



PLANNING COMMISSION

KAAINA S. HULL, CLERK OF COMMISSION

DONNA APISA, CHAIR
HELEN COX, VICE CHAIR
GERALD AKO, MEMBER
MELVIN CHIBA, MEMBER
FRANCIS DEGRACIA, MEMBER
GLENDA NOGAMI-STREUFERT, MEMBER
LORI OTSUKA, MEMBER

MEMORANDUM

DATE: May 10, 2021

TO: Planning Commission

FROM: Clerk of the Commission

SUBJECT: 1st Addition to the Planning Commission 5/11/2021 Agenda

F. SPECIAL ORDER OF THE DAY

a. **Michael S. Kaplan Revocable Trust**

3. Letter (5/9/2021) from Yoshito LHote.
4. Letter (5/7/2021) from Makaala Kaaumoana.
5. Letter (5/10/2021) from Eric Taniguchi.
6. Letter (5/10/2021) from Hope Kallai.
7. Letter (5/10/2021) from Teresa Tico, Attorney.
8. Letter (5/10/2021) from Shelley Spencer.
9. Applicant Michael Kaplan's Supplement to Application and Objection to Petition for Intervention and Request for Hearing, Exhibits "1" and "2". Re: Application for Class IV Zoning Permit (Z-IV-2021-8) and Use Permit (U-2021-7).
10. Memorandum (5/10/2021) from Kaaina Hull, Director of Planning.
11. Testimony of Felicia Cowden Councilmember, Kaua'i County Council dated 5/10/2021.

G. HEARINGS AND PUBLIC COMMENT

2. **New Agency Hearing**

a. **Kīlauea Old Mill, LLC.**

8. Letter (5/7/2021) from Makaala Kaaumoana.

Shanlee Jimenez

From: Planning Department
Sent: Monday, May 10, 2021 7:46 AM
To: Shanlee Jimenez
Subject: FW: permit (Z-IV-2021-8) and use permit(U-2021-7) TMK (4)5-2-012:019

Follow Up Flag: Follow up
Flag Status: Flagged

From: Yoshito LHote <yoshitol@yahoo.com>
Sent: Sunday, May 9, 2021 8:55 PM
To: Planning Department <planningdepartment@kauai.gov>
Subject: permit (Z-IV-2021-8) and use permit(U-2021-7) TMK (4)5-2-012:019

CAUTION: This email originated from outside the County of Kauai. Do not click links or open attachments even if the sender is known to you unless it is something you were expecting.

Aloha Commissioners,

When I got this latest County of Kaua'i Planning Commission Agenda, I was very surprised to see that SMA Use Permit SMA (U) 2011-1; Class IV zoning permit Z-IV-2011-1; and Use Permit U-2011-1TMK Nos. (4) 5-2-012:019 & (4) 5-2-021:041:0001 (por.) was on the special session of your agenda (Kaplan Dwelling).

I understood that a state judge ruled that in fact This development had to go back to the permitting process and allow for public comments.

I also understand that now the planning department is no longer considering this part of a larger development and furthermore invoking the exemption for a single family residence on only one of the lots even though it issued a two year extension to complete the residence and modify the design of the farm dwelling unit subject to two conditions: (1) complete residence by April 23, 2021, and (2) **comply with conditions of approval for SMA Use Permit SMA (U) 2011-1; Class IV zoning permit Z-IV-2011-1; and Use Permit U-2011-1.**

I am not familiar with the property but this change of position offers only one reality and that it is trying to avoid the SMA process of assessing the impact of the development. And even if it has to go in front of the Planning Commission because of the Open/ST-R it is no longer required to give the impact on the cultural resources that I believe exist on that particular parcel.

I believe you also have to determine whether to allow for intervention in the case. It is vital that if there is a request to intervene it be granted because it is the only recourse for individuals, communities and neighbors to understand the impact of a development and to be heard and voice their concern.

In these COVID days we have been completely removed from the governmental process and if we deny the opportunity to chime in in any situation for good or bad reasons, for insignificant or legitimate reason, we will have completely undermined the process of check and balances. we have to maintain that right no matter what, so I call on your good conscience to make the right call in this situation.

F.A.3.
MAY 11 2021 (A)

A concerned citizen.

Yoshito L'Hote

Kaauomoana
POB 1205 Kilauea, Hawaii 96754
Kaaumoana@gmail.com
PH: 808-828-1205 Cell: 808-346-5458 Fax: 431-4444

May 7, 2021
Kauai County Planning Commission
Testimony
May 11, 2021 meeting

Item# Z-IV-2021-6 UI-2021-7

Aloha Commissioners,

I testify in support of the petition for intervention by Mauna Kea Trask, Esq. on behalf of West Sunset 32, Phase 1 LLC, CS Development LLC and Charles Somers individually. I believe this permit needs an SMA permit, that it is part of a larger development and any approval of this application in its current form will constitute a very concerning precedent for development in our special management areas on Kauai. Specifically properties in the immediate area of this application were not handled in the same way this one is being considered.

I believe that approving this petition for intervention will provide this Commission essential information needed to correctly consider its appropriateness for this location. The precedent being set by the Planning department here is dangerous and compromises the SMA/CZMA program and process throughout the whole island at a time when coastal lands and the coastal zones are most threatened.

Under the Planning Departments rationale, the community could challenge a larger development spanning multiple lots, win at circuit court, stop the development, only to have the Planning Department later say that a SMA Permit is not needed while the matter is up on appeal thus allowing the development to go through.

Picture a subdivision in the SMA involving ten houses on ten separate lots, all initially recognized as one project. The Planning Department in this scenario could later say that now that the court invalidated the permits, what was once a ten lot subdivision development is now just a bunch of individual single family houses all exempt from SMA permitting requirements, evading public participation and public notice. This cannot stand and such an interpretation and precedent harms the community and the island as a whole.

Do we, you, know exactly how many bedrooms are proposed? What kind of wastewater system is required and where the waste will leach?

The charge for this Commission and those of us concerned with our environment is above all do no harm.

Me ka pono,



Makaala Kaaumoana

F.a.4.
MAY 11 2021 (A)

Date: 5/10/2021

From: Eric Taniguchi

(printed)

TO: Kauai County Planning Commission.

Subject: In the Matter of the Application of Michael Kaplan, Trustee of the Michael A. Kaplan Revocable Trust, date August 12, 1992 as amended and restated by instrument dated July 16, 2017, affecting real property located at Kahili Ahupua'a, Hanalei, Island and County of Kauai, State of Hawaii, more particularly identified as Tax Map Key No. (4) 5-2-012:019, and containing an area of 32,034 sq. ft., more or less.

Honorable Members of the Kauai County Planning Commission,

The native Hawaiian community of Kaua'i is very concerned about this development. We have only recently learned about the importance of the Naiamaneo (wahine) aka Naaiaamaneo kuleana lot, L.C.Aw. No. 10333, Mokupuni Kauai, Moku: Ko'olau, in the ili of Kupa, and the extent of the lo'i kalo complex down there in the Kilauea river valley.

In reviewing the records and files in this permit request it is clear that this development is within the SMA and needs a SMA Use Permit. This single family residence is part of a larger development that covers the kuleana lot and parcel 41 unit 1, and does not qualify for the first house exemption under the SMA rules.

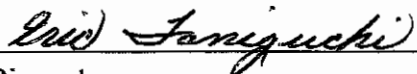
A lot of people are bad mouthing Charles Somers for trying to intervene in this permit request and I think these criticisms are misplaced. Charles has done a lot for the community since he moved here. For example, this past year he donated \$80,000 to fund the emergency generator to the Makana North Shore Clinic, \$20,000 to the Hanalei Initiative to help fund their clean water study, \$28,560 to Kilauea Elementary school to buy computers for their teachers and computer licensing software for the students, and \$30,000 to the Hawaiian Islands Land Trust. This is in addition to the millions of dollars he has spent to help build the Kilauea Ag. Park over these past few years.

F.A.G.
MAY 11 2021 (A)

Nonetheless, this intervention is not about any of these things. Protecting our wahipana is not about rumors or criticisms. In our culture we look at action and what people do, not what they say. This issue is about making sure that development in the SMA and in the Open Zone Special Treatment District follows the law and is fairly applied to everyone. The public and especially the native Hawaiian community were not made aware of these proceedings until the very last minute. This is not pono. The Naiamaneo lo'i kalo complex is a very important historic site and the Planning Commission should have all relevant information about it before it grants any permit request and granting the intervention request will make sure that you have all the necessary information.

Please grant this petition for intervention and send this matter to contested case hearing so that you can have all the relevant evidence before you make a decision that could compromise this historic and cultural site forever. Development in Hawaii is a slow process because our environment and cultural sites are so sensitive and important. There is no need to rush. Ho'olohi Planning Commissioners, go slow so that you make the correct decision.

