
>
> **(A) Correct the violation within the time specified in the order;**
>
> **(B) Pay a civil fine not to exceed $10,000 in the manner, at the place, and before the date specified in the order;**
>
> **(C) Pay a civil fine up to $10,000 per day for each day in which the violation persists, in the manner and at the time and place specified in the order**.

(emphasis added).

22. After observing continued advertisements of the Subject Property on Airbnb, the Planning Department mailed Petitioner the NOV, notifying her that she had failed to

comply with the Zoning Compliance Notice and ordering her to pay a fine of $10,000. *See* Exhibit "D."

23. Contrary to Petitioner's argument that the Planning Department failed to comply with Section 8.3(b) of the KCC, the Planning Department followed the required process by providing Petitioner with a warning and opportunity to comply and then, only after Petitioner failed to comply with the warning, issued a fine of $10,000 and a fine of $10,000 per day should the violation persist after 14 days.

24. Accordingly, the Planning Department has not acted erroneously, arbitrarily, and did not manifestly abuse its discretion when it issued the NOV.

B. Petitioner's Homestay Operation is Not A Lawful Nonconforming Use.

25. Instead of presenting evidence that Petitioner was not running a homestay operation when she was issued the NOV, Petitioner alternatively argued that her use was a lawful nonconforming use that existed prior to Ordinance 1002.

26. "The counties of our state derive their zoning powers from HRS § 46-4(a), referred to as the Zoning Enabling Act." *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 483, 777 P.2d 244, 246 (1989).

27. One of the central canons of statutory construction is that *all* portions of a statute must be given effect. *See, e.g.*, *Ferris*, 138 Hawai'i at 310, 378 P.3d at 1026 ("Courts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.") (citations and internal quotation marks omitted).

28. Under this statute, the counties have been delegated significant authority

over zoning, including establishing districts; determining where business may be conducted; determining where residential uses may be undertaken; and the power to enact "necessary and proper" regulations, as the counties' respective councils determine. HRS § 46-4(a) (see language emphasized above).

29. These are the grants of authority that "*shall be liberally construed* in favor of the county" under the terms of the statute itself. *Id.* (emphasis added). The statute explicitly states that it does not "limit or repeal any powers of any county[.]"). *Id.* Thus the counties are granted substantial authority over zoning in their respective jurisdictions, and all the tools they need to implement that authority.

30. Petitioner testified that she ceased homestay operations from April of 2018 to June 2019. *See* Hearing Transcript at 19. Accordingly, Petitioner's use has been abandoned and cannot lawfully continue even if Petitioner was correct that KCC § 8-13.2 applied to KCC §18.1(b).

31. **KCC § 8-13.2(a)** provides a nonconforming use "**may** continue to the extent that the use existed on September 1, 1972." (Emphasis added). However, if that "nonconforming use ceases for any reason for a continuous period of twelve (12) calendar months or for one (1) season if the use is seasonal, then the use **shall not be resumed**." KCC § 8-13.2(b) (emphasis added). Therefore, the continuation of the nonconforming use is discretionary,[2] but once abandoned, it is mandatory that this nonconforming use shall not be resumed.[3] *Id.*

32. The public policy embodied in zoning ordinances dictates "the firm

---

[2] "The term 'may' is generally construed to render optional, permissive, or discretionary the provision in which it is embodied." *State v. Kahawai*, 103 Hawai'i 464, 465, 83 P.3d 725, 728 (2004) (emphasis added).

[3] "As used in statutes, contracts, or the like, this word [(i.e. shall)] is generally imperative or mandatory." *Leslie v. Board of Appeals of County of Hawaii*, 109 Hawai'i 384, 394, 126 P.3d 1071, 1081 (2006) *quoting Black's Law Dictionary* 1375 (6th Ed. 1990) (emphasis added).

regulation of nonconforming uses with a view to their eventual elimination." *Bastian v. City of Twin Falls*, 104 Idaho 307, 309, 658 P.2d 978, 980 (Ct. App. 1983). A nonconforming use does not possess any inherent right to be extended or enlarged and "[t]his corollary is recognized in nearly all states." *Id*

33. KCC § 8-13.2 should not apply to homestay operations in effect prior to enactment of Ordinance 1002 because Petitioner has not offered credible evidence of a continuous homestay operation before May 18, 2016, nor has she described her homestay operation prior to May 18, 2016 with sufficient specificity to conclude that she was running a homestay operation.

34. Moreover, substantial evidence was presented by the Planning Department that raises doubt as to the credibility of Petitioner's testimony of continuous homestay because she was, at least at some times, renting a dwelling that she did not also reside in.

35. KCC § 8-1.5 defines a homestay as "an owner occupied dwelling unit in which overnight accommodations are provided to transient guests within the same dwelling unit in which the owner resides. . ."

36. Exhibits "B," "E" and "G" contain advertisements wherein Petitioner rents out the main portion and also the octagonal cottage on the Subject Property. Although the advertisements describe the Sea Turtle Cottage as 500 square feet, the real property records actually list the building as 164 square feet.

37. Aside from Petitioner's admission to the homestay use that led to the NOV, Petitioner has failed to establish that her use should be grandfathered pursuant to KCC § 8-13.2.

38. Moreover, even if Petitioner had submitted credible evidence of her

continuous use prior to the enactment of Ordinance 1002, Petitioner's homestay use would not have been "lawful" because Petitioner admittedly did not have a use permit as required by KCC Section 8-3.2(b). *See* KCC Section 8-3.2 ("[n]o person shall undertake any construction or development, or **carry on any activity or use for which a Use Permit is required** by this Chapter, or obtain a building permit for construction, development, activity or use for which a Use Permit is required by this Chapter, **without first obtaining a Use Permit**.") (emphasis added).

39. On the identification of lawful nonconforming uses, "previous lawfulness" should be "determined by reference to the zoning ordinances in existence at the time of a property owner's structure or use of property was rendered unlawful under a change to the zoning laws." *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of the City & County of Honolulu*, 86 Hawai'i 343, 355, 949 P.2d 183, 194 (App. 1997).

40. **KCC Section 8-3.2** provided the following standards for the issuance of a Use Permit:

> 1) A Use Permit may be granted only if the Planning Commission finds that the establishment, maintenance, or operation of the construction, development, activity or use in the particular case is a compatible use and is not detrimental to health, safety, peace, morals, comfort and the general welfare of persons residing or working in the neighborhood of the proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the community, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters, and will not be inconsistent with the intent of this Chapter and the General Plan.
>
> (2) The Planning Commission may impose conditions on the permit involving any of the following matters: location, amount and type and time of construction, type of use, its maintenance and operation, type and amount of traffic, off-street parking, condition and width of adjoining roads, access, nuisance values, appearance of the building, landscaping, yards, open areas and other matters

deemed necessary by the Planning Commission.

41. Mr. Emayo explained that prior to the enactment of Ordinance 1002 uses other than those allowed under the applicable zoning district would have to apply for a Use Permit:

> The Ordinance 1002, the homestay ordinance did not - to my understanding they did not make an opening for people coming to certify the grandfather use because it was always open for anybody to go in to get a - what they used to call it a B&B use through a use permit process. So it was -it- you could always go in and - for a use permit. And we do have some use permits from before the ordinance for B&Bs.

See Hearing Transcript at 77.

42. Accordingly, given the absence of any evidence of a Use Permit for the Subject Property, Petitioner may not rely on KCC § 8-13.2(a) as a basis to challenge the NOV issued by the Planning Department.

43. The powers of the Hearing Officer originate from the Planning Commission, and the Planning Commission does not have authority to recognize Petitioner's prior homestay use as a lawful nonconforming use, nor can the Planning Commission disregard the prohibition contained in KCC § 8-18.1(b).

C. **The Planning Department's NOV Did Not <u>Violate Petitioner's Due Process</u>.**

44. Petitioner next argues that the NOV did not provide her with due process by failing to provide specific facts to support the violation.

45. Due process does not entitle a litigant to a particular result; it entitles a litigant to *process*. *See, e.g., Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai'i 217, 243, 953 P.2d 1315, 1341 (1998) ("The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful

manner.") (citations and internal quotation marks omitted).

46. The Planning Department provided Petitioner with due process of law by providing her with the Zoning Compliance Notice that informed her the she was in violation of KCC § 8-18.1(b). After providing such notice, the Planning Department met with her on April 12, 2017 to further discuss the basis of her violation. *See* Hearing Transcript at 64.

47. The evidence further demonstrates that Petitioner was not confused about the allegations contained in the Zoning Compliance Notice. Rather, she disagreed with the Planning Department's interpretation of its rules because she believed that she should have been grandfathered in. *See* Hearing Transcript at 28 ("It never occurred to me for a minute that there would be anything other than that, that would occur. So I never thought that – I thought I should be grandfathered in.").

48. When asked what her position was when she received the Zoning Compliance Notice, Petitioner testified that "[i]t was my position that I didn't think they knew what they were doing and the process did not seem appropriate. . ." *See* Hearing Transcript at 26; *see also* Exhibit "3" ("It is my belief, however, that I have not, and have never, been in violation of any of the older county ordinances.").

49. Due process requires only notice and an opportunity to be heard. *Sullivan*, 87 Hawai'i at 243, 953 P.2d at 1341. Petitioner has been afforded such an opportunity. Petitioner clearly disagrees with the Planning Department's interpretation of Article 18, but differing opinions on the law do not rise to the level of a due process violation.

50. Accordingly, there was no due process violation in the Planning Department's issuance of the NOV.

D. The Fines Imposed By The NOV Were <u>Authorized by KCC Section 8-3.5</u>.

51. Finally, the Petitioner argues that the Planning Department acted erroneously, arbitrarily, and manifestly abused its discretion when it issued the NOV and imposed an excessive fine against Petitioner.

52. In the event of a homestay violation, **KCC Section 8-18.3(e)** states that "[e]nforcement of this section shall be subject to Section 8-3.5 of the Kauai County Code."

53. **KCC Section 8-3.5** provides the authority for the Planning Department's issuance of a civil fine of $10,000 and the imposition of a civil fine up to $10,000 per day for each day the violation persists. *See* KCC § 8-3.5(b)(1).

54. Mr. Laureta explained the Planning Department's fining procedure as follows:

> "we start off at 10. If there's any effort towards compliance, we start off at 10, and during the remediation phase without the NOV in the ZCN phase, if there's any effort, any willingness to remediate by providing us documentation, we would say we could reduce the fine depending on how fast you can remediate. So depending on how long it takes to provide us documentation that you've cancelled all your commitments, that you removed your website, we would offer up a reduced fine consideration. If there is no effort to do any of that and the use continues, especially after the ZCN meeting, then it's like, nah, you know, 10. We stay at 10. Let them appeal the 10 because they made no effort to remediate, which includes no effort to cancel the website, cancel future commitments, and try and get into compliance."

See Hearing Transcript at 46.

55. It is undisputed that Petitioner failed to make any effort to return to compliance.

56. The Planning Department was within its authority to levy a $10,000 fine and impose a $10,000 fine per day that the violation continues as authorized by KCC § 8-3.5. *See* HRS § 91-14(g)(2) (agency acting in "excess of the statutory authority or jurisdiction" is

grounds for reversal or modification of agency decision); *Kilakila 'O Haleakala v. Bd. of Land and Natural Resources*, 138 Hawai'i 383, 401, 382 P.3d 195, 213 (2016) ("A determination made by an administrative agency *acting within the boundaries of its delegated authority* will not be overturned unless 'arbitrary, or capricious, or characterized by a clearly unwarranted exercise of discretion.' ")

57. Petitioner has not presented evidence that the Planning Department did not act erroneously, arbitrarily or manifestly abuse its discretion by imposing the fines contained in the NOV.

58. If any Conclusion of Law herein should be designated as a Finding of Fact, the same shall be deemed to have been identified as such.

VI. CONCLUSION

Based upon the foregoing, it is recommended that the Planning Commission AFFIRM the decision of the Planning Director in issuing the Notice of Violation & Order to Pay Fines dated May 23, 2017, and DISMISS Petitioner's appeal because Petitioner has not met her burden to establish that the action by the Planning Director was based on an erroneous finding of a material fact, or that the Planning Director acted in an arbitrary or capricious manner, or abused his discretion. RPPPC Rule 1-9-2(b)(6).

DATED: Lihue, Hawaii, _____.

_____
HARLAN Y. KIMURA
Hearing Officer for the Planning Commission
of the County of Kaua'i

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of: Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Haʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI, Respondent.	CC-2017-4 TMK: (4) 5-8-005:005 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

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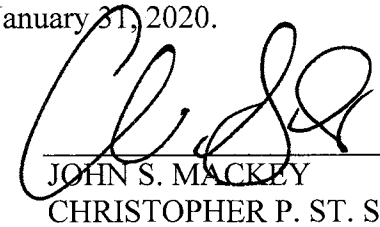
DATED: Honolulu, Hawai'i, January 31, 2020.



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BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **PETITIONER'S REPLY TO RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S CLOSING ARGUMENTS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; CERTIFICATE OF SERVICE** CONTESTED CASE HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

PETITIONER'S REPLY TO RESPONDENT PLANNING DEPARTMENT OF THE COUNTY OF KAUAI'S CLOSING ARGUMENTS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner PATRICIA McCONNELL hereby submits this reply to Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAI's closing arguments and proposed findings of fact and conclusions of law. Specifically, Petitioner challenges two main arguments made by the Planning Department that were not raised in the Notice of Violation, its prehearing statement, or explicitly raised at the contested case hearing as additional reasons to support its Notice of Violation and should therefore be disregarded: (1) that Petitioner was required to obtain a use permit for the homestay use of her property; and (2) that Petitioner operated a transient vacation rental ("TVR") on her property.

I. THE NOTICE OF VIOLATION ONLY ALLEGED A VIOLATION OF CZO § 8-18.1(b).

Petitioner appealed from a Notice of Violation dated May 23, 2017, which alleges Petitioner was in violation of "Section 8-18.1(b) General Provisions for Homestays." This section prohibits homestays outside the visitor destination area. Petitioner's Exhibit "1". Specifically, the violation states: "The Planning Department has confirmed that the subject property is currently being used for a Homestay operation. The continued use for the subject property for a Homestay operation outside the designated Visitor Designation Area constitutes a violation." No other explanation was given for a finding of a violation. The Planning Department, in its closing argument and proposed findings and conclusions, attempts to make additional arguments to support a finding of a violation that were not specified in Petitioner's Notice of Violation and should, thus, be disregarded.

II. THE NOTICE OF VIOLATION AND PLANNING DEPARTMENT ARGUMENTS DID NOT MENTION A USE PERMIT REQUIREMENT.

The Planning Department claims that Petitioner's homestay was not valid because she did not have a use permit pursuant to Kauai County Code, Comprehensive Zoning Ordinance ("CZ)") § 8-3.2(b). Closing Arg. at 5, 7. However, as stated above, the Notice of Violation does not specify this section of the ordinance being violated. Rather, it alleges that Petitioner was in violation of CZO § 8-18.1. Furthermore, the Planning Department submitted a motion for summary judgment and its prehearing statement prior to the contested case hearing, neither of which mention Petitioner's lack of a use permit or cite to CZO § 3.2. The only time "use permit" was brought up during the contested case hearing was by Mr. Emayo, who testified that prior to the passage of Ordinance 1002, anybody could get a use permit for their B&B or homestay. CCH Trans. at 77. Mr. Emayo admitted, however, that prior to the passage of Ordinance 1002 there was no reference in the zoning code to homestays or B&B's and thus no way for a person to know that the use permits applied to homestays. *Id.*

Currently, CZO § 8-3.2(b) provides:

> No person shall undertake any construction or development, or carry on any activity or use for which a Use Permit is required by this Chapter, or obtain a building permit for construction, development, activity or use for which a Use Permit is required by this Chapter, without first obtaining a Use Permit.

Without reference to Homestays anywhere in the ordinance prior to the passage of Ordinance 1002, Petitioner was not on notice that a Use Permit was required. In fact, Petitioner testified that she went to the Planning Department in 2005 and asked what she needed to do to lawfully use her home as a homestay. CCH Trans. at 9-11. The Planning Department official by the name of Mario responded that all she needed to do was to obtain GET and TAT tax licenses, which she did. *Id.* The Planning Department did not inform her that there was any other permitting process that she needed to comply with. In addition, in

2008, Petitioner again inquired with the Planning Department to see if she needed to obtain a nonconforming use certificate with the passage of Ordinance 864, which prohibited transient vacation rentals outside the visitor destination area. *Id.* at 11. The Planning Department informed Petitioner that she was not eligible for a nonconforming use certificate because it did not apply to homestays. *Id.* at 12. At this time, the Planning Department, again, did not inform Petitioner of any other permitting requirement for her homestay.

Given that the Notice of Violation, the Planning Department's motion for summary judgment, and the Planning Department's Prehearing Statement make no mention of a use permit requirement and the fact that the Planning Department when directly asked never informed Petitioner of this requirement, the Planning Department cannot in hindsight decide that Petitioner was required to obtain a use permit. She did not have notice of any such requirement. Therefore, the Hearing Officer should disregard this argument in the Planning Department's closing argument. Closing argument at 2, 7. Petitioner also objects to the Planning Department's proposed Findings of Fact 47 and Conclusions of Law 38, 40, 41, and 42.

III. THE NOTICE OF VIOLATION DID NOT ALLEGE PETITIONER OPERATED A TVR.

Not only does the Planning Department attempt to add the additional arguments regarding the use permit to its closing argument and proposed findings and conclusions, it also attempts to allege that Petitioner may have operated an illegal TVR. *See* Planning Dept. Closing Arg. at 5 ("Petitioner also violated Section 8-17.8(a) because she advertised a single family vacation rental outside of the VDA.").

However, as stated above, the Notice of Violation only alleges a violation of CZO § 8-18.1(b) regarding Homestays and makes no mention of Petitioner operating a transient vacation

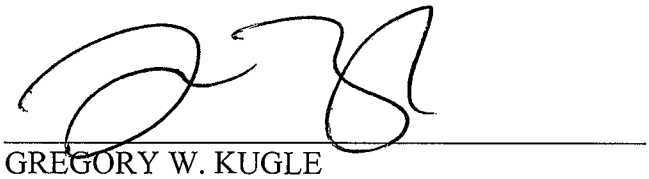
rental. Furthermore, Mr. Emayo from the Planning Department confirmed this fact when he testified that the Planning Department did not have evidence of TVR use when it issued the Notice of Violation, and it purposefully only alleged homestay use. CCH Trans. at 86-87. Because the Notice of Violation does not allege a violation based on TVR use, the portions of the Planning Department's closing argument that alleges TVR use must be disregarded. Closing Arg. at 5. Petitioner also objects to the Planning Department's proposed Findings of Fact 8, 32, 33, 35, 36, 38, 48 and Conclusions of Law 13, 34, 36.

III. CONCLUSION

Because Petitioner operated her homestay prior to the passage of Ordinance 1002, her homestay is a nonconforming use. Therefore, Petitioner respectfully requests that the Hearing Officer determine that the Notice of Violation was issued in error.

DATED: Honolulu, Hawaii, February 7, 2020.

DAMON KEY LEONG KUPCHAK HASTERT



GREGORY W. KUGLE
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Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon the following individuals by emailing and mailing said copy, postage prepaid, to their last known address as follows:

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DATED: Honolulu, Hawaii, February 7, 2020.

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Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	HEARING OFFICER'S REPORT AND RECOMMENDATION OF CONTESTED CASE; CERTIFICATE OF SERVICE
	)	HEARING (Held):
	)	Date: August 30, 2019
	)	Time: 9:00 a.m.
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

HEARING OFFICER'S
REPORT AND RECOMMENDATION OF CONTESTED CASE

I. INTRODUCTION.

This Contested Case arises as a result of the letter stamp-dated May 23, 2017 entitled "**NOTICE OF VIOLATION & ORDER TO PAY**

FINES" ("Notice of Violation") issued by Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI ("Planning Department") to Petitioner PATRICIA D. McCONNELL ("Petitioner"). Exhibit D[1]. The Notice of Violation advised Petitioner to immediately Cease and Desist the use of her property located at 4813 Ananalu Road in Hanalei, Kauai for "transient accommodations"[2] because it is in a location not designated as a Visitor

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[1] All Exhibits identified by **Alphabets** were introduced by the Planning Department. Conversely, all Exhibits referenced by **Numbers** originated from Petitioner. Hearing Officer's Scheduling Order dated December 14, 2018 ("Scheduling Order") at 2.

[2] "**Transient Accommodations**" as used in the Notice of Violation refers to a "**Homestay**" as defined in *Kauaʻi County Code* ("KCC") § 8-1.5.

A **Homestay** is "an owner occupied ***dwelling unit*** in which overnight accommodations are provided to ***transient*** guests within the same dwelling unit in which the owner resides and the respective owner currently benefits under Sec. 5A-11 of this Code for a homeowners' exemption for the homestay site. A ***guest house*** may not be used as accommodations for transient guests in a homestay operation. *Id. (emphasis added).*

A **Dwelling Unit** is defined as "any ***building*** or any portion thereof which is designed or intended for occupancy by one (1) family or persons living together or by a person living alone and providing complete living facilities, within the unit for sleeping, recreation, eating and sanitary facilities, including installed equipment for only one (1) ***kitchen***." *Id.* (emphasis added).

Transient is "any person who owns, rents, or uses a dwelling unit or a portion thereof **for one hundred eighty (180) days or less,** and which dwelling unit is not the person's primary residence under the Internal Revenue Code. . . ." *Id.* (emphasis added).

A **Guest House** is "a building with a floor area of no more than five hundred (500) square feet, may contain a kitchen, and is used for dwelling purposes by guests, tenants, or owner(s). A guest house shall not be used for a transient vacation rental (TVR) or homestay operation within or outside of the ***visitor destination area (VDA)***." *Id.* (emphasis added).

A **Building** is defined as "a roofed ***structure***, built for the support, shelter or enclosure of persons, animals, chattels or property of any kind. The word 'building' includes the word 'structure.'" *Id.* (emphasis added).

A **Kitchen** is defined as "any room used or intended or designed to be used for cooking and preparing food." *Id.*

Visitor Destination Areas or **VDAs** "are those areas designated as Visitor Destination Areas on County of Kauaʻi Zoning Maps." *Id.* and *See also* Ordinance No. 436 adopted on September 7, 1982 by the County of Kauaʻi County Council ("Ordinance No. 436").

Destination Area. *Id*. at 1. After receiving the Notice of Violation, Petitioner submitted a timely **Notice of Appeal and Demand for Contested Case Hearing** dated June 9, 2017 through her counsel, Gregory W. Kugle, Esq., and Veronica A. Nordyke, Esq., of the law firm of Damon Key Leong Kupchak Hastert ("Notice of Appeal").

II. PROCEDURAL HISTORY.

Pursuant to the Hearing Officer's ***First Amended*** Scheduling Order dated July 5, 2019 ("First Amended Scheduling Order"), the Planning Department submitted Respondent Planning Department Of The County Of Kauai's Motion For Summary Judgment dated July 9, 2019 ("Planning Department's MSJ") arguing there is no genuine issue of material fact that Petitioner is operating the Subject Property as a homestay outside of a VDA in violation of KCC § 8-18.1(b). Attached to the Planning Department's MSJ is the Declaration of Mike Laureta ("Laureta Declaration"), the Program Manager and Custodian of Records for the Planning Department.[3] The Exhibits appended to the Laureta Declaration contained copies of documents in the Investigation File offered in support of the

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A **Structure** is defined as "anything constructed or erected which requires location on the ground or which is attached to something having location on the ground . . ." *Id.*

[3] See Transcript of the Contested Case Hearing held on August 30, 2019 in this Contested Case; CC-2017-4 ("Transcript") at 35-36.

Notice of Violation. Finally, the Declaration of Britni Ludington-Braun ("Ludington-Braun Declaration"), ADU/TVR Enforcement Specialist with the Planning Department,[4] sets forth the details regarding Petitioner's meeting with her and Mr. Andres "Bambi" Emayo ("Emayo"), Supervising Inspector for the Enforcement Section of the Planning Department,[5] on April 12, 2017 as a result of the Zoning Compliance Notice stamp-dated January 11, 2017 ("Zoning Compliance Notice").

Petitioner Patricia McConnell's Memorandum In Opposition To Respondent Planning Department Of The County Of Kauai's Motion For Summary Judgment dated August 14, 2019 ("Memorandum In Opposition") responded that the Planning Department's MSJ should be denied on five (5) grounds. First, the Planning Department's MSJ is "factually unsupported" because the Laureta Declaration and Ludington-Braun Declaration are deficient and void of facts to support the Zoning Compliance Notice and/or Notice of Violation. Memorandum In Opposition at 5. Second, the Planning Department failed to submit evidence of "an actual violation." *Id.* at 6-7. Instead, the Notice of Violation is supported by Internet postings of advertisements for daily rental of the Subject Property and reviews of guests allegedly having stayed at that location. *Id.* Third, the

[4] SeeTranscript at 101.
[5] See Transcript at 54.

$150,000.00 fine imposed by the Notice of Violation is not supported by the facts and unconstitutionally excessive. *Id.* at 7-9. Fourth, the Planning Department refused to comply with Petitioner's Discovery Request and therefore, on or about July 10, 2019 submitted a Uniform Information Practices Act Request For Government Records to obtain the requested documents ("UIPA Request").[6] *Compare Id.* at 9, *with* Exhibit 1 attached to Memorandum In Opposition. Finally, Summary Judgment would deny Petitioner's right to a Contested Case Hearing pursuant to RPPPC Rule 1-9-3 and Chapter 91 of the *Hawai'i Revised Statutes.* Memorandum In Opposition at 9-10.

In reply to the Memorandum In Opposition, the Planning Department noted Petitioner admitted to operating a homestay outside of a VDA. Respondent Planning Department Of The County Of Kaua'i's Reply To Petitioner Patricia McConnell's Memorandum In Opposition To Respondent County of Kauai's Motion For Summary Judgment ("Planning Department's Reply") at 2. Secondly, the Comprehensive Zoning Ordinance ("CZO") prohibits homestay operations outside of VDAs pursuant to KCC § 8-18.1(b). *Id.* at 7-8. Finally, KCC § 8-3.5(b) permits the Planning Department to impose fines of up to $10,000.00 **per day**. *Id.* at 7-8.

