



PLANNING COMMISSION

KAAINA S. HULL, CLERK OF COMMISSION

FRANCIS DEGRACIA, CHAIR
DONNA APISA, VICE CHAIR
GERALD AKO, MEMBER
HELEN COX, MEMBER
GLENDA NOGAMI STREUFERT, MEMBER
JERRY ORNELLAS, MEMBER
LORI OTSUKA, MEMBER

SEP 23 -6 P 4:00

- The Planning Commission Meeting will be at:

Līhu'e Civic Center, Moikeha Building
Meeting Room 2A-2B
4444 Rice Street, Līhu'e, Kaua'i, Hawai'i

- Oral testimony will be taken on specific agenda items, at the public meeting location indicated on the meeting agenda.
- Written testimony indicating your 1) name or pseudonym, and if applicable, your position/title and organization you are representing, and 2) the agenda item that you are providing comment on, may be submitted on any agenda item in writing to planningdepartment@kauai.gov or mailed to the County of Kaua'i Planning Department, 4444 Rice Street, Suite 473, Līhu'e, Hawai'i 96766. Written testimony received by the Planning Department at least **24 hours prior** to the meeting will be posted as testimony to the Planning Commission's website prior to the meeting (<https://www.kauai.gov/Government/Boards-and-Commissions/Planning-Commission>). Any testimony received after this time will be retained as part of the record, but we cannot assure the Commission will receive it with sufficient time for review prior to the meeting.

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

PLANNING COMMISSION MEETING NOTICE AND AGENDA

Tuesday, September 12, 2023

9:00 a.m. or shortly thereafter

Līhu'e Civic Center, Moikeha Building

Meeting Room 2A-2B

4444 Rice Street, Līhu'e, Kaua'i, Hawai'i

23 SEP -6 P 4:00

A. CALL TO ORDER

B. ROLL CALL

C. APPROVAL OF AGENDA

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

1. June 27, 2023.

E. RECEIPT OF ITEMS FOR THE RECORD

1. None for this Meeting.

F. HEARINGS AND PUBLIC COMMENT

1. **Continued Agency Hearing**

- a. None for this Meeting.

2. **New Agency Hearing**

- a. None. For this Meeting.

3. **Continued Public Hearing**

- a. None for this Meeting.

4. **New Public Hearing**

- a. None for this Meeting.

G. CONSENT CALENDAR

1. **Status Reports**

- a. None for this Meeting.

2. **Director's Report for Project(s) Scheduled for Agency Hearing**

- a. None for this Meeting.

3. Class III Zoning Permits

- a. None for this Meeting.

H. GENERAL BUSINESS MATTERS

1. Subdivision Application No. S-2021-7

5425 Pa'u A Laka, LLC.

Proposed 2-lot Consolidation and Resubdivision into 4-lots

TMK: (4) 2-8-014: 032

Kōloa, Kaua'i

- a. Supplement #1 to Subdivision Report/Request for Extension of Time.
- b. Correspondence dated September 01, 2023, from McCorriston Miller Mukai MacKinnon LLP involving Petition to Appeal Action of the Director Pertaining to Subdivision Application No. S-2021-7.

2. Subdivision Application No. S-2022-6

Kukui'ula Development Company, LLC./MP Kaua'i HH Development Fund, LLC.

Kukui'ula Parcel HH Subdivision

Proposed 3-lot Consolidation and Resubdivision into 51-lots

TMK: (4) 2-6-019: 026, 029, 031

Kōloa, Kaua'i

- a. Supplement #1 to Subdivision Report/Request for Extension of Time.
- b. Correspondence dated September 01, 2023, from McCorriston Miller Mukai MacKinnon LLP involving Petition to Appeal Action of the Director Pertaining to Subdivision Application No. S-2022-6.

3. In the Matter of Petition to Appeal Decision of the Planning Director's Decision Related to the Planning Director's Notice of Violation and Order to Pay Fines for the continued use of a Farm Dwelling as a "Dormitory/Residence Hall and School", Kauai Christian Fellowship, 2799 R Ala Kinoiki, Koloa, Kauai, TMK 28022015-2, appeal received on July 28, 2023, for referral to Board and Commissions as Contested Case File No. CC-2024-2.

- a. Memorandum in Opposition to Planning Director Kaaina S. Hull's Petition to Revoke Permits Initially Granted to Applicant Koloa Congregation of Jehovah's Witness, Presently Owned by Kauai Christian Fellowship, and Issue an Order to Show Cause and Set Hearing = Use Permit U-2013, Special Permit SP-2013-4, and Class IV Zoning Permit Z-IV-2013-11, Tax Map Key (4)2-8-022:015 (Unit B), Poipu, Kauai. Koloa Congregation of Jehovah's Witness, applicant, Property now owned by Kauai Christian Fellowship.

4. Pacific Resource Partnership's Petition for Declaratory Order regarding HPM Building Supply's permit application for a Class IV Zoning Permit (Z-IV-2022-8), Use Permit (U-2022-8), and Special Permit (SP-2022-1), Tax Map Key (4)2-6-001-001, Koloa, Kauai.

I. COMMUNICATION

1. None for this meeting.

J. COMMITTEE REPORTS

1. Subdivision Committee Report

K. UNFINISHED BUSINESS (For Action)

1. In the Matter of the Petition to revoke: (1) Land Use Commission District Boundary Amendment under Decision and Order A76-418, as amended August 5, 1997; and (2) Class IV Zoning Permit (Z-IV-2006-27), Use Permit (U-2006-26), and Project Development Use Permit (PDU-2006-25) for a development situated at the Pau A Laka Street/Kiahuna Plantation Drive, 5425 Pau A Laka Street. Tax Map Key: 2-8-014: 032, and containing a total area of 27.886 acres, Petitioners Friends of **Mahaulepu and save Koloa's Petition for to Intervene and, Alternatively for Denial of Applications**. [Referred to Planning Director and deferred, July 11, 2023].
 - a. Director's Report Pertaining to this Matter.