Thank you for your consideration of these matters,



Signature

Eric Taniguchi

(Printed name)

Shanlee Jimenez

From: Planning Department
Sent: Monday, May 10, 2021 9:41 AM
To: Shanlee Jimenez
Subject: FW: Comments on Kaplan Use Permit
Attachments: 2021 May 10 Planning Commission.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

From: Hope Kallai <lokahipath2@live.com>
Sent: Monday, May 10, 2021 9:39 AM
To: Planning Department <planningdepartment@kauai.gov>
Subject: Comments on Kaplan Use Permit

CAUTION: This email originated from outside the County of Kauai. Do not click links or open attachments even if the sender is known to you unless it is something you were expecting.

Aloha e Planning Department : Attached please find my comments requesting approval of Use Permit U 2021-7 and

Class IV Zoning Permit Z-IV-2021-8 on TMK (4) 5-2-012:019. Please let me know if it does not open correctly.

Mahalo,

Hope Kallai

F.A.G.
MAY 11 2021 (A)

2021 May 10

Hope Kallai
POB 655
Kilauea, HI 96754
lokahipath2@live.com

Planning Commission
c/o County of Kauai Planning Department
4444 Rice Street, Suite A473
LThu'e, Kauai 96766
Phone: (808) 241-4050
Fax: (808) 241-6699

RE: Use Permit U 2021-7 and
Class IV Zoning Permit Z-IV-2021-8
TMK (4) 5-2-012:019

Aloha e Chair Apisa and honorable Planning Commission:

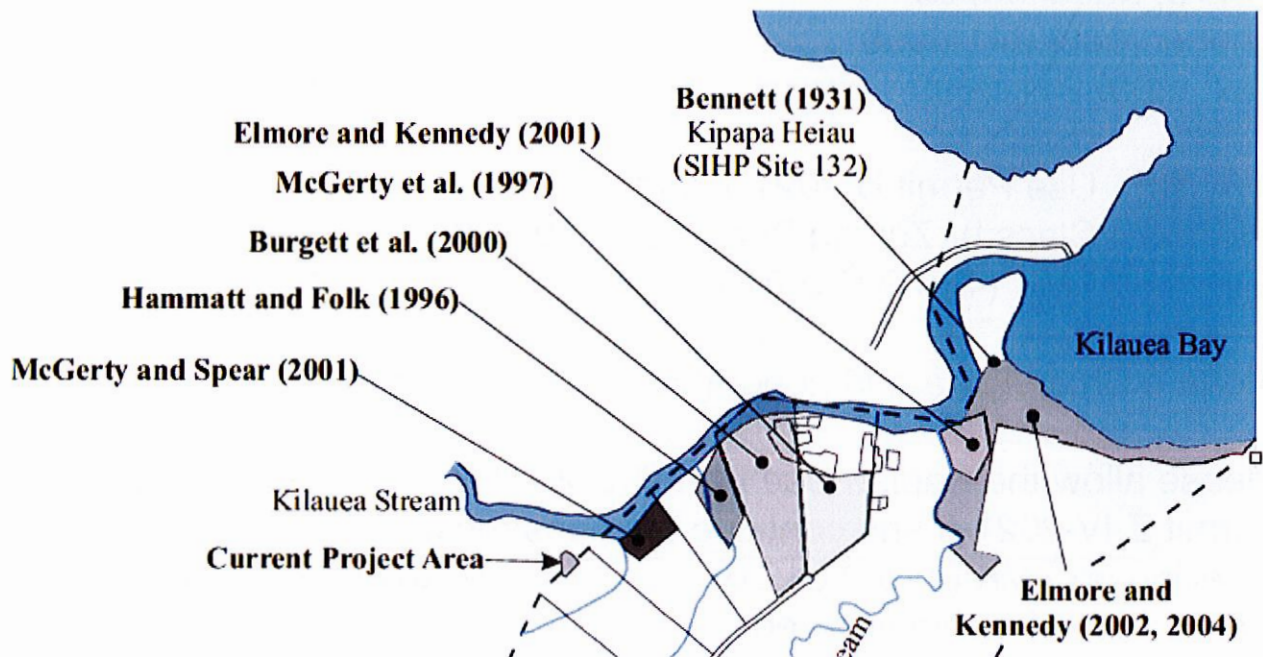
Please allow the Kaplan Use Permit U 2021-7 and Class IV Zoning Permit Z-IV-2021-8 and continue the construction of their Single Family Dwelling on TMK (4) 5-2-012:019, a 0.73 acre kuleana, Land Court Award #10333 to Naaimaneo.

This kuleana is being described as being part of the "last intact pre-historic complex of lo'i kalo" in the ahupua`a of Kahili. This is not true. There is an extensive rockwall and agricultural terrace system still in existence throughout the entire Kahili/Kilauea River valley, including on other kuleana properties and contiguous property that did not receive Land Court Awards.

The Current Project Area on the Naaimaneo kuleana, originally `aina kalo, was converted to rice culture by the late 1800's. There were 9 rock lined terrace fiields on the kuleana and an `auwai. One rock wall had a 4 meter gap and walls in varying stages of disrepair. This

kuleana property had a modern residence built in 1985 that was wrecked by Hurricane Iniki. The `auwai was not intact. There was a rice mill with a waterwheel on the contiguous property TMK (4) 5-2-21-041:001 also owned by the Kaplans, with a remnant historic concrete slab. Subsurface trenching archaeological record on the kuleana was "silent as to pre-contact agriculture." There was no trace of taro culture; taro was displaced by rice fields - still an important chapter of history, but not taro.

Previous Archaeology in Kilauea area.



After an Archaeological Inventory Survey and subsurface trenching in 2010 on the Kaplan kuleana, SHPD determined that data recovery was sufficient on this site and that no further work was recommended on the kuleana property. Now, a downstream property owner is claiming to know better than SHPD, challenging a 10 year old Archaeological Restoration and Preservation Plan, calling it "development."

This is not right, the Kaplan house should be allowed to be built on this property. There are other prehistoric lo'i complex in makai Kahili

kuleana that have over 115 existing rockwalls and pondfield systems including State Historic Sites 50-30-04-632 on the south side of Kilauea River, a PreContact/Early Historic Agricultural Complex with 56 rock features including modified outcrops, stone alignments, cobble filled cracks, terraces, boulder alignments, walls, upright stones, cupboards and cleared overhangs on moderate to steep slope above floodplain. This prehistoric site has been recommended for preservation by SHPD.

A nearby Kilauea property across the river, with archaeological sites 50-10-04-580, consisting of 53 agricultural terraces and 2 possible habitation areas, and 50-10-04-581, with a stone retaining wall and rock faced trail, were both recommended as eligible to the Hawaii Register of Historic Places, yet preservation of only 92% of these features were recommended by SHPD, as stated on page ii of the Archaeological Inventory Survey, Approx 74-ac Portion of the Kilauea Falls Ranch Property, Kilauea, Kauai, in Special Management Area Use Permit SMA(U) 2008-5, Use Permit U 2008-4, Class IV Zoning Permit No. Z-IV 2008-6.

It is incongruous to request preservation of an archaeological site on Kaplan's land with data recovery deemed sufficient by SHPD and allow destruction of 8% of a site deemed eligible for the Historic Register.

It is not fair to claim archaeological significance on contiguous properties can terminate house site rights on a property cleared by SHPD.

If private parties can override Planning Director's Reports and challenge past owner's permitting processes, nobody's house on Kauai is safe from legal challenge and attack. Please allow this single family dwelling to be built and the Archaeological Preservation Plan to continue to honor this property. Mahalo for your time and consideration,

Hope Kallai

TERESA TICO, ATTORNEY

*P.O. Box 220
Hanalei, HI 96714
(808) 639-9080*

May 10, 2021

Kauai Planning Commission
C/O Planning Department, Kapule Building
4444 Rice Street, Suite A473
Līhu'e, Hawai'i, 96766

RE: May 11, 2021 Agenda Item F, Special Order of the Day
Application for Class IV Zoning Permit (Z-IV-2021-8) and
Use Permit (U-2021-7), Michael Kaplan
TMK (4) 5-2-012:019; and
Petition for Intervention by West Sunset 32 Phase I and Charles Somers

Dear Commissioners:

I am writing in regard to the above referenced Agenda Item and, specifically, in opposition to the Petition for Intervention filed by West Sunset 32 Phase I and Charles Somers, individually.

I would like to disclose that I am an attorney for Michael Kaplan in another matter, although I do not represent him in the above referenced matter. He did not ask that I present written testimony nor have I discussed the nature of my testimony with him. However, I am well acquainted with his kuleana, building and preservations plans, and have personally visited the site several times.

The subject parcel is a kuleana consisting of .735 acres of land. Mr. Kaplan wishes to build a modest 2,500 sq ft home on the parcel. A building permit for construction of a house on the same kuleana parcel was issued years ago and a house was built on it; however, that house was destroyed in Hurricane Iniki. My understanding is that Mr. Kaplan's home will be built on or near the footprint of the previous home, thus disturbing no resources or significant historical sites.