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[6] The Planning Department is permitted to refuse Petitioner's Discovery Request pursuant to Rule 1-6-9(b) of the *Rules of Practice and Procedure of the Kaua'i County Planning*

The Planning Department's MSJ came on for hearing before this Hearing Officer at 9:00 a.m. on August 30, 2019 ("MSJ Hearing"). Gregory W. Kugle appeared on behalf of Petitioner. Maryann Sasaki appeared on behalf of the Planning Department, along with its duly authorized representative Emayo joining her later in these proceedings. Transcript at 24-25. Although the Agency Hearing Notice for this Contested Case was prepared and filed with the Office Of The County Clerk, County of Kauaʻi, State of Hawaiʻi, and timely posted pursuant to RPPPC Rule 1-6-5 and *Haw. Rev. Stat.* § 91-9, no other parties or members of the general public appeared at the Hearing. Transcript at 4.

After receiving arguments summarizing the respective positions of the Planning Department and Petitioner, this Hearing Officer DENIED the Planning Department's MSJ. *Id.* at 3-4. The Planning Department's MSJ was denied because neither the Laureta Declaration nor the Ludington-Braun Declaration stated those declarants were competent to testify to the matters set forth in their declarations. *Id.* at 4. Moreover, the Laureta Declaration was conclusory in nature, rather than setting forth specific undisputed facts which support the Planning Department's arguments that it should be entitled to judgment as a matter of law. See Memorandum In Opposition at 4 *citing GECC Financial Corporation.*

Commission (Codified May 2014) ("RPPPC").

v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw.Ct.App. 1995) and Transcript at 4.[7]

The final preliminary matter concerned the exhibits to be admitted into evidence. Transcript at 4-5. First, Exhibits 1 through 5, and Exhibit D, were admitted into evidence by stipulation. *Id.* at 5. Second, Petitioner objected to Exhibits A, B, C, E, and F on grounds they appear to be documents from the Planning Department's Investigation File which were not previously provided to her.[8] *Id.* at 5-7. Therefore, Petitioner argued "it is unfair and it's trial by surprise" by not having advance copies of those exhibits. *Id.* at 6. This Hearing Officer OVERRULED Petitioner's objections to those exhibits because the *Hawai'i Rules of Evidence* do not apply to these proceedings under RPPPC Rule 1-6-17(a) and therefore, would permit their introduction by the Planning Department.[9] Transcript at 7. To address Petitioner's claim of "unfair surprise," this Hearing Officer offered to continue the evidentiary portion of the hearing ("Hearing") should she determine additional research or preparation would be required to adequately oppose the evidentiary value of those exhibits. *Id.*

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[7] The denial of the Planning Department's MSJ on these grounds dispenses with the need to address the other arguments set forth in the Memorandum In Opposition.
[8] See footnote no. 6, *infra.*
[9] Exhibits A, B, C, and E were in fact offered and admitted into evidence. See Transcript at 55-63. However, the Planning Department did not offer Exhibit 7 into evidence. See *Id.* at 1-120.

III. DEVELOPMENTS DURING HEARING.

During the Hearing the Planning Department also offered Supplemental Exhibit G into evidence. *Id.* at 108. Exhibit G is the Planning Department's Investigation Report dated July 10, 2018 concerning the transient accommodations at the Subject Property. *Id.* at 101-07. On January 17, 2020, the Planning Department provided a Supplemental Exhibit List and Exhibit G to all the parties as previously directed by this Hearing Officer. Transcript at 112.

Also during the Hearing testimony was presented that the Planning Department did NOT receive the UIPA Request. Minutes Of Contested Case Hearing dated August 31, 2019 ("CCH Minutes") at 2 and Transcript at 94-96. Therefore, upon conclusion of the Hearing Petitioner requested leave to submit another UIPA Request ("UIPA Request II"). CCH Minutes at 2 and Transcript at 117. At stated times, Petitioner was requested to provide Status Reports regarding the Planning Department's response to UIPA Request II. CCH Minutes at 3 and Minute Order Regarding Pending Matters dated October 9, 2019 at 2-3. Since Petitioner subsequently reported the Planning Department rejected UIPA Request II, the Hearing was closed pursuant to RPPPC Rule 1-6-11(j) and a briefing schedule issued for submission of Closing Arguments and/or Proposed Findings of Fact and Conclusions of Law. Minute Order Regarding Telephone

Conference dated December 12, 2019 at 2-3. The requested Closing Arguments and/or Proposed Findings of Fact and Conclusions of Law were timely received.[10]

IV. FINDINGS OF FACT.

A. The Parties and Subject Property.

1. Petitioner is the owner of the real property located at 4813 Ananalu Road, Hanalei, Kauaʻi, Hawaiʻi 96714, TMK No. (4) 8-005:005 which is the subject of this Contested Case ("Subject Property"). Exhibit A at 1.

2. The Subject Property is located outside any of the Visitor Destination Areas. Transcript at 36-37 and see also Ordinance No. 436 at 1 and 8-11.

3. Petitioner has been residing at the Subject Property as her principal residence since she purchased it in 2004. Exhibit "3" at 1 and Transcript at 8-9. She began operating the Subject Property as a homestay from 2005 ("Homestay Operation"). Transcript at 9.

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[10] The issuance of this Report and Recommendation has been delayed due to the: (a) COVID-19 Pandemic; (b) Proclamation issued by the Governor of the State of Hawaiʻi dated March 4, 2020, Supplementary Proclamation dated March 16, 2020, Second Supplementary Proclamation dated March 21, 2020 and Third Supplementary Proclamation dated March 23, 2020; and (c) Proclamation COVID-19 [Novel Coronavirus] dated March 4, 2020 issued by the Mayor of the City and County of Honolulu, Supplemental Proclamation Of Emergency Or Disaster (COVID-19 [Novel Coronavirus]) dated March 18, 2020, Emergency Order No. 2020-01 (COVID-19 [Novel Coronavirus]), and Emergency Order No. 2020-02.

4. In 2005 Petitioner inquired with the Planning Department as to the requirements for the Homestay Operation. *Id.* at 10. At that time only a State of Hawaiʻi General Excise Tax License and Transient Accommodations Tax License were required for the Homestay Operation. *Compare Id., with* Ordinance No. 935 adopted by the County of Kauaʻi County Council ("Council") on November 14, 2012 and codified as KCC § 8-3.2, as amended.

5. The Homestay Operation which began in 2005 continued through the date of the Hearing. Compare *Id.* at 11, *with* 30-31.

6. The Planning Department is the governmental agency responsible for enforcing, among other things, the provisions of the CZO set forth in Chapter 8 of the *Kauaʻi County Code*. The Charter Of The County of Kauaʻi (2018 Codified Version), Article XIV, Section 14.05.

B. <u>Zoning Compliance Notice</u>.

7. On January 10, 2017, Emayo began an investigation of the Subject Property to determine its compliance with the CZO. *See generally* Transcript at 54-66. He prepared an Investigation Report dated January 10, 2017 based upon his discovery that transient accommodations were being offered at the Subject Property ("Report I"). Exhibit B.

8. Report I contained a printout of an Airbnb advertisement ("Advertisement") of a "luxury jungle retreat cottage . . . of about 1400 sq[uare] feet of space and has two bedrooms, a living room, a full kitchen, and enclosed lanai, a full bathroom and an outdoor shower."[11] Exhibit B at 15. There was also a separate cottage built onto the back of the house on the ground floor that could be rented out to other guests and identified as the "Sea Turtle Cottage."[12] *Id.* and see also Exhibit G at 13-23.

9. "By matching the airbnb's website (https://www.airbnb.com/rooms/12622481) and pictures with Pictometry and cross checking with Real Property Division records (Tax Classification – Vacation Rental), [Emayo] was able to determine the Tax Map Key and Property Owner of [that] transient accommodation operation." *Id.* at 1. It was the Subject Property owned by Petitioner. *Id.*

10. Petitioner and the Subject Property were not issued a Non-Conforming Use Certificate or applicable permit to conduct this transient accommodation outside a Visitor Destination Area and therefore, was in violation of KCC §§ 8-17.8 and 8-18.1(b). Exhibit B at 2.

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[11] The Advertisement also indicated the "luxury jungle retreat cottage" would be available to rent because Petitioner lives in a separate studio on the property. Exhibit B at 15.

11. By letter stamp-dated January 11, 2017 entitled "**ZONING COMPLIANCE NOTICE**", the Planning Department advised Petitioner its investigation revealed the Subject Property was being used "**for Transient Accommodation outside the designated Visitor Designation Area [and therefore,] constitutes a violation.**" Exhibit C at 1. The ordinances cited were KCC § 8-18.1(b) related to homestay operations, and § 8-17.8 for Transient Vacation Rentals.[13] *Id.*

12. The Zoning Compliance Notice further directed Petitioner to immediately "[c]ease and desist the use of the [S]ubject [P]roperty as a Transient Accommodation(s) . . . [and] Cancel all Transient Accommodations commitments for the property." *Id.* at 2. Petitioner's failure to comply with this directive "may result in a fine up to $10,000.00 and/or up to $10,000.00 per day, should the violation(s) persist." *Id.*

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[12] It is unclear from the evidence introduced at the Hearing whether the "Sea Turtle Cottage" is the separate studio Petitioner lives in and referenced in the Advertisement. See footnote 11, *infra*.

[13] A "**Transient Vacation Rental"** or "**TVR"** is defined as "a dwelling unit which is provided to transient occupants for compensation or fees, including club fees, or as part of interval ownership involving persons unrelated by blood, with **a duration of occupancy of one hundred eighty (180) days or less.**" *Id.* (emphasis added). Apparently this violation was also included in the Zoning Compliance Notice because the Advertisement noted the "entire portion of the main house [(i.e. the luxury jungle retreat cottage) would be available to rent because Petitioner] . . lives in a separate studio on the property . . ." *Compare* Exhibit B at 15, *with* Transcript at 75.

13. The Zoning Compliance Notice was addressed to Petitioner at 104 Endlich Dr., Santa Cruz, CA 95060. *Id.* This was also the mailing address of Petitioner as of January 10, 2017 according to the records of the Real Property Assessment Division of the County of Kaua'i. Exhibit B at 4 and Transcript at 74.

14. Petitioner acknowledged receipt of the Zoning Compliance Notice on April 1, 2017 when a person came to the Subject Property and personally served her with it. Transcript at 12-13.

15. At the request of Petitioner, on April 12, 2017 she met with Emayo and Ms. Britni Ludington-Braun ("Ludington-Braun") to discuss her response to the Zoning Compliance Notice ("Meeting"). Transcript at 78. According to Emayo, to remedy the violation Petitioner could either: (a) submit a written remedial action plan; (2) remove the internet advertisement for the homestay rental of the Subject Property; and/or (3) "work with the Planning Department to rectify the violation." Transcript at 79.

16. Following the Meeting, Petitioner submitted a letter dated April 13, 2017 to the Planning Department stating her belief is that she "have (sic) not, and have (sic) never, been in violation of any of the older county ordinances." Exhibit E at 12. Petitioner was of that opinion because she assumed the Homestay Operation at the Subject Property was "grandfathered" from the prohibition of homestays outside of VDAs pursuant to Ordinance No. 1002 adopted by the

Council on May 18, 2016 ("Ordinance No. 1002"). See Transcript at 14 and 79. Nonetheless, in her own words she further stated "I wish to assure you I am, and will, make every attempt possible to assure I am in compliance with ordinances that apply to me and my home here in Kauai." *Id.*

C. <u>Notice of Violation</u>.

17. On May 16, 2017 Emayo conducted a follow-up investigation to determine whether Petitioner ceased the Homestay Operation at the Subject Property and cancelled all future bookings ("Report II"). Exhibit E. Emayo found website advertisements continuing to offer the Subject Property as a Transient Accommodation. *Id.* at 4-6. There were also two (2) reviews of guests staying at the Subject Property in April 2017. *Id.* at 7.

18. Based upon Report II, Emayo prepared the Notice of Violation reminding Petitioner that the Zoning Compliance Notice required her to "Cease and Desist the use of the [S]ubject [P]roperty for transient accommodations [and cancel all future commitments for such use]." Exhibit D at 1. The Notice of Violation also referenced the Meeting and confirmed "the continued transient accommodation operation (Homestay) use at the [S]ubject [P]roperty is a violation

of the Comprehensive Zoning Code, Chapter 8, Kaua'i County Code, 1987, as Amended".[14] *Id.*

19. Due to Petitioner's refusal to comply with the Zoning Compliance Notice and instructions at the Meeting, Petitioner was "**ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department**". *Id.* at 2 (emphasis in original). If those violations were not remedied within 14 days of the Notice of Violation, "[**a]n additional fine of $10,000.00 per violation, per day, for each day in which such violation persists shall be levied**." *Id.* at 3 (emphasis in original).

D. <u>Appeal Of Notice of Violation</u>.

20. By letter dated June 9, 2017 Counsel for Petitioner appealed the Notice of Violation to the Kaua'i Planning Commission ("Commission") pursuant to RPPPC Chapter 9 on two (2) grounds. See Notice of Appeal. First, Petitioner argued "[u]pon implementation of the Homestay Ordinance [(i.e. Ordinance No. 1002 codified as KCC § 8-18.1)], [her] business became a vested, non-conforming use. Thus, she is not subject to Sec. 8-18.1 of the CZO, or subject to the associated fines." Notice of Appeal at 2. Second, "the Director [of the

[14] Unlike the Zoning Compliance Notice, the Notice of Violation only referenced the Homestay Operation because the Planning Department "had no evidence of continued use [of the Subject Property as also a Transient Vacation Rental]." Transcript at 87.

Planning Department] acted erroneously, arbitrarily, and manifestly abused his discretion when he ignored [Petitioner's] valid concerns about the applicability [of the] Homestay Ordinance to her business and issued the [Notice of Violation]." *Id.*

E. Relevant Authorities and <u>Pertinent Legislative History.</u>

21. ***Haw. Rev. Stat.* § 46-4(a)** provides in pertinent part:

> (a) This section and any ordinance, rule, or regulation adopted in accordance with this section shall apply to lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.
>
> **Zoning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county.** Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner. Zoning in the counties of Hawaii, Maui, and Kauai means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district to carry out the purposes of this section. In establishing or regulating the districts, full consideration shall be given to all available data as to soil classification and physical use capabilities of the land to allow and encourage the most beneficial use of the land consonant with good zoning practices. **The zoning power granted herein shall be exercised by ordinance which may relate to:**
>
> . . .
>
> **(2) The areas in which residential uses may be regulated or prohibited;**

. . .

(4) The areas in which particular uses may be subjected to special restrictions;

. . .

(12) Other regulations the boards or city council find necessary and proper to permit and encourage the orderly development of land resources within their jurisdictions.

The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

. . .

The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole. This section shall not be construed to limit or repeal any powers of any county to achieve these ends through zoning and building regulations, except insofar as forest and water reserve zones are concerned and as provided in subsections (c) and (d). [(This paragraph shall hereafter be referred to as the "**Liberal Construction Provision**".)]

Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the

> ordinance takes effect; **provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out** of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. **In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses.** Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262. [(This paragraph shall hereafter be referred to as the "**Continued Lawful Use Provision**".)]

(emphasis added).

21. **KCC § 8-17.8** adopted by the Council on February 20, 2008 as part of Ordinance No. 864 provided in pertinent part:

> **Sec. 8-17.8 Single Family Transient Vacation Rentals.**
>
> (a) Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, **single-family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas.**

(second emphasis added).

22. **KCC § 8-17.10** also adopted by the Council as part of Ordinance No. 864 provided in pertinent part:

> **Sec. 8-17.10 Nonconforming Use Certificates for Single-Family Vacation Rentals.**
>
> (a) The purpose of this section is to provide a process to identify and register those single-family transient vacation rentals as nonconforming uses which have been in lawful use prior to the

effective date of this ordinance and to allow them to continue subject to obtaining a nonconforming use certificate as provided by this section.

(b) The owner, operator or proprietor of any single-family transient vacation rental which is operating outside of a Visitor Destination Area on the effective date of this ordinance shall by March 30, 2009, obtain a nonconforming use certificate for single family vacation rentals.

. . .

(f) **Failure to apply for a nonconforming use certificate by October 15, 2008 or failure to obtain a nonconforming use certificate by March 30, 2009, shall mean that the alleged nonconforming use is not a bona fide nonconforming use, and it shall be treated as an unlawful use,** unless the applicant demonstrates to the satisfaction of the Planning Commission that the alleged vacation rental use meets the criteria under Section 8-17.10(c) and (d). The Planning Director shall prepare an application form which shall be available to the public by March 30, 2008.

(emphasis added, except for "**Sec. 8-17.10 Nonconforming Use Certificates for Single-Family Vacation Rentals.**").

23. The intent of the Council in adopting **Ordinance No. 864** was, in pertinent part, as follows:

SECTION 1. Findings and Purpose.

The Council of the County of Kaua'i finds that there is a compelling need to regulate single-family transient vacation rentals on Kaua'i. Single-family transient vacation rentals are occurring at a greater rate and inflicting a larger impact on the community of Kaua'i than was ever anticipated in the County's original Comprehensive Zoning Ordinance. While this type of visitor unit could be compatible with the character and nature of Kaua'i and while it has certain positive advantages to the community and is desirable in terms of offering a mix of accommodations to the visitor,

the uncontrolled proliferation of vacation rentals in residential and other areas outside the Visitor Destination Areas (VDAs) is causing significant negative impacts to certain residential neighborhoods, foreshadowing similar potential impacts on other areas of the island[.]

The County General Plan, updated in the year 2000, recognizes this need by its policy for "Alternative Visitor Accommodations," which reads as follows:

"4.2.8.2 Alternative Visitor Accommodations

(a) The County of Kaua'i shall recognize alternative visitor accommodations, such as B&Bs, vacation rentals, inns, cabins, and retreat centers.

(b) The County shall enact clear standards and permit processes for regulating alternative visitor accommodation structures and operations in Residential, Agriculture, Open, and Resort zoning districts.

. . .

Census data shows that seasonal rentals account for 45% of the new housing units built on Kaua'i between 1990 and 2000, a greater percentage than housing built for long-term renters (14%) or for owner-occupied use (36%). Since 2000, out of the 2,050 new residential units, 1,070 have been built for the seasonal homes market and less than half have been for local families to rent (46) or own (936). **The potential for vacation rental use increases the value and thus the selling price and investment rating of property on Kaua'i, which increases prices and adds another potential layer of speculation in the real estate market. This also means that the limited available infrastructure and resources on Kaua'i, including roads, water, sewer capacity, building materials, and contractor time are being used primarily for expensive second or third homes rather than the primary home needs of local residents.**

In oceanfront or other places of premium real estate value, second and third homes and vacation rentals (often one and the

same) are displacing traditional neighborhoods where people of low and moderate income have been able to live in the past. Besides contributing to a lack of affordable housing in the community, this is changing the social character of neighborhoods where neighbors used to know each other. This has tended to make these neighborhoods more vulnerable to crime. While regulating single-family vacation rentals will not guarantee more affordable housing, it will dampen speculation and bring a halt to uncontrolled growth and cumulative impacts of vacation rentals which have affected the traditional neighborhoods of 'Anini and Ha'ena, and which could or are beginning to also affect neighborhoods such as Waimea Valley, Kekaha, and the makai side of Kapa'a Town.

. . .

The purpose of this bill is to restore a balance between primary residences and single-family transient vacation rentals by: 1) requiring registration of vacation rentals or nonconforming use certificates and setting standards for all vacation rentals, 2) explicitly prohibiting new single-family vacation rentals outside visitor destination areas (multi-family vacation rentals are already so prohibited), and 3) identifying and allowing nonconforming uses where single-family vacation rentals have been operating lawfully prior to approval of this bill.

(emphasis added).

24. **With respect to Homestays**, Ordinance No. 864 indicated that:

This bill does not apply to a bed and breakfast unit ("Homestay"). It is the intention of the Council to address these units as a separate matter after establishing a regulatory framework for single-family transient vacation rentals. Homestays are presently regulated through the use permit process [pursuant to KCC § 8-3.2].

(emphasis added).

25. As indicated by the Council, **Ordinance No. 1002** was adopted on May 18, 2016 to address regulation of Homestays, and provided in pertinent part:

> SECTION 1. Findings and Purpose: The Council finds the 2000 Kaua'i General Plan recognized the need "to develop a clear policy regarding B&Bs and vacation rentals" The General Plan recommended an implementing action to amend the CZO to facilitate the permitting of existing, nonconforming alternative visitor accommodations. The Council complied with the policy of the General Plan and grandfathered existing single-family transient vacation rentals (SFTVRs) that registered and met the prior use requirements established in Article 17 of the CZO.
>
> . . .
>
> Although the Council bifurcated the issues of homestays and SFTVRs, **it is now appropriate to adopt a clear and specific standard and review parameters under which homestay applications can be processed.**
>
> **The purpose of this bill is to restrict homestay operations to the Visitor Destination Areas (VDAs) and to establish additional standards under which homestays operate.**
>
> **Sec. 8-18.1 General Provisions for Homestays.**
>
> (a) A homestay operation shall operate under the following regulations:
>
> (1) Transient accommodations are provided for visitors for twenty-nine (29) days or less;
>
> (2) Homestays shall be limited to no more than three (3) guest rooms per homestay operation;
>
> (3) During homestay operations, the owner(s) benefiting under Sec. 5A-11 of this Code for a homeowner's exemption for the homestay site must be physically within the County of Kaua'i,

residing at the homestay operation site, and physically available for the needs and concerns of their respective homestay guests; and

(4) No other individual or designated representative may act on the owner(s) behalf to meet the requirements of Sec 8-18.1(a)(3).

(b) **Homestay operations are prohibited outside of the Visitor Destination Area (VDA).**

(emphasis added, except for "**Sec. 8-18.1 General Provisions for Homestays.**").

26. **Visitor Destination Areas** were first established by **Ordinance No. 436** adopted by the Council on September 7, 1982 and provided in pertinent part, as follows:

> SECTION 1. Findings and Purpose. Pursuant to the authority of Act 186, Session Laws of Hawaii, 1980, the County Council enacts this ordinance for the purpose of designating locations, referred to as "Visitor Destination Areas", in which transient vacation rentals, time share units and time share plans are allowed. **These Visitor Destination Areas include lands in** Poipu, Lihue, Wailua-Kapaa and **Princeville and are delineated on Visitor Destination Area Maps incorporated as part of this ordinance.**

(emphasis added).

27. **KCC § 8-13.2** adopted by the Council on November 14, 2012 as part of Ordinance No. 935 in its effort to update the CZO by focusing on, as a first step, the organizational and format changes, provides in pertinent part:

(a) **A nonconforming use of land, buildings, or other structures may continue to the extent that the use existed on September 1, 1972 or any amendment hereto, as provided in this Section,** provided that the Planning Commission may, after hearing,

order the termination of a nonconforming use that creates substantial danger to public health or safety.

(b) **If any nonconforming use ceases for any reason for continuous period of twelve (12) calendar months or for one (1) season if the use be seasonal, then the use shall not be resumed** and any use of the land or building thereafter shall be in full conformity with the provisions of this Chapter.

(emphasis added).

28. Enforcement authority, and penalties, of the above Ordinances are set forth in three (3) separate Sections of the *Kaua'i County Code*. They are in pertinent part:

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties.

(a) Enforcement, Legal Procedures and Penalties.

. . .

(2) It shall be the duty of the Planning Commission and Planning Director to enforce the provisions of this Chapter and it shall be the duty of all law enforcement officers of the County of Kaua‘i to enforce this Chapter and all the provisions thereof.

. . .

(b) Civil Fines.

(1) If the Director of the Planning Department determines that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, by mail or delivery, or by posting of the property which address is the most current address reflected in the Real Property tax records, or by publishing such notice in a newspaper of general circulation in the County of Kaua‘i should previous notification

efforts not be accepted, with an order pursuant to this Section. **The order may require the party responsible for the violation to do any or all of the following: (A) correct the violation within the time specified in the order; (B) pay a civil fine not to exceed ten thousand dollars ($10,000.00) in the manner, at the place, and before the date specified in the order; (C) pay a civil fine up to ten thousand dollars ($10,000.00) per day for each day in which the violation persists, in the manner and at the time and place specified in the order.** All civil fines shall be deposited to the Planning Enforcement Account within Fund 251.

(2) **The order shall advise the party responsible for the violation that the order shall become final thirty (30) calendar days after the date of its delivery or posting on the property, or publishing of such notice in a newspaper of general circulation in the County of Kauai.** The order shall also advise that the Director's action may be appealed to the Planning Commission.

(3) The provisions of the order issued by the Director under this Section shall become final thirty (30) calendar days after the service or posting on the property, or publishing of such notice in a newspaper of general circulation in the County of Kaua'i, of the order. The parties responsible for the violation may appeal the order to the Planning Commission pursuant to its rules. The form of this appeal must conform to the Planning Commission's rules. However, an appeal to the Planning Commission shall not stay any provision of the order.

(emphasis added, except for "**Sec. 8-3.5 Enforcement, Legal Procedures and Penalties.**")

Sec. 8-17.6 Penalty.

An owner of any unit which is operated in violation of this Article, and/or any other person, firm, company, association, partnership or corporation violating any provision of this Article, **shall each be fined not less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000.00) for each offense. This civil fine may be in addition to any criminal fines. If any person fails to cease such violation within one (1)**

month, such person shall be subject to a new and separate violation for each day the violation continues to exist.

(emphasis added, except for "**Sec. 8-17.6 Penalty.**").

Sec. 8-17.11 Enforcement Against Illegal Transient Vacation Rentals.

a) In addition to other penalties provided by law, including, but not limited to, Secs. 8-3.5(a) and 8-17.6, the Planning Commission Rules, as amended, the Planning Director, or any member of the public who has duly obtained standing pursuant to rules promulgated by the commission, may initiate proceedings to revoke or modify the terms of a Nonconforming Use Certificate pursuant to the Rules of Practice and Procedures of the Planning Commission, as amended. Violations of conditions of approval or providing false or misleading information on the application or in any information relating thereto at any time during the application process shall be grounds for revocation or cease and desist orders.

(b) **Advertising of any sort which offers a property as a transient vacation rental shall constitute prima facie evidence of the operation of a transient vacation rental on said property and the burden of proof shall be on the owner, operator, or lessee to establish that the subject property is not being used as a transient vacation rental or that it is being used for such purpose legally. If any unit is found to be operating unlawfully, penalties established in Secs. 8-3.5(a) and 8-17.6 shall apply.**

(emphasis added, except for "**Sec. 8-17.11 Enforcement Against Illegal Transient Vacation Rentals.**").

29. If any Finding of Fact herein should be designated as a Conclusion of Law, the same shall be deemed to have been identified as such.

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V. CONCLUSIONS OF LAW.

A. Principles of Statutory Construction.

1. "Courts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." *Robert D. Ferris Trust v. Planning Com'n of County of Kauai,* 138 Hawaiʻi 307, 310, 378 P.3d 1023, 1026 (2016) *quoting State v. Kaakimaka,* 84 Hawaiʻi 280, 289-90, 933 P.2d 617, 626-67 (1997).