L. NEW BUSINESS (For Action)

1. None for this Meeting.

M. EXECUTIVE SESSION

Pursuant to Hawaii Revised Statutes Sections 92-4 and 92-5(a)(4), the purpose of this executive session is to consult with the County's legal counsel on questions, issues, status, and procedural matters. This consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Commission and the County as they relate to the following matters:

1. Subdivision Application No. S-2021-7
5425 Pa'u A Laka, LLC.
Proposed 2-lot Consolidation and Resubdivision into 4-lots
TMK: (4) 2-8-014: 032
Kōloa, Kaua'i
2. Subdivision Application No. S-2022-6
Kukui'ula Development Company, LLC./MP Kaua'i HH Development Fund, LLC.
Kukui'ula Parcel HH Subdivision
Proposed 3-lot Consolidation and Resubdivision into 51-lots
TMK: (4) 2-6-019: 026, 029, 031
Kōloa, Kaua'i
3. In the Matter of Petition to Appeal Decision of the Planning Director's Decision Related to the Planning Director's Notice of Violation and Order to Pay Fines for the continued use of a Farm Dwelling as a "Dormitory/Residence Hall and School", Kauai Christian Fellowship, 2799 R Ala Kinoiki, Koloa, Kauai, TMK 28022015-2, appeal received on July 28, 2023, for referral to Board and Commissions as Contested Cased File No. CC-2024-2.
4. Pacific Resource Partnership's Petition for Declaratory Order regarding HPM Building Supply's permit application for a Class IV Zoning Permit (Z-IV-2022-8), Use Permit (U-2022-8), and Special Permit (SP-2022-1), Tax Map Key (4)2-6-001-001, Koloa, Kauai.

5. In the Matter of the Petition to revoke: (1) Land Use Commission District Boundary Amendment under Decision and Order A76-418, as amended August 5, 1997; and (2) Class IV Zoning Permit (Z-IV-2006-27), Use Permit (U-2006-26), and Project Development Use Permit (PDU-2006-25) for a development situated at the Pau A Laka Street/Kiahuna Plantation Drive, 5425 Pau A Laka Street. Tax Map Key: 2-8-014: 032, and containing a total area of 27.886 acres, Petitioners Friends of **Mahaulepu and save Koloa's Petition for to Intervene and, Alternatively for Denial of Applications**. [Referred to Planning Director and deferred, July 11, 2023].

N. ANNOUNCEMENTS

1. Topics for Future Meetings.

The following regularly scheduled Planning Commission meeting will be held at 9:00 a.m., or shortly thereafter, on October 10, 2023. The Planning Commission anticipates this meeting to be held in-person at the Līhu'e Civic Center, Moikeha Building, Meeting Room 2A-2B, 4444 Rice Street, Līhu'e, Kaua'i, Hawai'i. The Commission will announce its intended meeting method via an agenda electronically posted at least six days prior to the meeting date.

O. ADJOURNMENT



SPECIAL MANAGEMENT AREA (SMA) Minor Determinations

Date (Action)	SMA Minor Permit number	Location (TMK)	Activity/ structure
Approved (08.23.2023)	SMA(M)-2024-1	Princeville (5-4-004:050)	Construction / Ground mounted photovoltaic array.
Approved (09.1.2023)	SMA(M)-2024-2	Hanalei (5-8-011:011)	Construction/ Fence and gate.

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

September 12, 2023
SHORELINE SETBACK DETERMINATIONS

Application No.	Name of Applicant(s)	Property I.D. (Tax Map Key)	Location	Development/Reasons
SSD-2024-6	SOF-XI Kauai PV Hotel L.P., a Delaware Limited Partnership	(4) 5-4-011:004	Princeville	Beach Chairs and Existing Pads moved mauka of the certified shoreline. Relocation of activity structure to low-level pool area. / Shoreline certified to determine proper placement.
SSD-2024-7	Theron L. JR. and Geneil Vines	(4) 5-8-011:011	Hanalei	Fence and entry gate. / Based on a Shoreline Certification dated Oct. 4, 2022 on an adjacent property (TMK: 5-8-011:049), fence is setback 41 feet away from the shoreline line on the northwestern property line.
SSD-2024-8	Ed and Joan Ben Dor	(4) 5-5-010:032	Hanalei	Bedroom addition in existing lanai. Kitchen, Bedrooms, Living Room Remodel. / Pursuant to DPW letter dated August 2, 2023, work and improvements are considered unsubstantial.
SSD-2024-9	Andrew Porter	(4) 5-8-008:053	Hanalei	New Single-Family Dwelling and temporary construction storage containers to be removed after construction of dwelling is completed. / Single-family dwelling/ required setback 88 feet, proposed setback 249.9 feet.
SSD-2024-10	Paul Kyno and Stefan Mandel	(4) 4-5-011:036	Kapa'a	Construct a new 2-story Restaurant and Bar Building. / Required setback 109 feet. Proposed development approximately 470 feet from evidenced shoreline.

SSD-2024-11	Sunset Kahili	(4) 2-8-019:003 Unit 23	Kōloa	Concrete Deck Repairs to Apt. #406. / Rocky shoreline required setback is 70 feet from evidenced shoreline. Repair work is approximately 200 feet away evidenced shoreline.
SSD-2024-12	Sunset Kahili	(4) 2-8-019:003 Unit 24	Kōloa	Concrete Deck Repairs to Apt. #407. / Rocky shoreline required setback is 70 feet from evidenced shoreline. Repair work is approximately 200 feet away evidenced shoreline.
SSD-2024-13	Sheraton Coconut Beach Resort	(4) 4-3-007:028	Kapa‘a	Interior repair and renovation. / Stable shoreline, required setback 100 feet minimum. Development approximately 250 feet from evidenced shoreline.
SSD-2024-14	Brad and Wendy Rambo	(4) 5-6-004:014	Hanalei	Repairs. / Per Department of Public Works letter dated 8.11.2023 work has been deemed unsubstantial.

KAUA'I PLANNING COMMISSION
REGULAR MEETING
June 27, 2023
DRAFT

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair DeGracia at 11:16 a.m. - Webcast Link: <https://www.kauai.gov/Webcast-Meetings>

The following Commissioners were present:

Mr. Gerald Ako
Ms. Donna Apisa
Mr. Francis DeGracia
Ms. Glenda Nogami Streufert
Mr. Jerry Ornellas
Ms. Lori Otsuka

Excused or Absent

Ms. Helen Cox

The following staff members were present: Planning Department – Director Ka'aina Hull, Deputy Director Jodi Higuchi Sayegusa, Staff Planner Dale Cua, Romio Idica, Kenny Estes, and Planning Secretary Shanlee Jimenez; Office of the County Attorney – Deputy County Attorney Laura Barzilai, Office of Boards and Commissions – Support Clerk Lisa Oyama.

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Francis DeGracia: I'd like to call to order the Planning Commission meeting for Tuesday, June 27, 2023. The time is 11:16. Could we please have a roll call please, Mr. Clerk?