My testimony that follows is based on my background and knowledge of kuleana law, my review of the relevant Hawaii statutes and case law, Kauai County Comprehensive Zoning Ordinance, Special Management Area Rules, and Planning Commission Rules of Practice and Procedure. I served as a director on the board of directors at Native Hawaiian Legal Corporation for six years (2012-2018) where we vigorously defended kuleana rights which are distinguishable from modern property rights. I was lead trial counsel in *Marvin v. Pflueger*, 127 Hawa'ii 49, 280 P.3d 88 (Haw. 2012); 134 Hawai'i 114, 334 p.3d 777 (Haw. App. 2014) where the appellate court affirmed the trial court's expansion of a kuleana owner's right to ingress and egress.

F.a.7.
MAY 11 2021 (A)

My concern with the Petition for Intervention by Somers is that, if granted, it would erode 170 years of kuleana law intended to protect a kuleana owner's right to reside on and make improvements to the land, to protect and preserve the resources of that land, and to live off that land. To my knowledge, no Petition for Intervention involving a kuleana parcel that is exempt from SMA permitting (Kaplan is exempt) has ever been granted. The fact that applications for single family residences on kuleana parcels are exempt from County SMA rules is indicative of the distinguished land category that kuleana hold in our real property laws.

We all know the 1848 Great Mahele transformed the land tenure system in Hawai'i into one of private property ownership. However, this came at the expense of the tenants of the larger parcels (Ahupua'a) who became landlocked as a result of the new laws. Thus, the 1850 Kuleana Act came into law. Essentially, tenants could petition the Land Commission for title to their kuleana parcels, and with their title came inalienable rights to ingress and egress, to water, and to live on and farm the land, among numerous other rights. Since the passage of the Kuleana Act, the Hawaii Supreme Court has been diligent in protecting and preserving kuleana rights.

There are thousands of kuleana throughout the State of Hawaii. If any landowner could Petition for Intervention every time a kuleana owner needs to improve his or her property, this would fly in the face of the original intent of the Kuleana Act, to allow kuleana owners to live on their land. To grant Somers' petition would be unprecedented and would threaten the right of every kuleana owner to exercise his or her inalienable rights to live on the land.

But what is most egregious about Somers petition is his own admission, under oath, that what he really wants is "to maintain the strategy... of keeping the valley undeveloped," even if a property owner has the right to build a home. I have been observing the contested case hearing involving Valerie Neilson and David Kells' building permit application where Somers, who has been trying to buy their property, intervened. The hearing commenced well over a year ago and is far from complete. Clearly, Somers' strategy is to distress landowners who won't sell their property to him and who do not have the means to hire lawyers. This is an abuse of our administrative and judicial system.

To grant Somers' Petition for Intervention in this matter would denigrate kuleana rights and set a precedent that could imperil the right of kuleana owners throughout the State to enjoy their inalienable right to live on their land.

Additionally, I want to highlight the efforts Kaplan has taken (and continues to take) to manage, care for, and protect the natural resources on the property. Kaplan engaged an archaeological firm, ASM Affiliates, (who was already familiar with the property because they previously conducted an Archaeological Inventory Survey of the property) to prepare a Preservation Plan to ensure that the natural resources remain protected on the property. The Preservation Plan was submitted to the State of Hawaii Department of Land and Natural Resources State Historic Preservation Division who reviewed and approved it. Kaplan has actively and continuously involved members of ASM Affiliates with the activities at the property to ensure that the Preservation Plan is being followed and that the natural resources on the property are being properly protected. He has demonstrated his concern for protecting the environment, managed the property so that all significant archaeological and historic aspects of are being properly cared

for, and is in the process under the Preservation Plan of restoring the property to its proper condition. You can visit the property and I am certain you will be impressed with the work.

A few days ago, it was brought to my attention that certain misinformation about the Kaplan kuleana has been circulating through social media. It claims, among other things, that Mr. Kaplan is installing a septic system on the kuleana (he is not) and that the kuleana is the last intact lo'i complex in the Kahili valley (it was not intact, which is why Mr. Kaplan has been restoring it). While I do not yet know the source of this propaganda, I believe we must be careful to rely on facts, not fiction. Nor should we be swayed by inflammatory and unsupported allegations. Mr. Kaplan's permit application is a straightforward procedure and should be granted without intervention by Mr. Somers.

Sincerely,

/Teresa Tico/

Teresa Tico

Shanlee Jimenez

From: Planning Department
Sent: Monday, May 10, 2021 10:51 AM
To: Shanlee Jimenez
Subject: FW: Kilauea Old Mill, LLC

Follow Up Flag: Follow up
Flag Status: Flagged

-----Original Message-----

From: S Spencer <aloha_js_spencer@yahoo.com>
Sent: Monday, May 10, 2021 10:46 AM
To: Planning Department <planningdepartment@kauai.gov>; Planning Department <planningdepartment@kauai.gov>
Subject: Kilauea Old Mill, LLC

CAUTION: This email originated from outside the County of Kauai. Do not click links or open attachments even if the sender is known to you unless it is something you were expecting.

Subject: In The Matter of the Application of Kilauea Old Mill, L.L.C for Use Permit and Class IV Zoning Permit for Real Property situated at Kilauea, Kauai, Hawaii
identified by Kauai Tax Map Key No. {4} 5-2-014:049

To: Planning Commission Of The County Of Kauai

My Name is Shelly Spencer. I reside at 4315 Oka Place in Kilauea. I have resided in Kilauea since 1976. I was here when this property was first changed to the use permit. The town was much smaller then, and supported these permits. On Oka Street there were, and still are, four use permits that were granted around the same time frame and all are next to each other. From Lighthouse road, there is the Medical Clinic, Pharmacy, Old Mill area, and pre school. its the accumulation of all of these permits that congest the area. The town knew it would grow, and eventually the commercial space would be developed. Since then the town has grown almost to compacity. The commercial space has been developed into a shopping center. When the Kilauea town plan was done, the community members were under the understanding, that these use permits were to not expand but down size when the commercial property became available.

Our neighborhood has fought several different use permit application regarding this property, and other use permits on Oka Street through the years. To help maintain the integrity of the neighborhood from expansion of more commercial activity We have no side walks and this area it is not a safe environment for a neighborhood. Either walking, riding bike, wheel chair or baby stroller. I totally disapprove of granting the use permit for the juice bar/restaurant. This building has always only housed one business. To me it seems an expansion of the density of the use permit when another business is added into the same building. Regarding the use permit for the Athletic Club. I find the wording to not be applicable to the actual user of the Jujitsu Club that is operating there. Health Club brings to mind that hours operation are way more then actual time Bruno's is open I believe he made reference to this in his last testimony. This wording should be changed to represent true use and not leave it to interpretation. I have seen how these use permits seem to morph. I don't believe the parking is ample to support this request

I believe there are ample space available in the developed commercial shopping center that was designed for this use and has plenty of parking in a safe area outside of the neighborhood.

F.A.8.
'MAY 11 2021 (A)

Regarding the statement made by one of the commissioners regarding no complaints. I don't think its fair to the neighbors to have to regulate what the planning commission approves it doesn't make for a friendly environment.

I have always seen applications regarding use permits on this property and others taken by the actual person using the permit. In this case it is the owner of the property seeking the permit not sure why this has changed. I also believe that when properties sell that have use permits, new owners should be made to reapply for the uses. To make sure neighbors have the right to voice their concerns without being the complainer because it puts undue pressure on that neighbor's, since you actually have to go and file a complaint to be heard.

Thank you for allowing me to voice my concerns and hope that you consider all of the reasons i have stated to deny this application.

Shelly Spencer

Shanlee Jimenez

From: Planning Department
Sent: Monday, May 10, 2021 10:51 AM
To: Shanlee Jimenez
Subject: FW: Kilauea Old Mill, LLC

Follow Up Flag: Follow up
Flag Status: Flagged

-----Original Message-----

From: S Spencer <aloha_js_spencer@yahoo.com>
Sent: Monday, May 10, 2021 10:46 AM
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MAY 11 2021 (A)

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Thank you for allowing me to voice my concerns and hope that you consider all of the reasons i have stated to deny this application.

Shelly Spencer

BRONSTER FUJICHAKU ROBBINS
A Law Corporation

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MCCORRISTON MILLER MUKAI MACKINNON LLP

LAUREL LOO 4806
4537 Rice Street, Suite 201
Lihue, Hawai'i 96766
Telephone: (808) 977-8015

Attorneys for Applicant MICHAEL KAPLAN,
Trustee of the Michael A. Kaplan
Revocable Trust, dated August 12, 1992

IN THE PLANNING COMMISSION OF THE
COUNTY OF KAUAI

In the Matter of the Application
of

MICHAEL KAPLAN, Trustee of the
Michael A. Kaplan Revocable Trust, date
August 12, 1992 as amended and restated
by instrument dated July 16, 2017, affecting
real property located at Kahili Ahupua'a,
Hanalei, Island and County of Kauai, State
of Hawaii, more particularly identified as
Tax Key No. (4) 5-2-012:019, and
containing an area of 32,034 sq. ft., more or
less.

