

KAUA'I PLANNING COMMISSION
REGULAR MEETING
September 10, 2019

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair Sean Mahoney at 9:00 a.m., at the Lihu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Mr. Sean Mahoney
Ms. Glenda Nogami Streufert
Ms. Donna Apisa
Mr. Kimo Keawe

Absent:
Mr. Roy Ho

The following staff members were present: Planning Department – Director Kaaina Hull, Chance Bukoski, Jody Galinato, Dale Cua, Romio Idica, and Planning Commission Secretary Leslie Takasaki; Office of the County Attorney – Deputy County Attorney Nicholas Courson; Office of Boards and Commissions – Administrative Specialist Anela Segreti, Support Clerk Arleen Kuwamura

CALL TO ORDER

Chair Mahoney: Called the meeting to order at 9:00 a.m.

ROLL CALL

Planning Director Mr. Kaaina Hull: Good Morning Chair and members of the Commission. First order of business is roll call. Commissioner Ho is excused. Commissioner Apisa?

Ms. Apisa: Here.

Mr.Hull: Commissioner Keawe.

Mr. Keawe: Here.

Mr.Hull: Commissioner Streufert.

Ms. Nogami Streufert: Here.

Mr. Hull: Chair Mahoney

Chair Mahoney: Here.

Mr. Hull: You have a Quorum, Mr. Chair.

APPROVAL OF AGENDA

Mr. Hull: The next agenda item is approval of the agenda. The Department would recommend an amendment be made that Executive Session under Section H, be moved to the end of the agenda and that the meeting be adjourned and dismissed after that.

Ms. Nogami Streufert: I move to amend the agenda as suggested with the Executive Session at the end.

Ms. Apisa: Second.

Chair Mahoney: It's been moved and seconded. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

MINUTES of the meeting(s) of the Planning Commission

Mr. Hull: The next up is the minutes for July 23, 2019 Meeting.

Chair Mahoney: Chair will entertain a motion?

Ms. Nogami Streufert: I move to accept the minutes.

Ms. Apisa: Seconded.

Chair Mahoney: Ok, It's been moved and seconded. . All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

RECEIPT OF ITEMS FOR THE RECORD (None)

Mr. Hull: Next up, there are no receipt of items for the record.

HEARINGS AND PUBLIC COMMENT

Mr. Hull: So on to F., Hearings and Public Comment. At this time if any audience member would like to testify on any of the Agenda items, now would be your time or at the Chairs discretion he does allow for testimony on the specific agenda item. But if you want to, would like to testify now, you do have your three minutes. Oh wait, Mr. Mehta you have a Declaratory request on the agenda which you are afforded the time to speak during than. Would you want to reserve it then? Or, right now it's just for members of the public to testify. You actually have a petition.

Mr. Jimmit Mehta: I apologize. I will wait. Thank you.

Mr. Hull: Thank you. Any other members of the public that don't have specific Items agendized for their request? Seeing none.

Continued Public Hearing

Zoning Amendment Z-AV-2020-1 to amend Zoning Conditions in Ordinance No. PM-2004-370, relating to zoning designation at Kukui'ula, Kaua'i, further identified as Tax Map Keys 2-6-003: Por. 001, 004, 021, 023, Por. 031. And 032. 2-6-004: 017, 038, and 045; 2-6-011: 013 through 016; 2-6-015: 001 and 006, affecting a total land area of. 1,002 acres = County Of Kaua'i. [Continued 8/13/19.]

Mr. Hull: Moving on to the next, F.3., Continued Public Hearing. Zoning Amendment Z-AV-2020-1 to amend Zoning Conditions in Ordinance No. PM-2004-370, relating to zoning designation at Kukui'ula, Kaua'i, further identified as Tax Map Keys 2-6-003: Por. 001, 004, 021, 023, Por. 031. And 032. 2-6-004: 017, 038, and 045; 2-6-011: 013 through 016; 2-6-015: 001 and 006, affecting a total land area of. 1,002 acres, County Of Kaua'i, was the applicant. That was the proposal that the Department submitted concerning, or this is the proposal the Department submitted concerning looking at the ability to convert 20 acres of future park space for affordable housing. After receiving testimony at the Hearing, as well as meeting with the Koloa Community Association and other members of the community, as well as reviewing the south, further reviewing the South Kauai Community Plan. The Department has decided to withdraw this Petition and the Commissioners are in receipt of the withdrawal letter. So all the Department would be asking for is to receive the letter.

Ms. Apisa: I move that we receive the letter.

Mr. Keawe: Second.

Mr. Hull: We would like to see if there is any testimony.

Chair Mahoney: Is there any members of the public who would like to testify on this agenda item? You have three minutes and please state your name for the record.

Ms. Tess Kinnaman: Tessy Kinnaman for the record. Good Moring Commissioners. I'd like to thank the administration for withdrawing this amendment. And I'd like to make a suggestion, there is another location where it possibly could be built. The Wili Wili Track Subdivision, we have 60, there is 66 acres there supposedly for dedication, its State land. And it's been sitting there for over 40 years, the only portion that was built was the beginning of the Wili Wili Subdivision. I forget how many homes that was but it was built in the 70's, they made (inaudible). But there's 66 acres that is State land and if the Administration could lobby the state maybe they could Executive Order it over to the County and then we can have some of that land for housing. And the need for the housing for, on the State level (inaudible) so the County and State could partner up and do something about it. That would be ideal for the Koloa area because the other parks are fairly well used. The Koloa baseball park football and baseball and then the Waikomo Subdivision Park is great for soccer where the kids practice. And, and also, and also, I would like to mention enforcement of these Conditions also is very important especially No. 15. a., besides that park. 15. b., is really important, the harbor, Kukui'ula Harbor dedication. The Harbor Park has been ready for years and they're still a private property sign on

there, which still belongs to Kukui'ula. But after they, the Condition was that if they, after they do clean it up and fix it up, it's already fixed up then they dedicate it over to the County. And they will be maintaining it forever. And it's been very well used because Poipu Beach Park is overwhelmed a lot of South Shore parks are overgrown and we do need this park. Kids are, I mean it's so cute I even have a little (inaudible) for myself, you know. But there's canoes lined up on one end and (inaudible) there and those should be removed. And there's illegal sheds there and if I may ask to the Chair, to the Planning Director, what is the process for this Commission to enforce this condition? Hopefully before the year ends where this park is dedicated, the beach park is dedicated over to the County. So how does that work? Does the Commission make a recommendation and then the Planning Director enforces it?

Chair Mahoney: Right now we're, the testimony should be about receiving this, that's what's on the agenda. So Tess—

Mr. Hull: Tess, so what the Chair is getting at is that, this is to provide testimony not to necessarily question either Commissioners or the Department but on the side I can explain to you. For the public's purpose the Department can issue an enforcement investigation we just need an official complaint. So if you want to work with our enforcement office at the Planning Department to issue the complaint of the illegal structures that can occur.

Ms. Tess Kinnaman: No it's not a real complaint it's enforcing the Condition where they dedicate over the beach park over and after that enforcing the other illegal structures. But the main thing is to dedicate over the County Park, the park to the County. So I mean that is the process I was asking, how the Commission could go through. Thank you very much.