2. "The general rule is that repeals by implication are not favored and that if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is to remain in force and the later statute did not repeal it." *Reefshare, Ltd. v. Nagata,* 70 Hawaiʻi 93, 97, 762 P.2d 169, 172 (1988) *quoting State v. Pacariem,* 67 Hawaiʻi 46, 48, 677 P.2d 463, 465 (1984).

3. "[W]here there is a plainly irreconcilable conflict between a general and specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored." *Mahiai v. Suwa,* 69 Hawaiʻi 349, 356-57, 742 P.2d 359, 366 (1987) (internal quotation marks and citations omitted).

4. Another "cardinal rule of statutory construction is that [the courts] must ascertain and give effect to the intention of the legislature, and [they] must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." *Roaring Lion, LLC v. Exclusive Resorts PBL 1, LLC,* 2013 WL 1759002 at 10 (Haw. Ct. App. 2013) *citing Haole v. State,* 111 Hawaiʻi 144, 149, 140 P.3d 377, 382 (2006).

5. "Laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." *In the Interest of CM*, 141 Hawaiʻi 348, 353, 409 P.3d 752, 757 (2017) *quoting State v. Young,* 107 Hawaiʻi 36, 39-40, 109 P.3d 677, 680-81 (2005) (citations, internal quotations marks, brackets, and ellipses omitted; format changed).

6. In addition to all these rules of statutory construction, statutes and ordinances must be interpreted, if possible, to avoid violating constitutional provisions. *Ferris Trust¸* 138 Hawaiʻi at 314, 378 P.3d at 1029 *citing Life of the Land, Inc. v. West Beach Dev. Corp.,* 63 Hawaiʻi 529, 531, 631 P.2d 588, 590 (1981).

7. "When interpreting county charters, municipal ordinances, and administrative rules, the general principles of statutory construction apply." *Ferris*

Trust, 138 Hawaiʻi at 310, 378 P.3d at 1026 *quoting Kellberg v. Yuen,* 131 Hawaiʻi 513, 527, 319 P.3d 432, 446 (2014) (brackets omitted).

8. "It is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." *Hyatt Corp. v. Honolulu Liquor Com'n,* 69 Hawaiʻi 238, 242-43, 738 P.2d 1205, 1208 (1987) (brackets omitted).

9. "Zoning laws, whether statutes or ordinances, inasmuch as they curtail and limit uses of real estate and are in derogation of the common law must be given strict construction and the provisions thereof may not be extended by implication. Nevertheless, they should be read according to the natural and most obvious import of the language when there is no manifest legislative intent contrarywise." *Ferris Trust*, 138 Hawaiʻi at 311, 378 P.3d at 1027 *quoting Maui Cty. v. Puamana Mgmt. Corp.,* 2 Haw.App. 352, 356, 631 P.2d 1215, 1218 (1981) (ellipsis omitted).

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B. Interpretation and Application of *Haw. Rev. Stat.* <u>§ 46-4(a) and KCC § 8-13.2 to KCC § 8-18.1(b).</u>

10. Petitioner first argues the Homestay Operation is a "Lawful Nonconforming Use" permitting her to continue that use notwithstanding the Subject Property is located outside of a Visitor Destination Area in violation of KCC § 8-18.1(b) ("Lawful Nonconforming Use Argument"). See Petitioner's Closing Arguments; Proposed Hearing Officer Report And Recommendation dated January 15, 2020 ("Petitioner's Proposed R&R") at 5-6.[15] In support of the Lawful Nonconforming Use Argument Petitioner relies upon *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2(a). *Id.*, ¶¶8-11. Additionally, Petitioner cites "the Fifth Amendment of the United States Constitution and Article I, § 5 of the Hawaii Constitution [because they] both provide that no person shall be deprived of property without due process of law, nor have property rights taken or damaged without compensation." *Id.* at 6, ¶12 *citing Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. Of Appeals,* 86 Hawaiʻi 343, 353, 949 P.2d 183, 193 (Haw.Ct.App. 1997).

11. The Planning Department counters that the Lawful Continued Use Argument is inapplicable on five (5) grounds. Respondent Planning

[15] Although Petitioner's Proposed R&R does not contain any page numbers, references to the same is based upon the number of the page following the first (1st) page of that document.

Department Of The County Of Kauai's Closing Arguments; Proposed Findings Of Facts And Conclusions O Law dated January 31, 2020 ("Planning Department's Proposed R&R") at 20-24, ¶¶25-43. Those five (5) grounds are:

a. First, *Haw. Rev. Stat.* § 46-4(a) grant of authority to the counties "*shall be liberally construed*" and therefore, that statute may not usurp the zoning ordinances promulgated thereby;[16]

b. Second, Petitioner admitted to discontinuing the Homestay Operation from April 2018 to June 2019 and therefore, has abandoned that use prohibiting her from resuming it under KCC § 8-13.2(b);[17]

c. Third, the Homestay Operation is not continuous "because [Petitioner] was, at least sometimes, renting a dwelling that she did not reside in";[18]

d. Fourth, even if the Homestay Operation was not abandoned or discontinued, the same "would not have been 'lawful'

[16] Planning Department's Proposed R&R at 20-22, ¶¶25-33.
[17] *Id.* at 21, ¶30.
[18] *Id.* at 22, ¶34. Such use would deem the Subject Property to be a "Transient Vacation Rental" in violation of KCC § 8-17.8(a).

because Petitioner admittedly did not have a use permit as required by KCC Section 8-3.2(b)";[19] and

e. Finally, the "powers of the Hearing Officer originate from the Planning Commission, and the Planning Commission does not have authority to recognize Petitioner's prior homestay use as a lawful nonconforming use, nor can the Planning Commission disregard the prohibition contained in KCC § 8-18.1(b)."[20]

12. Principles of statutory construction resolves the issue whether *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2(a) permit Petitioner to continue the Homestay Operation after passage of KCC § 18-18.1 in 2016.

13. *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2 are general in nature because they address all types of nonconforming uses, but KCC § 8-18.1(b) deals only with homestays outside of Visitor Destination Areas. Therefore, the specific provisions of KCC § 8-18.1(b) is favored with respect to homestays over *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2(a) which govern all other nonconforming uses. *See Mahiai,* 69 Hawaiʻi at 356-57, 742 P.2d at 366 (A general rule of statutory construction is that the specific statute will be favored over a general statute of the same subject matter, but both may be given effect if

[19] *Id.* at 22-24, ¶¶38-42.
[20] *Id.* at 24, ¶43.

possible because repeal by implication is disfavored.), *Reefshare, Ltd.,* 70 Hawaiʻi at 97, 762 P.2d at 172 ("The general rule is that repeals by implication are not favored and that if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is to remain in force and the later statute did not repeal it.") and *In the Interest of CM*, 141 Hawaiʻi at 353, 409 P.3d at 757 ("Laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.").

14. KCC § 8-13.2(a) also provides a nonconforming use "**may** continue to the extent that the use existed on September 1, 1972". (emphasis added). However, if that "nonconforming use ceases for any reason for a continuous period of twelve (12) calendar months or for one (1) season if the use is seasonal, then the use **shall not be resumed**" (Discontinuance Requirement"). *Id.* at § 8-13.2(b) (emphasis added). Therefore, continuation of that use is discretionary,[21] but once that nonconforming use ceases for twelve (12)

[21] "The term '**may**' is generally construed to render **optional, permissive, or discretionary** the provision in which it is embodied". *State v. Kahawai,* 103 Hawaiʻi 464, 465, 83 P.3d 725, 728 (2004) (emphasis added).

consecutive calendar months or one (1) season if this use is seasonal, it is mandatory that this nonconforming use **shall not be resumed.**[22] *Id.*

15. Petitioner admitted not having any rentals from April 2018 until June 2019. Transcript at 19. Therefore, the Homestay Operation ceased for a continuous period of at least twelve (12) calendar months prohibiting that nonconforming use from resuming. KCC § 8-13.2(b).[23]

16. *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2 do not prevent the enforcement of KCC § 8-18.1(b) with respect to the Homestay Operation at the Subject Property because they both apply to all types of nonconforming uses, but KCC § 8-18.1(b) specifically governs homestays prohibited outside of Visitor Destination Areas. Alternatively, the Homestay Operation was discontinued for at

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[22] "As used in statutes, contracts, or the like, this word [(i.e. **shall**)] is generally **imperative or mandatory**." *Leslie v. Board of Appeals of County of Hawaii,* 109 Hawaiʻi 384, 394, 126 P.3d 1071, 1081 (2006) *quoting Black's Law Dictionary* 1375 (6th ed. 1990) (emphasis added).

[23] Enforcement of this Discontinuance Requirement appears to have been suspended during the relevant period of time pursuant to the Proclamation of April 15, 2018 by the Governor of the State of Hawaiʻi, and all Supplementary Proclamations issued thereafter as a result thereof, related to the disaster occurrence of heavy rains and flooding beginning April 14, 2018 that caused extensive damage to private and public property impacting the County of Kauai ("April 2018 Flooding"), and Emergency Proclamation of April 14, 2018 by the Mayor for the County of Kauai, and all Supplementary Emergency Proclamations issued thereafter as a result thereof, related to the April 2018 Flooding, However, this argument is waived because it was not raised in Petitioner's Reply To Respondent Planning Department Of The County Of Kauai's Closing Arguments And Proposed Findings Of Fact And Conclusions Of Law dated February 7, 2020. *See generally State v. Moses,* 102 Hawaiʻi 449, 456, 77 P.3d 940, 947 (2003) ("[I]f a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases.").

least twelve (12) consecutive months and therefore, cannot be resumed under KCC § 13.2(b).[24]

C. **Proper Notice Given By The Notice of Violation.**

17. Petitioner next argues the Notice of Violation is defective because it does not set forth the specific facts to support a violation of KCC § 8-18.1(b). See generally Petitioner's Proposed R&R at 7-8, ¶¶16-25. Therefore, the Notice of Violation infringes upon Petitioner's procedural and substantive due process rights. *Id.*

18. The Planning Department responds that procedural due process only requires that Petitioner is provided with "notice and an opportunity to be heard." Planning Department's Proposed R&R at 25, ¶49 *citing Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawaiʻi 217, 243, 953 P.2d 1315, 1341 (1998). This Contested Case and the Hearing has provided Petitioner with that notice and opportunity to be heard. *Id.*

19. The provisions of RPPPC Chapter 6 affords Petitioner adequate notice and the opportunity to present the grounds advanced in her Notice of Appeal. Moreover, KCC § 8-17.11(b) provides that the

[24] Petitioner's "grandfather" argument is dispensed with under both alternatives of this

Advertisement of the Subject Property as a Homestay and/or Transient Vacation Rental "shall constitute prima facie evidence of the operation of a transient vacation rental [and/or homestay rental] on said property and the **burden of proof shall be on the owner . . . to establish that the subject property is not being used as a transient vacation rental [and/or homestay rental] or that it is being used for such purpose legally**." (emphasis added). Therefore, an "actual violation" to commence enforcement action need not be established, but the ultimate burden of proof always remains with the Planning Department. *See generally Adams v. CDM Media USA, Inc.,* 135 Hawaiʻi 1, 43, 346 P.3d 70, 111 (2015) (Once a prima facie case has been established, the burden of producing evidence shifts to the other party, but the burden of proof always remains with the first party).

20. Substantive due process guards against "the government's action [being] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Petitioner's Proposed R&R at 7, ¶20 *citing In re Herrick,* 82 Hawaiʻi 329, 349, 922 P.2d 942, 962 (1996). Such action may be clearly arbitrary and unreasonable if the government's action is not supported by credible

evidence of a sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." *Id. citing Dao v. Zoning Board of Appeals,* 144 Hawaiʻi 28, 44, 434 P.3d 1223, 1239 (Haw.Ct.App. 2019).

21. The Planning Department presented reliable, probative, and substantial evidence that the Homestay Operation was being conducted at the Subject Property. First, the Advertisement is "prima facie" evidence of the Homestay Operation at the Subject Property. *Compare* Exhibit B at 11-18, *with* KCC § 8-17.11(b). Second, Petitioner admitted at the Meeting she was conducting the Homestay Operation at the Subject Property since 2005. Transcript at 11 and 30-31. Third, the Homestay Operation at the Subject Property continued after the Meeting. Transcript at 30-31 and Exhibit G at 13-23.

22. Further, enforcement of KCC § 8-18.1(b) has a substantial relation to the public health, safety, morals, or general welfare of the resident of Kauaʻi as articulated in Ordinance No. 864.[25]

[25] See Finding of Fact No. 23, *infra*. The Findings and Purpose of Ordinance No. 864 applies with equal force to Ordinance No. 1002 and KCC § 8-18.1 because the Council concluded Homestays would be addressed at a later time, but the need to do so was already articulated in Ordinance No. 864.

23. The Notice of Violation, RPPPC Chapter 6, and KCC § 8-18.1(b), satisfy Petitioner's due process rights, both procedurally and substantively.

D. <u>The Notice of Violation's Compliance With KCC § 8-3.5</u>.

24. Petitioner next argues the Notice of Violation does not comport with the requirements of KCC § 8-3.5 because the "Notice of Violation <u>and</u> Order to Pay Fines [is] in one letter." Petitioner's Proposed R&R at 9, ¶27. Instead, "under the CZO[,] the Planning Department must first give notice of a finding of a violation and then if the violation is not cured enter an order, which may require the payment of a fine." *Id.* at ¶28.

25. The Planning Department explains that the Zoning Compliance Notice is the "notice of violation" contemplated by KCC § 8-3.5(b)(1) and the Notice of Violation contains the "order [to pay fines] pursuant to this Section." *See generally* Transcript at 43-46, and *Compare with* KCC § 8-3.5(b)1). *See also Hyatt Corp.,* 69 Hawaiʻi at 242-43, 738 P.2d at 1208 ("It is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative

construction and follow the same, unless the construction is palpably erroneous.”) (brackets omitted).

26. The language of the Zoning Compliance Notice comports with the “notice of violation” contemplated by KCC § 8-3.5(b)(1) because it sets forth the Ordinances deemed to have been violated, advises Petitioner she has fourteen (14) days to terminate the unauthorized “vacation rental operation”, and instructs her to notify the Planning Department of that termination within the stated time period. Exhibit C attached to Planning Department’s MSJ. Failure to do so within those fourteen (14) days would result in enforcement action subjecting her to “a fine of up to $10,000.00 and/or up to $10,000.00 per day, should the violation(s) persist.” *Id.* at 2.

27. The Notice of Violation also comports with KCC § 8-3.5(b)(1) as the “order” to the extent it directs Petitioner to: (a) correct the violation within fourteen (14) days of the date of that “order”; (b) pay a civil fine of $10,000.00 to the Planning Department for that violation within 14 days of the date of the date of that “order”; and (c) pay a civil fine of $10,000.00 per day or each day after the aforesaid fourteen (14) days if the violation is not remedied within that time period. Exhibit D at 2-3.

28. Although the text of KCC § 8-3.5(b) is included in the Notice of Violation, it did not separately advise Petitioner that this “order shall become

final thirty (30) calendar days after the date of its delivery" as required by KCC § 8-3.5(b)(2).[26] *Compare* Exhibit D at 1-3, *with* KCC § 8-3.5(b)(2).

29. Since the Notice of Violation did not notify Petitioner that this order shall become final thirty (30) days after the date of delivery as mandated by KCC § 8-3.5(b)(2), the Planning Department may not impose the civil fine of $10,000.00, nor $10,000.00 per day for each day the Homestay Operation continues at the Subject Property.[27]

E. <u>Constitutional Grounds Advanced By Petitioner</u>.

30. Petitioner finally argues the continued nonconforming use of the Subject Property as a homestay operation is guaranteed under the "Fifth Amendment of the United States Constitution and Article I, § 5, of the Hawaii Constitution [because] both provide that no person shall be deprived of property without due process of law, nor have property rights taken or damaged without

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[26] This requirement in KCC § 8-3.5(b)(2) that "[t]he order **shall advise the party responsible** for the violation that the order shall become final thirty (30) days after the date of its delivery" is MANDATORY. *See generally Leslie*, 109 Hawaiʻi at 394, 126 P.3d at 1081.

[27] Petitioner's related argument that the Notice of Violation imposed an excessive fine for the violation need not be addressed because this Report and Recommendation concludes no civil fines may be imposed upon her since the same did not comply with KCC § 8-3.5(b)(2). See Petitioner's Proposed R&R at 9, ¶30-33. Additionally, this Report and Recommendation need not decide the issue whether the Director was arbitrary, capricious, and abused his discretion in finding a "continuing violation" of the Homestay Operation at the Subject Property. *See Dao*, 144 Hawaiʻi at 47, 434 P.3d at 1242 ("[F]or a determination that a violation of the [CZO] occurred for a **continuous period of time** to be upheld, there must be credible evidence of a

compensation." Petitioner's Proposed R&R at 6, ¶12. In support of this argument, Petitioner cites to the *Waikiki Marketplace* Case for the proposition that "due process principles protect a property owner from having his or her vested property rights interfered with, and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not **abrogate**." 86 Hawaiʻi at 353-54, 949 P.2d at 193-94 (emphasis added).

31. "*Black's Law Dictionary* defines **abrogate** as **abolish** (a law or custom) by formal or authoritative action; to annual or repeal." *MW Builders of Texas, Inc. v. City of Wichita Falls,* 2009 WL 2365443 at 7 (N.D. TX 2009) *quoting Black's Law Dictionary* (Westlaw 2009) (italics in original, internal quotations omitted, and **bold** emphasis added).

32. KCC § 8-18.1(b) prohibiting the Homestay Operation at the Subject Property did not **abrogate or abolish** that nonconforming use. Instead, the Homestay Operation ceased for twelve (12) consecutive months from April 2018 to June 2019 and therefore, KCC § 8-13.2(b) mandated that nonconforming use "**shall not be resumed**." Therefore, KCC § 8-13.2(b) did not abrogate or abolish

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sufficient quality and probative value to enable a person of reasonable caution to support a conclusion that **the violation occurred throughout that period of time.**") (emphasis added).

the Homestay Operation as argued by Petitioner, this ordinance merely prohibited that operation from starting up again.[28]

33. "Taking" of Petitioner's interest in the Subject Property also did not occur because the Homestay Operation ceased due to the April 2018 Flooding, rather than with the passage of Ordinance No. 1002. *Compare* Transcript at 19-20, *with* KCC § 8-18.1(b).[29]

34. Petitioner's constitutional due process rights were not violated by the enforcement of KCC § 8-18.1(b) because that ordinance did not abrogate or abolish the Homestay Operation at the Subject Property, but merely prohibited it from resuming pursuant to KCC § 8-13.2(b). There was also no "taking" for the same reason. Finally, no constitutional violations occurred with the passage of Ordinance No. 1002 because the Homestay Operation was not a prior lawful use since Petitioner did not have a use permit pursuant to KCC § 8-3.2 and/or permit under Ordinance No. 987.[30]

---

[28] See footnote 23, *infra*. Further, the Homestay Operation at the Subject Property was not a lawful use prior to passage of Ordinance No. 1002 because Petitioner did not obtain a permit for that use pursuant to Ordinance No. 987. *See Waikiki Marketplace Inv. Co.,* 86 Hawaiʻi at 354, 949 P.2d at 194 ("Since [*Haw. Rev. Stat.* § 46-4] refers expressly to uses of a building or premises at the time a zoning ordinance takes effect, the protection afforded a property owner under [that statute], relates, on its face, to lawful uses of a building or premises under **existing zoning ordinances.**") (emphasis added).

[29] See also footnote 28, *infra.*

[30] Petitioner should have been aware homestays were regulated by KCC § 8-3.2 prior to the adoption of Ordinance No. 864, and the Council would also be acting on this issue at a later

35. If any Conclusion of Law herein should be designated as a Finding of Fact, the same shall be deemed to have been identified as such.

VI. CONCLUSION.

Based upon all the foregoing, it is recommended that the Planning Commission AFFIRM IN PART the decision of the Planning Director to the extent the Notice of Violation ordered Petitioner to Cease and Desist the Homestay Operation at the Subject Property. However, it is further recommended the Planning Commission REVERSE IN PART the decision of the Planning Director to assess civil fines against Petitioner because the Notice of Violation did not comply with the requirement of KCC § 8-3.5(b)(2) to advise her that "order shall become final thirty (30) calendar days after the date of its delivery".

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time, because she knew of the passage and effect of Ordinance No. 864. *Compare* Transcript at 20-21 and Finding of Fact 24, *with* Finding of Fact 24.

It is further recommended that the Planning Commission REMAND THIS CONTESTED CASE TO THE PLANNING DEPARTMENT for issuance of an "Order" fully complying with all the requirements of KCC § 8-3.5(b) as a condition precedent to any Civil Action against Petitioner should she fail to terminate the Homestay Operation at the Subject Property within the time period stated in that "Order."

DATED at Honolulu, Hawaii, March 30, 2020.

__/s/ Harlan Y. Kimura_____
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kaua'i

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hāʻena, Kauaʻi, Hawaiʻi, identified by Kauaʻi TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on March 30, 2020.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. gwk@hawaiilawyer.com JOANNA C. ZEIGLER, ESQ. JCZ@hawaiilawyer.com Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Attorneys for Petitioner PATRICIA D. McCONNELL	X		X
JOHN S. MACKEY, ESQ. jmackey@goodsill.com CHRISTOPHER P. ST. SURE, ESQ. cstsure@goodsill.com Goodsill Anderson Quinn & Stifel First Hawaiian Center, Suite 1600 999 Bishop Street Honolulu, HI 96813 Attorney for Kaʻāina S. Hull, Director, PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI	X		X
NICHOLAS COURSON, ESQ. First Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: ncourson@kauai.gov Attorney for Planning Commission of the County of Kauaʻi	X		X

	U.S. Mail	Hand Delivery	Email
ELLEN CHING Administrator Office of Boards and Commissions County of Kauaʻi 4444 Rice Street, Suite 150 Līhuʻe, Kauaʻi, HI 96766 Email: eching@kauai.gov asegreti@kauai.gov			X

DATED at Honolulu, Hawaii, March 30, 2020.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

Kimo M. Keawe
Chair

Roy Ho
Vice-Chair

Kanoe Ahuna
Donna Apisa
Wayne Katayama
Sean Mahoney
Glenda Nogami Streufert
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Michael A. Dahilig
Clerk of the Commission

JUL 06 2017

Gregory W. Kugle
1003 Bishop Street, Suite 1600
Honolulu, Hawai'i 96813-6452

Jonathan Chun
4334 Rice Street, Suite 202
Līhu'e, Hawai'i 96766-1388

Subject: **File CC-2017-2**
Petition to Appeal Decision of Planning Director relating to the Forfeiture of TVNCU #4298 (Hale Mahana) for failure to renew
TMK: (4) 5-8-010: 15(3), Haena, Kauai
Alexandra Falk Living Trust, applicant

File CC-2017-3
Petition to Appeal Decision of Planning Director relating to the Forfeiture of TVNCU #4299 (Lihi Kai) for failure to renew
TMK: (4) 5-8-010: 15 (1), Hā'ena, Kaua'i
Alexandra Falk Living Trust, applicant

File CC-2017-4
Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an illegal transient accommodation use
TMK: (4)5-8-005: 5, Hā'ena, Kaua'i
Patricia D. McConnell,applicant

This letter memorializes the actions taken by the Kauai Planning Commission effective February 14, 2017 and June 27, 2017 that referred the above matters to a Hearings Officer regarding the above referenced petitions to appeal.

You will be contacted by a Hearings Officer at a later date with more information about next steps.

Should you have any questions regarding this matter, please contact Myles Hironaka at 808-241-4072.

Sincerely Yours,

MICHAEL A. DAHILIG
Clerk, Kaua'i Planning Commission

CC: Mauna Kea Trask, County Attorney
Jody Higuchi, Deputy County Attorney

MCCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

July 24, 2017

Gregory W. Kugle, Esq.
1003 Bishop Street, Suite 1600
Honolulu, Hawai'i 96813-6452

Re: **File CC-2017-4**
Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an illegal transient accommodation use
TMK: (4) 5-8-005; 5, Haena, Kauai
Patricia D. McConnell, applicant

Dear Mr. Kugle:

I have recently received an assignment to serve as the hearings officer to preside over the above-referenced matter and make the following disclosure:

I am currently a partner in the law firm of McCorriston Miller Mukai MacKinnon, LLP ("M4"). I was previously a partner in M4 from 1989 to mid-2007. I returned to M4 in early 2017 after having worked with other firms over the past ten years. During this ten-year period, David J. Minkin, a partner in the law firm, has handled cases as the attorney for the County of Kauai, its County Council, its Planning Commission and its various departments including the Police Department, Planning Department, and Housing Agency. These matters were pending in administrative proceedings and state and federal courts in Hawaii. Three matters are currently ongoing for the Police Department, Planning Department, and Housing Agency.

I am not involved in any of these past or ongoing matters. I have not discussed any of these matters with Mr. Minkin, nor do I plan to discuss them with him or anyone else either in the law firm or in the County of Kauai.

I believe that I can be fair and impartial as the hearings officer in your matter even though a partner in the firm has represented and continues to represent the County of Kauai as described in this disclosure.

If you have any questions, please feel free to contact me.

Very truly yours,

Nadine Y. Ando

cc: Mauna Kea Trask, County Attorney
Jodi Higuchi, Deputy County Attorney

PO Box 2800 • Honolulu, Hawaii 96803-2800
Five Waterfront Plaza, 4th Floor • 500 Ala Moana Boulevard • Honolulu, Hawaii 96813
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DAMON KEY LEONG KUPCHAK HASTERT

A LAW CORPORATION

October 4, 2017

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VIA E-MAIL ando@m4law.com
& U.S. MAIL

Nadine Y. Ando, Esq.
McCorriston Miller Mukai MacKinnon LLP
Five Waterfront Plaza, 4th Floor
500 Ala Moana Blvd
Honolulu, HI 96813

Re: File CC-2017-4
Petition to Appeal Decision of Planning Director's Decision
Related to the Notice of Violation and Order to Pay Fines for
the operation of an illegal transient accommodation use
TMK: 5-8-005:005, Haena, Kauai
Patricia D. McConnell, applicant

Dear Ms. Ando:

Thank you for your letter dated July 24, 2017, on the above-referenced matter disclosing your current association with the law firm of McCorriston Miller Mukai MacKinnon, LLP. We respectfully request more information regarding the proceedings involving the County of Kauai that your firm is currently handling. Specifically, please provide the name of the cases involving the County of Kauai, all the parties involved, the facts giving rise to the dispute and the witnesses that might be called to testify in those cases. In addition, we request that you disclose whether you or your firm have other clients that have or might have an interest in the outcome of the proceedings that you will be hearing. Examples of other clients that might have an interest in this matter could include hotels, timeshares or other visitor accommodation facilities that would benefit if the number of transient vacation rentals is reduced.