Planning Director Ka'aina Hull: Roll call, Mr. Chair. Commissioner Ako?

Commissioner Gerald Ako: Here.

Mr. Hull: Commissioner Apisa? Commissioner Cox is excused.

Commissioner Donna Apisa: Here.

Mr. Hull: Commissioner Ornellas?

Commissioner Jerry Ornellas: Here.

Mr. Hull: Commissioners Otsuka?

Commissioner Lori Otsuka: Here.

Mr. Hull: Commissioner Streufert?

D.1.
9/12/2023

Commissioner Glenda Streufert: Here.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Here.

Mr. Hull: You have a quorum, Mr. Chair. Next, we have the approval of the agenda.

APPROVAL OF AGENDA

Mr. Hull: The Department doesn't have any recommended changes or amendments to the agenda.

Chair DeGracia: Commissioners, taking a motion to approve the agenda?

Ms. Streufert: I move to approve the agenda.

Mr. Ako: Second.

Chair DeGracia: Motion on the floor is to approve the agenda. Any discussion? If not, we'll take a voice vote. All in favor say aye. Aye (unanimous voice vote). Oppose? Hearing none, motion passes. 6:0.

Mr. Hull: We don't have any minutes or additional items for Receipt of the Record, or Continued Agency Hearing, so we'll move into Agenda Item F.2.

HEARINGS AND PUBLIC COMMENT

New Agency Hearing

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2023-11) to allow construction of a new single-family dwelling unit on a parcel situated along the makai side of Kealoha Road in Kapa'a, situated approximately 200 feet east of its intersection with Keaka Road and further identified as 1004 Kealoha Road, Tax Map Key: (4) 4-5-001:012, affecting an area of approximately 10,125 square feet = **Craig and Jill Schwed.**

Mr. Hull: We don't have anybody public signed up to testify on this agenda item. Is there any member of the public that would like to testify on this agenda item, if so, please step forward and state your name. Seeing none, the Department would recommend closing the Agency Hearing.

Ms. Streufert: I move to close the Agency Hearing.

Ms. Otsuka: Second.

Chair DeGracia: Commissioners, motion on the floor is to close the agency hearing for this agenda item. We'll take a voice vote. All in favor say aye. Aye (unanimous voice vote). Oppose? Hearing none, motion carries. 6:0.

Mr. Hull: Next up we have:

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2023-10), CLASS IV ZONING PERMIT (Z-IV-2023-10), USE PERMIT (U-2023-7) to allow construction of public shared use path extending from Nawiliwili Park to Ahukini Landing and associated improvements involving a new comfort station, drainage ways, protective fencing and paved parking area, and

SHORELINE SETBACK VARIANCE PERMIT (SSV-2023-1) to deviate from the shoreline setback requirement involving properties along makai side of the Lihue Airport, further identified as Tax Map Keys: 3-5-001:004, 005, 008, 009, 085, 092, 102, 128, 158 & 160; 3-7-002:001 (Par.) and affecting a total area of approx. 9.2 acres = County of Kaua'i, Department of Public Works. [Director's Report Received 4/25/2023.]

Mr. Hull: We don't have any individuals signed up to testify. Is there any member of the public that are here to testify on this item? And I apologize, there, (inaudible) many of you are well aware, this is not the normal setup, so getting the sign-up sheet from where it is about 300 feet that way, to here, there's been some delay, so if you did sign up and I didn't call you, I apologize, but if you'd like to testify, please just approach the microphone, identify yourself and you have three minutes to testify. And sorry, lastly, please (inaudible) for the Commissioners (inaudible) as well as the public that may be tuning in, this agenda item was reviewed at the previous Planning Commission meeting. It was subsequently determined that there had been a failure to notify the adjacent property (inaudible) pursuant to, Chapter 8 of the Kaua'i County Code public hearing notification requirements, and so, we're having to rehold the hearing to action is essentially rendered invalid, so it's, holding the hearing again and going through the discussions, deliberations, anything, you know, that was stated or said or committed to at the previous meeting is no longer in effect, so it is again (inaudible) a brand new hearing and review. Thank you. I'll turn it over to the testifier. If you can identify yourself and you have three minutes for testimony.

Mr. Tommy Noyes: Aloha, Ka'aina, Mr. DeGracia, and Planning Commission members. My name is Tommy Noyes and I serve as the Executive Director of Kaua'i Path Incorporated, a Title 1, C 3 educational non-profit. Thank you for providing this forum for community members to express their concerns, and on the continued expansion of Ke Ala Hele Makālae in general and specifically regarding the proposed section of path on the makai side of the Līhu'e Airport. Kaua'i Paths Board of Directors request that its recommendation for you to approve the three permit applications which are the subject of this hearing be noted for the record. The board's support for this action stems from our involvement with the coastal path development program from its inception close to 30 years ago. Ke Ala Hele Makālae's roots are in Lydgate Beach Park where in 1994 thousands of volunteers came together to build Kamalani Playground. That (inaudible) of dedicated citizens laboring in collaboration with local government officials, correlated a community driven playground build into an environmental assessment, and manifested numerous enhancements to Lydgate Beach Park, including Phase 1 of the coastal path systems. Today we are still assertively pushing forward on this ambitious active transportation program which people frequently describe to me as an ideal example of tax dollars benefiting our whole island. The existing path system is used overwhelmingly by Kaua'i residents. In April of 2021 when resolution 21-13, a measure supporting Public Works acquisition of a shared use path easement at the Islander on the Beach in Waipouli was before the County Council. Kaua'i had selected path user's signatures on a successful petition, supporting that resolution. 5,000 volunteers collected signatures from people as they enjoyed the path, approximately 79% of those 228 signatures were from people identifying themselves as Kaua'i residents. The people of Kaua'i trust you as their Planning Commissioners to reach prudent decisions and act in their best interests. Please honor that trust now, by voting to approve these permit applications. Thank you. Tommy Noyes.

Chair DeGracia: Thank you.

Mr. Hull: Sorry, I got the list now for this agenda item. In addition to Mr. Noyes, we have, Roslyn Cummings.