Chair Mahoney: Okay. Thank you for your testimony. Any other members of the public like to testify on this agenda item. Seeing none.

Mr. Hull: I apologize, I believe there is a motion and a second on the floor to receive the letter.

Chair Mahoney: It's been moved and seconded. Any discussion further? Hearing none. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

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

CONSENT CALENDAR

Status Reports

Annual Status Report 2019 for Special Management Area Use Permit SMA(U)-2005-08, Project Development Use P.D. U-2005-26, Use Permit U-2005-25, and Class IV Zoning Permit Z-IV-2005-30, Tax Map Key: (4) 3-5-001:027 (Por.), 168, 169, 71 (Por.), 175, and 176 = Kauai Lagoons LLC & MORI Golf (Kauai) LLC.

Director's Report(s) for Project(s) Scheduled for Agency Hearing on Tuesday, September 24, 2019. (None)

Mr. Hull: Next on the Agenda Item is G. Consent Calendar. Unless the commission would like to move any items off the Consent Calendar? The Department will just be recommending adopting the Consent Calendar.

Ms. Apisa: I move that we adopt the Consent Calendar as presented.

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded to close the agency hearing. Any discussion further? Hearing none. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

EXECUTIVE SESSION

Pursuant to Hawai'i Revised Statutes 92-5(a) (2 and 4) for Evaluation of Planning Director for first 6 months of FY 2019. This session pertains to the evaluation of the Planning Director's work performance where consideration of matters affecting privacy will be involved. Further, to consult with legal counsel regarding powers, duties, privileges and/or liabilities of the Planning Commission as it relates to the evaluation to the Planning Director.

Mr. Hull: Next up would have been the Executive session but that has been moved to the end of the Agenda.

GENERAL BUSINESS MATTERS

HBR Enterprises LP's Petition for a Declaratory Order Regarding Noncompliance and, in the Alternative, Petition to Revoke and/or Modify Variance Application Permit V-72-11, (7/26/19) by Calvert G. Chipchase, ESQ., and Nicholas M. McClean, Esq. of Cades Schutte LLP, Attorneys for Petitioner HBR Enterprises LP.

- a. Planning Director's Report pertaining to this matter.
- b. Association of Apartment Owners of Hanalei Bay Resort's Memorandum in Opposition to HBR Enterprises LP's Petition for a Declaratory Order Regarding Noncompliance and, in the Alternative, Petition to Revoke and/or Modify Variance Application Permit V-72-11 (9/3/19) from Ian J. Jung, William C. Byrns, A. Bernard Bays, Michael C. Carroll, and Sharon Paris, Attorneys for Respondent, Hanalei Bay Resort.

Mr. Hull: Next agenda item is General Business Matters I.1., HBR Enterprises LP's Petition for a Declaratory Order Regarding Noncompliance and, in the Alternative, Petition to Revoke and/or Modify Variance Application Permit V-72-11, (7/26/19) by Calvert G. Chipchase, ESQ., and Nicholas M. McClean, Esq. of Cades Schutte LLP, Attorneys for Petitioner HBR Enterprises LP. There is also a Planning Director's Report pertaining to this matter. As well as an Association of Apartment Owners of Hanalei Bay Resort's Memorandum in Opposition to HBR Enterprises LP's Petition for a Declaratory Order Regarding Noncompliance and, in the Alternative, Petition

to Revoke and/or Modify Variance Application Permit V-72-11 (9/3/19) from Ian J. Jung, William C. Byrns, A. Bernard Bays, Michael C. Carroll, and Sharon Paris, Attorneys for Respondent, Hanalei Bay Resort. So I will just read on to record the Planning Department's Reports fairly brief. The Permit Compliance and zoning, excuse me, the Permit Compliance violation and Zoning Compliance notice that the Planning Department issued on August 9, 2017, is attached to our report. A condensed list of events from February 17 until present that details the Planning Department's enforcement actions and AOA Hanalei resorts progress and remediation of premises is also attached. On July 31, 2019, the Department received and accepted a draft remediation agreement that was approved by by the AOA of Hanalei Bay Resort and it includes a final parking plan. The Department is currently executing the final remediation agreement based on the July 31st, draft Proposal pursuant to that agreement. The Hanalei Resort must complete construction of the revised parking plan within 90 days from the execution of the remediation agreement. Based on the foregoing, the Planning Department is ultimately recommending a 90 day deferral to come into compliance or give the property owner the ability to come into compliance. This complaint goes back all the way back to February 17, and so if you guys read the timeline of events in addition to the parking issue at hand there are also some 134 condo units that had possible illegal modifications made. Which it did take some time for our one SMA Inspector to inspect all 134 apartment units. Several of them did, it was determined had illegal structures in them or illegal modifications. Those have all since been remedied but what is still outstanding is the fact that this site does not have the amount of parking stalls represented during the approval of the Variance Permit back in 1972. So the Department is in agreement this is a Zoning violation of the Variance permit and we have issued a notice accordingly and currently the property owners are in remediation, we are giving them 90 days essentially. So that's why we are recommending the 90 day deferral but ultimately the two parties have their attorneys here so I think it would be prudent at this time to hear from the attorneys. Unless you folks have any questions for the Department?

Chair Mahoney: Is there any questions from the Commissioners to the Department? Okay, well could the attorneys please come the Podium and state your names?

(Inaudible talking)

Chair Mahoney: Check your mic to make sure it is on.

Mr. Nick McClean: Mr. Chair, members of the Commission. Thank you very much for your time. My name is Nick McClean on behalf of the petitioner HBR Enterprises.

Mr. Ian Jung: Ian Jung on behalf of the Association of Apartment Owners of the Hanalei Bay Resort. And also, with me here today is Mr. George Costa who's the Resort Manager.

Mr. Nick McClean: Thank you members of the Commission. If I may just introduce the matter briefly, and then of course subject to any questions the Commission may have. This is an issue Mr. Hull mentioned that this goes back to 2017, and it certainly does, but it actually goes back even further. We submit that it goes back over 40 years to 1972, at that time the Hanalei Bay Resort made a commitment to the County that it would provide 149 parking spaces and the Variance Permit was approved on that bases. And over the pass, over 40 years, there has never been compliance and certainly it's an issue we've tried to resolve and has gone into litigation in the past. And ultimately, it's our position that a declaration of non-compliance is appropriate

