

KAUA'I PLANNING COMMISSION
CONTESTED CASE CALENDAR
January 9, 2018

The contested case calendar of the Planning Commission of the County of Kaua'i was called to order by Chair Apisa at 12:31 p.m., at the Līhu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Donna Apisa
Vice Chair Glenda Nogami Streufert
Mr. Roy Ho
Mr. Kimo Keawe
Mr. Sean Mahoney

Absent and Excused:
Ms. Kanoë Ahuna
Mr. Wade Lord

The following staff members were present: Office of the County Attorney – Deputy County Attorney Jodi Higuchi Sayegusa; Planning Department – Commission Secretary Leslie Takasaki; Office of Boards and Commissions – Administrator Paula M. Morikami (*entered at 1:10 p.m.*), Commission Support Clerk Darcie Agaran

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Apisa called the Contested Case Calendar to order at 12:31 p.m.

Chair Apisa: Jodi will open.

Deputy County Attorney Jodi Higuchi Sayegusa: We are on the Contested Case Calendar; 9:00:02 a.m. calendar. Chair, just for the record's sake, prior to getting into Item A, just wanted to note for the record that the Clerk of the Planning Commission has received and forwarded to the Commission the withdrawal and substitution of counsel for the following cases: Contested Case 2016-5, Wark; Contested Case 2015-1, Guyer-Searles; and Contested Case 2016-7 and Contested Case 2015-18, Hoff. That is all. Thank you.

CALENDAR

Contested Case CC-2017-12, Special Management Area Use Permit SMA(U)-2018-3 for the construction of a public shared use path extending from Papaloa Road to the Uhelekawawa Canal, and associated improvements involving an existing parking lot and a new comfort station, and Shoreline Setback Variance Permit SSV-2018-1 to deviate

from the shoreline setback requirement, involving several properties along the makai side of Kūhiō Highway in Waipouli identified as Tax Map Keys: 4-3-002:001, 012-016, 019, 020; 4-3-007:009, 011, 027, 028; 4-3-008:016, and containing a total area of approx. 2-14 acres = County of Kaua‘i, Department of Public Works. [Director’s Report (DR), Sup 1 DR, and S2 DR received 9/12/17; hearing continued 9/12/17 at request of the Office of the County Attorneys for further review of Petition to Intervene by Wailua-Kapa‘a Neighborhood Association 9/12/17; Petition to Intervene by Wailua-Kapa‘a Neighborhood Association approved 9/26/17; hearing closed 9/26/17; Contested Case Hearing held 11/14/17.]

Chair Apisa: I would, at this time, call the agenda item; the bike path.

Deputy County Attorney Higuchi Sayegusa: This is Item A, Contested Case CC-2017-12, Special Management Area Use Permit SMA(U)-2018-3 for the construction of a public shared use path extending from Papaloa Road to the Uhelekawawa Canal, and associated improvements involving an existing parking lot and a new comfort station, and Shoreline Setback Variance Permit SSV-2018-1 to deviate from the shoreline setback requirement, involving several properties along the makai side of Kūhiō Highway in Waipouli identified as TMKs: 4-3-002:001, 012-16, Parcels 019 (and) 020; 4-3-007:009, Parcels 011, 027, 028; 4-3-008:016, and containing a total area of 2-14 acres, County of Kaua‘i, Department of Public Works.

Chair Apisa: I would ask all parties to state their appearance.

Deputy County Attorney Adam Roversi: Deputy County (Attorney) Adam Roversi representing the Planning Department.

Deputy County Attorney Teresa Tumbaga: Good afternoon. Deputy County Attorney Teresa Tumbaga on behalf of the Department of Public Works.

Ms. Rayne Regush: Thank you. For the record, Rayne Regush, chair of the Wailua-Kapa‘a Neighborhood Association.

Chair Apisa: Thank you. I would like to update the Commission. I will provide an update and clear up some preliminary matters before we get into the evidentiary portion of the Contested Case. At the conclusion of the hearing held on November 14, 2017, Chair Keawe instructed that the closing argument and decision-making in this case would continue to January 9, 2018. Also, proposed Findings of Fact, Conclusions of Law, and Decision and Order were to be submitted within thirty (30) days of the close of the Contested Case, which would have been December 14, 2017. Subsequently, the Petitioner, the Department of Public Works, submitted and the clerk filed the stipulation of the parties to reopen the evidentiary portion of the Contested Case, which was signed by Chair Keawe and all the parties on December 12, 2017. The Commission has received a letter dated December 12, 2017 from the Deputy County Attorney representing the Department of Public Works. She stated that she would submit the Department of Public Works’ proposed Finding of Fact, Conclusion of Law, and Decision and Order within thirty (30) days of closing the Contested Case. Since the parties stipulated to reopen the evidentiary portion of the Contested Case, any proposed Findings of Fact, Conclusions of Law, and Decisions and Order

shall be submitted within thirty (30) days of the closure of the Contested Case; whether that be done today or at a future date. The Commission has also received a letter from Ms. Regush dated December 31, 2017 requesting amendments to the Commission's minutes. The request is for the Commission to decide what would the Commission like to do regarding the requested amendments.

Are there any other preliminary matters that—

Mr. Keawe: With regard to the minutes, there were changes that were suggested by the Intervenor, Ms. Regush, and so I reviewed them and I think most of them are grammatical in scope so I don't see a problem in approving the minutes. I think we did not approve the minutes in our previous meeting, so these are the minutes of the Contested Case for November 14th. I would go ahead and make a motion to approve those minutes subject to the changes that were offered.