Ms. Roslyn Cummings: Aloha, board members. Kou inoa, Roslyn Nicole Manawai'akea Malama mare Cummings, noho au Kalaheo ahupua'a (speaking in Hawaiian). I'm just here to bring forward a testimony (inaudible) Just as an awareness and hopes that we can prevent an issue with burials. So, Ahukini is

known (inaudible) about culturally and historically, there's that huge heiau over there. I don't know if you're familiar with Ahukini Point, and you gotta understand (inaudible) pathway, so, often times we see organizations utilize 'Ōlelo Hawai'i and in our language thankfully we don't generalize it, in a way, my tūtū before we spoke it in a way where we had to understand what she spoke but we didn't speak it fluently and when she spoke we had to listen, and so when I hear people speaking about the pathway, I think about the multiple things that happens on a pathway, so if you're a lawai'a, someone who fish or gathers in that way then you're gonna take that path there and your own way, like that's your style, and that path. If you just there to walk your dog, you're gonna take that path too, but my concern is when they construct this particular (inaudible) access, iwi kūpuna, so there's not gonna be something called an (inaudible) because this is me telling you, there's gonna be iwi within this construction (inaudible), and there is a \$10,000 fine and but because also unless you're private funded there's federal funding involved, there's federal laws that tie into this. So, I just wanna remind you guys of the scope of this project because I cannot tell you how it feels, you have to experience it for yourself, but when we have to go out there and face the trauma when we see our kūpuna and then people treat it, and I'll explain this because multiple times in the beginning when I first started, construction workers would tell me, well, when we used to do this, and we did Wailua Golf Course had thousands of bones and you know what the archaeologist did, they just told them keep going, and I just said kalamai, excuse me, and that's not how we treat our kūpuna. That's not how we're gonna continue to treat our iwi kūpuna, and also, we're gonna make sure that they get recorded because a hundred years from now we're not gonna disturb them again. So, I'm just here to make sure that that doesn't happen. So, I mahalo you and thank you for your time.

Chair DeGracia: Thank you for your testimony.

Mr. Hull: Next, we are signed up is Laura (inaudible).

Ms. Laura (inaudible): Aloha, Mr. DeGracia, and Commission members. My name is Laura (inaudible), and I am here as an avid cyclist, who regularly uses (inaudible) the shared path, as well as the sections that are currently seeking permit today. These areas afford me and my riding companion safe routes (inaudible) traffic, and (inaudible) we use and also found that this was also one of the most ways to go whale watching. Every time I ride this section, people of all ages are using this path and then these particular sections for permit today, I see runners, dog walkers and bike riders as the most common. Shared use paths (inaudible) for transportation or valuable alternatives to traditional secondary transportation, keep benefits for communities where the parks are built, and good gas savings, reduce vehicular traffic volumes and help maintaining or improving the health of path users to regular for occasional exercise. Given access to safe paths close to home, people will use them actively and frequently, even those who might not live adjacent to the path, access to site, long distance routes is away from traffic is valuable. Over the years I've been involved in the conversation and followed Ke Ala Hele Makālaes extensive approval process and I'm now excited as each new iteration shows how much the well-being of wise resident's matter. Please vote to approve the requested grants and advances for projects to go without delay. Mahalo for your attention.

Chair DeGracia: Thank you for your testimony.

Mr. Hull: Next, we have David Lister.

Mr. David Lister: Good morning. Thank you for having me. I appreciate you giving me the time to present to the board. My name is David Lister and I'm on the friends of Kamalani board. I work for Tommy Noyes, and I work with the Kaua'i path trying to get the information out on our radio station, Star 94.3, giving a listen best of the 80's, 90's, and now and we're passionate about this project because this is something that is gonna help the entire community. There have been hundreds of electric bites sold on Kaua'i in the last year alone. These people need a place to ride. It is not safe to ride with the tourist

who is driving a car, they're not normally driving in an area they are not used to. That's why we get a lot of mix, and we get a lot of people run off the road, so to speak. This gives us a safe passage and if we can get this thing from Līhu'e to Anahola, it will reduce the traffic on the highway. These people are wanting to ride these electric bikes. I don't have an electric bike, I prefer to pedal, and I walk out from Līhu'e to Anahola and back. I think it's a very good thing for the community, and that it works on our health, it showcases our beautiful shoreline, and if you'll recall, we placed sixth in a USA today poll by Raiders, now we were up against Detroit, we were up against Atlanta, Washington DC that had millions of people and we got number six, and it looks like a lot of the people that voted for that path weren't from Kaua'i, so what does that tell you, it's helping tourism as well. We have bike rental places all up and down the pathway. I ride this path all the time, I see the rental bikes, I know what they look like, they're definitely dressed like tourist, we love that because that is our bread and butter on this island. This will also help, as I stated before, the traffic, in between Līhu'e and Kapa'a, it's gotten better since they opened up that...let's give it a round of applause for that people that got those roads done out there, that is great because I do traffic on the radio and it's gotten a lot better through there but we need safe bike paths, and this will help the health, it's helped my health, I know that, I enjoy it, and I deal with a lot of the guys that sell the electric bikes and they're selling them like hotcakes, they got em, they can't even keep them in the stock at Costco. So, we know that these bikes are being purchased. This current path is used very heavily and would love to see it come to fruition. This has been in the planning for now close to 30 years, it's time for us to say, get off the schneider and get it done. I think we've got the resources to do it. There is some opposition and I do understand. The bones issue that they had with Wailua, I really think the county should have somebody working with the construction people to make sure that those situations are handled in the manner in which they should be. So, I really appreciate your time today. I'm also here representing the Rotary Club of Kaua'i and we have our members have drafted a letter in support of this and we hope that you will see it to fruition. Thank you so much for your time.

Chair DeGracia: Thank you for your testimony.

Mr. Hull: We also have signed up, Kaniela Matsushima.

Mr. Kaniela Matsushima: Aloha, on the record, for the record, my name is Kaniela Kaleikaumaka Matsushima kou inoa, o' Hanamā'ulu mai au. My name is Kaniela Kaleikaumaka Matsushima, and I'm from Hanamā'ulu Valley. I'm here today to testify again like I did during the last meeting. To testify against this bike path from being constructed. I was here during the last meeting when Mr. Niermann, the project coordinator stated the reasons they are breaking this project up in sections instead of continuing straight from Wailua straight to Nāwiliwili, Ninini Point, it's because it's easier to say, hey, you already finished majority of the project, you might as well do the rest, that rest, is the hard part, Hanamā'ulu to Wailua is the hard part. I going let you know in Ahukini, that's where my 'ohana is from, they lived there, they're buried there, they're all in there. The heiau is there, and the reason, sorry kalamai. My 'ohana is buried throughout that place, and they want to utilize that bridge, the train bridge, my 'ohana is buried right next to that bridge, and they're buried all throughout Nukoli'i (inaudible). Our family over the years have been dealing with the desecration of our family burials, from the removal of the sand dunes in Nukoli'i, which is where the majority of the burials are, and then, like I said, my 'ohana, my great-grandma is buried below that bridge and they want to utilize that bridge, and above all, we need to look at the bigger picture, what these kind of projects open doors to, it open doors to development and more paving up our 'aina that causes more pollution and destruction. I'm a mahi'ai, I'm a welder (inaudible) job, but I'm a mahi'ai, I'm a farmer, I grow kalo, and the kalo cannot grown in dirty water, and that's why I come here today, take time outta my day, (inaudible) cause I gotta go work after this, but who going clean um up the mess, the ocean is rising, why we going build something so close to the ocean. Our generation gonna have to live through that and we going have to clean them up, but you can clean up the surface, but what's below is irreversible, the damage of the impact is irreversible, iwi kūpuna is not just bones, as our family. I would not wish anybody in this room, anybody on this island, or their families to