and potentially modifying it or revoking the permit is an appropriate next step or certainly an OSC to that affect. The parking issues are outlined in our Petition, we appreciate very much the work that the Department has done. But ultimately we have concern with respect to the Remediation Plan and the proposed delay. I will speak first to the issue with respect to the proposed Remediation Plan. Now, I would say that our client hasn't been a party to most of those negotiations so we're, we are not privy to everything that has happened but it does appear that the existing Remediation Plan may have some serious legal components issues particularly with respect to the Fire Code. There is a provision that requires 20 foot clearance for, to enable fire engine to access the scene in the event of an emergency and it appears from what we've seen there are some document's relating to the Remediation agreement that are attached to the opposition that was found here. It appears that doesn't comply with the 24 foot requirement. So we certainly have serious concerns on that bases and would like to certainly express those now. More broadly we are concerned about the prospect of a delay in this matter because it's now been a number of years, we've been unable to successfully resolve this matter. And we think that increasing the legal clarity of the issues is something that would be very helpful to the parties in our view. And is something that is very much in this Commissions wheelhouse. It is the declaration essentially would be what the recommendation of the Planning Department has already said, "that there is an ongoing violation." As of today, certainly as of the day we filed our Petition, there simply is not compliance with the requirements that was set forth in the Variance Application. Now there are a couple of arguments that have been raised in the Opposition that was filed. I think as a threshold matter I would just like to point out that there has been no motion to intervene filed by the AOA. It's our position that they are properly parties to this proceeding and that the appropriate next step would be to have them file a motion to interface so we could respond to that. But as it is right now, it's not clear why they would have standing to file in opposition. But in any event, on the merits I think the, just very briefly, the arguments that they have put forward there are a couple of them that I think deserve special comment. The first is that they argue that there is no violation because the Variance Application doesn't mention this 249 Permits. But I think the fact of the matter is, if you refer it to Exhibits "D and G" of the Petition, it's very clear based on the correspondence that happened at the time, that there was an understanding. And a commitment made by the resort that there would be 249 that was reflected being the fact of the deficiencies was reflected in the Planning Directors Report at the time. And the recommendation to approve the Variance Application Permit and ultimately the, the Commission's approval of that permit was based on the understanding that there would be 249 parking spaces. Again, that requirement, that simple, has never been satisfied. There is also a point raised about the, in the opposition about an arbitration proceeding in front of Mark Bennet which occurred last year. And there, we would just say, that his words, specifically indicated that he wasn't breeching the question on whether this Commission or the County generally could enforce its own Zoning requirements or the requirements of the Permits. So, it's up to the extent there is an argument that there's some kind of res judicata or estoppel issue we simple disagree. Now, I think those are the key points that I'd like to introduce at this point. I know my client, Mr. Jimmit Mehta would like to address the Commission as well if he may, I think with the Commission's approval. Would it be possible for him to offer testimony?

Mr. Hull: Yes.

Mr. McClean: Thank You.

Chair Mahoney: Could you state your name for the record Please? Move into the microphone. Thank you.

Mr. Jimmit Mehta: My name is Jimmit Mehta. I am the restaurant operator at the Hanalei Bay Resort. Good morning to all of you and thank you for the opportunity to speak. I would like to share this parking map, I'm not sure if you had the opportunity to look at it yet? But was submitted as the parking plan is it possible to give that to you? Or is that not needed to?

Mr. Ian Jung: Chair. If I could just object. And just say something for the record?

Chair Mahoney: Okay.

Mr. Jung: This matter is actually a request to go into a declaratory order and which if the Commissions finds that there some kind of bases for going into a Contested Case Hearing, at that point they can present evidence. I think it's fair that we let the attorneys speak at this point and present the issue. If they have any testimonies they'd like to raise, if this Commission feels like they should bring it into a Contested Case point, then I think we can take testimony.

Chair Mahoney: Okay. Would the other attorney like to counter that? But I—

Mr. McClean: With request to that point, we are not requesting a formal adversarial sworn testimony. He's simply here as a party who would like to be heard on this issue and who feels passionately about the issue in a way that any member of the public would have the right too.

Chair Mahoney: I think, at this juncture, attorney Jung has a point though. And—

Deputy County Attorney Nicholas Courson: The public would have their three minutes to make any comments. In terms of taking testimony they have three minutes.

Chair Mahoney: Yes.

Mr. Hull: Yes, I think both the attorney and Chair are getting at is that if Mr. Mehta would like to submit as a general member of the public with three minutes of testimony, he can testify then, but to try and submit it as a party to these actual proceedings and having longer than three minutes of further dialog and discussion. He would have to far go those rights and talk under the three minutes.

Mr. McClean: Sir, I appreciate the clarification and we are certainly happy to have him testify as a member of the public, without waiving any additional procedures rights down the line (Inaudible).

Mr. Jung: And just for the record. Commission and Chair I take an objection to this because he is not necessarily a member of the public, he's a party filed under the declaratory request. So we file formal objection to that.

Chair Mahoney: Okay.

Mr. Courson: There's a distinction in Sunshine Law between a parties, a parties, (inaudible) gives up there rights as a member or the public, you're saying under 92?

Mr. Jung: I believe so because this is what we are doing here it's a Contested Case Hearing or leading to one there too.

Mr. Courson: Leading to one there too. But it is not, that's the crocks that you're argument, it's not yet a Contested Case Hearing.

Mr. Jung: Well we would still take the position that, they're not a member of the public at this point because they are filed as a Petitioner, named individually as a Petitioner.

Mr. Courson: And is there specific support for that position?

Mr. Jung: I think under Chapter 91-14, once you get into an area where there is a threat of a Contested Case becomes an interest of whether or not what types of factual assertions are made. At this point the attorneys are just opening the issue to what the frame of issues are and if we start takin testimony without putting them properly under oath, then I think it could jeopardize the Contested Case Proceedings that may occur.

Mr. McClean: And again, we would simply disagree with that argument. He, I think it's fairly clear that a person can have multiple statuses he is I think just as a matter of common sense both a Petitioner and, actually I should say, his LP is a Commissioner. So he is not a party, so he is at most, he is a person who has an affiliation with the Petitioner. So on that bases alone we think it's appropriate for him to testify as a member of the public here.

Mr. Courson: This is a novel issue for me yet, I've never had this come up, I've never researched it. I think in terms of it being unsworn testimony, the Commission could just attach whatever weight it wants to attach to it, later if it proceeds to that area it will be sworn testimony, you know. And if someone's testimony is different, I think, that right there would blow a hole in their credibility. So—

Ms. Nogami Streufert: And since we didn't let them speak at the beginning, at the public testimony, can we re-open it and have them do it then.

Chair Mahoney: They have an opportunity.

Mr. Courson: There's, at every agenda item usually there's the opportunity for public testimonies, it's not really re-opening it. There's other people in the public that probably want to testify as well. It's the Commissions call but I would recommend giving him his three minutes.

Chair Mahoney: Well okay.

Ms. Nogami Streufert: Is the Commission going to act (inaudible)?

Mr. Courson: But I would also keeping it with the rest of the public testimony. So if it the attorneys still have further issues then—

Chair Mahoney: Why don't we do that? When there is public testimony he'd be allowed to testify. Let's get this part here, I know the objection has been raised and we are going to do it, allow him to testify at the public testimony.