Chair Apisa: Did you get clarity on all of them?

Mr. Keawe: Yes.

Chair Apisa: They are okay? Okay. So is that a motion?

Mr. Keawe: That is a motion.

Mr. Mahoney: Second.

Ms. Tumbaga: Deputy County Attorney Teresa Tumbaga on behalf of the Department of Public Works. The minutes should accurately reflect what was stated in the hearing. I reviewed the recording and what was stated, and the minutes, as they were distributed to us, were accurate before Ms. Regush's corrections. So our position is that, as they should be accurate as to what was actually said in the hearing, they were accurate as we received them.

Chair Apisa: Go ahead.

Ms. Regush: Thank you. Rayne Regush here. I would suggest that when listening back to the tape recording, such as Alepa Loop Road or Aleka Loop Road, I think it is hard to hear on tape recordings, so again, these are grammatical changes for the most part. We do want accuracy as to the location.

Ms. Tumbaga: So again, our position is that accuracy of the minutes should be what was stated in the hearing. Regardless of...you don't actually need to correct minutes to reflect something different if that is not what was stated during the hearing. So our position is, again, the minutes, as were submitted by the clerk, were accurate as to what was stated.

Chair Apisa: Adam, do you have a position?

Mr. Roversi: On behalf of the Planning Department, I take no position on the minutes one way or the other. Thank you.

Ms. Regush: I might add, if I may, in the minutes where the areas have dot, dot, dot (...) that is indicative of not having the clarity to be able to transcribe. So words were spoken, but the dot, dot, dot (...) means please fill in the gaps because we couldn't understand it on the tape.

Chair Apisa: Well, my personal opinion, I think it is sort of trivial either way, so it would be the Commission's... Let's just reach a conclusion here and move on.

Ms. Nogami Streufert: Could I ask a question? Ms. Tumbaga, I presume you have a copy of the suggested changes or suggested corrections.

Ms. Tumbaga: Yes, I received them and basically, they seem to be correcting things after the fact, but that is not the purpose of minutes. Minutes aren't something that we need to grammatically change or correct. They should just reflect what occurred at the hearing, and in my review of the recording, the minutes were accurate as they were written.

Ms. Nogami Streufert: But if they were changed to reflect the changes that Ms. Regush suggests, would that substantially change the meaning of what we have on record?

Ms. Tumbaga: Again, those were not a transcript, although they were...when I listened, they were following along pretty much word for word. So the position of the Department is, again, whether or not they get corrected, those are just minutes, but we shouldn't, after the fact, change minutes because we prefer that a different word was said. The word that was stated is actually in the minutes right now, so we would prefer that they be accurate as to what was stated.

Ms. Nogami Streufert: But for "Alepa" versus "Aleka", for example, as a Loop.

Ms. Tumbaga: Right, that is a different street name. So when I listened, as the minutes were written, that is what was stated. In our documents, it does reflect Ms. Regush's changes, but again, for accuracy purposes, I think the minutes were accurate as to what was stated at the hearing.

Ms. Regush: If I could make just one more query, I would, then, ask why the Body has on the agenda minutes from each of your proceedings; to approve minutes. And I do hear, during other proceedings, that minutes are edited and amended to correct, so I don't see this as being much different from that policy.

Chair Apisa: If the Commission can come to a conclusion on this, I would like to get into the meat of the—

Mr. Keawe: I think there is a motion on the floor, Madame Chair.

Chair Apisa: We do have a motion on the floor, so any other comment on it? All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 5:0. Thank you.

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Now, are there any other preliminary matters that need to be dealt with?

Mr. Roversi: Adam Roversi on behalf of the Department. Madame Chair, you have made reference to the stipulation. I don't know that it is necessary, I will leave it to you whether to read the specifics of it into the record, but it does fairly well bracket what the purpose of today is. So I just want to be clear that we follow the stipulation as far as allowing the Intervenor to present additional testimony, but not calling any new witnesses, not admitting any new exhibits. It is a limited reopening of the case – I just wanted to make that point – per the stipulation that was signed by the parties.

Chair Apisa: Okay. With regard to the stipulation and agreement to reopen the evidentiary portion of the Contested Case, the parties agreed to reopen the evidentiary portion as long as...there were four (4) points: the testimony is only from Rayne Regush, the designated representative of the Wailua-Kapa'a Neighborhood Association; two, no new evidence and no new witnesses are presented, only testimony related to Intervenor's Exhibits 1 through 10; three, the Petitioner, the Department of Public Works, and the Department have the right to cross-examine; four and lastly, the Petitioner, the Department of Public Works, and the Department can present rebuttal witnesses. Is this correct?

Ms. Tumbaga: That is correct.

Chair Apisa: Thank you. Everyone has agreed, okay. Intervenor, please proceed with your presentation.

Ms. Regush: Thank you, Commissioners.

The shared-use path needs to be--

Chair Apisa: Oh, do we need to swear her in? I need to swear you in, I think. Sorry. Please raise your right hand. Do you swear and affirm that you will tell the truth?

Ms. Regush: I do.

Chair Apisa: You have now been sworn. Please say your name and address for the record.

Ms. Regush: Mahalo. My name is Rayne Regush, Chairperson, Wailua-Kapa'a Neighborhood Association. Address? 5591 Kaapuni Road, Kapa'a.

Chair Apisa: Thank you.