be dug up to be desecrated and say, you know what, the county can work through em, and they can do what they gotta do. They should just be left (inaudible) RIP, Rest in Peace, cause they're laid to rest in peace not in pieces. And like the old timers been telling me over and over, recently, it's best to leave one place as it is, too much damage already. Also, this bike path would bring the public to a place that is very dangerous to us lawai'a that fish in these areas and (inaudible) my 'ohana. These fish from the coast, from Hanamā'ulu to Wailua, and Hanamā'ulu to Nāwiliwili we fish those because that's where we gather our food from, that ocean coastline is so dangerous that's why only a few people go there because majority of the year that place is so bad that if you going bring local people that may not even be aware of the area, especially tourists, bringing um to the area is a liability, a huge liability. There's...

Mr. Hull: Three minutes, Mr. Chair.

Mr. Matsushima: Thank you. So, this path should not be built on a desecration of our family burials. Mahalo for your time.

Chair DeGracia: Thank you for your testimony.

Mr. Hull: We don't have any other individuals sign up to testify but is there any member from the public that did not testify previous on the agenda item and would like to testify, please approach the microphone, and state your name. If you can just state your name for the record, and you have three minutes for testimony. Thank you.

Ms. Kayla Matsushima: Aloha, Kayla Matsushima, on the record, for the record. I opposed the changing of the coastal setback for the remainder of this bike path project. I do not the support the changing of these coastal setback to allow for construction. These setbacks are in place for the safety and protection of our beaches and more importantly, add a layer protection for iwi kūpuna that are resting in the sand. I do not agree with any continuation of this bike path. I was too young at the time to understand what this project was about. So, I wasn't able to come and testify against it when it was in its infancy. But, today I'm more aware of what this project entails and because of that I stand as a firm note to any continuation of this bike path. My main reasons for this are number one, coastal areas are well known sites for graves. It is my understanding that during the Kealia through Kapa'a phase, iwi kūpuna were disturbed. To continue this project would be to blatantly to choose to desecrate more iwi kūpuna because you will desecrate more iwi kūpuna if this project continues. It is my belief that you cannot claim inadvertent burial findings when in a coastal zone. The sands are known to be the resting place for iwi kūpuna. So, who will be held liable for the damages? And who will take responsibility for the spiritual repercussions. Number 2, to continue the Ahukini to Nāwiliwili phase of this project is to assume that the Kapa'a to Nukoli'i phase is wanted as well, and that is an absolute no to putting a bike path there as well, for many reasons, most importantly for the protection of iwi kūpuna, and as my kāne that spoke previously to me. Spoke about that is his 'ohana buried there. History has already shown us that the sea level and tides are already high enough today that the hotels near Nukoli'i has been damaged. Why would this Department then permit a project that is even closer to the ocean? We must look forward toward the future and understand that on paper a project may seem like a good idea to some, but in real life when all things are taken into account it must remain just that, an idea one that cannot come to fruition because it will not work. For these reasons I do not support the continuation of this project. Please do not permit this project to continue. Protect what we have left of our coastlines. No more development in coastal areas at all. And all buildings along the coast as we begin to see more and more damage to them as sea levels rise, hold them accountable to clean up their mess. Do not add to it by allowing more development in these areas. Mahalo for your time.

Chair DeGracia: Thank you for your testimony.

Mr. Hull: We don't have anyone else signed up. Is there anybody that would like to testify in the public, please approach the microphone, state your name, and you have three minutes for testimony.

Mr. Douglas Haigh: Good morning. Thank you. Douglas Haigh, retired, government bureaucrat. I was involved with this project for many, many years. The environmental clearance, since federal hybrid funds were used with a federal process and took over 10 years to do the environmental clearance, which included an extensive archaeological, work and review by the State Historic Preservation Division and all the approvals included, requirement and an obligation to do archaeological monitoring. At any time, there was (inaudible) disturbance in your project. So, that's an issue that was very much addressed. I want to take this opportunity to thank the Planning Commission and Planning Department because previous actions by the Planning Commission, Planning Department have greatly made this portion of the path possible. The lands that the path is on here is either County of Kaua'i or State of Hawai'i Department of Transportation lands primarily, and then there's land (inaudible) and proactive actions by the Planning Department, Planning Commission. You've got private land dedicated to the County of Kaua'i, donated to the County of Kaua'i, so that land in front of the airport, a large portion of it is County parkland. Which is not being utilized as County parkland, but it is County parkland. (Inaudible) it was the action by the Planning Department that got that land donated, and if you look at the public access that's now available in previous called Kaua'i Lagoons property, there's extensive public access through that property, due to the actions and commitments of the developer property owners that provided this public access and it's, to me it's unprecedented the amount of public access through that private property, and part of it, well, actually improvements that they made won't be able to count as a (inaudible) to get federal funds for the balance of the project, so that is really critical. And I'm just saying this section from the lighthouse to Ahukini landing, it's an absolute gorgeous piece of coastline that very few people get to see, and it is largely the path, it's largely, significantly elevated, higher than the ocean and is primarily a lot of coastline. So, there's very few sections where there is some area where there is some sand, but very small pockets of sand, so it's a very different environment than say like, Wailua Beach. So, I just wanna thank you for your previous actions in supporting the path and encourage you to continue that support. Thank you very much.

Chair DeGracia: Thank you.

Mr. Hull: Anyone else (inaudible) and would like to testify on this agenda item? Sorry, it would just be (inaudible) previously testify.

Unknown Woman in audience: Previously?

Mr. Hull: Yes.

Unknown Woman in audience: Are you going to (inaudible) after this?