APPLICANT MICHAEL KAPLAN'S
SUPPLEMENT TO APPLICATION AND
OBJECTION TO PETITION FOR
INTERVENTION AND REQUEST FOR
HEARING; EXHIBITS "1" AND "2"

[Re: Application for Class IV Zoning Permit
(Z-IV-2021-8) and Use Permit (U-2021-7)]

Related property: TMK # (4) 5-2-012:019

Hearing date: May 11, 2021
Hearing Time: 9:00 a.m.

COUNTY OF KAUAI

'21 MAY 10 P2:48

PLANNING DEPT.

F.A.9.
MAY 11 2021 (A)

**APPLICANT MICHAEL KAPLAN'S SUPPLEMENT TO APPLICATION AND
OBJECTION TO PETITION FOR INTERVENTION AND REQUEST FOR HEARING**

Applicant MICHAEL KAPLAN, Trustee of the Michael A. Kaplan Revocable Trust, dated August 12, 1992 ("Kaplan"), submits this supplement to the Application for Class IV Zoning Permit (Z-IV-2021-8) and Use Permit (U-2021-7) ("Application") and his opposition to the Petition for Intervention ("Petition") submitted on April 6, 2021 on behalf of West Sunset 32 Phase 1, LLC, Charles Somers, as Trustee of the Charles Somers Living Trust, CS Development, and Charles Somers (collectively "Somers").

This Supplement is to update the Planning Commission of two recent developments that have occurred since the Commission meeting on April 13, 2021.

First, on April 30, 2021, the Circuit Court of the Fifth Circuit entered its order denying Somers's motion to enjoin the Commission from granting a permit of any kind to Kaplan for the use of his kuleana lot. See *Order Denying Appellants West Sunset 32 Phase 1, LLC, Charles Somers, as Trustee of The Charles Somers Living Trust, and Charles Somers, Individually's Motion To Enforce The Court's Findings Of Fact, Conclusions Of Law, Decision And Order, Dated June 9, 2020 And The Court's Final Judgment Dated June 17, 2020 And For Injunction Pending Appeal, Filed January 28, 2021*, attached as Exhibit "1". At the April 13 meeting, we had mentioned the court's decision, which the court formally entered on April 30. The court specifically found that there was insufficient evidence to support the injunctive relief being sought by Somers.

Second, Kaplan has filed a Complaint in the Circuit Court that alleges Somers, in granting a conservation easement (Easement C-1) on his land, violated the terms and conditions of an exclusive use easement in favor of Kaplan (Easement GU-4). See Complaint attached as Exhibit "2". The Complaint asserts that Somers improperly encumbered the GU-4 easement area

without consent of Kaplan or his predecessors-in-interest. The Complaint seeks a judicial declaration that Easement C-1 is invalid to the extent that it encumbers the easement area covered by Easement GU-4. Somers asserted in his petition for intervention that his right to intervene with respect to the Application is based in part on Easement C-1. However, as previously set forth, the entirety of Kaplan's proposed structure is solely within the Kuleana Parcel and not on any land owned by Somers, including Easement C-1 and therefore has no bearing on Kaplan's Application. Nevertheless, this issue will now be determined by the court.

DATED: Honolulu, Hawai'i, May 10, 2021.

/s/ Rex Y. Fujichaku

MARGERY S. BRONSTER
REX Y. FUJICHAKU

Attorneys for Plaintiff
MICHAEL KAPLAN, Individually and as
Trustee of the Michael A. Kaplan
Revocable Trust, dated August 12, 1992

EXHIBIT “1”

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TERESA S. TICO 1952-0
P.O. Box 220,
Hanalei, Hawai'i 96714
(808) 639-9080

Attorneys for Appellee
MICHAEL A. KAPLAN, Trustee of
the Michael A. Kaplan Revocable Trust

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

WEST SUNSET 32 PHASE 1, LLC;
CHARLES SOMERS, as Trustee of the
Charles Somers Living Trust; and CHARLES
SOMERS, Individually,

Appellants,

vs.

COUNTY OF KAUA'I PLANNING
COMMISSION; COUNTY OF KAUA'I
PLANNING DEPARTMENT, by its Director,
Ka'aina Hull; MICHAEL KAPLAN, Trustee
of the Michael A. Kaplan Revocable Trust,
dated August 12, 1992 as amended and
restated by instrument dated July 16, 2017,

Appellees.

Civil No. 5CC191000105
(Administrative Appeal)

ORDER DENYING APPELLANTS WEST
SUNSET 32 PHASE 1, LLC, CHARLES
SOMERS, AS TRUSTEE OF THE CHARLES
SOMERS LIVING TRUST, AND CHARLES
SOMERS, INDIVIDUALLY'S MOTION TO
ENFORCE THE COURT'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, DECISION
AND ORDER, DATED JUNE 9, 2020 AND
THE COURT'S FINAL JUDGMENT DATED
JUNE 17, 2020 AND FOR INJUNCTION
PENDING APPEAL, FILED JANUARY 28,
2021 [DKTS 138-139]

HEARING:

Date: March 23, 2021

Time: 1:30 p.m.

Judge: Hon. Kathleen N. A. Watanabe

ORDER DENYING APPELLANTS WEST SUNSET 32 PHASE 1, LLC, CHARLES SOMERS, AS TRUSTEE OF THE CHARLES SOMERS LIVING TRUST, AND CHARLES SOMERS, INDIVIDUALLY'S MOTION TO ENFORCE THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER, DATED JUNE 9, 2020 AND THE COURT'S FINAL JUDGMENT DATED JUNE 17, 2020 AND FOR INJUNCTION PENDING APPEAL, FILED JANUARY 28, 2021 [DKTS 138-139]

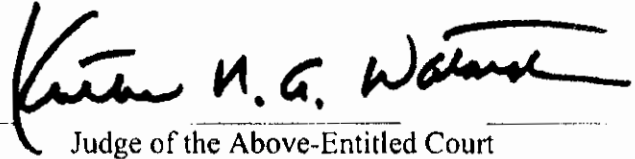
Appellants WEST SUNSET 32 PHASE 1, LLC, CHARLES SOMERS, AS TRUSTEE OF THE CHARLES SOMERS LIVING TRUST, AND CHARLES SOMERS, INDIVIDUALLY's Motion to Enforce the Court's Findings of Fact, Conclusions of Law, Decision and Order Dated June 9, 2020 and the Court's Final Judgment Dated July 17, 2020 and for Injunction Pending Appeal, Filed January 28, 2021 [Dkts 138-139] ("Motion") came on for hearing before the Honorable Kathleen N. A. Watanabe, Judge of the Above-Entitled Court on March 23, 2021 at 1:30 p.m. Present at the hearing via Zoom videoconference were Mauna Kea Trask, Esq. on behalf of Appellants West Sunset 32 Phase 1, LLC, Charles Somers, as Trustee of the Charles Somers Living Trust, and Charles Somers, Individually; Margery S. Bronster, Esq., Rex Y. Fujichaku, Esq. Skylar G. Lucas, Esq., and Teresa S. Tico, Esq. on behalf of Appellee Michael A. Kaplan, Trustee of the Michael A. Kaplan Revocable Trust; and Christopher Donahoe, Esq. on behalf of Appellees County of Kauai Planning Commission and County of Kauai Planning Department. Appellee Michael A. Kaplan was also in attendance.

The Court, having carefully read and considered the memoranda, the declarations and exhibits on file herein, and having held a hearing on the Motion,

West Sunset 32 Phase 1, LLC, Charles Somers, as Trustee of the Charles Somers Living Trust, et al. v. County of Kauai Planning Commission, et al.; Civil No. 5CC191000105 - ORDER DENYING APPELLANTS WEST SUNSET 32 PHASE 1, LLC, CHARLES SOMERS, AS TRUSTEE OF THE CHARLES SOMERS LIVING TRUST, AND CHARLES SOMERS, INDIVIDUALLY'S MOTION TO ENFORCE THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER, DATED JUNE 9, 2020 AND THE COURT'S FINAL JUDGMENT DATED JUNE 17, 2020 AND FOR INJUNCTION PENDING APPEAL, FILED JANUARY 28, 2021 [DKTS 138-139]

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Motion is DENIED as the Court finds that there is insufficient evidence to support both the enforcement and injunctive relief being sought in the Motion.

DATED: Lihue, Kauai, Hawai'i, April 30, 2021.