Ms. Regush: Thank you, Commissioners. The shared-use path before us needs to be located where it can provide greatest public benefit and afford the greatest protections for historic resources, maintain its scenic assets, protect coastal recreational resources, and minimize impacts from sea-level rise. The path should not infringe, minimize, or deter any of those longstanding uses. So this permitting process gives Commissioners the opportunity to manage and preserve all these coastal assets, and WKNA asks that the path's alignment conform with the County

Shoreline Setback Ordinance and follow the 60-foot setback requirement when there are no existing buildings that constrain the setback area. For example, in the undeveloped Coconut Plantation parcel, we ask, also, that a current certified shoreline be obtained.

To support our position, WKNA will address a number of important issues that include scenic and open space resources, recreational and cultural resources, historic and archaeological resources, coastal hazards, erosions, and the certified shoreline. This is all in conformance with HRS 205A and the project's impacts which must be assessed. The SMA Permit application is required, as you know, to address a wide range of concerns in conformance with the Coastal Zone Management objectives and policies. Our coastlines are fragile environments; uniquely important culturally, recreationally, and aesthetically; highly valued by the public.

Regarding scenic and open space resources, the objectives of HRS 205A-2(b)(3)(A) is to – and I will quote – “[p]rotect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources.” The County’s Comprehensive Zoning Ordinance defines “open space” as the portion or portions of a parcel unoccupied or unobstructed by buildings, by paving, or structures from the ground upward. This SMA application underestimates the impacts of the path related to scenic resources and aesthetic enjoyment, and how the path can negatively affect the natural beauty of this coastline and one’s experience of it. So although the 12-foot path may not cause significant or substantial harm, nonetheless it will impact the beauty of the area if it is built too close to the shore. And Act 50 brought in the definition of significant effect as “the sum of effects on the quality of the environment...” Although, at ground level, the path may seem inconspicuous, it is not a passive use. We know it is a popular thoroughfare that serves as a transportation corridor as well. So the cumulative effect of the proposed construction of the Coconut Plantation Resort, Coconut Beach Resort, combined with the volume of runners and joggers and cyclists and walkers and such, will substantially change the visual quality and experience of that coastline. We believe the built environment should not crowd our coastal environment with manmade amenities sited too close to the beach, and it is reasonable and beneficial to provide the largest buffer possible between the manmade path and the natural shoreline.

Moving on with regard to assessing impacts to recreational and cultural resources, the State Department of Health has identified the nearshore coastal waters in this area as Class A waters, and the objective for Class A waters is that “...their use for recreational purposes and aesthetic enjoyment be protected.” So people’s connection to nature is really a core value, and for nature lovers, the path can impair their experience of the coastal landscape. For Waipouli fishers and beachgoers who seek quiet enjoyment of the coastline, the path can feel intrusive. Both State and County rules require us to assess the degree to which the path will interfere with cultural practices and ways of life that are intrinsically connected and tied to our coastal areas. Again, those words “significant” and “substantial”...I mean, that is a very subjective way to determine impacts, but nonetheless that is what the rules afford. So this application is an opportunity for the Commissioners to evaluate the appropriateness of checking the box that is labeled “no impact” when assessing impacts to these resources. Building the path too far seaward will result in the permanent loss of traditional landscapes. And, in fact, “[s]ome describe the cumulative impact of the projects [here] as an atmosphere of unresolved sadness...”, and this was statement conveyed in the letter from the Office of Hawaiian Affairs included in the Cultural Impact

Assessment, which is Appendix D. Will the path cause irreparable injury? Perhaps. But certainly, it does have social and cultural impacts to some degree, and Commissioners can propose a greater setback for the path which is more respectful of the culture and the social values associated with the coastline.

Next, I wanted to address issues that are concerning historic and archaeological resources. In the final Archaeological Inventory Survey, which is Exhibit D, in the summary conclusions, the findings suggest a long occupation spanning several centuries in this area with evidence of a range of activities. The observed cultural layers and human burials suggest extensive use of the coastline in this area beginning approximately AD 1400 to 1500. Then, on pages 233 to 234, Table 70, that is a list of all historic properties encountered within the project area, along with their significant assessment. The largest historic site there is No. 1801, which includes the entire length of the coastline in the undeveloped Coconut Plantation parcel, and this site is eligible for listing on the Hawai'i Register of Historic Places because it meets one or more of the significance criteria in HAR 13-275-6. Criteria "d" is that the historic property has yielded, or maybe likely to yield, information in prehistory or history, and Criteria "e" states historic property has cultural significance to an ethnic group, including, but not limited to, religious structures, burials, and traditional cultural properties. On page 235, under Project Effect and Mitigation Recommendations, it states "[t]he multi-use path should [also] be situated to avoid, as much as possible..." this historic site. The boundaries of this historic site, 1801, they do not extend to the highway. They extend from the shoreline, landward, at about a distance between 65 to 100 feet. This also coincides with the County's 100-foot Open Zoning District, which affords protections to the site by prohibiting resort construction in the Open District. Therefore, to reduce the path's impact to the feeling, use, and character of this historic site, it is best accomplished by locating the path as far mauka as possible.