Mr. Jung: Again, good morning Commissioners. Ian Jung on behalf of the Association of Apartment Owners of Hanalei Resort. Thank you for listening to the objection we appreciate that. This case presents some unique issues, and I think for this body to enter the realm of this long standing dispute is unfortunate. Because as mentioned this has a very unique land use history to it. The Petition files it as Variance under the CZO but what they failed to understand is that this permit was actually issued prior to the adoption of the CZO. The Variance standard for which it was outlined under and approved years ago, was the IZO, which is the Interim Zoning Ordinance. And basically what happened with that IZO, is you have a specific list on enumerated requests that people can lodge that get outright permitted. But anything outside the ordinary that is like a resort type development it gets issued a Variance Commission by the Planning and Traffic Commission. So I think the Petition itself is flawed because they miss cite the standard for which to review on. From a procedural standpoint where we are at is a Petition for declaratory action and/or a motion for order to show cause to amend or revoke permit. There are two standards within the Planning Commission rules that kind of set this out. The first, what they are asking for is to go into a full on Contested Case Hearing where both parties can present evidence, take testimonies basically outline the issues on whether or not an order or a Condition has not complied with under the rule of law. And then the Commission would have the authority to make a declaratory ruling on that matter. The second, is they are asking for the Permits to be revoked. And from a procedural standpoint I don't think this is appropriate at this point because there are, is an interested party which is the owners in their individual capacity being at 16 A. So essentially, the Petitioner and Mr. Mehta who initially testified, he's a tenant of unit 16 A, and so if he is going to be asked to revoke a Permit for a 134 unit owners within a Association of Apartment owners, then I think all people should be brought in and they should notice all people within, who own a unit within that building. And secondly, if we look at this project from a land use standpoint, we all know when a project goes a developer builds it out. The next step is it is transferred over and sold either retained by the developers itself and transfer to entity to entity. But in this case the ownership was transferred over to individual unit owners who then formed the Association of Apartment Owners. And so there is a lot of flare and attack on the Board for not doing this and not doing that, but in reality, it was the developer who originally built this project and ultimately passed it over to the Association. So I think that it is unfair characterizations of Mr. McClean and his client to attack the Association on that matter. Secondly or thirdly, the history of this project is quite unique. So I know a lot of you are familiar with this project because you have probably seen it around. The Association of Apartment owners took over I think in 1978 after the developer was done. But what happen was when they originally permitted the project, they were proposing stalls for a 150 parking stalls. And this was going to be laid out and paved according to a plan that was submitted to the Again, Planning and Traffic Commission not the Planning Commission. What happened thereafter, was they started to build it out or they started to negotiate the traffic standards based on what was applied from, what I understand this is just from historical perspective, we can get into evidence on this if this goes to Contested Case. But what happen was they tried to use the City and County of Honolulu parking standards to apply it. So they came up with a number, what was identified as 228 as the quote unquote "required stalls" that was identified in our Exhibits. During some communication with the Planning staff back then, they realized that because of the special events that maybe had for the tennis facilities they proposed it 249. And so our developer at the time the AAO, the developer at the time proposed more then what was required and so identified these 249 stalls. And the resort then operated under and tennis and racket club and then in 1990, there is a request

to amend those permits or request the Planning Department it appears and at the time they sent in a modification which then created Happy Talk Restaurant and the Bali Hai Restaurant and this was in 1989. Interestingly, back in the day when the resort was originally proposed and approved, there was no commercial component of a restaurant it was a dining room that was going to be for the owners of that resort and people who would be staying on the resort. So there is an element of shift that accord with the project. And in 1989 with that shift came this new commercial component which sort of hybrid project to create this commercial outlet. Interestingly, what happened was the Planning Department would approve the plan with a site plan and the stall count was at 173 from what we saw on that 1989 plan set that has the Planning Departments stamp on the Zoning Permit. We worked with the Planning Department to try and identify and resolve this but the Association who now essentially stepping into the shoes of the developer realized okay lets file. There is a commitment back in 1970 to formalize stalls, let's propose a plan and do that. And I know the Petitioner is arguing that this was all done before, after the file, the Petition was filed but we've been organizing meetings to go out and take a look all of the 134 units, we've been having Mr. George Costa meet out with Les Milnes out there to identify the stall counts, all this was occurring in that two year time period and respectfully, I think the Planning Department was fair to delay it because they focused their energy on the rain 18 come March 2018 when the storm event happened. So there's a lot of red herrings been thrown about "why the delay?" But these things take time. The parking plan, we had our engineer, Honua Engineering, go out, measure out and it was just informed to me today that there is an issue with the 20 foot width. But we also proposed in our parking plan or George did anyhow, three additional stalls that would account for pay stalls but our engineer recognized that there is this 20 foot fire lane and we had to element those three so we could fit the staff parking, what we call the theater style parking in that range. So to keep that 20 foot fire clearance so again that's another red herring at the last minute that their throwing out. Because the original Petition said we want 249 stalls and they broke it down 37 theater, 32 lawn, our parking plan complies with that as we worked out the Planning Department. Which the Planning Department was diligently enforcing on us. And so now we are at a point where we're going to be thrown into a Contested Case Hearing on a Permit that is a grandfathered Permit pre-CZO which in fact does not have a Condition relating to parking. But rather a commitment on the developer post approval that they will resolve the parking the Planning Department and not necessarily the Planning Commission. So with that, you know, we respectfully ask that this matter be dismissed and allow us to continue to work with the Department to implement the plan that we've proposed and they've agreed too. I know they want us to go and check with fire but we can meet with fire and get out there and show them the 20 foot width. But I think at this point there is really nothing for the Petitioner to allege now, because we are coming into compliance not based on a Permit Condition, but whether an agreement that was made with the Planning Department staff back in 1972. And if you have any questions and if Mr. Mehta gets to testify, than I can call up George Costa to speak as member of the public staff who can kind of give you the history of the resort from his perspective.

Chair Mahoney: Yes.

Mr. McClean: Before we get to testimony, may I speak?

Chair Mahoney: Yes.

Mr. McClean: Thank you. Just very briefly, reply too, my colleague mentioned a couple of bites I'll address a handful of them. First, is there was issue raised with respect to the CZO vs the IZO it's our position that's simply for the purposes of the Petition that's really in many respects a distinction without a difference. Because in the opposition itself, there's a concession that the Section 3, of the IZO list of permitted uses, does not identify resort projects as an expressed permitted use. So it's clear that it needed a Variance Permit and that there is no real dispute about that whether you look at it under the CZO Report or the IZO. And certainly, if the Commission would like us to amend or clarify we can file a motion to that affect subsequently. And I think more generally, another distinction without a difference is the developer vs the AOA, I think it's well established that AOA steps into the shoes of the developer, there is legal commitments, you don't get to exempt yourself from those commitments simply because your, you've changed the legal form (inaudible) especially under these circumstances certainly should be clear. And I think that we would just clarify again, the when the Variance Application Permit was approved, it was done so based on a report to the Planning Commission identified as such in the report from the staff report and the, it indicated that, "based on the forging findings it of evaluations and conclusions the staff recommends this Variance Application Permit be approved subject to" and then one of the terms of Conditions was, "the parking deficiencies be resolved." And it was on the bases of that report reflected in the minutes that the application permit was approved by the Commission. So I think unless the Commission has any questions I don't have anything further.

Chair Mahoney: Okay. Thank you. Attorney Jung, would you like to respond?