Judge of the Above-Entitled Court

APPROVED AS TO FORM:

MAUKA KEA TRASK
Attorney for Appellants
WEST SUNSET 32 PHASE 1, LLC, CHARLES
SOMERS, AS TRUSTEE OF THE CHARLES
SOMERS LIVING TRUST, AND CHARLES
SOMERS, INDIVIDUALLY



CHRISTOPHER DONAHOE
Attorney for Appellees
COUNTY OF KAUAI PLANNING COMMISSION
and COUNTY OF KAUAI PLANNING
DEPARTMENT

West Sunset 32 Phase 1, LLC, Charles Somers, as Trustee of the Charles Somers Living Trust, et al. v. County of Kauai Planning Commission, et al.; Civil No. 5CC191000105 - ORDER DENYING APPELLANTS WEST SUNSET 32 PHASE 1, LLC, CHARLES SOMERS, AS TRUSTEE OF THE CHARLES SOMERS LIVING TRUST, AND CHARLES SOMERS, INDIVIDUALLY'S MOTION TO ENFORCE THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER, DATED JUNE 9, 2020 AND THE COURT'S FINAL JUDGMENT DATED JUNE 17, 2020 AND FOR INJUNCTION PENDING APPEAL, FILED JANUARY 28, 2021 [DKTS 138-139]

EXHIBIT “2”

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Attorneys for Plaintiff
MICHAEL KAPLAN, Individually and as
Trustee of the Michael A. Kaplan Revocable
Trust, dated August 12, 1992

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

MICHAEL KAPLAN, Individually and
as Trustee of the Michael A. Kaplan
Revocable Trust, Dated August 12,
1992,

Plaintiff,

vs.

WEST SUNSET 32 PHASE 1, LLC;
CHARLES SOMERS, Individually and
as Trustee of the Charles Somers
Living Trust; HAWAIIAN ISLANDS
LAND TRUST; DOES 1 -20,

Defendants.

Civil No. _____

COMPLAINT FOR DECLARATORY
RELIEF; SUMMONS

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff MICHAEL KAPLAN, Individually and as Trustee of the Michael A.
Kaplan Revocable Trust, Dated August 12, 1992, by and through his attorneys,
Bronster Fujichaku Robbins, brings this action against Defendants WEST

SUNSET 32 PHASE 1, LLC and CHARLES SOMERS, Individually and as Trustee of the Charles Somers Living Trust (collectively, "Defendants"), and alleges and avers as follows:

THE PARTIES

1. Plaintiff is an adult individual residing in the County of Kauai, in the State of Hawai'i. Kaplan is trustee of the Michael A. Kaplan Revocable Trust, Dated August 12, 1992.

2. Defendant WEST SUNSET 32 PHASE 1, LLC is a foreign limited liability company registered in the State of California.

3. Defendant CHARLES SOMERS is an adult individual living in the State of California and, upon information and belief, is an agent and member of WEST SUNSET 32 PHASE 1, LLC and is trustee of the Charles Somers Living Trust.

4. Defendant HAWAIIAN ISLANDS LAND TRUST ("HILT") is a Hawai'i nonprofit organization established for the purpose of the acquisition, preservation and protection of conservation lands in the state of Hawai'i.

5. DOES 1 – 20 are persons, partnerships, corporations, entities, or governmental units whose names are currently unknown to Plaintiff. As a precaution, unidentified defendants have been included in this action in the event it is later discovered that there are necessary parties that have not yet been named, or are not yet known to Plaintiff.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to Haw. Rev. Stat. § 603-21.5(a)(3).

7. This Court has jurisdiction over the parties to this action pursuant to Haw. Rev. Stat. § 634-35(a)(3).

8. Venue is proper in this Court pursuant to Haw. Rev. Stat. § 603-36(5).

FACTUAL ALLEGATIONS

9. On April 29, 2003, Floyd A. Miller, Jr., Trustee of the Floyd A. Miller, Jr. 1997 Revocable Trust dated January 16, 1998 ("Miller") was the owner of two contiguous parcels of land identified by tax map key as parcel (4) 5-2-12-35 ("Parcel 35") and parcel (4) 5-2-12-19 ("Parcel 19"). Parcel 35 and Parcel 19 are located in Kilauea, Kauai, Hawai'i.

10. On April 29, 2003, Miller recorded a Declaration of Exclusive Use Easement ("Easement GU-4") in the Bureau of Conveyances of the State of Hawai'i as Document No. 2003-078712.

11. Easement GU-4 gives the owner of Parcel 19 an exclusive use easement over, under and across a portion of Parcel 35 for the use, enjoyment, improvement and maintenance thereof.

12. Easement GU-4 defines the Easement Area through metes and bounds and by map as depicted in Exhibits "A" and "B" attached to the recorded Easement GU-4 document.

13. Paragraph 1 of Easement GU-4 grants the owner of Parcel 19, “the sole right to use, enjoy, improve and maintain the Easement Area.”

14. Paragraph 2 of Easement GU-4 states, “The Declarant shall not grant any similar or further rights to the Easement Area to any person or entity, without the consent of the owner of Parcel 19.”

15. Paragraph 16 of Easement GU-4 provides that “the rights and obligations set forth herein shall be binding upon, and shall inure to the benefit of, the Declarant, and his successors in interest, successors in trust, assigns, and any other person holding by or through the Declarant.”

16. On February 19, 2004, Miller transferred ownership of Parcel 19 to Arthur M. Saunders (“Saunders”) pursuant to the Warranty Deed recorded on February 25, 2004 in the Bureau of Conveyances of the State of Hawai‘i as Document No. 2004-037925.

17. On July 21, 2004, Miller transferred ownership of Parcel 35 to Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC pursuant to the Warranty Deed recorded in the Bureau of Conveyances of the State of Hawai‘i as Document No. 2004-148675.

18. Exhibit “A” attached to the Warranty Deed at paragraph 34 on page xiv provides that Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC’s ownership interest in Parcel 35 is subject to Easement GU-4.

19. On December 23, 2008, as a condition for obtaining a Special Management Area use permit, Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC recorded a Grant of Conservation Easement

(“Easement C-1”) in the Bureau of Conveyances of the State of Hawai‘i as Document No. 2008-191932. The grant purported to create a conservation easement on Parcel 35.

20. Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC, as owner, granted Easement C-1 in favor of Kauai Island Land Trust as holder.

21. Easement C-1 defines the Easement Area through metes and bounds and by map as depicted in Exhibits “A” and “B” attached to the recorded Easement C-1 document.

22. The entire easement area of Easement GU-4 is wholly encompassed and covered by the easement area of Easement C-1. Therefore, pursuant to the terms of Easement GU-4, as owners of Parcel 35, Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC were required to obtain the consent of the owner of Parcel 19 before granting “any similar or further rights to the Easement Area [of GU-4] to any person or entity,” such as Kauai Island Land Trust.

23. At the time Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC made the grant of Easement C-1, the owner of Parcel 19 was Saunders.

24. Upon information and belief, Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC did not obtain the consent of Saunders before encumbering Parcel 35 with Easement C-1, which included the area of Easement GU-4.

25. On July 27, 2009, Saunders conveyed title to Parcel 19 to The Hendrikus Group, Inc. ("Hendrikus") pursuant to that Warranty Deed recorded on July 31, 0209 in the Bureau of Conveyances of the State of Hawai'i as document number 2009-117220.

26. On May 26, 2011, the Kauai Island Land Trust assigned its beneficial interest in Easement C-1 to the Maui Coastal Land Trust by an Assignment of Grant of Conservation Easement (Easement C-1) recorded in the Bureau of Conveyances of the State of Hawai'i as document numbers 2011-084772 through 2011-084773.

27. Upon information and belief, the Kauai Public Land Trust, Oahu Land Trust, Hawaii Island Land Trust, and Maui Coastal Land Trust merged into the Maui Coastal Land Trust which then changed its name into Defendant Hawaiian Islands Land Trust ("HILT").

28. Defendant HILT is the current holder of Easement C-1. HILT has been named in this action as an indispensable party and because the relief requested may affect the extent of HILT's beneficial interest in Easement C-1.

29. On December 7, 2011, Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC transferred ownership of Parcel 35 to Defendants CHARLES SOMERS, as Trustee of the Charles Somers Living Trust dated November 12, 2002 and WEST SUNSET 32 PHASE 1, LLC by a Warranty Deed dated December 6, 2011 and recorded in the Bureau of Conveyances of the State of Hawai'i as Document No. 2011-206204.

30. Upon information and belief, Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC did not obtain the consent of Hendrikus to encumber Parcel 35 with Easement C-1.

31. On October 17, 2018, Plaintiff became the owner of Parcel 19 when Hendrikus transferred ownership of Parcel 19 to Plaintiff pursuant to that Deed recorded in the Bureau of Conveyances of the State of Hawai'i as Document No. A-68640524.

32. As the current owner of Parcel 19, Plaintiff is entitled to all rights, benefits, and privileges of ownership of Parcel 19, including enforcement of the rights granted in connection with Easement GU-4 to the owner of Parcel 19.

33. At the time of Plaintiff's purchase of Parcel 19, no consent to impair the rights granted under Easement GU-4 was recorded in the Bureau of Conveyances of the State of Hawai'i.

34. Upon information and belief, no owner of Parcel 19 ever provided Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC consent to encumber Easement GU-4 with Easement C-1.

35. Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC did not have the authority to encumber the easement area of Easement GU-4 with Easement C-1 without first obtaining consent from the owner of Parcel 19.

36. Plaintiff has not consented to Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC granting any rights over Easement GU-4.

37. Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC violated the rights of the owner of Parcel 19 under the terms of Easement GU-4 by granting Easement C-1 to Defendant HILT without first obtaining consent from Arthur M. Saunders.

38. Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC have represented to the Planning Commission of the County of Kauai that Easement C-1 encumbers the land covered by Easement GU-4 and that planting of trees in Easement C-1 violates the terms of the easement.

39. Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC contend that the rights they granted to Defendant HILT pursuant to Easement C-1 are superior to the rights granted by Easement GU-4 and restrict Plaintiff's use of the land despite the clear and unambiguous language of Easement GU-4.

40. Defendants have publicly represented that Easement C-1 is valid, supersedes and impairs the rights granted under Easement GU-4, and that because of Easement C-1, the Defendants have an indisputable right to intervene and prevent Plaintiff from obtaining permits necessary to build a house on Parcel 19.

41. Plaintiff, as the owner of Parcel 19, has the right to bring this action to enforce the provisions of Easement GU-4 and to protect his rights granted thereunder.

42. Plaintiff's rights as owner of Parcel 19 have been violated and Plaintiff has been harmed by Defendants CHARLES SOMERS and WEST

SUNSET 32 PHASE 1, LLC's failure to obtain consent prior to encumbering the GU-4 easement area of Parcel 35 with Easement C-1.

43. Any invalid provisions of Easement C-1 are severable pursuant to paragraph 10.5 of the Easement C-1 document.

44. Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC are personally, jointly, and severally liable for the acts alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants and declaratory relief as follows:

- A. A declaratory order of the Court holding that:
 - a. Easement C-1 was improperly granted by Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC to the extent that it purported to encumber or affect the area already covered by Easement GU-4;
 - b. Easement C-1 was granted by Defendants CHARLES SOMERS and WEST SUNSET 32 PHASE 1, LLC to Defendant HILT without the permission of the owner of Parcel 19, as required by the terms of Easement GU-4;
 - c. Easement C-1 was not approved by the owner of Parcel 19 before it was recorded;
 - d. Easement C-1 is void to the extent the easement applies to the area of Easement GU-4;

e. Plaintiffs' use, benefit, and enjoyment of the area of Lot 35 covered by Easement GU-4 supersedes Defendants' ability to encumber the land therein without first obtaining Plaintiff's consent; and

f. Neither the rights of Plaintiff nor any portion of Easement GU-4 is encumbered or affected by Easement C-1.

B. Award of all reasonable attorneys' fees and costs to Plaintiff in bringing this action under the terms of Easement GU-4; and

C. Any other relief as the Court deems just and equitable.

DATED: Honolulu, Hawai'i, May 7, 2021.

/s/ Margery S. Bronster



MARGERY S. BRONSTER

SUNNY S. LEE

SKYLAR G. LUCAS

Attorneys for Plaintiff

MICHAEL KAPLAN, Individually and as
Trustee of the Michael A. Kaplan
Revocable Trust, dated August 12, 1992

STATE OF HAWAI'I CIRCUIT COURT OF THE FIFTH CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	
CASE NUMBER PLAINTIFF MICHAEL KAPLAN, Individually and as Trustee of the Michael A. Kaplan Revocable Trust, Dated August 12, 1992	PLAINTIFF'S NAME & ADDRESS, TEL. NO. MARGERY S. BRONSTER 4750 SUNNY S. LEE 8532 SKYLAR G. LUCAS 10582 1003 Bishop Street, Suite 2300 Honolulu, Hawai'i 96813 Telephone: (808) 524-5644 Facsimile: (808) 599-1881	
DEFENDANT(S) WEST SUNSET 32 PHASE 1, LLC; CHARLES SOMERS, Individually and as Trustee of the Charles Somers Living Trust; HAWAIIAN ISLANDS LAND TRUST; and DOES 1 -20		
TO THE ABOVE-NAMED DEFENDANT(S) <p style="margin-left: 40px;">You are hereby summoned and required to filed with the court and serve upon Bronster Fujichaku Robbins, 1003 Bishop Street, Suite 2300, Honolulu, Hawai'i 96813</p> <p>_____</p> <p>plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.</p> <p>THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.</p> <p>A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.</p> <div style="display: flex; justify-content: space-between; align-items: flex-end; margin-top: 20px;"> <div style="width: 45%;"> <p>DATE ISSUED <u>May 7, 2021</u></p> </div> <div style="width: 45%; border: 1px solid black; padding: 10px; text-align: center;"> <p>Effective Date of 28- Oct- 2019 Signed by: /s/ J. Eghan Clerk, 5th Circuit, State of Hawai'i</p>  </div> </div>		
<div style="display: flex; align-items: center;">  <p style="font-size: small;">In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Fifth Circuit Court Administration Office at PHONE NO. 482-2347, FAX 482-2509.</p> </div>		

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

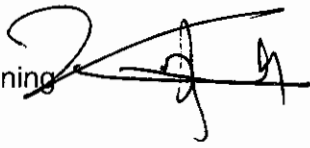
JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



DEREK S.K. KAWAKAMI, MAYOR
MICHAEL A. DAHLIG, MANAGING DIRECTOR

MEMORANDUM

TO: Planning Commission


FROM: Ka'aina Hull, Director of Planning 

DATE: May 10, 2021

SUBJECT: **USE PERMIT U-2021-7; CLASS IV ZONING PERMIT Z-IV-2021-8; PETITION FOR INTERVECTION; DECLARATION OF CHARLES SOMERS.**

A petition for intervention on the subject permits was submitted to the Planning Commission for its April 13, 2021 meeting. No action was taken during that meeting, and the item is on the May 11, 2021 Planning Commission agenda.

For clarification, the Department does not have a position on this petition request. The Department defers to the discretion and authority of the Commission in reviewing and taking action on this request.

F.9. 10. 
MAY 11 2021

COUNTY COUNCIL

Arryl Kaneshiro, Chair
Mason K. Chock, Vice Chair
Bernard P. Carvalho, Jr.
Felicia Cowden
Bill DeCosta
Luke A. Evslin
KipuKai Kualii



OFFICE OF THE COUNTY CLERK

Jade K. Fountain-Tanigawa, County Clerk
Scott K. Sato, Deputy County Clerk

Telephone: (808) 241-4188

Facsimile: (808) 241-6349

E-mail: cokcouncil@kauai.gov

Council Services Division
4396 Rice Street, Suite 209
Lihu'e, Kauai, Hawaii 96766

21 MAY 10 P3:55

RECEIVED

May 10, 2021

**TESTIMONY OF FELICIA COWDEN
COUNCILMEMBER, KAUAI COUNTY COUNCIL
ON
F. SPECIAL ORDER OF THE DAY**

A. CLASS IV ZONING PERMIT (Z-IV-2021-8) AND USE PERMIT (U-2021-7) FOR THE CONSTRUCTION OF A FARM DWELLING UNIT AND ASSOCIATED SITE IMPROVEMENTS ON A PARCEL LOCATED IN KILAUEA, SITUATED APPROXIMATELY 1,700 FEET FROM KAHILI MAKAI ROAD AND 2,700 FEET FROM THE KAHILI MAKAI ROAD/KUHIŌ HIGHWAY INTERSECTION, FURTHER IDENTIFIED AS TAX MAP KEY: (4) 5-2-012:019 AND CONTAINING A TOTAL AREA OF 0.735 ACRE = MICHAEL A. KAPLAN REVOCABLE TRUST

1. PETITION FOR INTERVENTION (4/5/2021) BY MAUNA KEA TRASK, ATTORNEY FOR PETITIONERS, WEST SUNSET 32 PHASE 1, LLC, CS DEVELOPMENT LLC, AND CHARLES SOMERS, INDIVIDUALLY

Planning Commission of the County of Kauai

Tuesday, May 11, 2021

9:00 a.m.

Meeting Available Via Microsoft Teams

Dear Chair Apisa and Members of the Planning Commission:

As an individual member of the Kauai County Council, I OPPOSE the above-referenced petition for intervention by the neighboring property owned by West Sunset 32 Phase 1 LLC, CS Development LLC, and Charles Somers, individually, represented by attorney Mauna Kea Trask, on Class IV Zoning permit Z-IV-2021-08 and Use Permit U-2021-7, for the Kaplan Revocable Trust to build a roughly 2,200 square-foot home. By way of background reference, I also happen to be a long-time resident of the town of Kilauea and am a member of the Kilauea Neighborhood Association.

There is no basis for intervention to countermand a sound Planning Director report. Allowing this intervention represents an unwise and unnecessary precedent for the shift of authority from the Kauai Planning Department and the Planning Commission to an adjacent neighbor. The Planning Director's Report for this property is a simple recommendation for approval. There is a growing trend for applications before the Planning Commission to be sent through quasi-judicial processes of intervention or contested cases that often take up to two years and are less inclusive of public commentary. Regardless of the decision by a hearings officer, the financially dominant party generally wins by economically exhausting the target.