Mr. Hull: The Department would be recommending closing the Agency Hearing, but it comes back again during the regular agenda items, which the public can testify on as well.

Unknown Woman in audience: Okay. I just wasn't sure cause earlier we could go up a second time if we wanted to, so I didn't know if (inaudible).

Mr. Hull: I believe the agenda was amended to go back-to-back on that and it wasn't amended in this case.

Unknown Woman in audience: Okay.

Mr. Hull: Is there anyone else that didn't previously testify on this particular Agency Hearing, and again, this will come back up again for the Commissioners deliberations and further public testimony. Anyone else? Seeing none, the Department would recommend closing the Agency Hearing.

Ms. Streufert: I move to close the Agency Hearing.

Ms. Otsuka: Second.

Chair DeGracia: Commissioners, motion on the floor is to close the Agency Hearing on this item. We'll take a voice vote. All in favor say aye. Aye (unanimous voice vote). Oppose? Motion carries. 6:0.

Mr. Hull: Moving on, we have no Status Report, Director's Report, we move on to General Business Matters, and I will turn it over to the County Attorney for that agenda item, but before I do...

GENERAL BUSINESS MATTERS

Deputy County Attorney Laura Barzilai: Our Clerk is stepping down to act as the Departments representative in this matter and I will read the notice. General Business H.1.

In the Matter of Petition to Appeal Decision of the Planning Director's Decision Related to the Planning Director's Cease and Desist and Forfeiture of TVRNCU #4250 (Nami Nori) for the Failure to Renew by June 6, 2022 Regarding the Property located at 4895 Weke Road, Hanalei, Kauai, Hawaii, identified by Kauai TMK No. (4)5-5-001: 040 containing 12,197.0 square feet, Patrick & Patricia Turley, Contested Case No. CC-2023-1.

Ms. Barzilai: Documents under consideration are Hearing Officer's Report and Recommendation of Contested Case related to the Planning Director's decision to deny the Renewal Application and Forfeit TVRNCU #4250 for the reasons therein.

B. Petitioners' Exceptions to Hearing Officer's Report and Recommendation of Contested Case; Request for Oral Argument; Certificate of Service.

C. Respondent Planning Department of the County of Kaua'i Support of the County of Kaua'i Support of Hearing Officer's Report and Recommendation of Contested Case; Certificate of Service.

Ms. Barzilai: I believe we have two people signed up to testify. The first is Elizabeth Okinaka. She might be outside in the overflow.

Unknown Woman in audience: She's not here, she left already.

Ms. Barzilai: I have Bridget Okinaka.

Unknown Woman in audience: I think she...

Ms. Barzilai: She also left?

Unknown Woman in audience: I think she left too.

Mr. Hull: I can take a look.

Ms. Barzilai: Anyone else here (inaudible) testimony on this item? We'll check the overflow first, Chair.

Chair DeGracia: Okay.

Ms. Barzilai: No one present waiting to testify on this item. Chair, we can now proceed.

Chair DeGracia: Thank you. We'll now proceed to consider the Petitioner's request for our oral arguments. So, Commissioners, I'm going to seek a motion to either grant the Petitioners for request for oral argument or a motion to deny the request for oral argument.

Ms. Otsuka: Motion to accept the Petitioners oral argument.

Ms. Apisa: Second.

Chair DeGracia: Commissioners, motion on the floor is to accept the request for oral argument. Is there any discussion before we take a vote? Hearing none, could we get a roll call please?

Ms. Barzilai: Sure. Roll call on motion to grant Petitioners request for oral argument. Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Ako?

Mr. Ako: Aye.

Ms. Barzilai: Commissioner Apisa?

Ms. Apisa: Aye.

Ms. Barzilai: Chair DeGracia?

Chair DeGracia: Aye.

Ms. Barzilai: Motion passes, Chair.

Ms. Otsuka: Oh, Glenda.

Ms. Apisa: Glenda.

Ms. Barzilai: Oh, I'm so sorry. So sorry, Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Motion passes. 6:0.

Chair DeGracia: Thank you. Now that oral argument is granted, we'll take oral arguments from both parties. Arguments will be up to 15 minutes for each side represented by their attorneys, followed by a rebuttal of three minutes each. Petitioner may begin.

Mr. Greg Kugle: Good morning, Chair, Planning Commission members. My name is Greg Kugle, and I represent the Turley's on this matter, and just by way of very, very little background and I don't intend to use the entire 15 minutes this morning I'll be brief. By way of background, they had had a permitted, well Nonconforming Use Certificate or a short-term rental (inaudible) vacation on Weke Road from 2008 when the law changed until June of 2022. They failed to submit the renewal packet by the Planning Commission's deadline, ah the Planning Department's deadline of June 6th, put it in approximately 2 weeks later, and then sort of the rest is history, it's in the record. We got the Cease and Desist letter, we took the appeal, a Hearing's Officer was appointed. The Hearing's Officer's recommendation is what is before you today. We opposed that and submitted our own proposed findings and fact, inclusions of law for the Hearing's Officer. We filed exceptions here and I'm not gonna I'll walk through it in detail, I just do wanna give you sort of the overarching (inaudible), which is, I haven't been before you for a while, thankfully, but I've been before you or your predecessors on the Commission many times on these, and what these are, are these late renewal for the Nonconforming Use Certificates, and they follow a typical pattern, here, which is we have that same history I discussed, there's, usually a late, renewal, and there was a change of policy, even change of ordinances and rules, over the years, but the more recent versions always ended the same way, which was, we would go through the Contested Case hearing with the Hearing's Officer, you would adopt his report, we would appeal to the circuit court and the circuit court would reverse you, and say you were wrong and, in just my own cases that happened, possibly 8 or 9 or 10 times, there's one exception with the County attorney will tell you about, but most recent decision, from the Fifth Circuit Court, it was in July 2020, and the judge again said the Planning Commission is wrong, Planning Department is wrong to use this procedure to take away somebody's right that's protected by state law and the Constitution, which is the right to rent over something as meaningless and ministerial as a deadline which over the years has been moved from July 31st, to the date the permit was issued, to maybe 30 days before the date of issue, it's all over the place, but the point is, it is a Nonconforming Use, which is why they have a Nonconforming Use Certificate, which has been issued by the Planning Department year after year after year after year until a deadline is missed. So, the court doesn't believe that that is the proper penalty for missing a deadline and has largely agreed and the County Attorney will tell you all, couple of those cases are up on appeal we haven't heard from the (inaudible) of Courts yet, true, but I feel pretty confident in my arguments, and we've been able to convince the judges who sit above this commission. And so, I just want, to give you that background as to why I believe we should stop playing these games and wasting people's time and money. It's the County Attorney, it's yourself, it's me, it's my clients, and so, I would therefore urge you to reject the Hearing's Officer's recommendation and to reverse the Planning Department's issuance of the Cease and Desist letter and reinstate the Nonconforming Use Certificate. Thank you. I'd be happy to answer questions and I do reserve my three minutes to respond.