Moving on, the County's approach to mitigating impacts is a vertical avoidance. The SMA application states that the path will be constructed on a berm (fill) over areas of concentrated cultural deposits to minimize the need for subsurface excavation. But, neither the final Environmental Assessment nor the SMA application discuss the environmental concerns of berms and fill within the Special Management Area or in the Shoreline Setback Area, so the County's Grubbing, Grading, and Stockpiling Ordinance, Chapter 22, Article 7 of the County Code, defines "grading" as any excavation or fill or any combination thereof. The ordinance also states that any grading of a coastal dune within the shoreline area is prohibited except with an SMA or Shoreline Setback Variance Permit to place sand in the dune area to rebuild or enhance the protective capacity and environmental quality of the coastal dune, so clearly, the path is not intended to do this. The ordinance's definition of "coastal dune" is the area of sand parallel to the beach that is accessible to waves and seasonal high waves for release to the beach or offshore waters. So again, building the path within the shoreline setback or the no-build zone means that the path is in the active beach area, and the intent of our SMA rules is to keep structures outside or landward of the shoreline area. In addition, with regard to removal of the mature trees that are along the beach in order to build the path, we recommend that the County consult with a coastal scientist who can identify the coastal dune and assess whether dune restoration or a dune management plan is necessary, especially since the coastal dune lies within this setback area where the trees are located. Should you need it, the definition of "grubbing" means any act by which vegetation or materials, including, but not limited to, trees, timber,

shrubbery, plants, concrete, or asphalt is dislodged or uprooted from the surface exposing bare ground.

This leads to our next area of concern, which is coastal hazards and erosion. The Special Management Area section of HRS 205A-21 declares "...that it is the state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawai'i." So neighborhood by neighborhood, protecting our coastlines is a challenge that is now amplified by the environmental changes that are being triggered by climate change and sea-level rise. The historical rates of shoreline change that are used in the County's setback calculations, which is specifically our Kaua'i coastal erosion study, it is using evidence from the past one hundred (100) years and it doesn't reflect the accelerating sea-level rise that is occurring right now. You have seen the dramatic photographs of the wave run-up events at nearby Waipouli Beach Resort, at Pono Kai Resort, as well as the evidence of this summer's king tide event at Coconut Plantation Village, and these all provide you with a preview of our near future and can guide you towards establishing a better alignment for the path. The State of Hawai'i and DLNR have openly embraced the science of climate change, and they are adopting its principles to guide State planning. The Hawai'i Inner Agency Climate Adaptation handbook and website portal – they urge us to begin responding to the anticipated threats immediately. "...[R]ising sea levels will increase the occurrence and severity of coastal erosion and flooding, threatening natural resources and economic sectors concentrated along low-lying shores." There is an absolute need to stay ahead of this curve, and this can be accomplished by increasing some of the shoreline setbacks in this variance application, primarily within the undeveloped parcels where there is room.

Briefly, next I would like to address the expired certified shorelines in this application. The SMA rules clearly intend that a currently valid State shoreline certification be used when considering a request for an SMA Permit. This SMA application is dated June 2017 and four (4) of the properties have certified shorelines that are a year or more old; Coconut Plantation was certified January 21, 2016, The Beachboy Resort was certified June 2, 2016, Islander on the Beach was certified June 2, 2016, and Courtyard Marriott was certified June 14, 2016. According to HRS 205A-42, "...no determination of a shoreline shall be valid for a period longer than twelve months..." According to County Shoreline Setback Ordinance Section 8-27.3, no shoreline setback line shall be established unless the application for a shoreline setback line includes a certified shoreline issued within twelve (12) months prior to submission of the application. So the County has an obligation to have a current shoreline for the (inaudible) permit application, and Commissioners should be concerned about these expired shorelines. Since 2004, I have participated in most of DLNR's certified shoreline site inspections that are along this Waipouli Beach corridor. With regard to Coconut Plantation, the undeveloped parcel, if DLNR's site inspection was scheduled after this summer's king tide event, DLNR staff would be obliged to delineate the certified shoreline along that line of debris, bringing it 20 feet further mauka. To be clear, HAR 13-222-2 defines the line of debris as the line marking the mauka or landward limit of debris deposits resulting from wave uprush.

Quickly, moving on, I would like to look at the Applicant's Exhibit R and the Coconut Plantation parcel, which consists of Transects Nos. 219 through 226 and requires a shoreline setback of 100 feet. Within this vacant parcel, there is ample space to construct the path landward with a 60-