AN EQUAL OPPORTUNITY EMPLOYER

F.A.11.

MAY 11 2021 (A)

Donna Apisa, Chair and Members of the Planning Commission
Re: Testimony Relating To Special Order of the Day, F.a.1, Petition for
Intervention re Class IV Zoning Permit Z-IV-2021-8 and Use Permit U-2021-7
May 10, 2021
Page 2

In this case, there is no significant impact by the Kaplan home to disadvantage its neighbors, other than being inclusive to the community—in sharp contrast to the Somers' policy of private security presence firmly restricting access to the valley and the waterfall that was once symbolic of Kīlauea. Even the view of the waterfall has been restricted through the encouragement of rapid-growth trees and bamboo along parts of the rim, as was recently contested at a Kīlauea Neighborhood Association meeting as an agenda item with Somers' attorney M. Trask.

The Kaplans are the third community-friendly owner of this steep hillside, which has culturally significant agricultural terracing above the east side of the waterfall (TMK (4) 5-2-012:19). The former owners, the Saunders, began hosting "community Sundays" after Somers closed access. They also invited daily use by the Kīlauea home school families; mine was among them. Both sides of the river are filled with terracing and cultural sites with many that were evident at the time on the Somers' properties. The Kaplan's "development" of concern referenced in the petition would be more appropriately described as a restoration of the rock walling and archaeologically significant terracing on the steep slopes. The Kaplans have worked to reveal and restore more of what had been previously buried under vegetative growth. They have demonstrated inclusionary interest in the community and welcome cultural preservation interest.

The Kīlauea Neighborhood Association has had years of meetings in which the membership has been strongly against the closure of the trail to the waterfall and Kahili Quarry Road. SMA Use Permit 2008-5, Use Permit 2008-4, Class IV Zoning Permit No. Z-IV-2008-6 had Development Conditions for the building of what is now roughly 43,000 square-foot under roof that included many commitments for community inclusion. There were numerous meetings discussing options with physical walks upon the land for the preferred trail access to Kīlauea Falls (See Enclosed). Through underfunded legal capacity, that agreement and expectation was lost or voided, to the disappointment of the Kīlauea Community. The P1 fishing access has also since been lost through the aggressive security protecting the development of Somers' property. Significant planting has occurred to move and adapt the Kahili Quarry Road along with an electrical line box placement that has amplified the flood erosion along the access among a list of neighborhood complaints. The Charles Somers Trust was cited for unpermitted grading and grubbing on a conservation easement as recently as December 7, 2020 (See Enclosed).

The Kaplans' permit application is straightforward and in alignment with the Planning Director's recommendation. In light of all the community has already lost, and due to Mr. Somers' repeated practice of opposing reasonable projects, I believe it would be an unfounded unfairness for the Commission to consider overriding the Director to hand intervention status to a private property owner who is perceived as routinely violating the trust of the surrounding community. This decision has the potential to set a precedent for any financially dominant neighbor to prohibit the

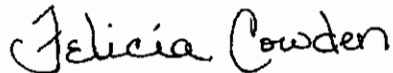
Donna Apisa, Chair and Members of the Planning Commission
Re: Testimony Relating To Special Order of the Day, F.a.1, Petition for
Intervention re Class IV Zoning Permit Z-IV-2021-8 and Use Permit U-2021-7
May 10, 2021
Page 3

exercise of perfectly reasonable and appropriate private property rights of the surrounding neighbors. This risk may well need to be in any future disclosure statements of property sales.

Please oppose this intervention.

My testimony is submitted in my individual capacity as a member of the Kaua'i County Council. Thank you for your consideration of this request. Should you have any questions, please feel free to contact me at 241-4188.

Sincerely,

A handwritten signature in cursive script that reads "Felicia Cowden".

FELICIA COWDEN

Councilmember, Kaua'i County Council

JA:lc
Enclosures



KILAUEA NEIGHBORHOOD ASSOCIATION

April 8, 2013

President:
Yoshito L'Hote

Kauai County Planning Commission
4444 Rice Street, Suite 150
Lihue, HI 96766

Vice President:
Mike Latif

Secretary:
Thomas Pickett

Treasurer:
Gary Pacheco

Sergeant-at-arms
Scott Mijares

Directors:
Nicki Pignoli
Bill Troutman
Tim Kalai
Rae Yadao-Butac
Alvin Castelo
Cherie Grousset
Charlie Martin
Carrie Souza
Jim Spencer

Aloha Honorable Commissioners,

Regarding the application of Charles M. Somers and West Sunset 32 Phase 1, LLC for a Special Management Area use permit, a Use permit, and a Class VI Zoning Permit for real property situated in Kilauea, Kauai.

The Kilauea Neighborhood Association (KNA) has applied for intervener status. The community had spoken firmly and consistently against any development of this land and was very active in the previous contested case hearing. Accordingly, your predecessors had the sensitivity and respect to significantly scale back the initial building proposals and not allow building the managers house and barn. The current application now seeks to amend your previous condition.

We will, once again, contest the amendment as we see no difference in the current application as compared to 2008.

Respectfully yours,

Yoshito L'Hote
President



KILAUEA NEIGHBORHOOD ASSOCIATION

Mr. Wayne Kateyama, Chair
Kauai Planning Commission
4444 Rice Street, Suite 140
Lihue, HI 96766

President:
Yoshito L'Hote

Vice President:
Alvin Castelo

Secretary:
Thomas Pickett

Treasurer:
Gary Pacheco

Sergeant-at-arms
Scott Mijares

PTSA Rep.
Susan Keller

Directors:
Mike Latif
Beryl Blaich
Bill Troutman
Tim Kalai
Ken Carlson
Charlie Martin
Carrie Souza
Jim Spencer
Ron Paul

Re: Charles Somers and West Sunset 32 Phase 1, LLC
Special Management Area Use Permit No. SMA(U)-2008-5, Use Permit (U-2008-4),
Class IV Zoning Permit (Z-IV-2008-6)

Dear Chairman Kateyama and Members of the Kauai Planning Commission;

The Board of the Kilauea Neighborhood Association (KNA) is unanimously opposed to this application. We are opposed for the reasons listed below:

First, speaking as president of the KNA, we are embarrassed that we were unable to follow through with the contested case intervention. The lawyer who could have made this case was not available. The funding for proper legal representation was prohibitive.

The history of this place at Kahili that Mr. Somers and West Sunset 32 Phase 1, LLC bought saddens us. We thought, because of federal action, including approval of President Bush in 2004, that the 161 acre parcel was going to be part of the Fish and Wildlife Refuge to be preserved in a pristine state for all of us, forever. It was, in our minds, a community achievement.

When Mr. Somers and Sunset LLC acquired the property at the last minute, the community was shocked. When he proposed his house, manager's house and barn, the community joined the intervention of neighbor Elizabeth Freeman to express and protect the conservation and cultural values that the SMA and the Special Treatment District acknowledge and supposedly perpetuate.

In the preliminary Findings of Law Decision and Orders, the Planning Commission acknowledged the "obscene" size of the "main" farm dwelling house and initially determined that the manager's house and barn were excessive.

At the conclusion of the 2008 contested case we thought that we had to accept the home in exchange for denial of the manager's house and barn as well as the extinguishing of allowable units on the 80 acres through the conservation easement.

Post Office Box 328, Kilauea, Kauai, Hawaii 96754
<http://kna-kauai.org> . Email: joekilauea@gmail.com
<http://facebook.com/kna.kauai>

KILAUEA NEIGHBORHOOD ASSOCIATION

We also had faith in the good judgment of Mr. Somers and West Sunset 32 Phase 1, LLC to negotiate managed, even limited, access to the waterfall.

The KNA was entirely stunned by the current application.

In short, we perceived this outcome as the compromise: Mr. Somer's got his house; the community got fewer structures. To have the manager's house and barn be submitted again demonstrates for us the irrelevance of community concerns and action.

Our specific concerns about this new application follow:

1. In September 2008, in order to receive permits for his unusually large farm dwelling which is located in the SMA and County's Special Treatment District, Charles Somers and West Sunset 32 Phase 1, LLC voluntarily gave up a manager's house and barn.
2. Mr. Somers and West Sunset 32 Phase 1, LLC are applying for a nearly 3000 square foot "conservation managers house" and a "conservation maintenance barn" of 2592 square feet. However, Mr. Somers has no conservation management plan and has not conducted any conservation activity.
3. The actual purposes of these structures seem to be security and storage of recreational equipment. Security has already been active for five years without additional structures.
4. The 2008 Decision and Orders placed 18 conditions on the project. Some conditions for the first permit have not been tested. Other conditions have not been completed.
 - a. Condition three required complete construction within 5 years from the date of approval or October 2, 2013. At that date the home had not been occupied and had not have been completed.
 - b. Even before the main house was done, Mr. Somers and West Sunset 32 Phase 1, LLC applied for the additional structures. His rationale appears to be solely that it made sense to continue construction while it was still occurring under the first permits. The applicant's convenience does not override the need to complete the conditions of the permit.
 - c. Among conditions for the first permit are several that were meant to protect the exceptional natural resources of the Kilauea River basin including minimal use of pesticides, herbicides and non-organic fertilizers, shielding of external lighting and reduction of the proposed grading area and volume. Because the home has not been occupied – even occasionally - we do not know whether these mitigation measures, imposed for one structure, are working as intended. Therefore, it is premature to add additional structures.
 - d. Condition 11.d. i. requires that "prior to recording the conservation easement, it shall be submitted to the Planning Department to review its compliance with this condition. The Planning Department shall solicit comments from the US Fish and Wildlife Service."