Mr. Jung: Yes. So the reference in the Planning Commission Report, is irrelevant because at the point of the issuance of the actual approval letter those are the stated Conditions of which a permit is issued under. And I would just like to clarify that.

Chair Mahoney: Okay. Thank you. Any Commissioners have any questions for either attorney?

Ms. Nogami Streufert: In the time that, just a question. In a time that this—

Chair Mahoney: Directed to whom?

Ms. Nogami Streufert: Either at this point. From reading all the documents it appears that in 72' there was a required 228 parking spaces. But the resort came back and then said that they would provide 249. So it was not something that was, something that the Planning Department recommended, it was the resort that had suggested it and that was approved in 1973. Alright. So it's not a new requirement it's something that's been there for a while. Was there a schematic that was include in this 243 at that time that we could look at?

Mr. Jung: Yes. And there was, it's identified by the Exhibit number for you. If you take it and look at Exhibit "5" of our opposition to the Petition. It identifies that there's going to be a 180 paved stalls with 32 lawn parking, and 37 theater style. So it anticipated how to arrange those cars with the idea of some kind of valet system would come into play.

Ms. Nogami Streufert: So if that was the case then, why was that not followed through?

Mr. Jung: Well it's being followed though now. We have, and for 40 years it's never been an issue until Mr. Mehta filed his complaint to the Planning Department.

Ms. Nogami Streufert: Well it is an issue if it wasn't complied with.

Mr. Jung: Right. And now we're working towards implementing the system and George and his team has created a valet process to accommodate the theatre style parking as well as the lawn style parking for special events. So as a part of our parking plan, we are implementing and complying with what originally approved. But from year 73 or 74 when it was built to 89 there was never an issue. And in 89 when the new parking plan came into play and they came up with creating "Happy Talk" and creating "Bali Hai" restaurant, the original site plan was laid out as 173.

Ms. Nogami Streufert: Right. But you're saying that the issue was someone complained about it. That's not the issue I think the issue is the original 249 stalls, parking spaces, rather that's grass or rather it's actual gravel parking space, or paved parking space is kind of irrelevant. The question is if they were, if it was originally intended to have 249, that's going to be, that's the issue it's not whether someone else, you have a new tenant that now acquires the 249.

Mr. Jung: Yes. And I think that is a fair comment because I am always an advocate to record Conditions on title. Which would at least announce or tell respective owners and buyers and put into title reports and what not that there is this specific obligation. But what happen was it was correspondence after the approval, and my thought it was lost in translation as it transitioned from developer over to the Association of Apartment owners and sold off individually. But now that it's been raised to my attention and I've been asked to remediate the problem and make sure we get implemented a plan, not just for 249 but we've committed to 252 in this case because we've found some other space create theater style parking.

Mr. Courson: The one comment that I'd throw out there too just to frame this up is we don't want to get too much into the substance just yet. This is just you know, you've got a number of possibilities, you have two attorneys asking for different things and you have a different recognition from the Department. What we are trying to figure out, of which of those three paths to go with?

Chair Mahoney: So any further questions by the Commissioners? No questions.

Ms. Nogami Streufert: No questions.

Chair Mahoney: Thank you gentlemen. At this juncture we will take public testimony.

Mr. Hull: The first person signed up is Council Member Felicia Cowden.

Councilmember Felicia Cowden: Felicia Cowden for the record. I've long been familiar with this property. It's always had you know, periods of difficulty in that parking. When I saw this on the Agenda and I looked at the proposed parking I thought, "Wow common sense tells you this is going to be a problem" to have perpendicular cars folding in and holding in the existing parking, that seems like a really difficult plan. So I went there and I looked and I kinda paced it out and I watched these big vehicles that are rental vehicles like Denali's and things, moving in and out of that parking lot. Even when there isn't that extra element and sometimes they have to back out, do like a three point reverse to come out. I don't see how it would work for police and fire if you had a real emergency. It looks like on a daily basis it would be difficult it would require just too even, get up and get to the airport, get out at any particular key time, they would

have to be a managed plan with valet being able to do it. So I'm curious if the Police and the Fire, Kauai Emergency Management Agency is signed off of this plan? It seems a little bit difficult if we start a precedent with having feeder parking I think is what you're calling it? I haven't seen that anywhere on this island. I'm not even really familiar with seeing it with other places I've ever tried to park. And I think it's a difficult precedent and I urge be very careful in, in confirming something like that. I also looked in to pictures of where that, I think they said 26 parking spaces for lawn, if they took the hedge out, it would maybe barely open up enough space for an in and out. I wonder if the owners of those apartments have been asked. It would certainly remove the value of the experience of living in that apartment or vacationing in that apartment if that was a parking lot right in front of them. So I just wanted to voice up and say, let's make good judgements especially if it sets a precedent. Thank you.

Chair Mahoney: Thank you for your testimony.

Mr. Hull: There are no further members signed up for testimony is there anybody else from the public that would like to testify?

Mr. George Costa: Aloha Commission members. George Costa, Resort General Manager, Hanalei Bay Resort. I just want to confirm that the 249 stall requirement has always been there. You know, depending on pave, lawn, theater style, which we call valet it's always been there. I've been there 8 months on a daily basis you know, that resort is almost 50 years old. It's been operating basically the same way for those number of years. I'm there every day, I see the cars going in and out. There's more than enough space clearance and I know that there was a concern with emergency vehicles and I made it a point that any time we have an emergency I require the fire and EMTs to drive all the way down through the parking lot, down to the buildings where there is fire lanes to accessing the buildings. Because I want the fire, police, and EMTs to get used to, to coming down to the buildings. Large fire trucks and so we've had in the 8 months I've been there at least 4 incidents where we've had to bring all those vehicles all the way down to the buildings going through the parking lot. So again, we do that on a daily basis and it's been manageable and so I just wanted to provide that testimony. Thank you.

Chair Mahoney: Thank you for your testimony

Mr. Hull: Would anybody else from the public like to testify on this agenda item?

Chair Mahoney: Could you state your name for the record please.

Mr. Jimmit Mehta: Good morning again Jimmit Mehta here. I'd like to speak as a member of the public. This plan that we recently had the opportunity to look at is seriously flawed. It's one thing when you see something on paper the cars and the scales you can adjust to whatever size that seems to fit. Respectfully this does not work. I know this, because like Mr. Costa, I'm there and we see the near misses, we see the accidents, we have employees whose cars get banged up and this is without any of the stack parking. If you were to have the Fire Department come out after layout all these cars at a safe distance you would not be able to meet those requirements. You will not if you can imagine as a guest some people will get to self-park here, some people will get to valet. And when your blocked, your waiting for valet to move your car and those side with the parking is not blocked you can't even back out now with some of these vehicles that you have with the clearance. We've measured the aisle, is a simple thing to go out and actually one

thing to look at everything on paper and it works. But it doesn't work in reality and regarding those lawn parking shown. They are not there you can't fit 26 cars there and in the original submittal to the County there wasn't a swimming pool there. That area was a tennis court and lawn much farther away than it is. So now, if you're an owner, of any of those units in the building. You've got head lights, during the day you have cars coming in and out. Now they say it's a special event, they're not going to have special events there for tennis that's just a smoke and mirror tactic, there is not going to be anyone using that because they're going to keep that off limits. What if you speak to the home owners let them speak out, Princeville Association has even made a comment that if you allow that type of lawn parking then the next thing is being members of the Community Association of Princeville, which Hanalei Resort is should they allow people to park in their back yards? There hasn't been enough study—

Mr. Hull: Three minutes Mr. Chair.