We would like to request that you disclose any known facts that a reasonable person would consider likely to affect your impartiality as a hearings officer in this matter, including whether you or your firm has a financial or personal interest in the outcome of the proceedings in which you will be hearing and whether you or your firm has an existing or past relationship with any of the parties to the proceedings you will hear, their counsel or representatives, or witness. Last, please provide us with a copy of you or your firm's application or proposal to be a hearings

officer for the County of Kauai and a copy of the published announcement or notice to which you or your firm was responding.

Thank for your attention to this matter. Please call if you have any questions.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
VERONICA A. NORDYKE

GWK/VAN:rp
367479

Donna Apisa
Chair

Glenda Nogami Streufert
Vice-Chair

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Michael A. Dahilig
Clerk of the Commission

JUL 31 2018

County of Kauai
Boards & Commissions
4444 Rice Street, Suite 150
Līhu'e, Hawai'i 96766

Subject: **File CC-2017-2**
Petition to Appeal Decision of Planning Director relating to the Forfeiture of TVNCU #4298 (Hale Mahana) for failure to timely renew
TMK: (4) 5-8-010: 15(3), Haena, Kauai
Alexandra Falk Living Trust, applicant

File CC-2017-3
Petition to Appeal Decision of Planning Director relating to the Forfeiture of TVNCU #4299 (Lihi Kai) for failure to timely renew
TMK: (4) 5-8-010: 15 (1), Hā'ena, Kaua'i
Alexandra Falk Living Trust, applicant

File CC-2017-4
Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an illegal transient accommodation use
TMK: (4)5-8-005: 5, Hā'ena, Kaua'i
Patricia D. McConnell,applicant

This letter is to inform you that the Kauai Planning Commission at its meeting held on July 24 2018 confirmed the referral of the above referenced appeals to the County of Kaua'i Boards and Commission to conduct hearings related to the above appeals.

Services should include but not be limited to: conduct the hearing, dispose of all pre-hearing motions, receive and record all evidence including subpoenaing any witness, and render a recommended filings of fact, conclusions of law, decision and order for the Planning Commission's Action.

Copies of the files listed above will be forwarded to your office. Please contact Myles Hironaka at 241-4072 should you have any questions.

Sincerely Yours,

MICHAEL A. DAHILIG
Clerk, Kaua'i Planning Commission

CC: Mauna Kea Trask, County Attorney
Jodi Higuchi, Deputy County Attorney
Jonathan Chun
Gregory Kugle

Bernard P. Carvalho Jr.
Mayor

Wallace G. Rezentes Jr.
Managing Director

Nicholas R. Courson
Boards and Commissions Administrator

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November 13, 2018

Harlan Y. Kimura, Esq.
Central Pacific Plaza
220 South King Street, Suite 1660
Honolulu, Hawai'i 96813

Subject: **File CC-2017-4**
Petition to Appeal Decision of Planning Director's Decision related to the Notice of Violation and Order to Pay Fines for the operation of an illegal transient accommodation use.
TMK: (4) 5-8-005:5, Hā'ena, Kaua'i
Patricia McConnell, Applicant

Dear Mr. Kimura,

Pursuant to Contract No. 9751, the Kaua'i Planning Commission has assigned the above referenced appeal to you.

Thank you.

Nicholas R. Courson
Administrator

hawaiilawyer.com®

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[1]Admitted in Hawaii and Washington
[2]Admitted in Hawaii and California
[3]Admitted in Hawaii and Florida

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July 16, 2019

VIA HAND DELIVERY & EMAIL

Harlan Y. Kimura, Esq.
Hearing Officer
County of Kauai Planning Commission
220 S. King Street, Suite 1600
Honolulu, Hawaii 96813
hyk@harlankimuralaw.com

Re: Patricia McConnell, CC-2017-4
TMK: (4) 5-8-005:005

Dear Hearing Officer Kimura:

In contested case hearing CC-2017-4, Petitioner Patricia McConnell is scheduled to have a contested case hearing on August 7, 2019. Ms. McConnell is unavailable on that date because she will be off island, thus, this letter is a request that the Hearing Officer continue Ms. McConnell's contested case hearing so that she may be present to give her testimony.

At a recent status conference, counsel for Ms. McConnell, Joanna Zeigler, represented that Ms. McConnell would not be available for the August 7, 2019 contested case hearing. At that time, the information known was that Ms. McConnell would be off island for family matters. The Hearing Officer decided that because the date had been scheduled for several months, the hearing date would stand but Ms. McConnell could provide a written request to continue the matter to a later date. After speaking with Ms. McConnell, Ms. McConnell stated that she will be off island for her god daughter's wedding. Ms. McConnell is the only family that her god daughter has and needs to be present for the wedding as well as to help her god daughter afterwards. Because of this, the earliest Ms. McConnell believes she could return to Hawaii is August 8 or 9.

Ms. McConnell's testimony is necessary to fully present the issues related to her challenge to the Notice of Violation that was issued to her by the Planning Department. Ms. McConnell's lead counsel, Gregory Kugle, is not available the week of August 12, however, he can rearrange his schedule to be present the week of August 19 or August 26. Ms. McConnell is available on these dates as well.

This request would merely push Ms. McConnell's hearing date one or two weeks and thus is not a request for a general delay. However, it would give Ms. McConnell a full and fair opportunity to present her case, which includes being present to give her testimony.

Thank you for your attention to this matter. Should you have any questions, please feel free to contact the undersigned at (808) 531-8031 or gwk@hawaiilawyer.com and jcz@hawaiilawyer.com.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT

Gregory W. Kugle
Joanna C. Zeigler

GWK/JCZ:rp
452566

cc: Maryann Sasaki, Esq.
Nicholas Courson, Esq.
Anela Segreti

DEPARTMENT OF PLANNING
THE COUNTY OF KAUA'I

DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHILIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

To: Planning Commission

From: Ka`aina S. Hull,
Director of Planning

Ka`aina Hull (Apr 9, 2020)

Re: Hearing Officer's Report and Recommendation of Contested Case re Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK (4) 58005005 containing 26,092 sq.ft., ***Patricia D. McConnell***, petitioner.

Date: April 9, 2020

Background.
The attached Report and Recommendation from the Hearings Officer received on April 1, 2020 is in regards to the Petition to Appeal Decision of Planning Director Relating to the Notice of Violation and Order to Pay Fines Related to an illegal and unpermitted transient accommodations for Property situated at Hā'ena, Kaua'i, Hawai'i, identified as TMK 58005005, containing a total area of 26,092 sq.ft..

Recommendation.
That the Planning Commission adopt the Report and Recmmendation as provided for by the Hearing Officer.

Attachment

J. 1.
MAY 1 2 2020

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BOARDS & COMMISSIONS

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of :	)	CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	HEARING OFFICER'S REPORT AND RECOMMENDATION OF CONTESTED CASE; CERTIFICATE OF SERVICE
	)	HEARING (Held):
	)	Date: August 30, 2019
	)	Time: 9:00 a.m.
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	)	
Respondent.	)	

HEARING OFFICER'S
REPORT AND RECOMMENDATION OF CONTESTED CASE

I. INTRODUCTION.

This Contested Case arises as a result of the letter stamp-dated May 23, 2017 entitled "**NOTICE OF VIOLATION & ORDER TO PAY**

FINES" ("Notice of Violation") issued by Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I ("Planning Department") to Petitioner PATRICIA D. McCONNELL ("Petitioner"). Exhibit D[1]. The Notice of Violation advised Petitioner to immediately Cease and Desist the use of her property located at 4813 Ananalu Road in Hanalei, Kauai for "transient accommodations"[2] because it is in a location not designated as a Visitor

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[1] All Exhibits identified by **Alphabets** were introduced by the Planning Department. Conversely, all Exhibits referenced by **Numbers** originated from Petitioner. Hearing Officer's Scheduling Order dated December 14, 2018 ("Scheduling Order") at 2.

[2] "**Transient Accommodations**" as used in the Notice of Violation refers to a "**Homestay**" as defined in *Kaua'i County Code* ("KCC") § 8-1.5.

A **Homestay** is "an owner occupied ***dwelling unit*** in which overnight accommodations are provided to ***transient*** guests within the same dwelling unit in which the owner resides and the respective owner currently benefits under Sec. 5A-11 of this Code for a homeowners' exemption for the homestay site. A ***guest house*** may not be used as accommodations for transient guests in a homestay operation. *Id. (emphasis added).*

A **Dwelling Unit** is defined as "any ***building*** or any portion thereof which is designed or intended for occupancy by one (1) family or persons living together or by a person living alone and providing complete living facilities, within the unit for sleeping, recreation, eating and sanitary facilities, including installed equipment for only one (1) ***kitchen***." *Id.* (emphasis added).

Transient is "any person who owns, rents, or uses a dwelling unit or a portion thereof **for one hundred eighty (180) days or less,** and which dwelling unit is not the person's primary residence under the Internal Revenue Code. . . ." *Id.* (emphasis added).

A **Guest House** is "a building with a floor area of no more than five hundred (500) square feet, may contain a kitchen, and is used for dwelling purposes by guests, tenants, or owner(s). A guest house shall not be used for a transient vacation rental (TVR) or homestay operation within or outside of the ***visitor destination area (VDA)***." *Id.* (emphasis added).

A **Building** is defined as "a roofed ***structure***, built for the support, shelter or enclosure of persons, animals, chattels or property of any kind. The word 'building' includes the word 'structure.'" *Id.* (emphasis added).

A **Kitchen** is defined as "any room used or intended or designed to be used for cooking and preparing food." *Id.*

Visitor Destination Areas or **VDAs** "are those areas designated as Visitor Destination Areas on County of Kaua'i Zoning Maps." *Id.* and *See also* Ordinance No. 436 adopted on September 7, 1982 by the County of Kaua'i County Council ("Ordinance No. 436").

Destination Area. *Id.* at 1. After receiving the Notice of Violation, Petitioner submitted a timely **Notice of Appeal and Demand for Contested Case Hearing** dated June 9, 2017 through her counsel, Gregory W. Kugle, Esq., and Veronica A. Nordyke, Esq., of the law firm of Damon Key Leong Kupchak Hastert ("Notice of Appeal").

II. PROCEDURAL HISTORY.

Pursuant to the Hearing Officer's ***First Amended*** Scheduling Order dated July 5, 2019 ("First Amended Scheduling Order"), the Planning Department submitted Respondent Planning Department Of The County Of Kauai's Motion For Summary Judgment dated July 9, 2019 ("Planning Department's MSJ") arguing there is no genuine issue of material fact that Petitioner is operating the Subject Property as a homestay outside of a VDA in violation of KCC § 8-18.1(b). Attached to the Planning Department's MSJ is the Declaration of Mike Laureta ("Laureta Declaration"), the Program Manager and Custodian of Records for the Planning Department.[3] The Exhibits appended to the Laureta Declaration contained copies of documents in the Investigation File offered in support of the

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A **Structure** is defined as "anything constructed or erected which requires location on the ground or which is attached to something having location on the ground . . ." *Id.*

[3] See Transcript of the Contested Case Hearing held on August 30, 2019 in this Contested Case; CC-2017-4 ("Transcript") at 35-36.

Notice of Violation. Finally, the Declaration of Britni Ludington-Braun ("Ludington-Braun Declaration"), ADU/TVR Enforcement Specialist with the Planning Department,[4] sets forth the details regarding Petitioner's meeting with her and Mr. Andres "Bambi" Emayo ("Emayo"), Supervising Inspector for the Enforcement Section of the Planning Department,[5] on April 12, 2017 as a result of the Zoning Compliance Notice stamp-dated January 11, 2017 ("Zoning Compliance Notice").

Petitioner Patricia McConnell's Memorandum In Opposition To Respondent Planning Department Of The County Of Kauai's Motion For Summary Judgment dated August 14, 2019 ("Memorandum In Opposition") responded that the Planning Department's MSJ should be denied on five (5) grounds. First, the Planning Department's MSJ is "factually unsupported" because the Laureta Declaration and Ludington-Braun Declaration are deficient and void of facts to support the Zoning Compliance Notice and/or Notice of Violation. Memorandum In Opposition at 5. Second, the Planning Department failed to submit evidence of "an actual violation." *Id.* at 6-7. Instead, the Notice of Violation is supported by Internet postings of advertisements for daily rental of the Subject Property and reviews of guests allegedly having stayed at that location. *Id.* Third, the

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[4] SeeTranscript at 101.
[5] See Transcript at 54.

$150,000.00 fine imposed by the Notice of Violation is not supported by the facts and unconstitutionally excessive. *Id.* at 7-9. Fourth, the Planning Department refused to comply with Petitioner's Discovery Request and therefore, on or about July 10, 2019 submitted a Uniform Information Practices Act Request For Government Records to obtain the requested documents ("UIPA Request").[6] *Compare Id.* at 9, *with* Exhibit 1 attached to Memorandum In Opposition. Finally, Summary Judgment would deny Petitioner's right to a Contested Case Hearing pursuant to RPPPC Rule 1-9-3 and Chapter 91 of the *Hawai'i Revised Statutes.* Memorandum In Opposition at 9-10.

In reply to the Memorandum In Opposition, the Planning Department noted Petitioner admitted to operating a homestay outside of a VDA. Respondent Planning Department Of The County Of Kaua'i's Reply To Petitioner Patricia McConnell's Memorandum In Opposition To Respondent County of Kauai's Motion For Summary Judgment ("Planning Department's Reply") at 2. Secondly, the Comprehensive Zoning Ordinance ("CZO") prohibits homestay operations outside of VDAs pursuant to KCC § 8-18.1(b). *Id.* at 7-8. Finally, KCC § 8-3.5(b) permits the Planning Department to impose fines of up to $10,000.00 **per day**. *Id.* at 7-8.

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[6] The Planning Department is permitted to refuse Petitioner's Discovery Request pursuant to Rule 1-6-9(b) of the *Rules of Practice and Procedure of the Kaua'i County Planning*

The Planning Department's MSJ came on for hearing before this Hearing Officer at 9:00 a.m. on August 30, 2019 ("MSJ Hearing"). Gregory W. Kugle appeared on behalf of Petitioner. Maryann Sasaki appeared on behalf of the Planning Department, along with its duly authorized representative Emayo joining her later in these proceedings. Transcript at 24-25. Although the Agency Hearing Notice for this Contested Case was prepared and filed with the Office Of The County Clerk, County of Kaua'i, State of Hawai'i, and timely posted pursuant to RPPPC Rule 1-6-5 and *Haw. Rev. Stat.* § 91-9, no other parties or members of the general public appeared at the Hearing. Transcript at 4.

After receiving arguments summarizing the respective positions of the Planning Department and Petitioner, this Hearing Officer DENIED the Planning Department's MSJ. *Id.* at 3-4. The Planning Department's MSJ was denied because neither the Laureta Declaration nor the Ludington-Braun Declaration stated those declarants were competent to testify to the matters set forth in their declarations. *Id.* at 4. Moreover, the Laureta Declaration was conclusory in nature, rather than setting forth specific undisputed facts which support the Planning Department's arguments that it should be entitled to judgment as a matter of law. See Memorandum In Opposition at 4 *citing GECC Financial Corporation.*

Commission (Codified May 2014) ("RPPPC").

v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw.Ct.App. 1995) and Transcript at 4.[7]

The final preliminary matter concerned the exhibits to be admitted into evidence. Transcript at 4-5. First, Exhibits 1 through 5, and Exhibit D, were admitted into evidence by stipulation. *Id.* at 5. Second, Petitioner objected to Exhibits A, B, C, E, and F on grounds they appear to be documents from the Planning Department's Investigation File which were not previously provided to her.[8] *Id.* at 5-7. Therefore, Petitioner argued "it is unfair and it's trial by surprise" by not having advance copies of those exhibits. *Id.* at 6. This Hearing Officer OVERRULED Petitioner's objections to those exhibits because the *Hawai'i Rules of Evidence* do not apply to these proceedings under RPPPC Rule 1-6-17(a) and therefore, would permit their introduction by the Planning Department.[9] Transcript at 7. To address Petitioner's claim of "unfair surprise," this Hearing Officer offered to continue the evidentiary portion of the hearing ("Hearing") should she determine additional research or preparation would be required to adequately oppose the evidentiary value of those exhibits. *Id.*

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[7] The denial of the Planning Department's MSJ on these grounds dispenses with the need to address the other arguments set forth in the Memorandum In Opposition.
[8] See footnote no. 6, *infra.*
[9] Exhibits A, B, C, and E were in fact offered and admitted into evidence. See Transcript at 55-63. However, the Planning Department did not offer Exhibit 7 into evidence. See *Id.* at 1-120.

III. DEVELOPMENTS DURING HEARING.

During the Hearing the Planning Department also offered Supplemental Exhibit G into evidence. *Id.* at 108. Exhibit G is the Planning Department's Investigation Report dated July 10, 2018 concerning the transient accommodations at the Subject Property. *Id.* at 101-07. On January 17, 2020, the Planning Department provided a Supplemental Exhibit List and Exhibit G to all the parties as previously directed by this Hearing Officer. Transcript at 112.

Also during the Hearing testimony was presented that the Planning Department did NOT receive the UIPA Request. Minutes Of Contested Case Hearing dated August 31, 2019 ("CCH Minutes") at 2 and Transcript at 94-96. Therefore, upon conclusion of the Hearing Petitioner requested leave to submit another UIPA Request ("UIPA Request II"). CCH Minutes at 2 and Transcript at 117. At stated times, Petitioner was requested to provide Status Reports regarding the Planning Department's response to UIPA Request II. CCH Minutes at 3 and Minute Order Regarding Pending Matters dated October 9, 2019 at 2-3. Since Petitioner subsequently reported the Planning Department rejected UIPA Request II, the Hearing was closed pursuant to RPPPC Rule 1-6-11(j) and a briefing schedule issued for submission of Closing Arguments and/or Proposed Findings of Fact and Conclusions of Law. Minute Order Regarding Telephone

Conference dated December 12, 2019 at 2-3. The requested Closing Arguments and/or Proposed Findings of Fact and Conclusions of Law were timely received.[10]

IV. FINDINGS OF FACT.

A. The Parties and Subject Property.

1. Petitioner is the owner of the real property located at 4813 Ananalu Road, Hanalei, Kaua'i, Hawai'i 96714, TMK No. (4) 8-005:005 which is the subject of this Contested Case ("Subject Property"). Exhibit A at 1.

2. The Subject Property is located outside any of the Visitor Destination Areas. Transcript at 36-37 and see also Ordinance No. 436 at 1 and 8-11.

3. Petitioner has been residing at the Subject Property as her principal residence since she purchased it in 2004. Exhibit "3" at 1 and Transcript at 8-9. She began operating the Subject Property as a homestay from 2005 ("Homestay Operation"). Transcript at 9.

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[10] The issuance of this Report and Recommendation has been delayed due to the: (a) COVID-19 Pandemic; (b) Proclamation issued by the Governor of the State of Hawai'i dated March 4, 2020, Supplementary Proclamation dated March 16, 2020, Second Supplementary Proclamation dated March 21, 2020 and Third Supplementary Proclamation dated March 23, 2020; and (c) Proclamation COVID-19 [Novel Coronavirus] dated March 4, 2020 issued by the Mayor of the City and County of Honolulu, Supplemental Proclamation Of Emergency Or Disaster (COVID-19 [Novel Coronavirus]) dated March 18, 2020, Emergency Order No. 2020-01 (COVID-19 [Novel Coronavirus]), and Emergency Order No. 2020-02.

4. In 2005 Petitioner inquired with the Planning Department as to the requirements for the Homestay Operation. *Id.* at 10. At that time only a State of Hawai'i General Excise Tax License and Transient Accommodations Tax License were required for the Homestay Operation. *Compare Id., with* Ordinance No. 935 adopted by the County of Kaua'i County Council ("Council") on November 14, 2012 and codified as KCC § 8-3.2, as amended.

5. The Homestay Operation which began in 2005 continued through the date of the Hearing. Compare *Id.* at 11, *with* 30-31.

6. The Planning Department is the governmental agency responsible for enforcing, among other things, the provisions of the CZO set forth in Chapter 8 of the *Kaua'i County Code*. The Charter Of The County of Kaua'i (2018 Codified Version), Article XIV, Section 14.05.

B. <u>Zoning Compliance Notice</u>.

7. On January 10, 2017, Emayo began an investigation of the Subject Property to determine its compliance with the CZO. *See generally* Transcript at 54-66. He prepared an Investigation Report dated January 10, 2017 based upon his discovery that transient accommodations were being offered at the Subject Property ("Report I"). Exhibit B.

8. Report I contained a printout of an Airbnb advertisement ("Advertisement") of a "luxury jungle retreat cottage . . . of about 1400 sq[uare] feet of space and has two bedrooms, a living room, a full kitchen, and enclosed lanai, a full bathroom and an outdoor shower."[11] Exhibit B at 15. There was also a separate cottage built onto the back of the house on the ground floor that could be rented out to other guests and identified as the "Sea Turtle Cottage."[12] *Id.* and see also Exhibit G at 13-23.

9. "By matching the airbnb's website (https://www.airbnb.com/rooms/12622481) and pictures with Pictometry and cross checking with Real Property Division records (Tax Classification – Vacation Rental), [Emayo] was able to determine the Tax Map Key and Property Owner of [that] transient accommodation operation." *Id.* at 1. It was the Subject Property owned by Petitioner. *Id.*

10. Petitioner and the Subject Property were not issued a Non-Conforming Use Certificate or applicable permit to conduct this transient accommodation outside a Visitor Destination Area and therefore, was in violation of KCC §§ 8-17.8 and 8-18.1(b). Exhibit B at 2.

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[11] The Advertisement also indicated the "luxury jungle retreat cottage" would be available to rent because Petitioner lives in a separate studio on the property. Exhibit B at 15.

11. By letter stamp-dated January 11, 2017 entitled "**ZONING COMPLIANCE NOTICE**", the Planning Department advised Petitioner its investigation revealed the Subject Property was being used "**for Transient Accommodation outside the designated Visitor Designation Area [and therefore,] constitutes a violation.**" Exhibit C at 1. The ordinances cited were KCC § 8-18.1(b) related to homestay operations, and § 8-17.8 for Transient Vacation Rentals.[13] *Id.*

12. The Zoning Compliance Notice further directed Petitioner to immediately "[c]ease and desist the use of the [S]ubject [P]roperty as a Transient Accommodation(s) . . . [and] Cancel all Transient Accommodations commitments for the property." *Id.* at 2. Petitioner's failure to comply with this directive "may result in a fine up to $10,000.00 and/or up to $10,000.00 per day, should the violation(s) persist." *Id.*

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[12] It is unclear from the evidence introduced at the Hearing whether the "Sea Turtle Cottage" is the separate studio Petitioner lives in and referenced in the Advertisement. See footnote 11, *infra.*

[13] A "**Transient Vacation Rental**" or "**TVR**" is defined as "a dwelling unit which is provided to transient occupants for compensation or fees, including club fees, or as part of interval ownership involving persons unrelated by blood, with **a duration of occupancy of one hundred eighty (180) days or less.**" *Id.* (emphasis added). Apparently this violation was also included in the Zoning Compliance Notice because the Advertisement noted the "entire portion of the main house [(i.e. the luxury jungle retreat cottage) would be available to rent because Petitioner] . . lives in a separate studio on the property . . ." *Compare* Exhibit B at 15, *with* Transcript at 75.

13. The Zoning Compliance Notice was addressed to Petitioner at 104 Endlich Dr., Santa Cruz, CA 95060. *Id.* This was also the mailing address of Petitioner as of January 10, 2017 according to the records of the Real Property Assessment Division of the County of Kaua'i. Exhibit B at 4 and Transcript at 74.

14. Petitioner acknowledged receipt of the Zoning Compliance Notice on April 1, 2017 when a person came to the Subject Property and personally served her with it. Transcript at 12-13.

15. At the request of Petitioner, on April 12, 2017 she met with Emayo and Ms. Britni Ludington-Braun ("Ludington-Braun") to discuss her response to the Zoning Compliance Notice ("Meeting"). Transcript at 78. According to Emayo, to remedy the violation Petitioner could either: (a) submit a written remedial action plan; (2) remove the internet advertisement for the homestay rental of the Subject Property; and/or (3) "work with the Planning Department to rectify the violation." Transcript at 79.

16. Following the Meeting, Petitioner submitted a letter dated April 13, 2017 to the Planning Department stating her belief is that she "have (sic) not, and have (sic) never, been in violation of any of the older county ordinances." Exhibit E at 12. Petitioner was of that opinion because she assumed the Homestay Operation at the Subject Property was "grandfathered" from the prohibition of homestays outside of VDAs pursuant to Ordinance No. 1002 adopted by the

Council on May 18, 2016 ("Ordinance No. 1002"). See Transcript at 14 and 79. Nonetheless, in her own words she further stated "I wish to assure you I am, and will, make every attempt possible to assure I am in compliance with ordinances that apply to me and my home here in Kauai." *Id.*

C. **Notice of Violation.**

17. On May 16, 2017 Emayo conducted a follow-up investigation to determine whether Petitioner ceased the Homestay Operation at the Subject Property and cancelled all future bookings ("Report II"). Exhibit E. Emayo found website advertisements continuing to offer the Subject Property as a Transient Accommodation. *Id.* at 4-6. There were also two (2) reviews of guests staying at the Subject Property in April 2017. *Id.* at 7.

18. Based upon Report II, Emayo prepared the Notice of Violation reminding Petitioner that the Zoning Compliance Notice required her to "Cease and Desist the use of the [S]ubject [P]roperty for transient accommodations [and cancel all future commitments for such use]." Exhibit D at 1. The Notice of Violation also referenced the Meeting and confirmed "the continued transient accommodation operation (Homestay) use at the [S]ubject [P]roperty is a violation

of the Comprehensive Zoning Code, Chapter 8, Kaua'i County Code, 1987, as Amended".[14] *Id.*

19. Due to Petitioner's refusal to comply with the Zoning Compliance Notice and instructions at the Meeting, Petitioner was "**ordered to pay a fine of ten thousand dollars ($10,000.00) for the above noted violations to the Planning Department**". *Id.* at 2 (emphasis in original). If those violations were not remedied within 14 days of the Notice of Violation, "[**a]n additional fine of $10,000.00 per violation, per day, for each day in which such violation persists shall be levied.**" *Id.* at 3 (emphasis in original).