foot setback at minimum, and within the three (3) transects that were inundated during the king tide event, any setback of less than 40 feet in this location should be deemed unacceptable. The justification is based on the County's Shoreline Setback Ordinance, their definition of "storm buffer zone", which is the first 40 feet of the shoreline setback area as measured from the shoreline. Furthermore, Exhibit R, Table 1 uses terms such as "offsets" and "eroding edges" to create the framework, but these are not ordinance-based terms. The "eroding edge" has no basis in law. With regard to the last column in Table 1 labeled "Offset from 2017 Eroding Edge to Makai Edge of Path", the facts should be stated that the shoreline is actually landward, or mauka, of the eroding edge. With regards to beach erosion, I would like to paraphrase Dr. Chip Fletcher. He is the professor and associate dean for University of Hawai'i at Mānoa, the School of Ocean and Earth Science and Technology, which is called "SOEST" for short, and he co-authored a publication called, "On the Shores of Paradise" – natural hazards, fragile environments, and human communities meet. He writes, "[a]s sea-level rises...the beach [will] shift upward and landward. This change in beach position is known as *shoreline retreat*...[or] *beach erosion*. It requires that a broad swath of coastal zone be free [from] development so that the beach and community infrastructure do not collide." The County's calculation of the shoreline setback area is based on historic shoreline locations, erosion trends, and sea-level rise, to some extent; however, any reduction in that setback due to a Variance Permit runs contrary to mitigating future coastal impacts and long-term coastal erosion. In areas where beach erosion is occurring at a faster rate, there is urgency for Commissioners to locate the path safely and conservatively more landward. There is a clear directive that is stated numerous times throughout the final Environmental Assessment, and that is to "...locate the path as far as mauka as possible." In 2014, WKNA anticipated that this variance issue would be a concern, so we submitted comments on the draft EA, and the Department of Public Works' Chief Engineer Larry Dill responded and wrote, a. "[y]ou are correct in that the undeveloped resort properties will not require a shoreline setback variance because of the required 100-foot shoreline setback conditioned on their SMA Permit.", and b., "[a]s stated in our public meeting, our intent is to locate the path as far as mauka from the shoreline as possible." Therefore, it is troubling that these conceptual plans presented in this application deviate so greatly from the final Environmental Assessment recommendation; particularly concerning the parcels that are not constrained by existing buildings. If Kaua'i's beaches are to survive and thrive, this trend of seeking shoreline variances needs to change. And again, I will quote Dr. Chip Fletcher who writes, "[i]t is time to stage a retreat from the shore. ...it is the right thing to do. Let us leave the gift of beaches for our children to enjoy." According to SOEST, the School of Ocean and Earth Science and Technology, this summer saw a confluence of conditions in Hawai'i that led to record high tides brought about by a strong southern swell, the yearly king tides, and gradually rising sea levels. They go on to say that coastal inundation around the Hawai'i chain was a preview of the flooding that will become typical during regular tides, and the summer king tide illustrates the areas particularly vulnerable to further sea-level rise. Common events like high tides, storm surges, will cause sea water to reach higher elevations or flow further inland than previously. So Commissioners, planning now for the new normal should guide your decision to locate the path further landward where you can. Building any structure too close to the shoreline is unwise and the HRS 205A definition of "structure" includes, but is not limited to, any portion of any building, pavement, road, pipe, flume, utility line, fence, groin, wall, or revetment. In closing...oh, and to be clear, according to Department of Public Works in Exhibit R, the path's design consists of at-grade concrete slabs resting on the existing beach surface. Keeping these definitions in mind, the smaller the setback,

the greater the risk that sand and ocean debris will be deposited onto the path and pose a risk to public health and safety. The fact that the path may be an occupied structure is irrelevant. The point is that the path should not be constructed closer to the ocean than necessary.

So in closing, Commissioners can help ensure Hawai'i's Coastal Zone Management rules are (inaudible) embraced as the front line of environmental protections instead of just being minimally applied. Hopefully this is our shared goal and that you will increase the setbacks for the path accordingly. Mahalo.

Chair Apisa: Thank you for your presentation. I believe now we have a cross-examination by the Department of Public Works.

Ms. Tumbaga: Good afternoon, Ms. Regush.

Ms. Regush: Good afternoon.

Ms. Tumbaga: You talked a bit about the path can feel intrusive, you stated impacts (inaudible) the area, but you didn't bring anyone here that testified that somehow the path is going to affect their historic practices or cultural practices, did you?

Ms. Regush: That is correct. I would rely on every resident here that frequents our coastlines to have judged that for themselves.

Ms. Tumbaga: However, again, you didn't bring anyone here that testified in front of the Commission and stated that somehow this path would negatively affect their ability to use the ocean and the cultural...the resources in that area.

Ms. Regush: Correct. Again, I defer to the Commissioners.

Ms. Tumbaga: (Inaudible) yes or no question.

Ms. Regush: Correct.

Ms. Tumbaga: So you do understand that the beach and the ocean is actually available to everyone in the public, not just certain people. Do you understand that?

Ms. Regush: Of course.

Ms. Tumbaga: Okay. You spoke with some confidence about Site 1801. You stated pretty confidently that the cultural deposits do not extend to the highway, but are you an archaeologist?

Ms. Regush: No, I am not. The information was quoted from the—

Ms. Tumbaga: Thank you. It is a yes or no question.

Ms. Regush: —document from your exhibits.

Ms. Tumbaga: It is a yes or no question, Ms. Regush. Have you personally done your own studies of the area, not reading the literature, but actually done fieldwork in the area?

Ms. Regush: No.

Ms. Tumbaga: And then my last question is just, are you a licensed surveyor?

Ms. Regush: No, I am not.

Ms. Tumbaga: Thank you. I have no further questions.

Chair Apisa: Okay, thank you. For the Planning Department, Adam Roversi.

Mr. Roversi: Thank you, Madame Chair. The Planning Department has no questions for the witness. Thank you.

Chair Apisa: Alright, thank you. The Commission – any questions from the Commission? Okay, no questions from the Commission.

Ms. Nogami Streufert: (Inaudible)

Chair Apisa: Oh, okay. We have one (1) question.

Ms. Nogami Streufert: Ms. Regush, you are concerned about the cultural practices, the iwi that might be under the sand, and the closeness of...and therefore, you want to move the path further mauka from the seashore. Yet, the information that we have in these archaeological studies, on page 211 so to speak, indicates that there might be...because that whole area was well-populated for a long period of time, that we might find archaeological things very far...even mauka of Kūhiō Highway. So even if the path were to be moved towards the land, that is no assurance that it wouldn't do the same thing that this path would. Based upon the information that we have, why would you think that that's an argument for moving the path?