Chair Mahoney: Okay. Your time is up. Thank you for your testimony.

Mr. Jimmit Mehta: Thank you.

Mr. Hull: Would any other members from the public like to testify on this agenda item? Seeing none. So Commission has essentially three recommendations before it. You have the Mr. Jung and his client recommend, request to dismiss the Petition for a declaratory action, you have request from Mr. McClean and his client to issue the declaratory action or modify the Permit Conditions or revoke the Permits all of which are required going into a Contested Case Hearing. And you have the Departments recommendation to defer this matter for 90 days. To finish and essentially complete the remediation. The Department is in complete agreement with Mr. McClean and his client Petition in that, there is a violation out there. We have issued that violation notice and we have given a timeline to the AOA to come into compliance. And so that's our recommendation to defer it. Wherever this goes, if it does go to the order to show cause side that's completely within the realm of this Commission. One thing I'd like to make abundantly clear to this body is that this doesn't function in the same, or at least the crisis going on right now it doesn't function the same manner as a Use Permit functions in that a neighbor is complaining about the lack of compatibility of an operation. These two parties share the Entitlement of the Variance Permit. This is not necessarily neighbor, well it is a neighborly dispute these two neighbors are entitled under that Variance Permit to have the Hanalei Bay Resort and to have the restaurant. These two parties are both responsible to ensure that the parking requirements are met and that's what the Department is holding it too. The Department is also, to some degree, with some disagreement we had at previous discussions that this enforcement action that we have been pursuing will be done in a manner that address all the parking issues in the same, in the sense that we are going to be enforcing what is required of the 249 as far as it meets the public works and fire standards for the safety and the access. But what is a civil dispute between this two parties as far as how valet is structured, how the parking stalls are further maintained, beyond the public works and fire department standards the Department is not going to get into that. They are essentially going to be coming to you are to a certain degree possibly we'll be requesting that of this body should it go into a Contested Case. But this Departments position that indeed there is a violation and we are working or remediation of that. But above and beyond that this is a civil matter between the two parties that again, share Entitlement to this Permit. The request to revoke this permit is a particular surprise, being that revocation of this permit would mean not only the ceasing of operation of Hanalei Bay Resort

but the Restaurant as well. So this is fairly contentious issue between the two parties and again, that is why the Department is essentially requesting 90 days remediation. And hopefully some remedy and reconciliation to happen, but that's where this Department stands.

Ms. Nogami Streufert: I move to defer this for 90 days.

Ms. Apisa: Second.

Chair Mahoney: It's been moved and seconded to defer for 90 days. Any discussion further? Hearing none. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

Notice of Appeal and Demand for Contested Case Hearing from Denial of Nonconforming Use Certificate Renewal Application at: 4922 Weke Road, Hanalei, Hawaii 96714 (Certificate #1032) for Christopher James from Gregory Kugle, Esq., and Joanna C. Zeigler, Esq., to Clerk of the Planning Commission, Mr. Kaaina S. Hull (8/19/19) [Contested Case No. CC-2019-17].

- a. Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision Related to the Denial of a 2019 renewal packet by Christopher James for TVRNCU #1032 due to a failure to timely renew in 2018, Tax Map Key (4) 55001014, Hanalei, Kauai, received August 19, 2019 via email, for referral to Board and Commissions as Contested Case File No. CC-2019-17.

Mr. Hull: So next Agenda Item is Item I.2., Notice of Appeal and Demand for Contested Case Hearing from Denial of Nonconforming Use Certificate Renewal Application at: 4922 Weke Road, Hanalei, Hawaii 96714 (Certificate #1032) for Christopher James from Gregory Kugle, Esq., and Joanna C. Zeigler, Esq., to Clerk of the Planning Commission, Mr. Kaaina S. Hull. You have a recommendation from the Clerk of the Commission to Refer an Appeal of the Planning Director's Decision Related to the Denial of a 2019 renewal packet by Christopher James for TVRNCU #1032 due to a failure to timely renew in 2018, Tax Map Key (4) 55001014, Hanalei, Kauai, received August 19, 2019 via email, for referral to Board and Commissions as Contested Case.

Chair Mahoney: Okay Commissioners.

Mr. Keawe: I move to refer to the Board of Commissions Contested Case File No. CC-2019-17.

Ms. Apisa: Second.

Chair Mahoney: It's been moved and seconded to go to Contested Case. Any discussion further? Hearing none. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

Petition to Appeal the Action of the Director of Planning of the County of Kauai reDeniel of 2019 Renewal Application Packet for Non-Conforming Use Certificate TVNCU #5023 (Hale Haloko Kai), 5111 Hoona Road, Koloa, Kauai, Tax Map Key 4-2-6-006-

004-0000 =Rosa Giem (Petition Undated, Received 8/21/19) [Contested Case No. CC-2018-18].

- a. Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision Related to the Denial of a 2019 renewal packet by Rosa Giem for TVRNCU #5023 due to a failure to timely renew in 2019, Tax Map Key (4) 26006004, Koloa, Kauai, received on August 21,2019, for referral to Board and Commissions as Contested Case File No. CC-2019-18.

Mr. Hull: So next Agenda Item is Item I.3., Petition to Appeal the Action of the Director of Planning of the County of Kauai re Denial of 2019 Renewal Application Packet for Non-Conforming Use Certificate TVNCU #5023 (Hale Haloko Kai), 5111 Hoona Road, Koloa, Kauai, Tax Map Key 4-2-6-006-004-0000 *Rosa Giem* is the applicant or the Petitioner. Clerk of the Commission's, my recommendations is to refer an appeal of the Planning Director's Decision related to the Denial of a 2019 renewal packet for referral to the Boards and Commissions as a Contested Case File No. CC-2019-18.

Chair Mahoney: Chair will entertain a motion.

Ms. Apisa: I move that we move this to a Contested Case CC-2019-18.

Mr. Keawe: Second.

Chair Mahoney: It's been moved and seconded to go to Contested Case. Any discussion further? Hearing none. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

Petition to Appeal the Director Decision to Revoke Non-Conforming Use Permit #TVNC1050, The Poipu Hideaway, 2397A Kipuka Street, Poipu, Kauai, Tax Map Key: 2-8-023:044 Unit A, Santo Giogio (Received 8/26/19) [Contested Case No. CC-2019-19].

- a. Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision Related to the Denial of a 2019 renewal packet by Santo Giogio for TVRNCU #1050 due to a failure to timely renew in 2019, Tax Map Key (4) 28023044A, Poipu, Kauai, received on August 26, 2019, via email, for referral to Board and Commissions as Contested Case File No. CC-2019-19.