D. <u>Appeal Of Notice of Violation</u>.

20. By letter dated June 9, 2017 Counsel for Petitioner appealed the Notice of Violation to the Kaua'i Planning Commission ("Commission") pursuant to RPPPC Chapter 9 on two (2) grounds. See Notice of Appeal. First, Petitioner argued "[u]pon implementation of the Homestay Ordinance [(i.e. Ordinance No. 1002 codified as KCC § 8-18.1)], [her] business became a vested, non-conforming use. Thus, she is not subject to Sec. 8-18.1 of the CZO, or subject to the associated fines." Notice of Appeal at 2. Second, "the Director [of the

[14] Unlike the Zoning Compliance Notice, the Notice of Violation only referenced the Homestay Operation because the Planning Department "had no evidence of continued use [of the Subject Property as also a Transient Vacation Rental]." Transcript at 87.

Planning Department] acted erroneously, arbitrarily, and manifestly abused his discretion when he ignored [Petitioner's] valid concerns about the applicability [of the] Homestay Ordinance to her business and issued the [Notice of Violation]." *Id.*

E. Relevant Authorities and <u>Pertinent Legislative History.</u>

21. ***Haw. Rev. Stat.* § 46-4(a)** provides in pertinent part:

> (a) This section and any ordinance, rule, or regulation adopted in accordance with this section shall apply to lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.
>
> **Zoning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county.** Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner. Zoning in the counties of Hawaii, Maui, and Kauai means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district to carry out the purposes of this section. In establishing or regulating the districts, full consideration shall be given to all available data as to soil classification and physical use capabilities of the land to allow and encourage the most beneficial use of the land consonant with good zoning practices. **The zoning power granted herein shall be exercised by ordinance which may relate to:**
>
> . . .
>
> **(2) The areas in which residential uses may be regulated or prohibited;**

. . .

(4) The areas in which particular uses may be subjected to special restrictions;

. . .

(12) Other regulations the boards or city council find necessary and proper to permit and encourage the orderly development of land resources within their jurisdictions.

The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

. . .

The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole. This section shall not be construed to limit or repeal any powers of any county to achieve these ends through zoning and building regulations, except insofar as forest and water reserve zones are concerned and as provided in subsections (c) and (d). [(This paragraph shall hereafter be referred to as the "**Liberal Construction Provision**".)]

Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the

ordinance takes effect; **provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out** of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. **In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses.** Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262. [(This paragraph shall hereafter be referred to as the "**Continued Lawful Use Provision**".)]

(emphasis added).

21. **KCC § 8-17.8** adopted by the Council on February 20, 2008 as part of Ordinance No. 864 provided in pertinent part:

Sec. 8-17.8 Single Family Transient Vacation Rentals.

(a) Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, **single-family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas.**

(second emphasis added).

22. **KCC § 8-17.10** also adopted by the Council as part of Ordinance No. 864 provided in pertinent part:

Sec. 8-17.10 Nonconforming Use Certificates for Single-Family Vacation Rentals.

(a) The purpose of this section is to provide a process to identify and register those single-family transient vacation rentals as nonconforming uses which have been in lawful use prior to the

effective date of this ordinance and to allow them to continue subject to obtaining a nonconforming use certificate as provided by this section.

(b) The owner, operator or proprietor of any single-family transient vacation rental which is operating outside of a Visitor Destination Area on the effective date of this ordinance shall by March 30, 2009, obtain a nonconforming use certificate for single family vacation rentals.

. . .

(f) **Failure to apply for a nonconforming use certificate by October 15, 2008 or failure to obtain a nonconforming use certificate by March 30, 2009, shall mean that the alleged nonconforming use is not a bona fide nonconforming use, and it shall be treated as an unlawful use,** unless the applicant demonstrates to the satisfaction of the Planning Commission that the alleged vacation rental use meets the criteria under Section 8-17.10(c) and (d). The Planning Director shall prepare an application form which shall be available to the public by March 30, 2008.

(emphasis added, except for "**Sec. 8-17.10 Nonconforming Use Certificates for Single-Family Vacation Rentals.**").

23. The intent of the Council in adopting **Ordinance No. 864** was, in pertinent part, as follows:

SECTION 1. Findings and Purpose.

The Council of the County of Kaua'i finds that there is a compelling need to regulate single-family transient vacation rentals on Kaua'i. Single-family transient vacation rentals are occurring at a greater rate and inflicting a larger impact on the community of Kaua'i than was ever anticipated in the County's original Comprehensive Zoning Ordinance. While this type of visitor unit could be compatible with the character and nature of Kaua'i and while it has certain positive advantages to the community and is desirable in terms of offering a mix of accommodations to the visitor,

the uncontrolled proliferation of vacation rentals in residential and other areas outside the Visitor Destination Areas (VDAs) is causing significant negative impacts to certain residential neighborhoods, foreshadowing similar potential impacts on other areas of the island[.]

The County General Plan, updated in the year 2000, recognizes this need by its policy for "Alternative Visitor Accommodations," which reads as follows:

"4.2.8.2 Alternative Visitor Accommodations

(a) The County of Kaua'i shall recognize alternative visitor accommodations, such as B&Bs, vacation rentals, inns, cabins, and retreat centers.

(b) The County shall enact clear standards and permit processes for regulating alternative visitor accommodation structures and operations in Residential, Agriculture, Open, and Resort zoning districts.

. . .

Census data shows that seasonal rentals account for 45% of the new housing units built on Kaua'i between 1990 and 2000, a greater percentage than housing built for long-term renters (14%) or for owner-occupied use (36%). Since 2000, out of the 2,050 new residential units, 1,070 have been built for the seasonal homes market and less than half have been for local families to rent (46) or own (936). **The potential for vacation rental use increases the value and thus the selling price and investment rating of property on Kaua'i, which increases prices and adds another potential layer of speculation in the real estate market. This also means that the limited available infrastructure and resources on Kaua'i, including roads, water, sewer capacity, building materials, and contractor time are being used primarily for expensive second or third homes rather than the primary home needs of local residents.**

In oceanfront or other places of premium real estate value, second and third homes and vacation rentals (often one and the

same) are displacing traditional neighborhoods where people of low and moderate income have been able to live in the past. Besides contributing to a lack of affordable housing in the community, this is changing the social character of neighborhoods where neighbors used to know each other. This has tended to make these neighborhoods more vulnerable to crime. While regulating single-family vacation rentals will not guarantee more affordable housing, it will dampen speculation and bring a halt to uncontrolled growth and cumulative impacts of vacation rentals which have affected the traditional neighborhoods of 'Anini and Ha'ena, and which could or are beginning to also affect neighborhoods such as Waimea Valley, Kekaha, and the makai side of Kapa'a Town.

. . .

The purpose of this bill is to restore a balance between primary residences and single-family transient vacation rentals by: 1) requiring registration of vacation rentals or nonconforming use certificates and setting standards for all vacation rentals, 2) explicitly prohibiting new single-family vacation rentals outside visitor destination areas (multi-family vacation rentals are already so prohibited), and 3) identifying and allowing nonconforming uses where single-family vacation rentals have been operating lawfully prior to approval of this bill.

(emphasis added).

24. **With respect to Homestays**, Ordinance No. 864 indicated that:

This bill does not apply to a bed and breakfast unit ("Homestay"). It is the intention of the Council to address these units as a separate matter after establishing a regulatory framework for single-family transient vacation rentals. Homestays are presently regulated through the use permit process [pursuant to KCC § 8-3.2].

(emphasis added).

25. As indicated by the Council, **Ordinance No. 1002** was adopted on May 18, 2016 to address regulation of Homestays, and provided in pertinent part:

> SECTION 1. Findings and Purpose: The Council finds the 2000 Kaua'i General Plan recognized the need "to develop a clear policy regarding B&Bs and vacation rentals" The General Plan recommended an implementing action to amend the CZO to facilitate the permitting of existing, nonconforming alternative visitor accommodations. The Council complied with the policy of the General Plan and grandfathered existing single-family transient vacation rentals (SFTVRs) that registered and met the prior use requirements established in Article 17 of the CZO.
>
> . . .
>
> Although the Council bifurcated the issues of homestays and SFTVRs, **it is now appropriate to adopt a clear and specific standard and review parameters under which homestay applications can be processed.**
>
> **The purpose of this bill is to restrict homestay operations to the Visitor Destination Areas (VDAs) and to establish additional standards under which homestays operate.**
>
> **Sec. 8-18.1 General Provisions for Homestays.**
>
> (a) A homestay operation shall operate under the following regulations:
>
> (1) Transient accommodations are provided for visitors for twenty-nine (29) days or less;
>
> (2) Homestays shall be limited to no more than three (3) guest rooms per homestay operation;
>
> (3) During homestay operations, the owner(s) benefiting under Sec. 5A-11 of this Code for a homeowner's exemption for the homestay site must be physically within the County of Kaua'i,

residing at the homestay operation site, and physically available for the needs and concerns of their respective homestay guests; and

(4) No other individual or designated representative may act on the owner(s) behalf to meet the requirements of Sec 8-18.1(a)(3).

(b) **Homestay operations are prohibited outside of the Visitor Destination Area (VDA).**

(emphasis added, except for "**Sec. 8-18.1 General Provisions for Homestays.**").

26. **Visitor Destination Areas** were first established by **Ordinance No. 436** adopted by the Council on September 7, 1982 and provided in pertinent part, as follows:

SECTION 1. Findings and Purpose. Pursuant to the authority of Act 186, Session Laws of Hawaii, 1980, the County Council enacts this ordinance for the purpose of designating locations, referred to as "Visitor Destination Areas", in which transient vacation rentals, time share units and time share plans are allowed. **These Visitor Destination Areas include lands in** Poipu, Lihue, Wailua-Kapaa and **Princeville and are delineated on Visitor Destination Area Maps incorporated as part of this ordinance.**

(emphasis added).

27. **KCC § 8-13.2** adopted by the Council on November 14, 2012 as part of Ordinance No. 935 in its effort to update the CZO by focusing on, as a first step, the organizational and format changes, provides in pertinent part:

(a) **A nonconforming use of land, buildings, or other structures may continue to the extent that the use existed on September 1, 1972 or any amendment hereto, as provided in this Section,** provided that the Planning Commission may, after hearing,

order the termination of a nonconforming use that creates substantial danger to public health or safety.

(b) **If any nonconforming use ceases for any reason for continuous period of twelve (12) calendar months or for one (1) season if the use be seasonal, then the use shall not be resumed** and any use of the land or building thereafter shall be in full conformity with the provisions of this Chapter.

(emphasis added).

28. Enforcement authority, and penalties, of the above Ordinances are set forth in three (3) separate Sections of the *Kaua'i County Code*. They are in pertinent part:

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties.

(a) Enforcement, Legal Procedures and Penalties.

. . .

(2) It shall be the duty of the Planning Commission and Planning Director to enforce the provisions of this Chapter and it shall be the duty of all law enforcement officers of the County of Kaua'i to enforce this Chapter and all the provisions thereof.

. . .

(b) Civil Fines.

(1) If the Director of the Planning Department determines that any person, firm or corporation is not complying with a notice of violation, the Director may have the party responsible for the violation served, by mail or delivery, or by posting of the property which address is the most current address reflected in the Real Property tax records, or by publishing such notice in a newspaper of general circulation in the County of Kaua'i should previous notification

efforts not be accepted, with an order pursuant to this Section. **The order may require the party responsible for the violation to do any or all of the following: (A) correct the violation within the time specified in the order; (B) pay a civil fine not to exceed ten thousand dollars ($10,000.00) in the manner, at the place, and before the date specified in the order; (C) pay a civil fine up to ten thousand dollars ($10,000.00) per day for each day in which the violation persists, in the manner and at the time and place specified in the order.** All civil fines shall be deposited to the Planning Enforcement Account within Fund 251.

(2) **The order shall advise the party responsible for the violation that the order shall become final thirty (30) calendar days after the date of its delivery or posting on the property, or publishing of such notice in a newspaper of general circulation in the County of Kauai.** The order shall also advise that the Director's action may be appealed to the Planning Commission.

(3) The provisions of the order issued by the Director under this Section shall become final thirty (30) calendar days after the service or posting on the property, or publishing of such notice in a newspaper of general circulation in the County of Kaua'i, of the order. The parties responsible for the violation may appeal the order to the Planning Commission pursuant to its rules. The form of this appeal must conform to the Planning Commission's rules. However, an appeal to the Planning Commission shall not stay any provision of the order.

(emphasis added, except for "**Sec. 8-3.5 Enforcement, Legal Procedures and Penalties.**")

Sec. 8-17.6 Penalty.

An owner of any unit which is operated in violation of this Article, and/or any other person, firm, company, association, partnership or corporation violating any provision of this Article, **shall each be fined not less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000.00) for each offense. This civil fine may be in addition to any criminal fines. If any person fails to cease such violation within one (1)**

month, such person shall be subject to a new and separate violation for each day the violation continues to exist.

(emphasis added, except for "**Sec. 8-17.6 Penalty.**").

Sec. 8-17.11 Enforcement Against Illegal Transient Vacation Rentals.

a) In addition to other penalties provided by law, including, but not limited to, Secs. 8-3.5(a) and 8-17.6, the Planning Commission Rules, as amended, the Planning Director, or any member of the public who has duly obtained standing pursuant to rules promulgated by the commission, may initiate proceedings to revoke or modify the terms of a Nonconforming Use Certificate pursuant to the Rules of Practice and Procedures of the Planning Commission, as amended. Violations of conditions of approval or providing false or misleading information on the application or in any information relating thereto at any time during the application process shall be grounds for revocation or cease and desist orders.

(b) **Advertising of any sort which offers a property as a transient vacation rental shall constitute prima facie evidence of the operation of a transient vacation rental on said property and the burden of proof shall be on the owner, operator, or lessee to establish that the subject property is not being used as a transient vacation rental or that it is being used for such purpose legally. If any unit is found to be operating unlawfully, penalties established in Secs. 8-3.5(a) and 8-17.6 shall apply.**

(emphasis added, except for "**Sec. 8-17.11 Enforcement Against Illegal Transient Vacation Rentals.**").

29. If any Finding of Fact herein should be designated as a Conclusion of Law, the same shall be deemed to have been identified as such.

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V. CONCLUSIONS OF LAW.

A. Principles of Statutory Construction.

1. "Courts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." *Robert D. Ferris Trust v. Planning Com'n of County of Kauai,* 138 Hawai'i 307, 310, 378 P.3d 1023, 1026 (2016) *quoting State v. Kaakimaka,* 84 Hawai'i 280, 289-90, 933 P.2d 617, 626-67 (1997).

2. "The general rule is that repeals by implication are not favored and that if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is to remain in force and the later statute did not repeal it." *Reefshare, Ltd. v. Nagata,* 70 Hawai'i 93, 97, 762 P.2d 169, 172 (1988) *quoting State v. Pacariem,* 67 Hawai'i 46, 48, 677 P.2d 463, 465 (1984).

3. "[W]here there is a plainly irreconcilable conflict between a general and specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored." *Mahiai v. Suwa,* 69 Hawai'i 349, 356-57, 742 P.2d 359, 366 (1987) (internal quotation marks and citations omitted).

4. Another "cardinal rule of statutory construction is that [the courts] must ascertain and give effect to the intention of the legislature, and [they] must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." *Roaring Lion, LLC v. Exclusive Resorts PBL 1, LLC,* 2013 WL 1759002 at 10 (Haw. Ct. App. 2013) *citing Haole v. State,* 111 Hawai'i 144, 149, 140 P.3d 377, 382 (2006).

5. "Laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." *In the Interest of CM,* 141 Hawai'i 348, 353, 409 P.3d 752, 757 (2017) *quoting State v. Young,* 107 Hawai'i 36, 39-40, 109 P.3d 677, 680-81 (2005) (citations, internal quotations marks, brackets, and ellipses omitted; format changed).

6. In addition to all these rules of statutory construction, statutes and ordinances must be interpreted, if possible, to avoid violating constitutional provisions. *Ferris Trust,* 138 Hawai'i at 314, 378 P.3d at 1029 *citing Life of the Land, Inc. v. West Beach Dev. Corp.,* 63 Hawai'i 529, 531, 631 P.2d 588, 590 (1981).

7. "When interpreting county charters, municipal ordinances, and administrative rules, the general principles of statutory construction apply." *Ferris*

Trust, 138 Hawai'i at 310, 378 P.3d at 1026 *quoting Kellberg v. Yuen,* 131 Hawai'i 513, 527, 319 P.3d 432, 446 (2014) (brackets omitted).

8. "It is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." *Hyatt Corp. v. Honolulu Liquor Com'n,* 69 Hawai'i 238, 242-43, 738 P.2d 1205, 1208 (1987) (brackets omitted).

9. "Zoning laws, whether statutes or ordinances, inasmuch as they curtail and limit uses of real estate and are in derogation of the common law must be given strict construction and the provisions thereof may not be extended by implication. Nevertheless, they should be read according to the natural and most obvious import of the language when there is no manifest legislative intent contrarywise." *Ferris Trust,* 138 Hawai'i at 311, 378 P.3d at 1027 *quoting Maui Cty. v. Puamana Mgmt. Corp.,* 2 Haw.App. 352, 356, 631 P.2d 1215, 1218 (1981) (ellipsis omitted).

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B. Interpretation and Application of *Haw. Rev. Stat.* <u>§ 46-4(a) and KCC § 8-13.2 to KCC § 8-18.1(b).</u>

10. Petitioner first argues the Homestay Operation is a "Lawful Nonconforming Use" permitting her to continue that use notwithstanding the Subject Property is located outside of a Visitor Destination Area in violation of KCC § 8-18.1(b) ("Lawful Nonconforming Use Argument"). See Petitioner's Closing Arguments; Proposed Hearing Officer Report And Recommendation dated January 15, 2020 ("Petitioner's Proposed R&R") at 5-6.[15] In support of the Lawful Nonconforming Use Argument Petitioner relies upon *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2(a). *Id.*, ¶¶8-11. Additionally, Petitioner cites "the Fifth Amendment of the United States Constitution and Article I, § 5 of the Hawaii Constitution [because they] both provide that no person shall be deprived of property without due process of law, nor have property rights taken or damaged without compensation." *Id.* at 6, ¶12 *citing Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. Of Appeals,* 86 Hawai'i 343, 353, 949 P.2d 183, 193 (Haw.Ct.App. 1997).

11. The Planning Department counters that the Lawful Continued Use Argument is inapplicable on five (5) grounds. Respondent Planning

[15] Although Petitioner's Proposed R&R does not contain any page numbers, references to the same is based upon the number of the page following the first (1st) page of that document.

Department Of The County Of Kauai's Closing Arguments; Proposed Findings Of Facts And Conclusions O Law dated January 31, 2020 ("Planning Department's Proposed R&R") at 20-24, ¶¶25-43. Those five (5) grounds are:

a. First, *Haw. Rev. Stat.* § 46-4(a) grant of authority to the counties "*shall be liberally construed*" and therefore, that statute may not usurp the zoning ordinances promulgated thereby;[16]

b. Second, Petitioner admitted to discontinuing the Homestay Operation from April 2018 to June 2019 and therefore, has abandoned that use prohibiting her from resuming it under KCC § 8-13.2(b);[17]

c. Third, the Homestay Operation is not continuous "because [Petitioner] was, at least sometimes, renting a dwelling that she did not reside in";[18]

d. Fourth, even if the Homestay Operation was not abandoned or discontinued, the same "would not have been 'lawful'

[16] Planning Department's Proposed R&R at 20-22, ¶¶25-33.
[17] *Id.* at 21, ¶30.
[18] *Id.* at 22, ¶34. Such use would deem the Subject Property to be a "Transient Vacation Rental" in violation of KCC § 8-17.8(a).

because Petitioner admittedly did not have a use permit as required by KCC Section 8-3.2(b)";[19] and

e. Finally, the "powers of the Hearing Officer originate from the Planning Commission, and the Planning Commission does not have authority to recognize Petitioner's prior homestay use as a lawful nonconforming use, nor can the Planning Commission disregard the prohibition contained in KCC § 8-18.1(b)."[20]

12. Principles of statutory construction resolves the issue whether *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2(a) permit Petitioner to continue the Homestay Operation after passage of KCC § 18-18.1 in 2016.

13. *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2 are general in nature because they address all types of nonconforming uses, but KCC § 8-18.1(b) deals only with homestays outside of Visitor Destination Areas. Therefore, the specific provisions of KCC § 8-18.1(b) is favored with respect to homestays over *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2(a) which govern all other nonconforming uses. *See Mahiai,* 69 Hawai'i at 356-57, 742 P.2d at 366 (A general rule of statutory construction is that the specific statute will be favored over a general statute of the same subject matter, but both may be given effect if

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[19] *Id.* at 22-24, ¶¶38-42.
[20] *Id.* at 24, ¶43.

possible because repeal by implication is disfavored.), *Reefshare, Ltd.,* 70 Hawai'i at 97, 762 P.2d at 172 ("The general rule is that repeals by implication are not favored and that if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is to remain in force and the later statute did not repeal it.") and *In the Interest of CM,* 141 Hawai'i at 353, 409 P.3d at 757 ("Laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.").

14. KCC § 8-13.2(a) also provides a nonconforming use "**may** continue to the extent that the use existed on September 1, 1972". (emphasis added). However, if that "nonconforming use ceases for any reason for a continuous period of twelve (12) calendar months or for one (1) season if the use is seasonal, then the use **shall not be resumed**" (Discontinuance Requirement"). *Id.* at § 8-13.2(b) (emphasis added). Therefore, continuation of that use is discretionary,[21] but once that nonconforming use ceases for twelve (12)

[21] "The term '**may**' is generally construed to render **optional, permissive, or discretionary** the provision in which it is embodied". *State v. Kahawai,* 103 Hawai'i 464, 465, 83 P.3d 725, 728 (2004) (emphasis added).

consecutive calendar months or one (1) season if this use is seasonal, it is mandatory that this nonconforming use **shall not be resumed.**[22] *Id.*

15. Petitioner admitted not having any rentals from April 2018 until June 2019. Transcript at 19. Therefore, the Homestay Operation ceased for a continuous period of at least twelve (12) calendar months prohibiting that nonconforming use from resuming. KCC § 8-13.2(b).[23]

16. *Haw. Rev. Stat.* § 46-4(a) and KCC § 8-13.2 do not prevent the enforcement of KCC § 8-18.1(b) with respect to the Homestay Operation at the Subject Property because they both apply to all types of nonconforming uses, but KCC § 8-18.1(b) specifically governs homestays prohibited outside of Visitor Destination Areas. Alternatively, the Homestay Operation was discontinued for at

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[22] "As used in statutes, contracts, or the like, this word [(i.e. **shall**)] is generally **imperative or mandatory**." *Leslie v. Board of Appeals of County of Hawaii,* 109 Hawai'i 384, 394, 126 P.3d 1071, 1081 (2006) *quoting Black's Law Dictionary* 1375 (6th ed. 1990) (emphasis added).

[23] Enforcement of this Discontinuance Requirement appears to have been suspended during the relevant period of time pursuant to the Proclamation of April 15, 2018 by the Governor of the State of Hawai'i, and all Supplementary Proclamations issued thereafter as a result thereof, related to the disaster occurrence of heavy rains and flooding beginning April 14, 2018 that caused extensive damage to private and public property impacting the County of Kauai ("April 2018 Flooding"), and Emergency Proclamation of April 14, 2018 by the Mayor for the County of Kauai, and all Supplementary Emergency Proclamations issued thereafter as a result thereof, related to the April 2018 Flooding, However, this argument is waived because it was not raised in Petitioner's Reply To Respondent Planning Department Of The County Of Kauai's Closing Arguments And Proposed Findings Of Fact And Conclusions Of Law dated February 7, 2020. *See generally State v. Moses,* 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) ("[I]f a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases.").

least twelve (12) consecutive months and therefore, cannot be resumed under KCC § 13.2(b).[24]

C. <u>Proper Notice Given By The Notice of Violation.</u>

17. Petitioner next argues the Notice of Violation is defective because it does not set forth the specific facts to support a violation of KCC § 8-18.1(b). See generally Petitioner's Proposed R&R at 7-8, ¶¶16-25. Therefore, the Notice of Violation infringes upon Petitioner's procedural and substantive due process rights. *Id.*

18. The Planning Department responds that procedural due process only requires that Petitioner is provided with "notice and an opportunity to be heard." Planning Department's Proposed R&R at 25, ¶49 *citing Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai'i 217, 243, 953 P.2d 1315, 1341 (1998). This Contested Case and the Hearing has provided Petitioner with that notice and opportunity to be heard. *Id.*

19. The provisions of RPPPC Chapter 6 affords Petitioner adequate notice and the opportunity to present the grounds advanced in her Notice of Appeal. Moreover, KCC § 8-17.11(b) provides that the

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[24] Petitioner's "grandfather" argument is dispensed with under both alternatives of this

Advertisement of the Subject Property as a Homestay and/or Transient Vacation Rental "shall constitute prima facie evidence of the operation of a transient vacation rental [and/or homestay rental] on said property and the **burden of proof shall be on the owner . . . to establish that the subject property is not being used as a transient vacation rental [and/or homestay rental] or that it is being used for such purpose legally**." (emphasis added). Therefore, an "actual violation" to commence enforcement action need not be established, but the ultimate burden of proof always remains with the Planning Department. *See generally Adams v. CDM Media USA, Inc.,* 135 Hawai'i 1, 43, 346 P.3d 70, 111 (2015) (Once a prima facie case has been established, the burden of producing evidence shifts to the other party, but the burden of proof always remains with the first party).

20. Substantive due process guards against "the government's action [being] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Petitioner's Proposed R&R at 7, ¶20 *citing In re Herrick,* 82 Hawai'i 329, 349, 922 P.2d 942, 962 (1996). Such action may be clearly arbitrary and unreasonable if the government's action is not supported by credible

evidence of a sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." *Id. citing Dao v. Zoning Board of Appeals,* 144 Hawai'i 28, 44, 434 P.3d 1223, 1239 (Haw.Ct.App. 2019).

21. The Planning Department presented reliable, probative, and substantial evidence that the Homestay Operation was being conducted at the Subject Property. First, the Advertisement is "prima facie" evidence of the Homestay Operation at the Subject Property. *Compare* Exhibit B at 11-18, *with* KCC § 8-17.11(b). Second, Petitioner admitted at the Meeting she was conducting the Homestay Operation at the Subject Property since 2005. Transcript at 11 and 30-31. Third, the Homestay Operation at the Subject Property continued after the Meeting. Transcript at 30-31 and Exhibit G at 13-23.