There is no apparent record of consultation with the United States Fish and Wildlife Service by the Planning Department. In the FWS system, only qualified individuals within the Ecological Services unit in Honolulu can assess a conservation easement. There is no record of such consultation.

KILAUEA NEIGHBORHOOD ASSOCIATION

e. Condition 12 states that Mr. Somers and West Sunset Phase 1 LLC shall improve the entire length of Kahili Quarry Rd. That improvement has not been completed.

f. Condition 18 allowed access to the waterfall at the Somers and West Sunset 32 Phase 1, LLC 's discretion. Public access to the upper river and Kilauea Falls has been almost completely denied for the last five years. Now, the Planning Commission has the opportunity the rectify this.

5. How can this application be considered when some conditions are not tested; some need clarification and some conditions are not fulfilled? With the completion of these obligations, these additional buildings could be warranted in the future.

6. The proposed "maintenance" buildings are larger than used by other Kaua`i conservation projects.

7. Charles Somers and West Sunset Phase I LLC residence is a "farm dwelling." This farm dwelling does not have any agricultural component. When the main house farm dwelling was permitted, an agro-forestry project was part of the application. What has happened to the agro-forestry project?

8. Condition 13 prohibits use for "vacation rental or bed and breakfast purposes." That restriction does not prohibit a corporate retreat with staff and recreational amenities.

9. The conservation easement itself raises many questions.

In summary, we are against permitting these structures at this time. Just as Mr. Somer's "farm dwelling" does not house a farm family, the conservation manager's house and conservation maintenance barn are not for conservation use.

Additional structures for a manager and equipment could be permitted when there is an actual conservation plan including specific objectives and measurable indicators, maps, methods of habitat conservation, enhancement or restoration, the number and qualifications of personnel and the equipment required for the work.

Please do not approve these permits.

Thank you for you work.

Respectfully,

Yoshi L`Hote
President



DEPARTMENT OF PLANNING
THE COUNTY OF KAUAI

DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHLIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

NOTICE OF VIOLATION & ORDER TO PAY FINES

DEC 07 2020

VIA CERTIFIED MAIL

SOMERS, CHARLES M TRUST
C/O B & Z PROPERTIES
5241 Arnold Ave
MCCLELLAN AFB, CA 95652

SUBJECT: ILLEGAL DEVELOPMENT WITHIN THE SMA DISTRICT & FAILURE
TO SECURE REQUIRED SMA PERMIT DETERMINATION ON:
1957 Kahili Quarry Road, KILAUEA, HI
TMK: (4) 5-2-012:035 Hanalei District
Kahili, Kilauea, Kauai, Hawaii.

On September 21, 2020, the Planning Department inspected the subject property regarding violations on the subject property. To date, (November 23, 2020), the Planning Department has verified violations of the Hawai'i Revised Statutes §205A and the Special Management Area Rules and Regulations, as follows:

HAWAII REVISED STATUTES (HRS) §205A-28

Permit required for development. No development shall be allowed in any county within the special management area without obtaining a permit in accordance with this part.

SPECIAL MANAGEMENT AREA (SMA) RULES AND REGULATIONS

Section 1.4 (F):

"Development" means any of the uses, activities or operations on land or in or under water within a Special Management Area that are included below:

(2) Grading, removing, dredging, mining, or the extraction of any materials;

Section 5.0 DEVELOPMENTS PROPOSED WITHIN THE SPECIAL MANAGEMENT AREA SUBJECT TO REVIEW

Any use, activity, or operation proposed within the Special Management Area defined as "development" pursuant to Section 1.4 [F] above shall be subject to the review of the Director, Planning Department, and Planning Commission under these Rules and Regulations ...

Notice of Violation and

Order to Pay Fines

TMK: 5-2-012: 035(4) 5-2-012:035

Page 2

VIOLATIONS:

The activity of grading, both cut and fill of materials, along the toe of the slope adjacent and parallel to Kahili Quarry Road for the purposes of altering drainage outflow of an upslope drainage culvert is considered to be "development" pursuant to SMA Section 1.4(F)(2). This activity without an SMA permit is a violation of HRS §205A-28 and SMA Section 5.0, "DEVELOPMENTS PROPOSED WITHIN THE SPECIAL MANAGEMENT AREA SUBJECT TO REVIEW."

ORDER:

Pursuant to HRS §205A-32 and SMA Rules and Regulations Section 13.0, you are hereby ordered to comply with the following requirements:

- a. Cease and desist the unpermitted activity immediately.
- b. Provide Best Management Practices (BMP's) in all areas of the noted development prone to erosion as may be prudent to mitigate sediment runoff onto near Kilauea Stream and coastal shore areas.
- c. Within thirty (30) days from date of Notice, provide the Department with a certified survey reflecting all development conducted on subject property associated with the subject area. Such survey shall identify location of all cut and fill limits along with location of newly excavated drainage ditches developed in conjunction with the drainage channeling.
- d. Within sixty (90) days from date of Notice, provide the Department with required SMA Assessment Application to address the **noted development of the new drainage channeling**. The application shall include engineering plans equivalent to an NOI Grading Permit Application with delineation of existing contour cuts/fills, proposed finish graded areas along with cubic yardage calculations. Plans shall encompass the proposed finished ditch channeling contours to the Kilauea Stream bank and a design to mitigate sediment entering Kilauea Stream.
- e. Pay a civil fine of Fifteen Thousand dollars (\$15,000.00) for the above noted violation.
- f. In addition, you will be required to pay a civil fine up to ten thousand dollars (\$10,000.00) per day for each day in which the violation persists from the date of this Notice should any timeline requirement be violated.

Notice of Violation and
Order to Pay Fines
TMK: 5-2-012: 035(4) 5-2-012:035
Page 3

Payment of the \$15,000.00 civil fine is due to the Planning Department twenty-one (21) days from the receipt of this Order. Failure to correct the violation or pay the total amount of the civil fine imposed within ninety (90) days of this Order may result in a lien placed on the subject property. In addition, you may be subject to criminal prosecution.

This Order shall become final twenty-one (21) days after the date of this Order. Pursuant to SMA Rules and Regulations Section 13.0, and Chapter 9 and 6 of the Rules of Practice and Procedure of the Planning Commission (RPPPC), you have a right to appeal this Order to the Planning Commission. The SMA Rules and Regulations and the RPPPC are available online at the Planning Department's website: <https://www.kauai.gov/Planning>.

Please contact Leslie P. Milnes, CZM Enforcement Officer, of my staff at 241-4064 or email at lmilnes@kauai.gov upon receipt of this letter to discuss the required remedial action plan.

Kaaina Hull
Digitally signed by Kaaina
Hull
Date: 2020.12.04
10:15:35 -10'00'

KA'ĀINA S. HULL
Director of Planning

Cc. Max Graham, Esquire, Owners Authorized Agent VIA EMAIL & CERTIFIED MAIL
DPW, Engineering Attn: Paul Togioka, Eng.

Kaumoana
POB 1205 Kilauea, Hawaii 96754
Kaumoana@gmail.com
PH: 808-828-1205 Cell: 808-346-5458 Fax: 431-4444

May 7, 2021
Kauai County Planning Commission
Testimony
May 11, 2021 meeting

Item: Z-IV-2021-7, U-2-21-6 Old Mill Commercial Kitchen

Aloha Commissioners,

I have testified on nearly identical applications for this property for over twenty years. A commercial kitchen on this site is an expansion of its current use and does not align in any way with the Kilauea Town Plan nor the long standing uses in this residential neighborhood.

This specific site is a remnant of parts of the Kilauea Sugar Mill. It should not morph into something it was never intended for nor should the Kilauea neighbors be subjected to the intensified commercial use.

Many participated in the Kilauea Town Plan and worked hard to preserve the neighborhoods in which they lived and visualize the Kilauea they hoped for for their children. This proposed use does not appear anywhere in that plan.

In fact, the community was very concerned about the development of the nearby shopping center and only acquiesced in order to relocate this kind of use to a more central and less intrusive location. I have requested a plan be produced eliminating the Aalona ingress and egress to mitigate some of the traffic impacts on Aalona which is already overrun with cars parked for the pharmacy use operating under a special permit.

Respect for the Kilauea Town Plan must be demonstrated by NOT allowing this commercial use in this inappropriate place.

Mahalo, me ka pono,



Makaala Kaumoana

G. 2. 9. 8.
MAY 11 2021 (A)