Mr. Hull: So next Agenda Item is Item I.4., Petition to Appeal the Action of the Director Decision to Revoke Non-Conforming Use Permit #TVNC1050, The Poipu Hideaway, 2397A Kipuka Street, Poipu, Kauai, Tax Map Key: 2-8-023:004 Unit A, *Santo Giogio* is the Petitioner and you have my Recommendation to Recommendation to Refer an Appeal of the Planning Director's Decision Related to the Denial of a 2019 renewal packet by *Santo Giogio* for TVRNCU #1050 due to a failure to timely renew in 2019, Tax Map Key (4) 28023044A, Poipu,

Kauai, received on August 26, 2019, via email, for referral to Board and Commissions as Contested Case File No. CC-2019-19.

Mr. Keawe: I move to refer to the Board and Commission's Contested Case File No. CC-2019-19.

Ms. Apisa: Second.

Chair Mahoney: It's been moved and seconded to refer CC-2019-19 to a hearings Officer. Any discussion further? Hearing none. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

COMMUNICATION (For Action)

Mr. Hull: Next up we have no further Communications for Action.

COMMITTEE REPORTS

Subdivision

Mr. Hull: We have Committee Reports Subdivision, Subdivision Action matters listed in the Subdivision Committee Agenda.

Mr. Keawe: The Subdivision Committee Report has been distributed to all members. I move to accept the report. We had Antone Souza, the action was to defer to the November meeting 2:0, Salvatore & Joann Deleonardo Trust, Approval 2:0, and the Kukui'ula Development Company, LLC, Approval 2:0, Modification of Condition H.

Ms. Apisa: Second.

Chair Mahoney: It's been moved and seconded. Any discussion further? Hearing none. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0. Thank you.

UNFINISHED BUSINESS (For Action)

In the Matter of Petition to Appeal Decision of the Planning Director Relating to the Denial of Non-Conforming Use Certificate Packet Submitted on 8/13/18, as Required by Kauai County Code Sec. 8-17.10 (h)(1) for TVNC#5081, Anini Beach Hale, LLC, located at 4371 Anini Beach Road, Kilauea, Kauai, Hawaii, 96754, and Further identified by the Kauai TMK No. (4) 5-3-007:006, and containing 32,813 s.f. = Anini Beach Hale, LLC. [Deferred 8/13/19.]

- a. Hearing Officer's Report and Recommendation of Contested Case dated July 29, 2019. [Deferred 8/13/19.]

- b. Planning Department's Written Brief Limited to the Issues of Whether the Petitioner was a "Quasi-Governmental Agency," and if so, Whether that Status Meant that the Emergency Proclamation Applied to Petitioner; Exhibits A-B; Certificate of Service (8/30/19) from Matthew M. Bracken, County Attorney and Mary Ann Sasaki, Deputy County Attorney for Responding Planning Department of the County of Kauai.
- c. Supplemental Briefing to the Planning Commission, Certificate of Service (8/30/19) from David G. Brittin and Michelle J. Chapman of Case Lombardi & Petit, Attorneys for Petitioner Anini Beach Hale LLC.

Mr. Courson: Chair, next up, we have Item L – Unfinished Business L.1. In the Matter of Petition to Appeal Decision of the Planning Director Relating to the Denial of Non-Conforming Use Certificate Packet Submitted on 8/13/18, as Required by Kauai County Code Sec. 8-17.10 (h)(1) for TVNC#5081, Anini Beach Hale, LLC, located at 4371 Anini Beach Road, Kilauea, Kauai, Hawaii, 96754, and Further identified by the Kauai TMK No. (4) 5-3-007:006, and containing 32,813 s.f. = *Anini Beach Hale, LLC*. Deferred 8/13/19. A., Hearing Officer's Report and Recommendation of Contested Case dated July 29, 2019. Deferred 8/13/19. Planning Department's Written Brief Limited to the Issues of Whether the Petitioner was a "Quasi-Governmental Agency," and if so, Whether that Status Meant that the Emergency Proclamation Applied to Petitioner; Exhibits A-B; Certificate of Service. B., Planning Department's Written Brief Limited to the Issues of Whether the Petitioner was a "Quasi-Governmental Agency," and if so, Whether that Status Meant that the Emergency Proclamation Applied to Petitioner; Exhibits A-B; Certificate of Service (8/30/19) from Matthew M. Bracken, County Attorney and Mary Ann Sasaki, Deputy County Attorney for Responding Planning Department of the County of Kauai. And C., Supplemental Briefing to the Planning Commission, Certificate of Service (8/30/19) from David G. Brittin and Michelle J. Chapman of Case Lombardi & Petit, Attorneys for Petitioner Anini Beach Hale LLC. I believe we have both the County and the Petitioner here.

(Inaudible talking)

Mr. Courson: I guess we need a short recess?

Chair Mahoney: Okay. Could we take a caption break, 10 minutes?

The Commission recessed this portion of the meeting at 9:59 a.m.

The Commission reconvened this portion of the meeting at 10:04 a.m.

Chair Mahoney: I call the meeting back to order.

Mr. Courson: So Chair, before the recess we were on Item L.1., and I believe both parties have Counsel here.

Chair Mahoney: Okay, could you come to the podium and state your names for the record please.

Mr. David Brittin: David Brittin for Anini Beach Hale, Petitioner.

Chair Mahoney: Okay, thank you.

Deputy County Attorney James Forrest: Deputy County Attorney, James Forrest for the Planning Department.

Chair Mahoney: Thank you. And who do we start off with either?

Mr. Courson: Usually we start off with the Petitioner.

Chair Mahoney: Okay. So representing the petitioner—

Mr. Forrest: If I could say something just to start off?

Chair Mahoney: Sure.

Mr. Forrest: My client just informed me that he didn't really want me to present any new evidence and he is going to rely on the submissions already submitted to the body.

Chair Mahoney: Okay.

Mr. Courson: Also, you know, I apologize. I was remiss about including this into order but I believe the Commission wanted both sides to be about 10 minutes. Is that sufficient time Mr. Brittin?

Mr. Brittin: Yeah, that's fine.

Mr. Courson: So I don't think the County will be going at all and Mr. Brittin will have his 10 minutes to present what he wants.

Chair Mahoney: Okay. We can start with Mr. Brittin please?

Mr. Brittin: Okay, yeah, thanks very much. David Britten for the Petitioner, Anini Beach Hale. Just for the record we wanted to note the fact that the County did not submit its supplemental briefing in conformance with the order it was supposed to be served electronically by 4:30pm on August 30th. We did not receive a copy of it until September 4th, which is not a huge deal but, it is somewhat ironic in an argument about a late filed pleading that the County would repeatedly file its pleadings late. We just would like to note that for the record. With respect to the issue that the Planning Commission asked us for supplemental briefing on which is whether or not Anini Beach Hale qualified as a "Quasi-Governmental Entity," I think the one thing that both the County and our side agree on is that there is not very much law on the topic. There is no specific statute, there is not a lot—

Chair Mahoney: Excuse me could you speak up a little louder, please?

Mr. Brittin: Is that okay? You want me to start over?

Chair Mahoney: No, no, you're fine.