22. Further, enforcement of KCC § 8-18.1(b) has a substantial relation to the public health, safety, morals, or general welfare of the resident of Kaua'i as articulated in Ordinance No. 864.[25]

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[25] See Finding of Fact No. 23, *infra*. The Findings and Purpose of Ordinance No. 864 applies with equal force to Ordinance No. 1002 and KCC § 8-18.1 because the Council concluded Homestays would be addressed at a later time, but the need to do so was already articulated in Ordinance No. 864.

23. The Notice of Violation, RPPPC Chapter 6, and KCC § 8-18.1(b), satisfy Petitioner's due process rights, both procedurally and substantively.

D. <u>The Notice of Violation's Compliance With KCC § 8-3.5</u>.

24. Petitioner next argues the Notice of Violation does not comport with the requirements of KCC § 8-3.5 because the "Notice of Violation <u>and</u> Order to Pay Fines [is] in one letter." Petitioner's Proposed R&R at 9, ¶27. Instead, "under the CZO[,] the Planning Department must first give notice of a finding of a violation and then if the violation is not cured enter an order, which may require the payment of a fine." *Id.* at ¶28.

25. The Planning Department explains that the Zoning Compliance Notice is the "notice of violation" contemplated by KCC § 8-3.5(b)(1) and the Notice of Violation contains the "order [to pay fines] pursuant to this Section." *See generally* Transcript at 43-46, and *Compare with* KCC § 8-3.5(b)1). *See also Hyatt Corp.*, 69 Hawai'i at 242-43, 738 P.2d at 1208 ("It is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative

construction and follow the same, unless the construction is palpably erroneous.") (brackets omitted).

26. The language of the Zoning Compliance Notice comports with the "notice of violation" contemplated by KCC § 8-3.5(b)(1) because it sets forth the Ordinances deemed to have been violated, advises Petitioner she has fourteen (14) days to terminate the unauthorized "vacation rental operation", and instructs her to notify the Planning Department of that termination within the stated time period. Exhibit C attached to Planning Department's MSJ. Failure to do so within those fourteen (14) days would result in enforcement action subjecting her to "a fine of up to $10,000.00 and/or up to $10,000.00 per day, should the violation(s) persist." *Id.* at 2.

27. The Notice of Violation also comports with KCC § 8-3.5(b)(1) as the "order" to the extent it directs Petitioner to: (a) correct the violation within fourteen (14) days of the date of that "order"; (b) pay a civil fine of $10,000.00 to the Planning Department for that violation within 14 days of the date of the date of that "order"; and (c) pay a civil fine of $10,000.00 per day or each day after the aforesaid fourteen (14) days if the violation is not remedied within that time period. Exhibit D at 2-3.

28. Although the text of KCC § 8-3.5(b) is included in the Notice of Violation, it did not separately advise Petitioner that this "order shall become

final thirty (30) calendar days after the date of its delivery" as required by KCC § 8-3.5(b)(2).[26] *Compare* Exhibit D at 1-3, *with* KCC § 8-3.5(b)(2).

29. Since the Notice of Violation did not notify Petitioner that this order shall become final thirty (30) days after the date of delivery as mandated by KCC § 8-3.5(b)(2), the Planning Department may not impose the civil fine of $10,000.00, nor $10,000.00 per day for each day the Homestay Operation continues at the Subject Property.[27]

E. <u>Constitutional Grounds Advanced By Petitioner</u>.

30. Petitioner finally argues the continued nonconforming use of the Subject Property as a homestay operation is guaranteed under the "Fifth Amendment of the United States Constitution and Article I, § 5, of the Hawaii Constitution [because] both provide that no person shall be deprived of property without due process of law, nor have property rights taken or damaged without

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[26] This requirement in KCC § 8-3.5(b)(2) that "[t]he order **shall advise the party responsible** for the violation that the order shall become final thirty (30) days after the date of its delivery" is MANDATORY. *See generally Leslie*, 109 Hawai'i at 394, 126 P.3d at 1081.

[27] Petitioner's related argument that the Notice of Violation imposed an excessive fine for the violation need not be addressed because this Report and Recommendation concludes no civil fines may be imposed upon her since the same did not comply with KCC § 8-3.5(b)(2). See Petitioner's Proposed R&R at 9, ¶30-33. Additionally, this Report and Recommendation need not decide the issue whether the Director was arbitrary, capricious, and abused his discretion in finding a "continuing violation" of the Homestay Operation at the Subject Property. *See Dao*, 144 Hawai'i at 47, 434 P.3d at 1242 ("[F]or a determination that a violation of the [CZO] occurred for a **continuous period of time** to be upheld, there must be credible evidence of a

compensation." Petitioner's Proposed R&R at 6, ¶12. In support of this argument, Petitioner cites to the *Waikiki Marketplace* Case for the proposition that "due process principles protect a property owner from having his or her vested property rights interfered with, and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not **abrogate**." 86 Hawai'i at 353-54, 949 P.2d at 193-94 (emphasis added).

31. "*Black's Law Dictionary* defines **abrogate** as **abolish** (a law or custom) by formal or authoritative action; to annual or repeal." *MW Builders of Texas, Inc. v. City of Wichita Falls,* 2009 WL 2365443 at 7 (N.D. TX 2009) *quoting Black's Law Dictionary* (Westlaw 2009) (italics in original, internal quotations omitted, and **bold** emphasis added).

32. KCC § 8-18.1(b) prohibiting the Homestay Operation at the Subject Property did not **abrogate or abolish** that nonconforming use. Instead, the Homestay Operation ceased for twelve (12) consecutive months from April 2018 to June 2019 and therefore, KCC § 8-13.2(b) mandated that nonconforming use "**shall not be resumed**." Therefore, KCC § 8-13.2(b) did not abrogate or abolish

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sufficient quality and probative value to enable a person of reasonable caution to support a conclusion that **the violation occurred throughout that period of time.**") (emphasis added).

the Homestay Operation as argued by Petitioner, this ordinance merely prohibited that operation from starting up again.[28]

33. "Taking" of Petitioner's interest in the Subject Property also did not occur because the Homestay Operation ceased due to the April 2018 Flooding, rather than with the passage of Ordinance No. 1002. *Compare* Transcript at 19-20, *with* KCC § 8-18.1(b).[29]

34. Petitioner's constitutional due process rights were not violated by the enforcement of KCC § 8-18.1(b) because that ordinance did not abrogate or abolish the Homestay Operation at the Subject Property, but merely prohibited it from resuming pursuant to KCC § 8-13.2(b). There was also no "taking" for the same reason. Finally, no constitutional violations occurred with the passage of Ordinance No. 1002 because the Homestay Operation was not a prior lawful use since Petitioner did not have a use permit pursuant to KCC § 8-3.2 and/or permit under Ordinance No. 987.[30]

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[28] See footnote 23, *infra*. Further, the Homestay Operation at the Subject Property was not a lawful use prior to passage of Ordinance No. 1002 because Petitioner did not obtain a permit for that use pursuant to Ordinance No. 987. *See Waikiki Marketplace Inv. Co.,* 86 Hawai'i at 354, 949 P.2d at 194 ("Since [*Haw. Rev. Stat.* § 46-4] refers expressly to uses of a building or premises at the time a zoning ordinance takes effect, the protection afforded a property owner under [that statute], relates, on its face, to lawful uses of a building or premises under **existing zoning ordinances.**") (emphasis added).

[29] See also footnote 28, *infra*.

[30] Petitioner should have been aware homestays were regulated by KCC § 8-3.2 prior to the adoption of Ordinance No. 864, and the Council would also be acting on this issue at a later

35. If any Conclusion of Law herein should be designated as a Finding of Fact, the same shall be deemed to have been identified as such.

VI. CONCLUSION.

Based upon all the foregoing, it is recommended that the Planning Commission AFFIRM IN PART the decision of the Planning Director to the extent the Notice of Violation ordered Petitioner to Cease and Desist the Homestay Operation at the Subject Property. However, it is further recommended the Planning Commission REVERSE IN PART the decision of the Planning Director to assess civil fines against Petitioner because the Notice of Violation did not comply with the requirement of KCC § 8-3.5(b)(2) to advise her that "order shall become final thirty (30) calendar days after the date of its delivery".

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time, because she knew of the passage and effect of Ordinance No. 864. *Compare* Transcript at 20-21 and Finding of Fact 24, *with* Finding of Fact 24.

It is further recommended that the Planning Commission REMAND THIS CONTESTED CASE TO THE PLANNING DEPARTMENT for issuance of an "Order" fully complying with all the requirements of KCC § 8-3.5(b) as a condition precedent to any Civil Action against Petitioner should she fail to terminate the Homestay Operation at the Subject Property within the time period stated in that "Order."

DATED at Honolulu, Hawaii, March 30, 2020.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kaua'i

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of :	CC-2017-4
	TMK: (4) 5-8-005:005
Petition to Appeal Decision of the Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the Operation of an Illegal Transient Accommodation Use for Property Situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-005:005 containing 26,092 square feet,	CERTIFICATE OF SERVICE
PATRICIA D. McCONNELL,	
Petitioner,	
vs.	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	
Respondent.	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on March 30, 2020.

	U.S. Mail	Hand Delivery	Email
GREGORY W. KUGLE, ESQ. gwk@hawaiilawyer.com JOANNA C. ZEIGLER, ESQ. JCZ@hawaiilawyer.com Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813 Attorneys for Petitioner PATRICIA D. McCONNELL	X		X
JOHN S. MACKEY, ESQ. jmackey@goodsill.com CHRISTOPHER P. ST. SURE, ESQ. cstsure@goodsill.com Goodsill Anderson Quinn & Stifel First Hawaiian Center, Suite 1600 999 Bishop Street Honolulu, HI 96813 Attorney for Ka'āina S. Hull, Director, PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I	X		X
NICHOLAS COURSON, ESQ. First Deputy County Attorney County of Kaua'i 4444 Rice Street, Suite 220 Līhu'e, Kaua'i, HI 96766 Email: ncourson@kauai.gov Attorney for Planning Commission of the County of Kaua'i	X		X

	U.S. Mail	Hand Delivery	Email
ELLEN CHING Administrator Office of Boards and Commissions County of Kaua'i 4444 Rice Street, Suite 150 Līhu'e, Kaua'i, HI 96766 Email: eching@kauai.gov asegreti@kauai.gov			X

DATED at Honolulu, Hawaii, March 30, 2020.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kaua'i

COUNTY OF KAUA'I, PLANNING DEPARTMENT
4444 RICE STREET, LIHUE, KAUAI, HAWAII 96766

MEMORANDUM

DATE: ***May 11, 2020***

TO: ***Planning Commission***

FROM: ***Clerk of the Commission***

SUBJECT: ***Second Addition to the Planning Commission 5/12/2020 Agenda***

G. HEARINGS AND PUBLIC COMMENT

2. New Agency Hearing

a. ***Charles Somers & West Sunset 32 Phase I, LLC***

3. Letter (5/8/2020) from Max W. J. Graham, Esq., w/enclosed Memorandum in Support of Application and Motion for Second Amendment to Master Permit; Exhibits "1" and "2" dated May 8, 2020.

J. GENERAL BUSINESS MATTERS

1. ***Patricia D. McConnell***

b. Stipulation to Continue Hearing Date for Oral Argument from Matthew M. Bracken, Kauai County Attorney and Chris Donahoe, Kauai County Deputy Attorney, Attorneys for Respondent Planning Department of the County of Kauai (5/5/2020) and Gregory W. Kugle and Joannna C. Zeigler, Attorneys for Petitioner Patricia D. McConnell.

BELLES GRAHAM LLP

ATTORNEYS AT LAW

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OF COUNSEL

DAVID W. PROUDFOOT
DONALD H. WILSON

Federal I.D. No. 99-0317663

May 8, 2020

Mr. Ka'āina S. Hull
Director of Planning
Planning Department
4444 Rice Street, Suite A473
Lihue, Kauai, Hawaii 96766

VIA EMAIL ONLY

Re: **Memorandum In Support Of Application And Motion For Second Amendment To Master Permit**
Application for a Special Management Area Use Permit, Use Permit, and Class IV Zoning Permit by CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, affecting real property located at Kilauea, Hanalei, Island and County of Kauai, State of Hawaii, more particularly identified as Kauai Tax Map Key No. (4) 5-2-012:035
Special Management Area Use Permit SMA(U)-2008-5
Use Permit No. U-2008-4
Class IV Zoning Permit No. Z-IV-2008-6
Lot 2
Kilauea, Kauai, Hawaii
Kauai Tax Map Key No. (4) 5-2-012:035
Owner: Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC, a California limited liability company

Dear Mr. Hull:

I am writing to you on behalf of Charles Somers, Trustee of the Charles Somers Living Trust dated November 12, 2002, and West Sunset 32 Phase 1, LLC ("Owners"), the owners of the above-described Property. Pursuant to Rule 1-3-2(e) of the Rules Of Practice And Procedure Of The Kaua'i County Planning Commission, I am submitting the enclosed Memorandum In Support Of Application And Motion For Second Amendment To Master Permit; Exhibits "1" And "2" dated May 8, 2020.

{W:/DOCS/26951/1/W0164238.DOCX }

G.2.a.n. A2

MAY 1 2 2020

Thank you very much for your continued assistance in this matter.

Sincerely yours,

BELLES GRAHAM LLP

Max W. J. Graham, Jr.

MWJG:jgm
Enclosure
cc: Ms. Jodi A. Higuchi Sayegusa, Deputy Planning Director, w/encl. (via email only)
Mr. Dale A. Cua, w/encl. (via email only)
Ms. Jody Galinato, w/encl. (via email only)

BELLES·GRAHAM LLP

MAX W. J. GRAHAM, JR. 926-0
4334 Rice Street, Suite 202
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Telephone: (808) 246-6962
Facsimile: (808) 245-3277
Email: mwg@kauai-law.com

Attorney for Applicants,
CHARLES SOMERS, as Trustee of the Charles Somers
Living Trust dated November 12, 2002 and
WEST SUNSET 32 PHASE 1, LLC,
a California limited liability company

BEFORE THE PLANNING COMMISSION

OF THE

COUNTY OF KAUAI

In The Matter Of The Application Of CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, a California limited liability company, for a Special Management Area Use Permit, a Use Permit, and a Class IV Zoning Permit for real property situated at Kilauea, Kauai, Hawaii, identified by Kauai Tax Map Key No. (4) 5-2-012:035.	SPECIAL MANAGEMENT AREA USE PERMIT SMA(U)-2008-5 USE PERMIT NO. U-2008-4 CLASS IV ZONING PERMIT NO. Z-IV-2008-6 **MEMORANDUM IN SUPPORT OF APPLICATION AND MOTION FOR SECOND AMENDMENT TO MASTER PERMIT; EXHIBITS "1" AND "2"** **(BARN)**

MEMORANDUM IN SUPPORT OF APPLICATION
AND MOTION FOR SECOND AMENDMENT TO MASTER PERMIT

Come now, CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002, and WEST SUNSET 32 PHASE 1, LLC, a California limited

liability company, Applicants in the above-captioned proceedings, by and through their undersigned attorney, and hereby submit to the Planning Commission of the County of Kauai ("Planning Commission") this Memorandum In Support Of Application And Motion For Second Amendment To Master Permit ("Second Amendment"). The purpose of the Second Amendment is to amend Special Management Area Use Permit SMA(U)-2008-5, as amended ("SMA Permit"), Use Permit U-2008-4, as amended ("Use Permit"), and Class IV Zoning Permit Z-IV-2008-6, as amended ("Zoning Permit") (collectively, the "Master Permit"), as set forth herein. This Memorandum is filed pursuant to Rule 1-3-2(e) of the Rules Of Practice And Procedures Of The County Of Kauai Planning Commission ("PC Rules").

1. Background. The property which is the subject matter of this Application ("Subject Property") is described as Lot 2, located in Kilauea, Kauai, Hawaii, identified by Kauai Tax Map Key No. (4) 5-2-012:035. The Subject Property contains approximately 161.88 acres. The Applicants are the owners of the Subject Property. The Subject Property is located in the: State Land Use Commission ("SLUC") Agricultural District; the Kaua'i General Plan Natural Land Use Designation; the County of Kauai Comprehensive Zoning Ordinance ("CZO") Open District and Special Treatment District (Scenic/Ecologic Resources); and in the Special Management Area ("SMA") of the County of Kauai.

On or about October 25, 2007, the Applicant filed an Application for a Special Management Area Use Permit, a Use Permit, and a Class IV Zoning Permit to develop the Subject Property (the "Initial Application"). By Planning Commission's Findings Of Fact, Conclusions Of Law, Decision And Order dated October 2, 2008 ("Master Permit Approval"), the Planning Commission approved Special Management Area Use Permit SMA(U)-2008-5, Use Permit U-2008-4, and Class IV Zoning Permit Z-IV-2008-6 (collectively, the "Master Permit"),

which allowed: the development on the Subject Property of a single family dwelling ("Main House"), driveway, and landscaping; the grading, preservation of historic sites, and installation of utilities (including a well and tank) on the Subject Property; and the construction of improvements to Kahili Quarry Road. A copy of the Decision And Order portion of the Master Permit Approval is attached to the Second Amendment as Exhibit "C-1". The Master Permit Approval was subject to eighteen (18) Conditions of Approval ("Initial Conditions"), as described in the Index Of Initial Conditions (Master Permit) attached to the Second Amendment as Exhibit "C-2". The Main House and accessory improvements were thereafter constructed.

On or about February 4, 2013, the Applicant filed an Application (Caretaker House & Barn) for an amendment to the Master Permit allowing additional development on the Subject Property ("First Amendment"). By action taken on April 26, 2016 as set forth in a letter from the Planning Commission dated April 28, 2016, attached to the Second Amendment as Exhibit "C-3", the Planning Commission amended the Master Permit ("First Amendment Approval") to allow: the further development on the Subject Property of a second single family dwelling ("Manager's House"), a maintenance building ("Barn"), a temporary equipment tent ("Equipment Tent"), a wildlife enclosure ("Nene Fence"), driveways, and landscaping; further grading; and further utility installations. The First Amendment Approval was subject to sixteen (16) Conditions of Approval ("Additional Conditions"), as described in the Index Of Additional Conditions (First Amendment) attached to the Second Amendment as Exhibit "C-4". However, despite the First Amendment Approval, the Manager's House, Barn and Nēnē Fence have not been constructed.

The significant events concerning the Subject Property since 1978 are shown in more detail in the Chronology attached to this Memorandum as ***Exhibit "1"***.

2. Second Amendment. By the Second Amendment, the Applicants are requesting that the Master Permit (as amended by the First Amendment), be further amended to allow the following:

a. Barn. The Barn will be redesigned as a two-story building. The lower floor of the Barn will be increased in area from approximately 4,269 square feet to approximately 5,195 square feet and a new upper floor area containing approximately 1,589 square feet will be added, all as shown on the Barn Plans attached to the Second Amendment as Exhibit "B-2". A comparison of the Barn design as originally approved in the Fist Amendment and as re-submitted and redesigned in the Second Amendment is shown in the Barn Comparison Index attached to this Memorandum as ***Exhibit "2"***.

b. Accessory Improvements. The utilities, driveways, landscaping and site grading for the Barn ("Accessory Improvements") will be developed and located in the areas shown on the Barn Site Plans attached to the Second Amendment as Exhibit "B-1". *[Note: The development of the Barn and Accessory Improvements will be referred to as the "Project".]*

c. Manager's House. The Manager's House and associated driveway, landscaping, and utilities accessory thereto (previously approved by the First Amendment) will be eliminated. It was initially proposed that the Ranch Manager, who is responsible for the supervision of all employees and for the overall operation and maintenance of the Subject Property, would reside in a single family residence ("Manager's House") to be constructed near the Barn. The Manager's House was approved as part of the First Amendment but never constructed. As noted, the Applicants are no longer requesting permission to develop a Manager's House. The current Ranch Manager lives off-site.

It was intended that the Manger's House would be used not only as a residence, but also as an office and meeting location to be used by the Ranch Manager to conduct business operations and meet with employees. Since that space will no longer be available, the Applicants have had the Barn redesigned and re-purposed so that the Upper Floor can be used by the Ranch Manager as an office and meeting area.

d. Nēnē Fence. The Nēnē Fence will be eliminated, as discussed in Section 3 of this Memorandum.

e. Equipment Tent. The use of the equipment tent will be allowed to continue on a temporary basis as approved by the First Amendment. Once the Barn is approved and constructed, the equipment and materials presently being stored in the Equipment Tent will be moved into the Barn and the Equipment Tent will be removed.

f. Additional Conditions. The Applicants are requesting that Additional Condition A15 (relating to the Nene Fence) be eliminated, and that Additional Condition A13 be revised to read as follows:

> "A13. The applicant shall comply with the previously approved conditions for Special Management Area Use Permit SMA(U)-2008-5, as amended, prior to the issuance of building permits for the [~~residence and~~] maintenance building. The applicant shall apply for the building permit within one (1) year of the date of approval of this application or within one (1) year of the date of approval of any new application to modify the design of the maintenance building, and complete the proposed development within two (2) years of the date of approval of the building permit."

3. Conservation Plan. As discussed in Section 3.1 of the Second Amendment, the Applicants have conveyed two (2) Conservation Easements totaling 149.4 acres over the Subject Property to the Hawaiian Island Land Trust ("HILT"). The purpose of the Conservation

Easements is to preserve and protect the "Conservation Values" of the "Easement Areas". The Conservation Values are defined as: water and wetland resources; archaeological resources; indigenous wildlife resources; scenic resources; and agricultural resources. To accomplish these purposes, the Conservation Easements restrict certain uses on, and the development of certain improvements within, the Easement Areas.

The Applicants have retained exclusive control of an approximately 12.48 acre portion of the Subject Property which is not subject to the Conservation Easements (the "Building Envelope") and which has density for two (2) farm dwelling units. The Main House is located in this area. The proposed Barn will also be located in the Building Envelope.

The Applicants have reserved the right (but not the obligation) under the Conservation Easements to conduct land management and environmental restoration activities in the Easement Areas, provided that: the activities do not conflict with the Conservation Values; the area affected by the activities does not exceed two (2) acres in any twelve (12) consecutive months, or twenty (20) acres over any period of time; and a Management Plan is first prepared for HILT's review and approval for proposed activities within wetlands or endangered species habitat areas.

To meet the general requirements of the Conservation Easements and the specific requirements relating to the preparation of a Management Plan, the Applicants had a Conservation Plan, Kīlauea Falls Ranch (January 2016), prepared and submitted to HILT pursuant to the requirements of the Conservation Easements. This Conservation Plan is intended to be an organic document to be revised as activities on the Subject Property changed. In addition, it only applies to the Easement Area, and not to activities within the Building Envelope.

This Conservation Plan described the proposed activities and protective measures for the Easement Areas as of 2016. The Conservation Plan presently includes: plans for the preservation and protection of the 57 archaeological sites located within a 74 acre portion of the Easement Areas; protocols for the protection of native seabirds; protocols for protection of Nēnē; a proposal for the construction of a predator enclosure fence (enclosing approximately 3.5 acres) to protect the Nēnē (the "Nēnē Fence"); and guidelines for native plant restoration.

After careful consideration, the Applicants have decided not to construct the Nēnē Fence. The reasons for this decision are as follows:

a. The Nēnē are no longer listed as an endangered species. Instead, they appear to be thriving on numerous areas on Kauai, including the adjacent Kilauea Point Natural Wildlife Refuge operated by the U.S. Fish & Wildlife Service ("U.S. FWS").

b. The Applicants do not have the expertise or ability to identify and implement the mitigative measures necessary to protect the Nēnē. Any such activities could also impact other endangered seabirds and could require the Applicants to apply for permits under the Endangered Species Act. It would be best if such specific protective activities were left to the experts, such as U.S. FWS.

c. The Nēnē Fence, if constructed, would separate the Nēnē from their wetland and water-based habitat along the Kilauea River, which would defeat the purpose of creating the proposed habitat area for the Nēnē in the first place. *[Note: The Nēnē Fence area cannot include the wetland area along the Kilauea Stream because there is a County of Kauai public access easement that runs along the stream bank which separates the stream from the proposed Nēnē Fence area.]*

As a result, the Applicants have notified HILT that the Nēnē Fence will not be constructed. Instead, the Applicants will pursue the other activities described in the Conservation Plan.

4. Conclusion. Based on the contents of the Application for the Second Amendment and this Memorandum, the Applicants are respectfully requesting the Planning Commission to approve the requested approvals contained in the Second Amendment.

DATED: Lihue, Kauai, Hawaii, May 8, 2020.

BELLES GRAHAM LLP

By _____

MAX W. J. GRAHAM, JR.
Attorney for Applicants,
CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002 and WEST SUNSET 32 PHASE 1, LLC, a California limited liability company

EXHIBIT LIST

(Somers Trust/West Sunset 32 Phase 1, LLC; Memorandum In Support Of Application And Motion For Second Amendment To Master Permit; Exhibits "1" And "2") (Barn)

EXHIBIT	ITEM
1	CHRONOLOGY
2	BARN COMPARISON INDEX

EXHIBIT "1"

CHRONOLOGY

1978	Grant of Easement (9/26/78) Rex Financial to County of Kauai (P-1)
2004	
July 16	Deed for Lot 2 (Floyd Miller to Charles Somers, et al./Doc. No. 2004-148675) (161.88 acres)
2005	Lot 26 Subdivision [Lot 26-A (75.431 acres)/Lot 26-B (6.914 acres)]
2007	
October 25	Application I filed with Planning Commission (Main House and accessory structures and uses)
2008	
March 18 April 1 May 6	Contested Case Hearing
October 2	Findings of Fact, Conclusions of Law, Decision and Order issued **(18 Conditions)**
December 22	Grant of Conservation Easement (C-1) (Somers, et al. to Kauai Public Land Trust/Doc. No. 2008-191932) (80.1 acres) Grant of Conservation Easement (C-2) (Somers, et al. to Kauai Public Land Trust/Doc. No. 2008-192741) (69.3 acres) 161.88 -149.40 12.48
2009	
September 1	First Status Report

EXHIBIT "1"

2010

August 8	Second Status Report

2011

February 15	Building Permit Approval
March 30	Assignment of Grant of Conservation Easement (C-1) (KPLT to Maui Coastal Land Trust nka Hawaii Islands Land Trust/Doc. No. 2011-084772) Assignment of Grant of Conservation Easement (C-2) (KPLT to Maui Coastal Land Trust nka Hawaii Islands Land Trust/Doc. No. 2011-055037)
September 30	Third Status Report

2012

September 4	Fourth Status Report

2013

February 4	Application II filed with Planning Commission (Caretaker's House, Maintenance Building (Barn), and accessory structures and uses) **(16 Conditions)**
March 27	Planning Commission – Director's Report
April 1	Kilauea Neighborhood Association Intervention filed
April 9 & 23	Planning Commission hearings postponed (lack of quorum)

April 30	Planning Commission
	- Public hearing (closed)
	- Intervention granted
	  - Kilauea Neighborhood Association
	  - Elizabeth Freeman

June 4	Party status withdrawn – Elizabeth Freeman
October 1	Fifth Annual Status Report
November 13	Party status withdrawn – Kilauea Neighborhood Association

2014

January 28	Planning Commission - Agency hearing - Deferred and continued - Time requirements waived (60 days)
February 26	Certificate of Occupancy (Main House)
October 1	Sixth Annual Status Report

2015

January 13	Planning Commission – Sixth Annual Status Report Review
February 24	Planning Commission – Sixth Annual Status Report Review
September 22	Planning Commission – Letter requesting deferral of Updated Status Report
October 27	Planning Commission – Updated Status Report Review

2016

January 26	Planning Commission – Agency hearing (continued)
April 26	Planning Commission approves First Amendment

2017

2018

2019

December 1	Seventh Status Report Filed
December 27	Second Amendment (Barn) Filed

2020

EXHIBIT "2"

BARN COMPARISON INDEX

	FIRST AMENDMENT	SECOND AMENDMENT
Floors	One Floor	Two Floors
Floor Area	Main Floors 4,000 s.f. Entry/Lanai 240 s.f. Wooden Walkway 29 s.f. Total: 4,269 s.f.	Lower 5,195 s.f. Upper 1,589 s.f. Total: 6,784 s.f.
Site	Same Location	Same Location
Bathroom	1 Full Bathroom	Lower Floor - One Half Bathroom - One Outdoor Shower
Sink	N/A	Upper Floor
Exterior	Cedar Board and Batten	Reverse Board and Batten with Stone Columns and Walls
Roof	Standing Seam Metal Roof	Cedar Shake
Foundation	Concrete Slab	Concrete Slab

EXHIBIT "2"

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

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Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATION OF CONTESTED CASE; REQUEST FOR ORAL ARGUMENT; CERTIFICATE OF SERVICE** CONTESTED CASE HEARING: Date: August 30, 2019 Time: 9:00 a.m. Hearing Officer: Harlan Y. Kimura

J.1.a.