Ms. Regush: Sorry, I actually was not drilling down to specifically address iwi because those have been mitigated and there are burial treatment plans. Overall, the cultural resource is that coastal corridor as well, so I am looking at it a bit more broadly; that there is a buffer needed for various reasons, so I am certainly not focusing only on the cultural deposits. It looks at all the other environmental aspects – the scenic open space, recreation.

Ms. Nogami Streufert: But you did bring up–

Ms. Regush: Yes.

Ms. Nogami Streufert: That was your first argument, so I am just trying to address that one. I don't see how pushing the path further inland would actually mitigate the problem of potential archaeological findings (inaudible).

Ms. Regush: So, again, there is a difference between cultural deposits and an iwi...the burials.

Ms. Nogami Streufert: Right. But even the cultural deposits – they are saying it could be further mauka. So the question is–

Ms. Regush: Yes.

Ms. Nogami Streufert: Do you have any information that would indicate otherwise? Why moving it further inland...that we would mitigate some of these issues?

Ms. Regush: Again, I was only going by the recommendations of Theresa Donham who chaired the Department, and we could see the boundary of the historical site within this project area and it did say it extended 65 to 100 feet, so always best to be conservative and to go landward.

Ms. Nogami Streufert: Because on page 211, it says that it can go even further, so I am not sure whether that would be–

Ms. Regush: And who stated that?

Ms. Nogami Streufert: It is a summary of archaeological concerns. It is on page–

Ms. Regush: Yes, yes, but that is what we deal with here in Hawai‘i.

Ms. Nogami Streufert: Thank you.

Ms. Regush: Thank you.

Chair Apisa: Okay. Is that it from the Commission? Does the Department of Public Works or Planning Department wish to introduce any rebuttal evidence?

Ms. Tumbaga: No, Chair. At this time, we do not. Thank you.

Mr. Roversi: No, Madame Chair. The Department has no additional evidence.

Chair Apisa: Thank you. Is there any public testimony per Commission Rule 1-6-10 [*sic*] (c)? Hearing none.

May I have a motion to close the public testimony?

Mr. Keawe: I move to close the public testimony.

Mr. Mahoney: Second.

Ms. Higuchi Sayegusa: Sorry. To clarify – again, we closed the public hearing I think several times, but since we’ve reopened the evidentiary portion of the Contested Case, that is why the Chair entertained further public testimony, but in any case...

Chair Apisa: Hearing none.

Mr. Keawe: We have a motion on the floor.

Chair Apisa: We have a motion on the floor. All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 5:0. The public testimony is closed.

And then we would also entertain a motion to close the Contested Case hearing.

Mr. Mahoney: Chair, move to close the Contested Case hearing.

Ms. Nogami Streufert: Second.

Chair Apisa: We have a motion on the floor to close the Contested Case hearing. All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 5:0. Contested Case hearing is closed.

Each party may submit proposed or stipulated Findings of Fact, Conclusions of Law, and Decision and Order. Each proposal must be served to each other party and shall be made within thirty (30) days after close of Contested Case hearing. Exceptions to a proposed Decision and Order may be filed within seven (7) days from date of service of proposed Decision and Order. We will be scheduling final arguments and decision on the Contested Case on February 27th; or it could be later, but I think we will do it on February 27th. Will this date work for all the parties? February 27th, will this date work?

Mr. Roversi: I believe that is fine with the Planning Department. Thank you.

Ms. Tumbaga: That is fine with Public Works as well. We are open and available to do closing argument today, followed, of course, with the submission of our proposed findings, but it is up to the Commission.

Mr. Ho: Madame Chair, could we have five (5) minutes here?

Chair Apisa: Yes, let's take a quick 5-minute recess here. But Rayne, was the February 27th...if we decide to go with that, is that date okay with you?

Ms. Regush: Thank you. That would work fine.

Chair Apisa: Okay. We are going to take a 5-minute recess so we can convene here.

The Commission recessed this portion of the meeting at 1:17 p.m.

The Commission reconvened this portion of the meeting at 1:23 p.m.

Chair Apisa: I would like to resume.

Mr. Ho: Is the floor clear? Any motions outstanding? Are there any motions on the floor that are outstanding?

Chair Apisa: No.

Mr. Ho: No? Okay. Madame Chair, I would like to question Mr. Haigh just a bit more.

Chair Apisa: To do that, I think we have to reopen the...

Ms. Higuchi Sayegusa: Yes, and for that I think we need a motion and a second to reopen for the particular reason that you seek.

Mr. Keawe: I had a question. Is your motion specifically to question him or anybody else?

Mr. Ho: I don't know, but I believe Mr. Haigh has his attorney as his counsel; Ms. Tumbaga, here, is his counsel. So I would question Dough Haigh, yes.

Chair Apisa: Well, you have a motion on the floor, then, to reopen.

Mr. Ho: I will make the motion that I would like to reopen the hearing.

Ms. Nogami Streufert: I second.

Chair Apisa: Alright. We have a motion on the floor. Any discussion on it? All in favor? (Two (2) ayes) Any opposed? (Two (2) nos) Oh boy.

Mr. Mahoney: The motion doesn't carry.

Ms. Higuchi Sayegusa: Perhaps I will do the roll call. Okay? Commissioner Keawe.

Mr. Keawe: No.

Ms. Higuchi Sayegusa: Commissioner Mahoney.

Mr. Mahoney: No.

Ms. Higuchi Sayegusa: Commissioner Streufert.

Ms. Nogami Streufert: Yes.