Mr. Brittin: Yeah, so there is not very much law on this particular topic. There is not a particular statute that list the items that one needs to have in order to be deemed a "Quasi-Governmental Entity," there is not a checklist of items that someone like the Mayor would need have met to appoint my client as a "Quasi-Governmental Entity." So it's really something that's in the eye of the beholder. As the Commission is aware we had a Contested Cases Hearing in

front of the Hearings Officer Kimura. He heard all of the evidence and he determined that my client had been appointed by the Mayor as a “Quasi-Governmental Entity,” to help with relief from the storm. And in fact, there was quite a bit of aid that was given by my client Mr. Combs, who is here today and is the Land Manager for Anini Beach Hale and a number of other entities that are affiliates. And when he was asked to provide support he did the right thing, he dropped most of everything and for months on end was working 7 days a week in order to assist the County in its response to the storm relief effort. So I think that’s exactly what the Mayor wanted to have happen which is the (inaudible) Emergency Statute to which the Emergency Proclamations were issued and tends to happen which is to provide for the County to have the broadest possible relief effort and to put all of the resources that are available to use. So we believe that the Hearings Officer made a very reasoned decision without belaboring over everything again. He went through you know, the appointment by the mayor, the fact that Anini Beach Hale would qualify as emergency personnel and that really it should receive the benefit of the suspension of any sort of statute or permit, or zoning law that would tend to inhibit the storm relief efforts. This is a case of no good deed goes unpunished. Mr. Comb put aside a lot of his personal life, a lot of his professional life to give back to the community to provide storm relief efforts. We don’t dispute that fact he miss the deadline to renew the TVR Permit on July 31, but I think and I certainly hope that the Planning Commission would agree that his efforts were better spend elsewhere. This is something that is just a ministerial Permit I know that it is very controversial over here and many people seem to be missing the deadline. But in this instance the reasons why the deadline were missed were certainly good ones and that the community benefited from Mr. Comb’s places and intentions on the storm relief efforts. So we believe that the Hearing Officer’s decision was correct that, Anini Beach Hale should be considered emergency personnel and that they should be considered “Quasi-Governmental Entity” and that the Hearings Officer’s recommendation should be accepted and adopted by the Planning Commission. I am available for questions if you like, as I don’t have anything further.

Chair Mahoney: Is there any questions for the attorney? Any rebuttal from the County?

Mr. Forrest: Based on my client’s recommendation I have no comment.

Chair Mahoney: Okay.

Mr. Courson: So at the last meeting we had the Recommendation from the Hearings Officer and there were questions about whether or not the facts and circumstances and anything else made Anini Beach Hale “Quasi-Governmental Entity” and now received written briefings and oral argument. And so now we are back at the original decision whether to accept the Hearings Officers Recommendation, to modify it, or just to go entirely your own way? And if you need to speak with me in private to get legal advice we can go into an unanticipated executive session that’s fine. But if you don’t that is also fine too.

Ms. Nogami Streufert: I would ask for a consultation with our attorney.

Ms. Apisa: I agree. Second.

Chair Mahoney: Go into an executive session so we—

Mr. Keawe: Yup.

Chair Mahoney: So we need a motion to do that.

Ms. Nogami Streufert: I move to go into executive session, unanticipated Executive Session.

Ms. Apisa: Second.

Mr. Courson: And before you go I could read that in which 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. Should be to consult with the attorney regarding the Boards powers and liabilities. No it’s appropriate to vote.

Chair Mahoney: So the motion on the floor has been moved and seconded. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0.

We will go into executive session for 10 minutes.

The Commission went into Executive Session at 10:12 a.m.

The Commission reconvened this portion of the meeting at 10:27 a.m.

Chair Mahoney: I call the meeting back to order.

Mr. Courson: You could ask the parties to comeback up.

Chair Mahoney: Yeah. Could both parties please come to the table please?

Mr. Courson: Traditionally if you know which way you are going it’s good to have a motion on the floor.

Chair Mahoney: At this juncture Chair will accept a motion.

Ms. Nogami Streufert: I move to accept the Hearing’s Officers Report except for the Characterization of Anini Beach Hale, LLC, as the “Quasi-Governmental Agency.”

Mr. Keawe: Second.

Chair Mahoney: Okay.

Mr. Courson: Can I ask to make sure that motions clarified. That would have the ultimate effect of denying.

Ms. Nogami Streufert: According to the, from the Conclusions on the Hearing’s Officer’s Report, I would imagine (inaudible) it was to remand the case back to it because of the declarations or I should say Proclamation sorry, and that was based upon the Findings from the Hearing’s Officer that this was a “Quasi-Governmental Agency.” Sorry.

Mr. Courson: I might ask say that again—

Chair Mahoney: If you move it a little closer maybe too.

Ms. Nogami Streufert: Right now the Conclusions from the Hearing's Officer are two; one of them that the, it was remanded back to the Planning Department on the bases that the Anini Hale was classified so to speak as by the Hearing's Officer as being a "Quasi-Governmental Organization." And the second part of it was that preponderance of proof, or it did not meet its burden of proof by a preponderance of evidence. Because the first paragraph was based upon a finding of "Quasi-Governmental" and I don't think that it has been established that this is a "Quasi-Governmental Agency" that it would probably deny the suspension of the deadline. That was not as much as I—

Chair Mahoney: Is that Clarification?

Mr. Courson: Yeah, I think it clarifies the intent of the motion. And so now you know—

Ms. Apisa: So just to further, further clarify I think that the distinction between Anini Beach Hale and maybe the airport. There two distinct entities.

Ms. Nogami Streufert: So it may be managed by the same people but it's not necessarily the same entity. But thank you very much for all the effort to everybody in the community has done a lot to remediate the situation on the north shore. Every effort is appreciated.

Chair Mahoney: Okay so we've got the motion and the explanations. Any further discussion? At this time we will take a vote. All in favor, signify by saying, aye. Aye. (Unanimous voice vote). Opposed? (None). Motion carried. 4:0.

NEW BUSINESS

Mr. Keawe: What do we got now, executive session?

Mr. Courson: Yeah. Chair, next Item is New Business do you have anything?

Chair Mahoney: Let's see.

EXECUTIVE SESSION

Mr. Courson: And the final Item on the Agenda is H., which was moved to the end of the Agenda and that is also Executive Session. So if I could get a motion and a second and then I'll read the language.

Mr. Keawe: I move to go into Executive Session to address the Agenda Item.

Chair Mahoney: Second please?

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded.

The Commission went into Executive Session at 10:30 a.m.

EXECUTIVE SESSION

Pursuant to Hawai'i Revised Statutes 92-5(a) (2 and 4) for Evaluation of Planning Director for first 6 months of FY 2019. This session pertains to the evaluation of the Planning Director's work performance where consideration of matters affecting privacy will be involved. Further, to consult with legal counsel regarding powers, duties, privileges and/or liabilities of the Planning Commission as it relates to the evaluation to the Planning Director.

Chair Mahoney adjourned the meeting 10:55 a.m.

Respectfully submitted by:



Arleen Kuwamura,
Commission Support Clerk

(X) Approved as circulated October 22, 2019.

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