MAY 1 2 2020

CC-2017-4

499448

PETITIONERS' EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATION OF CONTESTED CASE

Pursuant to the Rules of Practice and Procedure of the Kauai Planning Commission Rule 1-6-10(b), Petitioner Patricia D. McConnell, hereby submits her Exceptions to Hearing Officer's Report and Recommendation of Contested Case ("Report") entered on March 30, 2020. The Kauai Planning Commission should reject the Hearing Officer's conclusion that Petitioner must cease the use of her property as a homestay, despite that fact that she operates her homestay as a nonconforming use, and the Planning Commission should accept the Hearing Officer's conclusion that Petitioner is not subject to any fine in this case.

I. INTRODUCTION

This case is easily decided based on basic principles of zoning and land use law: lawful uses of property in effect prior to a change in ordinance, may continue. Here, a Notice of Violation ("NOV") and order to pay a $10,000 fine was issued to Petitioner, but at that time Petitioner lawfully operated a homestay in her home on the North Shore of Kauai because she began her homestay use prior to a change in the Kauai County Code that prohibited homestays outside the visitor destination area. The Hearing Officer agreed that Petitioner had a nonconforming use (conclusion of law 15), but went on to conclude that because Petitioner did not operate her nonconforming use while Kuhio Highway was shut down to renters between April 2018 and April 2019 (in conjunction with the natural disaster that occurred), she abandoned that use. The fact that Petitioner was forced to comply with the shutdown of Kuhio Highway does not constitute an abandonment of a nonconforming use and, nonetheless, this period of time was long after the NOV was issued and irrelevant to the case at hand. The Hearing Officer was tasked with determining whether Petitioner's homestay use was in fact

illegal at the time the NOV was issued and because Petitioner had a nonconforming use at that time, the Hearing Officer should have determined the NOV was invalid.

Furthermore, the NOV cannot stand, not only because of Petitioner's nonconforming use, but because it contained several flaws serious enough to deem it invalid. First, it did not give Petitioner proper notice of what evidence the alleged violation was based on or a date or time the alleged violation occurred. This is a violation of due process. Second, the Kauai County Code ("KCC") requires that a notice of violation and an order be two separate actions. KCC § 8-3.5(b)(1). The NOV violates this provision because it provides the notice of a violation and the order to pay a fine in one letter. Given these flaws, the Hearing Officer should not have affirmed the NOV to the extent that the Hearing Officer concluded that Petitioner must cease the homestay operation. Therefore, the Planning Commission should reject this portion of the Hearing Officer's Report.

The Planning Commission should accept the Hearing Officer's conclusion that Petitioner is not subject to any fines in this case for the reasons stated in the Hearing Officer's Report and the reasons Petitioner argued in her briefing and at the contested case hearing.

II. SPECIFIC EXCEPTIONS

In addition to the general objections and exceptions noted above, Petitioner objects to the following specific findings of fact and conclusions of law, without waiving any other arguments.

A. Findings of Fact

Petitioner objects to Finding of Fact 10, which states: "Petitioner and the Subject Property were not issued a Non-Conforming Use Certificate or applicable permit to conduct this transient accommodation outside a Visitor Destination Area and therefore, was in violation of KCC §§ 8-17.8 and 8-18.1(b)." First, this is a conclusion of law and not a finding of fact. Second, KCC § 8-17.8 (Transient Vacation Rental ordinance) was not at issue in this case

because the NOV only alleged a violation of KCC § 8-18.1(b) (Homestay ordinance), thus, the Hearing Officer erroneously concluded that there was a violation of KCC § 8-17.8. Third, the KCC does not provide for a means of obtaining a nonconforming use certificate for a Homestay operation, thus, the lack of a nonconforming use certificate is not a violation of KCC § 8-18.1(b).

Petitioner objects to Finding of Fact 11 and footnote 13 because the Zoning Compliance Notice is not an actual finding of a violation and the NOV in this case did not allege a violation of KCC § 8-17.8 for a transient vacation rental.

B. "Relevant Authorities and Pertinent Legislative History"

Petitioner objects to paragraphs 21-23 because those paragraphs address ordinance sections related to transient vacation rentals and are therefore irrelevant because the NOV at issue in this case alleged a homestay violation, not a transient vacation rental violation; two distinct ways to rent one's home and addressed separately under the KCC.

Petitioner objects to paragraph 28, citation to KCC § 8-17.11 "Enforcement Against Illegal Transient Vacation Rentals." This KCC section addresses transient vacation rentals and is not relevant to the alleged homestay violation.

C. Conclusions of Law

Petitioner objects to conclusion of law 13 because it misapplies the law. The Hearing Officer cites to case law addressing the issue of when two statutes are in conflict, stating the specific statute is favored over a general statute of the same subject matter. Here, the conflict is found in enforcing state statute Haw. Rev. Stat. § 46-4, requiring the continued lawful use of a property, and county ordinance KCC § 8-18.1(b), which provides that homestays are prohibited outside the visitor destination area and the Planning Department argues applies to all homestays even if they had been in use prior to the passage of KCC § 8-18.1. Thus, it is a statute and an ordinance that are in potentially in conflict, not two statutes. Pursuant to the supremacy clause,

the ordinance must be interpreted so as not to conflict with Haw. Rev. Stat. § 46-4. *Save Sunset Beach Coal. v. City & Cty. of Honolulu*, 102 Haw. 465, 480-81, 78 P.3d 1, 16-17 (2003) (counties are authorized to zone only according to the dictates of Haw. Rev. Stat. § 46-4 and "any conflict between the State provisions and the county zoning ordinances is resolved in favor of the State statutes, by virtue of the supremacy provisions in article VIII, section 6 of the Hawaii Constitution and HRS § 50-15."). Therefore, KCC § 8-18.1(b) should be interpreted to prohibit homestays outside of the visitor destination area, except those homestays that were in operation prior to the passage of the ordinance.

Petitioner objects to conclusion of law14 because the use of the phrase "may continue" in KCC § 8-13.2(a) does not mean that the continuation of a nonconforming use is discretionary. *See* Haw. Rev. Stat. § 46-4; *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 353-54, 949 P.2d 183, 193-94 (1997) (stating "preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate").

Petitioner objects to conclusion of law 15 stating, "Petitioner admitted not having any rentals from April 2018 until June 2019. Transcript at 19. Therefore, the Homestay Operation ceased for a continuous period of at least twelve (12) calendar months prohibiting that nonconforming use from resuming. KCC § 8-13.2(b)." The Hearing Officer made no finding as to why Petitioner did not rent during that period, which was because the County closed Kuhio Highway, and therefore access to Petitioner's property, to all transient vacation renters and homestay renters. Transcript at 19. But for the road closure, Petitioner would have been able to continue her nonconforming homestay operation. Importantly, however, the issue of whether her nonconforming use ceased *after* the NOV was issued is not relevant to whether the NOV should be upheld. The Hearing Officer was only required to determine that Petitioner had a nonconforming use at the time the NOV was issued, which she did.

Petitioner objects to conclusion of law 16 for the same reasons stated as objections to conclusions of law 14 and 15.

Petitioner objects to conclusion of law 18 because the contested case hearing does not resolve Petitioner's due process arguments. Petitioner argued that the NOV did not provide notice to Petitioner of the specific violation, it only generally provided the language of the homestay ordinance, but provided no specific facts to support the claim. For example, the NOV does not provide a date of when the violation occurred or what specific evidence supported the NOV. *See Dao v. Zoning Board of Appeals*, 144 Haw. 28, 44, 434 P.3d 1223, 1239 (App. 2019) (*citing Price v. Zoning Board of Appeals*, 77 Haw. 168, 883 P.2d 629 (1994)) (stating that a notice of violation for an alleged unpermitted transient vacation rental must be supported by "credible evidence of a sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.") Petitioner is entitled to notice of what the Planning Department is basing the NOV on prior to the deprivation of her protected property interests and payment of a substantial fine. Therefore, although the contested case hearing may have provided Petitioner an opportunity to be heard, the NOV did not provide her proper notice in violation of her due process rights.

Petitioner objects to conclusion of law 19 because the Hearing Officer concludes that KCC § 8-17.11(b) applies to homestays when that section clearly only applies to transient vacation rentals. KCC Chapter 8, Article 17 applies to transient vacation rentals and KCC Chapter 8, Article 18 applies to homestays. Therefore, KCC § 8-17.11(b) ("Enforcement Against Illegal Transient Vacation Rentals") does not apply to this case, which is an enforcement action against an alleged illegal homestay.

Petitioner objects to conclusion of law 21 because the Planning Department acted erroneously, arbitrarily, and manifestly abused its discretion when it issued the NOV without

providing support for an actual violation. The Planning Department further ignored Petitioner's representations that she had rented her property as a homestay prior to the amendment in the KCC limiting homestays to the visitor destination area. Because Petitioner established that she had rented the property prior to the change in the KCC, the burden shifted to the Planning Department to show that the nonconforming use no longer existed at the time the NOV was issued. *See Van Sant v. City of Everett*, 849 P.2d 1276, 1280 (Wash. Ct. App. 1993).

Petitioner objects to conclusion of law 23 for the same reasons stated as objections to conclusions of law 19 and 21.

Petitioner objects to conclusion of law 26 because the Zoning Compliance notice is a warning and is not an actual notice of violation as contemplated under KCC § 8-3.5(b)(1).

Petitioner objects to conclusion of law 32 because Petitioner was unable to rent her property as a homestay when the County shutdown Kuhio Highway to homestay renters, and therefore shutdown access to Petitioner's property. Importantly, the shutting down of Kuhio Highway happened long after the NOV was issued. The issuance of the NOV is the point in time when the Hearing Officer and the Planning Commission should decide this case. At that point in time, Petitioner was operating her homestay as a nonconforming use, and therefore, the NOV is invalid. This conclusion further contradicts finding of fact 5 in which the Hearing Officer found that Petitioner operated her homestay beginning in 2005 and continued operation through the date of the contested case hearing.

Petitioner objects to conclusion of law 33 for the same reasons stated for objecting to conclusion of law 32.

Petitioner objects to conclusion of law 34. This conclusion provides that Petitioner should have obtained a use permit pursuant to KCC § 8-3.2 and/or a permit under Ordinance 987. This conclusion contradicts finding of fact 4, which found in 2005 "only a State of Hawaii

General Excise Tax License and Transient Accommodations Tax License were required for the Homestay Operation." Petitioner complied with those requirements. If the KCC was later amended to require separate permitting after Petitioner began operating, she was not required to obtain such a permit because she had a nonconforming use. Thus, Petitioner was not required to obtain a use permit.

D. Hearing Officer's Conclusion

Petitioner objects to the Hearing Officer's conclusion in that the Hearing Officer recommends that Petitioner cease her homestay operation on her property despite the fact that it is a nonconforming use.

III. CONCLUSIONS

The Planning Commission should reject the Hearing Officer's conclusion that Petitioner must cease her homestay operation and instead conclude that her homestay is a nonconforming use and Petitioner is entitled to continue that use pursuant to Haw. Rev. Stat. § 46-4 and KCC § 8-13.2. The Planning Commission should accept the Hearing Officer's conclusion that Petitioner is not subject to any fine in this case.

DATED: Honolulu, Hawaii, April 6, 2020.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Gregory W. Kugle
GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of: Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet, PATRICIA D. McCONNELL, Petitioner, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I, Respondent	)	CASE NO. CC-2017-4 TMK: (4) 5-8-005:005 **REQUEST FOR ORAL ARGUMENT**

REQUEST FOR ORAL ARGUMENT

Pursuant to the Rules of Practice and Procedure of the Kauai Planning Commission Rule 1-6-19(d), Petitioner respectfully requests that she be granted an opportunity for oral argument before the Planning Commission. The Hearing Officer in this case disregarded Petitioner's legal and constitutional arguments. An oral argument before the Planning Commission would give Petitioner an opportunity to clarify her arguments and further highlight the errors in the Hearing Officer's Report and Recommendation, so that the Planning Commission can properly make its decision regarding the Report and not act in violation of Petitioner's rights.

DATED: Honolulu, Hawaii, April 6, 2020.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Gregory W. Kugle
GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUA'I

In the Matter of:	)	CASE NO. CC-2017-4
	)	TMK: (4) 5-8-005:005
Petition to Appeal Decision of Planning Director's Decision Related to the Notice of Violation and Order to Pay Fines for the operation of an Illegal Transient Accommodation Use for Property Situated in Haena, Kauai, Hawaii, identified by Kauai TMK No. (4) 5-8-005:005 containing 26,092 square feet,	)	**CERTIFICATE OF SERVICE**
PATRICIA D. McCONNELL,	)	
Petitioner,	)	
vs.	)	
PLANNING DEPARTMENT OF THE COUNTY OF KAUA'I,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon the following individuals by emailing and mailing said copy, postage prepaid, to their last known address as follows:

NICHOLAS COURSON
First Deputy County Attorney
Office of the County Attorney
4444 Rice Street, Suite 220
Lihue, Hawaii 96766
Email: ncourson@kauai.gov
Attorney for the
PLANNING COMMISSION OF THE
COUNTY OF KAUAI

MATTHEW BRACKEN, ESQ.
CHRISTOPHER DONAHOE, ESQ.
4444 Rice Street
Lihue, Hawaii 96766
Email: mbracken@kauai.gov
cdonahoe@kauai.gov
Attorneys for KAAINA HULL, DIRECTOR,
COUNTY OF KAUAI, DEPARTMENT OF PLANNING

ELLEN CHING
ANELA SEGRETI
Boards and Commissions
4444 Rice Street, Suite 150
Lihue, Hawaii 96766
Email: asegreti@kauai.gov

DATED: Honolulu, Hawaii, April 6, 2020.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Gregory W. Kugle
GREGORY W. KUGLE
JOANNA C. ZEIGLER

Attorneys for Petitioner
PATRICIA D. McCONNELL

GARY G. GRIMMER & ASSOCIATES

GARY G. GRIMMER 1769
ANN CORREA 5031
City Financial Tower
201 Merchant Street, Suite 1940
Honolulu, HI 96813
Tel No. 808.457.1320
Emails: Gary@grimmerhawaiilaw.com
Ann@grimmerhawaiilaw.com

Attorneys for Appellant
BLAINE PERRELLA

BEFORE THE PLANNING COMMISION

OF THE

COUNTY OF KAUAI

In the Matter of the Application of BLAINE PERRELLA appealing zoning classification Determination and Allowable Building Area Determination for Unit B of Kukuna Seaside Estates on land located in Aliomanu, Kawaihau, Puna, Kauai, Hawai'i Tax Map Key No. (4) 4-9-005:015 0002	**PETITION TO APPEAL DECISION OF THE PLANNING DIRECTOR**; EXHIBITS "A" - "C"; CERTIFICATE OF SERVICE

PETITION TO APPEAL DECISION OF THE PLANNING DIRECTOR

Notice is hereby given that the Appellant, **BLAINE PERRELLA**, by and through his undersigned counsel, pursuant to Chapter 9 of the Rules of Practice and Procedure of the Planning Commission, hereby appeals the decision of the Planning Director as set forth in his letter executed on June 1, 2020, a copy of which is attached hereto and incorporated herein as **Exhibit "A"**.

Appellant BLAINE PERRELLA states as follows:

1. BLAINE PERRELLA herein referred to as ("**Mr. Perrella**") is the Appellant herein and has the following address and telephone number:

c/o Gary G. Grimmer, Esq.
Gary G. Grimmer & Associates
City Financial Tower
201 Merchant Street, Suite 1940
Honolulu, HI 96813
Tel No. 808.457.1330

2. Subject Property. The property which is the subject matter of this Application is Unit B of the Kukuna Seaside Estates Condominium Project ("**Subject Property**"). The Subject Property sits on a portion of Allotment 24-D of Moloa'a Hui Lands located in Aliomanu, Kauaihau, Puna, Kauai, Hawai'i and is identified by Kauai Tax Map Key No. (4) 4-9-005:015 0002. The legal parcel on which Subject Property sits contains approximately 3.00 acres, shared about equally by Units A and B of Kukuna Seaside Estates Condominium Project.

3. The Subject Property is unimproved.

4. The Subject Property is within the State of Hawai'i State Land Use Commission ("**SLUC**") Agriculture District and to Mr. Perrella's surprise is within the Kauai Comprehensive Zoning Ordinance ("**CZO**") Open District.

5. Mr. Perrella purchased Unit B by Warranty Apartment Deed recorded with the Bureau of Conveyances as Document No. A64950087 on October 13, 2017.

6. Part of what Mr. Perrella relied on in purchasing Unit B was that the Unit A owner had already built a large house with long driveway on his Unit pursuant to a 1998 recorded Farm Dwelling Agreement with the County of Kauai, which stated that the land was "zoned Agriculture by the County, a copy of which is attached hereto as Exhibit "B". Mr. Perella also spoke with the Unit A owner, who stated the land was CZO Agriculture.

7. Mr. Perrella also relied on the January 1999 approved Zoning Permit Application permitting construction of a 4-Bedrom Private Residence on Unit A on which the County zoning is listed as Agriculture, a copy of which is attached hereto as Exhibit "C".

8. After purchasing Unit B, Mr. Perrella began gathering information to build his own large home and learned that County Planning Department now considered the land to be zoned Open. The consequence of this was to severely reduce the allowable buildable areas for his home and driveway.

9. As can be seen from Exhibit "A" hereto, the allowable coverage area for the land if zoned Open is 12,981 square feet and Unit A has already used 9,700 square feet. The remaining 3,281 square feet is not nearly enough for Mr. Perrella to build his home and driveway with a size he was counting on and commensurate with the home on Unit A.

10. Thus, Mr. Perrella has detrimentally reasonably relied on what he saw was built on Unit A and read about agricultural zoning in County documents, Exhibits "B" and "C" hereto. He would not have bought Unit B if permissible land coverage was only 3,281 square feet, instead of the much larger permissible land coverage area if zoned Agriculture.

WHEREFORE, Mr. Perrella prays that the Planning Commission:

A. Reverse and set aside the Planning Director's June 1, 2020 Determination Letter;

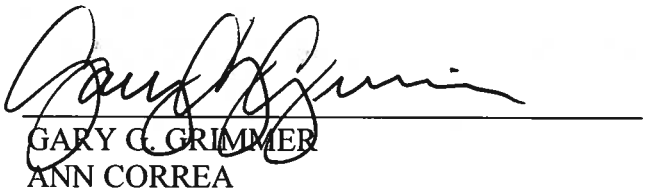
B. Determine that Appellant detrimentally reasonably relied as set forth above;

C. Determine that Appellant is entitled to have his Unit B designated CZO Agriculture;

D. Determine that Appellant is entitled to a permissible land coverage or allowable building area on his Unit B as if the land was zoned Agriculture; and

E. Grant such further relief as may be just.

DATED: Honolulu, Hawai'i, June 8, 2020.



GARY C. GRIMMER
ANN CORREA

Attorneys for Appellant
BLAINE PERRELLA

DEPARTMENT OF PLANNING
THE COUNTY OF KAUA'I
DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHILIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

June 1, 2020

Gary G Grimmer
201 Merchant Street
City Financial Tower, Suite 1940
Honolulu, HI 96813

Subject: Zoning Classification Determination
Allowable Buildable Area Determination
Tax Map Key: (4) 4-9-005:015 Kilauea, Kaua`i

In response to your email correspondence (attached) requesting the zoning classification and allowable buildable area for the parcel referenced above, the following information is provided.

The subject property is located within the State Land Use Agriculture (A) District, and it is located within the County of Kaua'i Open (O) Zoning District. The subject property is approximately 129,809 square feet in size. For an accurate lot size, a certified survey must be done.

Based on the approximate size of the subject property, and its location within the Open (O) Zoning District, the subject property qualifies for one (1) farm dwelling. The subject property also has an executed and approved Additional Dwelling Unit (ADU) clearance form that entitles the subject property to construct an ADU.

Pursuant to Chapter 8-9.2(a) of the Kaua'i County Code, improvement of properties located within the Open (O) Zoning District shall not exceed ten percent land coverage of the lot or parcel area. Based on the approximate size of the subject property, 129,809 square feet, the subject property (entire lot of record) has a permissible land coverage of approximately 12,981 square feet.

As you stated in your email, Unit A's building area covers approximately 9,700 square feet. If this is the existing land coverage, the remaining additional and permissible land coverage for the subject property (entire lot of record) would be approximately 3,281 square feet.

Should you have further questions regarding this matter, please contact Shelea Blackstad of my staff at 808-241-4050.

Ka`aina Hull
Ka`aina Hull (Jun 1, 2020 15:42 HST)

KA'ĀINA S. HULL
Director of Planning

EXHIBIT A

R-607

STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED

DEC 21, 1998 10:45 AM

Doc No(s) 98-191105

/s/CARL T. WATANABE
ACTING
REGISTRAR OF CONVEYANCES

LAND COURT SYSTEM | REGULAR SYSTEM

Return by Mail (X) Pickup ( ) To:

County of Kauai
Planning Department
4444 Rice Street, Suite 473
Lihue, Kauai, Hawaii 96766

FARM DWELLING AGREEMENT

THIS AGREEMENT made and entered into by and between

Charles W. Morse,

whose mailing address is 17430 Campbell Rd, Suite 200

Dallas, TX 75252,

hereinafter called the "APPLICANT(S)", and the COUNTY OF KAUAI PLANNING DEPARTMENT, whose business and mailing address is 4444 Rice Street, Suite 473, Lihue, Hawaii 96766, hereinafter called the "DEPARTMENT",

W I T N E S S E T H

WHEREAS, the APPLICANT(S) warrant and represent that they are the owner of

that certain parcel of land, Tax Map Key No. TMK No. (4) 4-9-05:15 more particularly described in Exhibit "A" attached hereto and made a part hereof; and

EXHIBIT B

WHEREAS, this document pertains only to Unit A as shown in Exhibit "B" and made a part hereof; and

WHEREAS, that certain parcel of land is classified Agriculture by the State Land Use Commission and is zoned Agriculture by the County of Kauai; and

WHEREAS, Chapter 205, Hawaii Revised Statutes, and the State Land Use District Regulations only permit "farm dwellings" within the State Agriculture Land Use District unless otherwise relieved from the restriction by a special permit obtained pursuant to Chapter 205, Section 6, Hawaii Revised Statutes; and

WHEREAS, a "farm dwelling" is defined by Chapter 205, Hawaii Revised Statutes, and the State Land Use District Regulations as "a single family dwelling located on and used in connection with a farm where agricultural activity provides income to the family occupying the dwelling"; and

WHEREAS, the parcel identified by Tax Map Key No. TMK (4) 4-9-05:15 is entitled to 2 residential units and one guest house; and

WHEREAS, this agreement is evidenced that Unit A is entitled to one of those residence units; and

WHEREAS, a "family" as used in the definition of a "farm dwelling" is defined by the State Land Use District Regulations as "an individual or two or more persons related by blood, marriage or adoption or a group comprising not more than five persons, not related by blood, marriage or by adoption"; and

WHEREAS, the APPLICANT(S) acknowledge that a violation of Chapter 205, Hawaii Revised Statutes, and the State Land Use Agriculture District restriction is subject to a citation and fine of not more than $5,000 pursuant to Chapter 205, Section 13, Hawaii Revised Statutes, as amended; and

WHEREAS, the APPLICANT(S) also acknowledge that failure to abide by this agreement may result in the removal of the prohibited structure at the owner's expense; and

WHEREAS, the DEPARTMENT is charged with the enforcement of the restriction by Chapter 205, Hawaii Revised Statutes;

WHEREAS, the APPLICANT(S) wish to construct a dwelling unit on that certain parcel of land described in Exhibit "A"; and

WHEREAS, the APPLICANT(S) wish to execute this Farm Dwelling Agreement without first obtaining the signatures of all interest holders in the CPR;

NOW THEREFORE, for and in consideration of the terms, covenants and conditions hereinafter contained, the parties hereby mutually agree as follows:

1. That the dwelling permitted to be constructed on the parcel of land described in Exhibit "A" classified Agriculture by the State Land Use Commission shall be a "farm dwelling" as defined by Chapter 205, Hawaii Revised Statutes, and the State Land Use District Regulations, as recited herein; and

2. That the dwelling shall only be occupied by a "family", as defined by the State Land Use District Regulations and as recited herein, who derive income from the agricultural activity on the parcel; and

3. That the APPLICANT(S) and all present and future owners, lessees and occupants of said land grant the DEPARTMENT the right of entry at the request of the DEPARTMENT to inspect the premises to assure compliance with the provisions of this agreement; and

4. That this agreement shall be a covenant running with the land and be binding on the APPLICANT(S), and all present and future owners, lessees and occupants of said land and anyone claiming under said APPLICANT(S), their heirs, executors, administrators, successors and assigns, as owners or occupants thereof or otherwise; and

5. That this agreement shall remain in effect so long as the land retains its Agriculture District classification under the State Land Use Commission and the pertinent restrictive provisions of Chapter 205, Hawaii Revised Statutes, and the State Land Use District Regulations remain in effect; and

6. That the APPLICANT(S) expressly set forth the provisions of this agreement in any subsequent conveyance, deed, lease or rental agreement to said property executed by them, so as to give effect to said covenant; and

7. That this agreement shall be recorded with the State of Hawaii Bureau of Conveyances, fees to be paid by the APPLICANT(S).