Chair DeGracia: Thank you. Could we hear from the Department respondent? Unless, Commissioners, you have any questions for the Petitioner.

Mr. Ornellas: I do have a question.

Chair DeGracia: Okay.

Mr. Ornellas: Can you address any extenuating circumstances if they exist in this particular case?

Mr. Kugle: I'd be happy to. So, that was, we put our evidence before the Hearing's Officer, in this case the Turley's property manager was, a man named Scott Lindman, who was a realtor here on Kaua'i. He had handled the annual renewals for the Turley's for many years, and he passed away in early 22, the exact date I do not know. The application was signed by his office and signed by my clients on June 1st, so it was sitting there ready to go. The check I think was dated May 31st; this is all prior to the June 6th deadline. And with the passing of Mr. Lindman and trying to then get his office and his office employees

figuring out what was going on. This one was not filed, until as I said, about just over 2 weeks after the June 6th date. So that was extenuating circumstances. That didn't matter to the Hearing's Officer that doesn't appear in his report, but it is in the record that we put on testimony and (inaudible).

Mr. Ornellas: Thank you.

Chair DeGracia: Commissioners, anything further for the Petitioner?

Ms. Apisa: I guess a question on clarity in my mind is, my understanding is the County Council passed a law and there is no allowance, I mean, unfortunately, personally, I think it is unfortunate, but there is no allowance for any, delay. Can you address that?

Mr. Kugle: I do understand that. Previously there had been, the so called 30-day grace period, and that the ordinance and the interpretive rules were changed at some point to eliminate that, I believe that was in 2017. If I can explain why the County Council's decision doesn't end the discussion (inaudible), why the Circuit Court keeps reversing the Planning Commission, is because you can't trump, the County Council can't trump a state law, which is HRS 46 4, which says that, a Nonconforming Use of residentially zone property cannot be eliminated, it has to be protected, and that is, this is a Nonconforming Use, that's why the Planning Department issued, Nonconforming Use Certificates year after year after year for this property and for possibly 400 others here on Kaua'i because that's enshrined in state law and the state law simply reflection of constitutional law, that says a zoning ordinance cannot be changed to take away a prior lawful existing use, in this case the short term rental before the ordinance itself was changed in 2008 was a perfectly legal use. County Council in 2008 saw fit to end that practice, but it had to create to protect constitutional rights, had to create the Nonconforming Use Certificate system. I don't know. I hope that answered you. Yes, the County Council took it away, but the judge, that doesn't matter because constitutional rights and save off trump a county ordinance on this topic.

Ms. Apisa: Is there any attempt to go back to the County Council to amend, I mean, to make it "right" in your mind?

Mr. Kugle: I'm not leading that effort, but I'm also not a lobbyist, and I represent usually one of the home owners who either don't have the wherewithal or the organization to do that, so, no, I mean, we just, see to protect the rights through the administrative process, which is what you are and then ultimately through the judicial process, and that's all we can do until and unless the, council changes its mind about that.

Ms. Streufert: Are you implying then that the county has no access or no legal basis upon which to change any of the zoning (inaudible) or laws that, or that they have no independence from the state, and everything has to be (inaudible) upon the state?

Mr. Kugle: Well, actually yes, that's true. So, there's a what's called the State Zoning Enabling Act HRS 46 4 where the state legislator granted each of the 4 counties the power to pass zoning laws and that power is pretty broad, (inaudible) counties can change zoning, but there was one limitation put on that, they cannot eliminate a Nonconforming Use, a residential property. So, that is without the county power to do, which is why the county adopted these Nonconforming Use Certificates to begin with.

Ms. Streufert: But that doesn't mean that they are doing that, they said that there could be Nonconforming residences but not necessarily the rules by which people have to comply in which to continue on for the (inaudible). It appears that there's... The county did not take away the right to have nonconforming. They actually develop the nonconforming category at that time, so, it's not so that they took the right away, they did, however, put restrictions on how you can retain (inaudible) the noncompliant classification for units. Is that not, correct?

Mr. Kugle: Well, that is what the ordinance attempted to do that is for instance the annual resubmission process, which is not an actual decision as long as, the purpose of the resubmission process, is to confirm what both county ordinance and state law say about nonconforming uses which is they can be lost by abandonment or surrendered, and so when the applicants submit their package, it shows their GET and TAT tax return showing they did in fact use it the prior year in accordance with the certificate meaning they had not abandoned it. There are also other requirements (inaudible) some photographs need to be shown, signage needs to be up and things like that, and that's all in that packet as well. So, yes, the county has imposed certain requirements associated with, those Nonconforming Use Certificates. It's my opinion, and I guess I've been at least backed up by the circuit court, that the county cannot, impose restrictions that at some point are either sell onerous or as in this case that we're talking about ultimately result in the ultimate penalty which is forfeiture because there's no dispute between the county and me that with respect to this property that throughout the duration of (inaudible) 2021 to June 2021 to June 2022 it had in fact been used so it's not been abandoned. And that's what the state statute speaks to.

Ms. Streufert: But the county statute also speaks to renewal within one year after the date of renewal. Is that correct?

Mr. Kugle: It does, yes.

Chair DeGracia: Commissioners, any further questions?

Mr. Ako: As I understand nobody is (inaudible) that the filing was late. The question is, the circumstances in terms of why it was filed late, as well as the rules, the ordinance itself, pretty much leaves very little discretion for the department to act upon. I understand what you're saying about these other HRS rules are in there. Right now, what is before us is the current ordinance from the County of Kaua'i. What is your expectation for us to do? Because I think the reading is pretty clear, that there's no discretion in there. Are you expecting us to go beyond that and rule or...

Mr. Kugle: Well, I would suggest to you this, and I mean ultimately I think that maybe you go into executive session because you need advice from your lawyers, but it's my contention that the circuit court most recently in July of 2020 has said that the circumstances that we're discussing cannot be the basis for a revocation or a forfeiture of a Nonconforming Use, and that is a superior body to you, in all due respect. Appeals from your decision go to the court, and so a court has said it was a different case, different people, essentially the same facts, has said you cannot use this forfeiture process. The Planning Department cannot impose the penalty of forfeiture under those circumstances, for the legal reasons that I was explaining and so you know, whether, I don't want to give you advice on what to do, it would certainly be my encouragement, that you, (inaudible) to what the circuit court has said about this situation, and not go through it again and force everybody to go up there again, but ultimately that's your decision today.