Ms. Higuchi Sayegusa: Commissioner Ho.

Mr. Ho: Yes.

Ms. Higuchi Sayegusa: And Chair Apisa.

Chair Apisa: No.

Ms. Higuchi Sayegusa: Okay. (Motion) fails 2:3. Thank you.

I think what we left off with is now what to do about scheduling, either entertaining final arguments now or if you want to schedule that to coincide with the decision-making hearing. I think there is the option of the parties, also, to submit proposed Findings of Fact, Conclusions of Law within thirty (30) days of the close of the Contested Case, which was today, and then, of course, exceptions – the opportunity for the other parties to file exceptions to each other's Findings of Fact, Conclusions of Law. So I think that is what was left off. I think the request of the Petitioner was to have final arguments today.

Chair Apisa: Is there any opposition to moving forward?

Ms. Regush: Well, just a clarification, you are saying final arguments, but I do believe, according to the rules, that at the end of the evidentiary portion of the hearing, we can make the closing statements today. So is closing statement different than what...

Mr. Roversi: Same thing.

Ms. Regush: Okay. I would be prepared to do my closing statement today.

Chair Apisa: So that we could just conclude it?

Ms. Higuchi Sayegusa: Maybe you can ask the Planning Department.

Chair Apisa: Planning?

Mr. Roversi: The Planning Department has no objection to doing closing arguments today.

Mr. Keawe: I have a question, Madame Chair. What about the Decisions and Orders? Those would have to be done within thirty (30) days?

Ms. Tumbaga: Just for the Commission's information, the three (3) parties discussed the next hearing date, and actually, we would all prefer the February 13th date if that is available.

Mr. Keawe: February 13th instead of February 27th?

Ms. Tumbaga: That is correct. As far as the submission of the proposed findings, Public Works is open to a shorter deadline than thirty (30) days.

Mr. Keawe: Okay.

Ms. Tumbaga: But, again, we would still defer to the Commission, and I am not sure what Ms. Regush's position is on that.

Ms. Higuchi Sayegusa: Apologies. Let me just check to make sure that there will be a February 13th meeting. I'm sorry. We do. Sorry.

Mr. Keawe: So we would...oh, Madame Chair?

Chair Apisa: Please, Commissioner.

Mr. Keawe: So what we are talking about is having the parties offer their closing arguments today and then in a subsequent meeting, either February 13th or 27th or whenever we agree, they would have submitted their D&Os at that time and then we make a decision on the Decisions and Orders?

Ms. Higuchi Sayegusa: Right.

Mr. Keawe: Is that right? Because they are doing closing arguments, but they still need to give us a written Decision and Order.

Ms. Higuchi Sayegusa: They have the option to do so, right. So I think for that, since the proposal was that the thirty (30) days is going to be beyond that first hearing date, so if you folks have an agreement to the deadlines of Findings of Fact, Conclusions of Law.

Mr. Roversi: I believe – and Rayne can correct me if I am wrong – that we have an interest in expediting the decision-making process; moving the hearing date to February 13th, presuming there will be a hearing on that day.

Chair Apisa: Yes.

Mr. Roversi: Shortening the deadline amongst ourselves for the Findings of Fact, Conclusions of Law, subject to Rayne's approval, I believe that we could have those done no later than January 30th. That would still allow the seven (7) days for a rebuttal amongst ourselves in advance of the February 13th hearing.

Mr. Keawe: Okay.

Mr. Roversi: And that would, then, give the Commission two (2) weeks to review the Findings of Fact, Conclusions of Law, and a week to review any rebuttal or exceptions to the Findings of Fact, Conclusions of Law prior to the February 13th hearing. Subject to Rayne's agreement, I believe the Department and the Department of Public Works are fine with that sped up deadline process.

Ms. Regush: Yes, I would concur with what Mr. Roversi has explained.

Chair Apisa: Okay. We certainly don't want to hold it up, so—

Ms. Regush: Exactly. Thank you.

Chair Apisa: –let’s move it along.

Ms. Higuchi Sayegusa: Just to reiterate, January 30th would be the deadline for the proposed Findings of Fact, Conclusions of Law.

Mr. Roversi: Correct.

Ms. Higuchi Sayegusa: Okay. And then February 6th is any exceptions, and then the decision-making on February 13th.

Mr. Roversi: Correct.

Ms. Higuchi Sayegusa: Got it. Okay.

Chair Apisa: Then I think that concludes it. I would entertain a motion to adjourn.

Mr. Roversi: How about the issue of whether you want to do closing arguments now or–

Chair Apisa: Yes, that’s right. We got a little hasty there. Yes, thank you. Yes, we will do the closing arguments now. Would five (5) minutes be adequate to...

Ms. Tumbaga: Yes.

Chair Apisa: For each party? Okay, let’s do that. Five (5) minutes for your closing arguments.

Mr. Roversi: What order would you like us to go in?

Ms. Higuchi Sayegusa: I think it would be–

Ms. Regush: Follow the rules.

Ms. Higuchi Sayegusa: –the Petitioner, the Department, and then the Intervenor.

Ms. Regush: Intervenor last.

Ms. Higuchi Sayegusa: Yes.

Ms. Regush: Thank you.

Ms. Higuchi Sayegusa: Okay.