8. The DEPARTMENT and APPLICANT(S) shall execute the Farm Dwelling Agreement; and

9. The APPLICANT(S), for themselves (himself/herself), their (his/her) heirs, administrators, successors and assigns, do hereby waive and release the DEPARTMENT and the County of Kauai, a political subdivision of the State of Hawaii, whose principle place of business is 4444 Rice Street, Suite 473, Lihue, Hawaii, 96766, from all claims and causes of action, either legal or equitable, which may hereafter accrue by reason of the DEPARTMENT'S execution of said Farm Dwelling Agreement; and

10. The APPLICANT(S) do(es) hereby promise to indemnify and hold the DEPARTMENT and the County of Kauai, its successors, assigns, offices, employees, agents, attorneys or any other person or legal entity connected with or legally responsible to them, harmless from any and all claims, actions, causes of action, lawsuits, demands or liability for damages of whatever kind and nature, arising out of the DEPARTMENT'S execution of said Farm Dwelling Agreement; and

11. This agreement shall be a covenant running with the portion of land described in Exhibit "A", and shall be binding on APPLICANT(S) and all present and future owners and occupants of said portion of land and any one claiming under APPLICANT(S), their successors, and assigns, as owners or occupants thereof. The APPLICANT(S) further agree(s) to expressly set forth the provisions of this waiver and indemnity agreement in any subsequent conveyance, deed, lease, or rental agreement so as to give effect to said covenant.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed on the _____ day of DEC 15 1998, _____.

APPROVED:
IAN K. COSTA

for Planning Director
County of Kauai
Planning Department

Applicant(s)

Charles W. Morse

APPROVED AS TO FORM
AND LEGALITY:

for County Attorney

STATE OF TEXAS)
)
COUNTY OF DALLAS)

On this 8th day of October, 1998, before me personally appeared CHARLES W. MORSE to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Sue D Jones
Notary Public, State of Texas
SUE D. JONES

SUE D. JONES
MY COMMISSION EXPIRES
June 14, 2001

STATE OF HAWAII)
) ss.
COUNTY OF KAUAI)

On this _____ day of DEC 15 1998, _____, before me appeared IAN K. COSTA to me personally known, who being by me duly sworn, did say that he is Deputy Planning Director of the PLANNING DEPARTMENT of the COUNTY OF KAUAI; and that said instrument was executed on behalf of said PLANNING DEPARTMENT; and that said IAN K. COSTA acknowledged that he executed the same as his free act and deed of the PLANNING DEPARTMENT of the COUNTY OF KAUAI. ~~Said~~ Department has no seal.

LESLIE K. TAKASAKI NOTARY PUBLIC STATE OF HAWAII

Leslie K. Takasaki
LESLIE K. TAKASAKI
Notary Public, State of Hawaii
My commission expires: 11.04.99

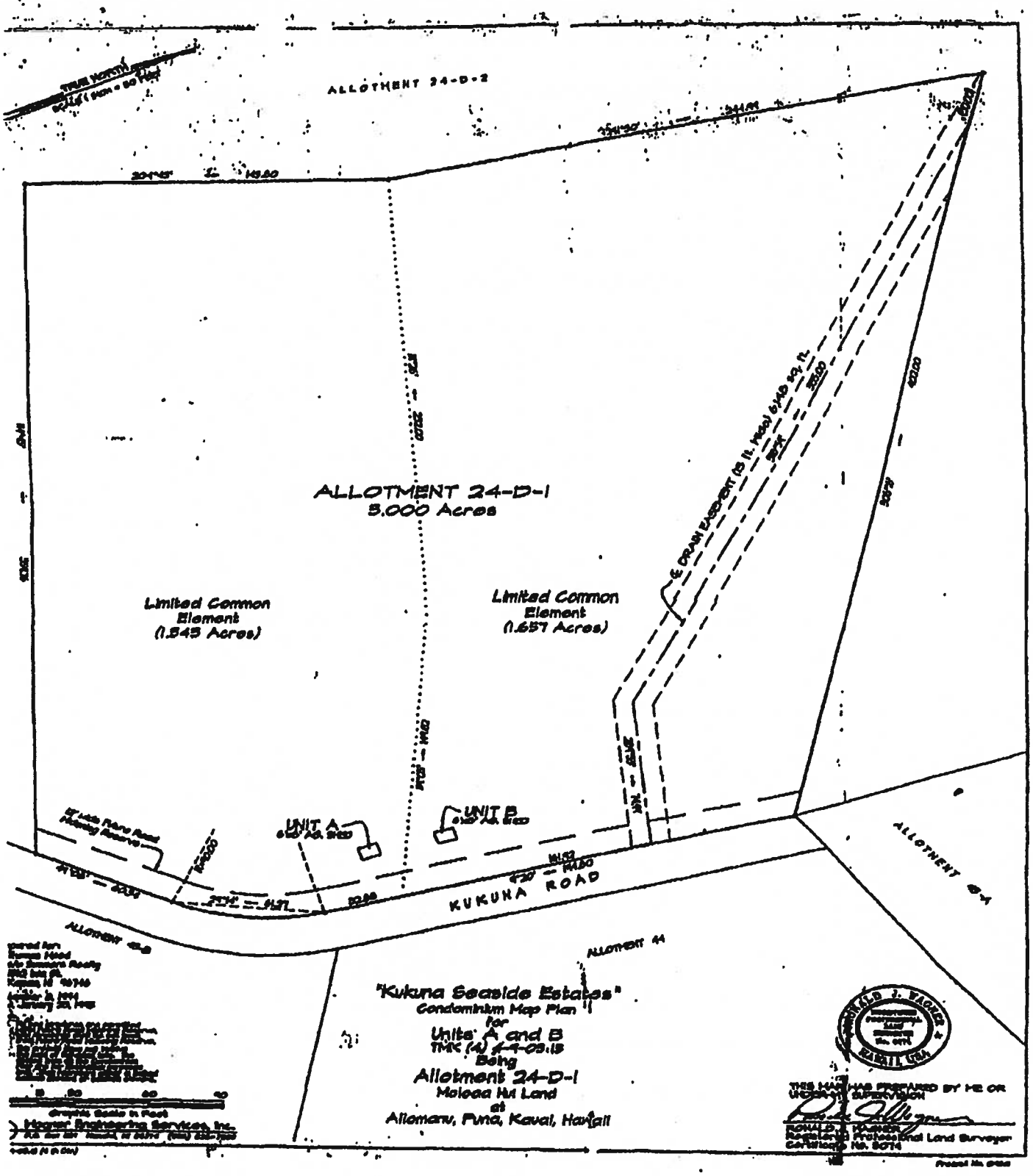

ALLOTMENT 24-D-2
ALLOTMENT 24-D-1
5.000 Acres
Limited Common Element (1.545 Acres)
Limited Common Element (1.657 Acres)
UNIT A
UNIT B
KUKUNA ROAD
ALLOTMENT 44
"Kukuna Seaside Estates"
Condominium Map Plan
for
Units A and B
TMK (4) 4-4-09:15
Being
Allotment 24-D-1
Moloaa Hui Land
at
Allomaru, Puna, Kauai, Hawaii

EXHIBIT 'A'

EXHIBIT "A"

All of that certain parcel of land, being ALLOTMENT 24-D-1, a portion of Allotment 24-D, Moloaa Hui Lands, situate at Aliomanu, Kawaihau, Puna, Island and County of Kauai, State of Hawaii, and more particularly described as follows:

Beginning at a pipe in concrete at the northeast corner of this parcel of land, on the west side of Kukuna Road, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Moloaa", being 8,406.37 feet South and 3,590.01 feet East, thence running by azimuths measured clockwise from True South:

1.	9°	20′	194.80	feet along the west side of Kukuna Road, continuing on the west side of Kukuna Road on a curve to the right with a radius of 90 feet, the chord azimuth and distance being:
2.	29°	14′	61.27	feet;
3.	49°	08′	60.54	feet along the west side of Kukuna Road;
4.	114°	45′	359.76	feet through the remainder of Allotment 24-D;
5.	204°	45′	145.80	feet through the remainder of Allotment 24-D;
6.	191°	30′	224.99	feet through the remainder of Allotment 24-D;

7.	306°	16′	402.00	feet through the remainder of Allotment 24-D to the point of beginning and containing an area of 3.00 acres, more or less.

Being a portion of the land conveyed by:

EXCHANGE DEED

Grantor:	Irving Aaron Jenkins and May Cecilia Kenkins, husband and wife
Grantee:	Thomas E. Wood, husband of Francis Wood
Dated:	January 19, 1979
Book:	13460
Page:	235

99-52

COUNTY OF KAUAI
PLANNING DEPARTMENT

COPY

For Planning Department Use Only
Zoning Permit No. Z-431-99
Use Permit No.
Variance Permit No.
Special Permit No.
SMA Permit No.
Zoning Permit Class 5
Date Received 1/11/99 By
Date Approved 1/12/99 By
Plans By
Permit Fee $ 5 - Date 1/11/99

(X) ZONING PERMIT APPLICATION
( ) USE PERMIT APPLICATION
( ) PROJECT DEVELOPMENT USE PERMIT APPLICATION
( ) VARIANCE PERMIT APPLICATION
( ) SPECIAL PERMIT APPLICATION
( ) SMA PERMIT APPLICATION

APPLICANT DONNA YUEN DESIGN
ADDRESS 1661 PEE RD
KOLOA 96756

CF 233328

PHONE NO. (work) 7427141 (home)

Tax Map Key (4) 4-9-05:15 Lot No. A Lot Size 3000 AC (130,680 SF) Zoning AG Existing Land Use VACANT

APPLICANT IS: (check one)

A. Owner of Property ___ (Holder of at least 75% of the equitable and legal title.)
B. Lessee of Property ___ *Number of Years Leased ___ From ___ to ___
C. Authorized Agent X Attach Letter of Authorization.

NOTE: *Lessee must have an unexpired and recorded lease of five (5) years or more from date of filing this application. Owner(s) must sign below if lease is less than five (5) years remaining and/or unrecorded.

DESCRIPTION OF PROPOSED USE, IMPROVEMENT, ALTERATION, AND/OR CONSTRUCTION: (specify exact use, number of units, etc.)

4 BEDROOM PRIVATE RESIDENCE

FOR VARIANCE OR USE PERMITS ONLY

Conditions justifying Variance or Use Permit application: (use additional sheets as required)

The owner/applicant or authorized representative for the purpose of said permit shall, prior to commencing excavation, construction, installation or placement of the foundations and/or footings of the improvements allowed hereunder, and after compliance with the foregoing condition, notify the Planning Department no later than 5 working days in advance of such work, in order that the Planning Department might inspect and certify the applicable and approved setbacks and other zoning requirements.

The construction, work and/or activity approved in this permit shall be subject to inspection by the Planning Inspector or authorized personnel of the Planning Department, County of Kauai. The applicant is advised that inspection will occur prior to or during construction and use to ascertain compliance with the provisions of Ordinance No. 396, as amended, (Comprehensive Zoning Ordinance, County of Kauai, 1972) and other laws that are enforced by the Planning Department.

Signature [signature]
Owner/Applicant

1/11/99

EXHIBIT C

BEFORE THE PLANNING COMMISION

OF THE

COUNTY OF KAUAI

In the Matter of the Application of BLAINE PERRELLA appealing Zoning Classification Determination and Allowable Building Area Determination for Unit B of Kukuna Seaside Estates on land located in Aliomanu, Kawaihau, Puna, Kauai, Hawai'i Tax Map Key No. (4) 4-9-005:015 0002	**CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served upon the COUNTY OF KAUAI PLANNING COMMISSION, via certified mail, return receipt requested, by depositing same in the United States Post Office at Honolulu, Hawai'i, postage prepaid, addressed to it the COUNTY OF KAUAI PLANNING DEPARTMENT, County of Kauai, 4444 Rice Street, Suite A-473, Lihue, Kauai, Hawai'i 96766:

DATED: Honolulu, Hawai'i, June 8, 2020.

GARY G. GRIMMER
ANN CORREA

Attorneys for Appellant
BLAINE PERRELLA

DEPARTMENT OF PLANNING
THE COUNTY OF KAUA'I
DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHILIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

July 6, 2020

Glenda Nogami-Streufert, Chair
County of Kaua'i Planning Commission
c/o County Planning Department
4444 Rice Street, Suite A473
Līhu'e, Hawai'i 96766

Subject: Memoranda of Understanding
Expedia and County of Kaua'i
Airbnb and County of Kaua'i

Dear Chair Nogami-Streufert,

Please find attached two (2) memoranda of understanding (MOUs) that the County of Kaua'i recently signed with third party host vacation rental booking platforms Expedia and Airbnb. These two MOUs facilitate a data sharing process whereby Expedia and Airbnb will require all transient vacation rental (TVR) and homestay hosts using the Expedia or Airbnb platforms to identify their respective TVR's or homestay's site location prior to advertising. These locations will be shared with the Planning Department's Enforcement Division on a monthly basis, and the platforms have agreed to remove any hosts from their platforms that are illegally operating in those areas where transient accommodations are prohibited.

This is the first compliance agreement that a municipality has entered into with a third party host platform in the State of Hawaii, and this is the first type of compulsory compliance agreement that a municipality has entered into with a third party host platform in the country. With your permission, I am available to give an oral presentation and answer any questions or concerns for the Planning Commission at its July 14, 2020 Commission meeting. Mahalo for your time and consideration.

KA'AINA S.HULL
Director of Planning

I.7.
JUL 1 4 2020

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is entered into by and between Expedia, Inc. ("Expedia"), and Kauai County (the "County").

1. **Mandatory Field:** Expedia will create a mandatory field for the government-issued Tax Map Key number (TMK). Partners listing a Single-Family Transient Vacation Rental or Homestay on Expedia's websites will be required to provide the TMK number before their property will appear as a listing.

2. **Display of Number on Listings:** Expedia will display the partner-provided TMK number on the partner's publicly facing property listing.

3. **Listing Removal for Failure to Include Number:** When the mandatory field is implemented, Expedia will not allow any new listings to appear on its websites without the partner having entered a TMK number. Existing listings will have a phase-in period to enter a TMK number. Specifically, beginning 60 days after implementation of the mandatory field, Expedia will deactivate any listings that pre-date the implementation of the mandatory field for which the partner has failed to input a TMK number.

4. **Link to County's Information:** Expedia will display a link to the County's licensing and information webpage in close proximity to the mandatory field. That website is https://www.kauai.gov/Government/Departments-Agencies/Planning-Department/Transient-Vacation-Rentals

5. **Owner Education:** Before the mandatory field is launched, Expedia will communicate to partners regarding the County's requirements, including that they will need to enter a TMK number to continue to list their property on Expedia's websites.

6. **Monthly Report:** Each month, for the Single-Family Transient Vacation Rentals and Homestays on its websites, Expedia will send a report to the County that includes the URL for each such property together with the partner-provided TMK number for that property. The report will be submitted on the last business day of the month. The first report due pursuant to this Paragraph will be submitted after the 60-day implementation period described in Paragraph 3.

7. **Deactivation of Listings:** Using the monthly report, the County may check the validity of the TMK numbers provided by partners. If any numbers are invalid, the County may notify Expedia, providing a reason for the invalidity. For example, the number has expired, been revoked, was never valid, or is not the TMK number associated with a permitted Transient Vacation Rental or Homestay. Expedia will remove the listing(s) associated with those invalid numbers within five business days of the County's notification. The County will not send more than two such notifications per month. Each notification may identify multiple listings or properties. Notifications should be sent to: KauaiCountySupport@expedia.com.

I.3.a.

JUL 1 4 2020

8. **Meet-and-Confer**: If the County believes that Expedia is not complying with any of the provisions set forth in this MOU, it shall notify Expedia and the parties shall meet and confer in good faith to resolve any dispute. The County will provide Expedia reasonable time to resolve or cure any alleged violation or non-compliance of this MOU before bringing an enforcement action against Expedia.

9. **Future Amendments**: If the County amends its laws or administrative rules to be more restrictive of Transient Vacation Rentals or Homestays or impose obligations on short-term rental hosting platforms, Expedia may withdraw from this agreement. If the State of Hawai'i passes a new law or administrative rule regarding short-term rentals, Expedia may withdraw from this agreement.

10. **Consistency and Effective Date**: Expedia expects that the County will adopt policies and practices regarding short-term rental hosting platforms that are consistent industry-wide and not advantage certain industry participants over others.

    a. If the County enters a different agreement with another hosting platform that offers properties for short-term rental in Kauai County, Expedia may choose to withdraw from this agreement or unilaterally amend this agreement to substitute or add the more favorable term(s) or condition(s).

    b. This agreement will become effective 60 days after Expedia and the County sign it.

    c. The County will provide notice to Expedia if and when it reaches agreements with other hosting platforms that offer properties for short-term rental in Kauai. The County will also provide copies of those agreements to Expedia.

11. Confidentiality: Subject to compliance with the Hawai'i Uniform Information Practices Law, Chapter 92F, HRS, the County agrees discussions and negotiations related to this MOU will remain confidential to the extent permitted by Hawai'i law. The Hawai'i Uniform Information Practices Law provides that any records made or received by any public agency in the course of its official business are available for inspection, unless specifically exempted. The parties recognize and agree that the Hawai'i Uniform Information Practices Law applies to documents and records exchanged between Expedia and the County, and that such documents and records are subject to disclosure pursuant to a public records request, unless an exemption applies. If the County receives a public records request for disclosure of documents or records made available to the County pursuant to the terms of this agreement, the County agrees to provide Expedia with notice at least 10 days prior to fulfilling the request.

12. **Counterparts**: This MOU may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. The parties will accept emailed PDFs of signature pages.

13. **Contact and Notice Information**: Unless otherwise specified, all notices and other communications related to the administration of this MOU will be in writing and delivered to the parties using the following email addresses and physical addresses:

Expedia:

Expedia, Inc.
1111 Expedia Group Way W.
Seattle, WA 98119
Email: kbennard@expediagroup.com
Attention: Kristina Silja Bennard
Senior Corporate Counsel
Expedia, Inc., Legal & Corporate Affairs

The County:

Kaaina Hull
Director of Planning, County of Kaua'i
4444 Rice Street, Suite A473
Lihue, HI 96766-1300
khull@kauai.gov

IN WITNESS WHEREOF, the parties have caused this Memorandum of Understanding to be executed by their duly authorized officers.

Expedia:
Expedia, Inc.

Name: Amanda Pedigo
Title: Vice President, Government & Corporate Affairs
Date: 06/23/2020

The County:
Kauai County

Name: Derek S. K. Kawakami
Title: Mayor
Date: 6/25/2020

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is entered into by and between Airbnb, Inc. ("Airbnb") and the County of Kauai ("County") (collectively, the "Parties") as of the date signed by both parties (the "Effective Date").

WHEREAS, short-term rentals via online platforms are an emerging sector of the sharing economy, providing "Hosts" and "Guests" new outlets for safe and responsible home-sharing and affordable accommodations when traveling for tourism, business, and personal reasons;

WHEREAS, short-term rentals promote the efficient use of existing resources, including residential space, and are an acceptable and welcomed use in the County when legally operated;:

WHEREAS, Kauai provides law-abiding residents the opportunity to offer and use short-term rentals in an orderly manner, consistent with state and local law, while also preserving the quiet nature and atmosphere of residential areas;

WHEREAS, this MOU provides the County, in collaboration with Airbnb, the reasonable ability to regulate short-term rentals within the County;

WHEREAS, this MOU sets forth the mutual understanding of Airbnb and the County on Airbnb's implementation of a tax map key number field and the Parties' notice and takedown procedure to advance the County's enforcement of its laws regulating short-term rentals.

NOW, THEREFORE, the Parties hereto agree as follows:

1. DEFINITIONS

1.01 "Department" means the Kauai County Planning Department.

1.02 "Homestay" means an owner occupied dwelling unit in which overnight accommodations are provided to transient guests within the same dwelling unit in which the owner resides and the respective owner currently benefits under Sec. 5A-11 of the Kauai County Code ("Code") for a homeowner's exemption for the homestay site as defined in Sec. 8-1.5 of the Code.

1.03 "Single Family Transient Vacation Rental" means a single family dwelling unit, other than homestay, which is used as a transient vacation rental as defined in Sec. 8-1.5 of the Code.

I.3.b.

JUL 1 4 2020

2. AIRBNB RESPONSIBILITIES

2.01 **Mandatory Field:** Beginning no later than 120 days after the Effective Date, Airbnb will create a mandatory field for the government-issued Tax Map Key number (TMK). Hosts listing a Single-Family Transient Vacation Rental or Homestay will be required to provide the TMK number before their property will appear on Airbnb's platform.

2.02 **Display of Number on Listings:** Subject to the terms of the MOU, Airbnb will display the host-provided TMK number on a host's Single-Family Transient Vacation Rental or Homestay publicly facing property listing on Airbnb's platform.

2.03 **Listing Removal for Failure to Include Number:** Beginning no later than 60 days after the mandatory field is implemented or later based on mutual written agreement of the Parties, Airbnb will deactivate on a one-time basis any Single-Family Transient Vacation Rental or Homestay listing that pre-dates the implementation of the mandatory field for which the host has failed to input a TMK number. Hosts that have been removed will be able to relist on Airbnb's platform once they enter a TMK number.

2.04 **Link to County's Information:** Airbnb will display a link to the County's licensing and information web page on Airbnb's responsible hosting page. That website is located at https://www.kauai.gov/Government/Departments-Agencies/Planning-Department/Transient-Vacation-Rentals.

2.05 **Owner Education:** Prior to the launch of the mandatory field, Airbnb will communicate to hosts regarding the County's requirements, including that they will need to enter a TMK number to continue to list their Single-Family Transient Vacation Rental or Homestay properties on Airbnb's platform.

2.06 **Monthly Report:** Each month, for the Single-Family Transient Vacation Rentals and Homestays on its platform, Airbnb will send an electronic report to the Department that includes the URL for each such listing together with the host-provided TMK number for that property. The electronic report will be submitted on the last business day of the month. The first report will be submitted no later than the 60 days after the launch of the mandatory field.

2.07 **Deactivation of Listings:** Beginning no earlier than 180 days after the Effective Date, using the monthly report set forth in Sec. 2.06 of the MOU, the County may check the validity of the TMK numbers provided by Airbnb. If any numbers are invalid, the County may notify Airbnb, providing a reason for the invalidity. For example, the number has expired, been revoked, was never valid, or is not the TMK number associated with a permitted Transient Vacation Rental or Homestay. Prior to the County's notification to Airbnb, the County will provide a list of reason codes that specify the basis for the listing's removal. Upon receipt of the

County's notice. Airbnb will remove the listing(s) in the County's notification within seven business days. The County will not send more than two such notifications per month. Each notification may identify multiple listings or properties. Notifications should be sent to: andrew.fede@airbnb.com.

2.08 **Meet-and-Confer**: If the County believes that Airbnb is not complying with any of the provisions set forth in this MOU, it shall notify Airbnb and the parties shall meet and confer in good faith to resolve any dispute. The County will provide Airbnb reasonable time to resolve or cure any alleged violation or non-compliance of this MOU.

3. MOU TERM

3.01 **Effect of Changes in Law**: This MOU shall commence on the Effective Date and remain in effect until terminated by either party upon 60 days' prior written notice to the other party. If the County or State of Hawaii amends its ordinances, state statutes, regulations, administrative rules or policies to be more restrictive, or otherwise allows for more restrictions, for Transient Vacation Rentals or Homestays or imposes, or otherwise allows for, additional obligations on short-term rental hosting platforms, Airbnb reserves the right to terminate this MOU, in its entirety, within 60 days' prior written notice to the County. In the event the Parties withdraw from the MOU or this MOU is otherwise terminated, the Parties shall be returned to the legal positions they occupied prior to execution of this MOU.

3.02 **Effect of other Platform Agreements**: If any more favorable term or condition related to the listing and display of a TMK number for a Single-Family Transient Vacation Rental and Homestay listing or the County's enforcement of such unregistered listings as applied to a short-term rental hosting platform, is or has been agreed to by the County with another short-term rental hosting platform, the County shall notify Airbnb within 5 business days, and shall agree to amend this MOU to substitute or add the more favorable term or condition within 30 business days.

4. MISCELLANEOUS

4.01 **Geographic Scope**. This MOU, and the obligations imposed on the Parties, are limited to Single-Family Transient Vacation Rentals and Homestays located within the County.

4.02 **MOU Amendments**: This MOU may be modified or amended at the mutual discretion of the Parties by written amendment signed by both Parties.

4.03 **Counterparts**: This MOU may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. The parties will accept emailed PDFs of signature pages. The Parties hereby consent to the use of electronic

signatures in connection with the execution of this agreement, and further agree that electronic signatures to this agreement will be legally binding with the same force and effect as manually executed signatures.

4.04 **Governing Law**: This MOU shall be deemed to be made under, and shall be interpreted in accordance with the laws of the State of Hawaii and the laws of the United States, as applicable.

4.05 **Contact and Notice Information**: All notices and other communications related to the administration of this MOU will be in writing and delivered to the Parties using the following email addresses and/or physical addresses:

Airbnb, Inc.:

Airbnb, Inc.
Matt Middlebrook
matt.middlebrook@airbnb.com

With a copy sent to:
Benjamin Lee
ben.clee@airbnb.com

City:

The County of Kauai
Kaaina Hull
khull@kauai.gov

With a copy sent to:
Matthew Bracken
mbracken@kauai.gov

IN WITNESS WHEREOF, the Parties have caused this Memorandum of Understanding to be executed by their duly authorized officers.

Airbnb:
Airbnb, Inc.
DocuSigned by
Jordi Torres
684CF838CF83426

Name: Jordi Torres
Title: Regional Director of the Americas
Date: June 27, 2020

The County:
County of Kauai

Name: Derek S.K. Kawakami
Title: Mayor
Date: June 27, 2020