Ms. Tumbaga: Good afternoon. Deputy County Attorney Teresa Tumbaga on behalf of the Department of Public Works. Chair Apisa (and) fellow Commissioners, thank you very much for your attention and your patience throughout this process. The evidence presented by the Department shows that Phases C and D of the Lydgate-Kapa’a Bike and Pedestrian Path comply with all of the requirements under the law, including the objectives and policies of the Coastal

Zone Management Act, the Special Management Area guidelines, the standards for granting variances from the shoreline setback area, and the requirement to protect cultural, historical, and natural resources, including traditional and customary Native Hawaiian rights. This project is the result of years of preparation and the hard work of dedicated professionals. In preparing for this project, the Public Works Department consulted with various experts, agencies, and community organizations and members. They conducted numerous studies, including an Environmental Assessment, a Section 7 Endangered Species Act consultation, a Section 106 National Historic Preservation Act consultation, a Cultural Impact Assessment, an Archaeological Inventory Study [*sic*], and a burial treatment plan. A project such as this requires multiple levels of cooperation and input, and part of that input is acquired through public participation. Throughout this project, the Department has reached out to various community organizations, including the Intervenor. However, now that the dust has settled and the Intervenor has once again been provided the opportunity to participate, it is abundantly clear that the Intervenor has not provided any evidence or even a reasonable argument that would even suggest that the permit should not be granted. To the contrary, the evidence shows that the Department went above and beyond its legal and regulatory obligations in securing these permits with the ultimate goal of improving public shoreline access for all. The Public Works Department has met its burden, and we request that the Commission grant both permits. If granted, we also request additional time for this project. This project depends on Federal funding and because this process has taken longer than the Department originally anticipated, additional time may be needed to secure that Federal funding. Additionally, it would be prudent to have more time due to the sensitive nature of the area. Therefore, the Public Works Department is requesting that Condition No. 8 on page 12 of the Director's Report be amended to state that the applicant shall obtain the necessary building permit and commence construction within five (5) years from the date of approval of the SMA Permit, and complete construction within ten (10) years from the date of approval of the Building Permit. That is the preferred time period; however, the Department would ask for a minimum of at least two (2) years to commence and five (5) years, if that time period is too long. Thank you.

Chair Apisa: Thank you. Then the Planning Department.

Mr. Roversi: Thank you, Madame Chair. Adam Roversi for the Planning Department; I will be brief. I would like to refocus the Commission on what exactly is before you today. We have an SMA Permit and a Shoreline Setback Variance application. So the primary purpose of the SMA statutory scheme is to ensure public access and preserve coastal resources. This project is, by definition, to provide public access to the coast and the area where there is existing, yet discontinuous and non ADA compliant public access. This proposed project will provide continuous public access well-connected to parking and public areas to allow the public to reach this section of the beach. There has been no substantive evidence presented that this proposed project – and this is all covered in the Director's Report – will do anything to destroy coastal resources. In fact, the Director's Report contains recommended conditions and the Department of Public Works has agreed that if, in any future date, the shoreline erodes to this path, it has been constructed in such a way and the Department suggests conditioning it on the removal of the path, so it will not harden the shoreline. The construction of the path does nothing to destroy coastal resources in and of itself.

As to shoreline setback variances, under Kaua'i County Code 8-27.10, such variances are appropriate – under subsection 7 – for public structures that are clearly in the public interest. Again, because the entire purpose of this shoreline path is to provide public access to the shoreline – ADA compliant public access – it is the very definition of the purposes under which shoreline setback variances can be granted. I would like to reiterate that ultimately, the SMA Permits and the shoreline setback variances are ultimately a discretionary permit within the Commission's purview to weigh the subjective evidences presented; it is not a clear cut black or white question. We, as laid out in the Director's Report, feel that given the clear public purpose, both under SMA and the shoreline setback variance provisions, the Commission should grant the permit subject to the conditions set out in the Director's Report. Thank you.

Chair Apisa: Alright, thank you.

Ms. Regush: Thank you, Commissioners and Chair Apisa. Rayne Regush for the record. Please remember that WKNA is a supporter of the path and we don't want to delay its construction, but the goal is to keep as much of the coastal resource in its natural state and maintain its scenic qualities and visual corridors, and the goal is to preserve recreational, social, and cultural resources that occur along the coastline. The goal is also to afford the greatest protections to historic sites and to keep manmade structures outside of the shoreline setback and to minimize the use of variances where possible. The goal is to respond immediately to sea-level rise, especially in the Waipouli parcels that have experienced significant wave run-up, such as the summer with the king tide event, and the goal is to have current certified shorelines for this permit application, not the four (4) expired shorelines that were a year or more old. And the intent of State and County Coastal Zone Management rules are based on minimizing these impacts. True, the path is not going to destroy anything, but we can manage the impacts nonetheless. So, Wailua-Kapa'a Neighborhood Association recommends that the path be aligned, where there are no existing constraints, so that the setback is 60 feet, and the undeveloped Coconut Plantation Village parcel has ample space to move the path mauka at least another 20 feet inland in response to the evidence from the king tide event based on photographs from DLNR's...both the site inspection and the surveyor for the applicant that staked the land and provided those photos in juxtaposition of our king tide photos. Thank you for your patience, and that concludes my closing statement.

Chair Apisa: Okay. Thank you very much. I think, then, that concludes it. Motion to adjourn?

Mr. Mahoney: Motion to adjourn, Chair.

Ms. Nogami Streufert: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Motion carried 5:0. Meeting is adjourned.

Chair Apisa adjourned this Contested Case Calendar at 1:40 p.m.

Respectfully submitted by:



Darcie Agaran,
Commission Support Clerk

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

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