Mr. Ako: (Inaudible) different people, different circumstances, is that a different (inaudible) or is that the Kaua'i ordinance that we dealing with?

Mr. Kugle: That's the Kaua'i ordinance in its, basically in its current version, in other words that's a case that was not back when the 30-day grace period existed, yes.

Mr. Ako: Okay. In your brief you mentioned several places about arbitrary timelines, arbitrary deadlines, arbitrary dates that were used. What did you mean by that?

Mr. Kugle: Well, I mean that, there's nothing magical about the one year. The one year exists, it's written into the ordinance. It could have been nine months, it could be 13 months, but I say it's arbitrary for two

reasons, so one is (inaudible), but what I do say about it being arbitrary is the city council has settled on one year as the date to renew, the city, the County Council has also over the years changed that date, at one point they had a uniform date when they passed ordinance A64 in 2008, that said, it's going to be July 31st for everybody. Two years later, 2014 they changed that to say okay it's not July 31st, now it's gonna be at the date that your original certificate was issued as a calendar date, which is all over the calendar. That's what I mean by arbitrary, mostly what I would say in context with arbitrary is it's the ministerial purpose of assuring that the use has not been abandoned. If somebody submits their paperwork and shows that they didn't have any rentals because they paid no GE tax and no TAT Tax, then that proves to the Planning Department that the use has been abandoned for the last 12 months which is what another of Kaua'i County's zoning ordinance has said about how you use, excuse me, how you lose a Nonconforming Use, through non-use.

Mr. Ako: So, arbitrary in the sense that this time was changed from annually to July 31st, whatever it is to, nine months, but the Turley's have been using their residence as a TVR prior to 2008.

Mr. Kugle: They were, that's why I (inaudible) nonconformance.

Mr. Ako: So, after 2008 there was, I don't know what the time was to renew it, and that was, what, one year or July 31st?

Mr. Kugle: Yes.

Mr. Ako: (Inaudible) July 31st, and in 2014 it was changed to annually.

Mr. Kugle: It was changed again to the date of the original issuer, rather than July 31st.

Mr. Ako: Right. Have the attorneys ever been late in filing their renewal since they began using their residence as a TVR?

Mr. Kugle: Well, I don't want to, I'm going to say direct, but the Turley's were not the original owner when the ordinance was passed, and they were subsequent purchaser. I don't remember exactly when they bought it, but it was in the 20 teens, so, there had been a history with a prior owner and then the Turley's once they acquired the property had not had a problem with that, prior to June of 2022.

Mr. Ako: Alright, so they were aware of the date. Apparently, it seems like the application was filed in May, but the check that's attached to it (inaudible), I don't know, June or whatever.

Mr. Kugle: No doubt. We're not, I'm not contending that they didn't know.

Mr. Ako: Right, but I think (inaudible) back to the arbitrary date, it kind of is implying to me that they were not aware of the date, or we shouldn't be paying attention to that date. I cannot make the connection between arbitrary and the late filing.

Mr. Kugle: Sorry. So, what I'm saying is that the courts have ruled that a forfeiture of a property (inaudible) and that's exactly what the right to a Nonconforming Use or the right to short term rent is, it's a property (inaudible) is too high of a penalty or missing a deadline where you're supposed to submit paperwork, pictures, a copy of your rules and those kind of things and a registration fee, in other words, and what traditionally the Planning Department had done before this was they decisive, they say, hey, we had a deadline, you missed it, assess a fine, and reinstate it, and I don't think that was ever legally challenged because in my view that's perfectly defensible.

Mr. Ako: So, I know we're talking right now about, we're still talking about whether it was (inaudible), I guess, in terms of why it was late, and yet I think when you look at the code with the ordinances there's certain places where we talk about, there's a time that you have to file by, but there's good cause should you not make that deadline, in this one here, I think there's no mention about having good cause, the reason for good cause. Do you think that it's purposely put in certain places and purposely not left in certain places? Which limits now the decision-making body, the ability to stray away from that good cause, that was because there's no good cause phrase in there, we have no (inaudible).

Mr. Kugle: I understand your question. I agree with you that it's not in there, it doesn't say that that can be waived for good cause. I think...I have two answers to that, one, I don't know what the County Council intended when in this ordinance or in this provision of the zoning ordinance, it has the language that it does versus others that you've referred to, where it does have a good cause standard. I think that there is an (inaudible) power of a port or a...or a quasi, adjudicative body like yourselves to, excuse or wave things, I think you have that (inaudible) power. The county attorney will get up after me and tell you don't, but I think that that exists so, I don't draw significance from that one or the other and I don't know why the County Council chose to include that in some instances in county ordinances but not all of them.

Mr. Ako: Thank you, Mr. Chair.

Chair DeGracia: I have a couple of questions. So, you mentioned earlier, 9 times out of 10 that the decision of the Department was reversed (inaudible) circuit court, and was it based on the same ordinance, the same CZO ordinance that we're speaking about today?

Mr. Kugle: It was all on TVR non-renewal, you know, the renewal with requirement. Some of those early cases, came up just as the interpretive rule for change in 2017 to omit the 30-day grace period. Others came after that one, essentially. I think the ordinance has been tweaked, not in any respect material to what we're talking about, but so yes, some of those cases arose on the same walls that you have to apply today.

Chair DeGracia: Thank you, and if you could just remember maybe some of the, some of those petitioner's names just for reference that were, is similar as far as your concern, similar to this that has been already overturned by the circuit court.

Mr. Kugle: Sure. So, this, the one I referred to in July of 2020, is known as the Kendrick or Chaulklin case, the two owners were Kendrick and Chaulklin, and they brought the appeal, so that's the most recent one that I referred to. There were, a number of the others that I mentioned, I'm trying to recall the names because some of the properties were held as LLCs., and that's how I knew them, so it was Kauaians LLC. versus Planning commission was the name of the case. I believe that the other one was Fliess, and there were two Fliess cases, F-L-I-E-S-S. Off the top of my head I don't recall other names, but I could certainly submit a table with them or, but I'm not sure if Mr. Donahoe will know them, but the ones, the ones that were brief, before the hearing officer was really the, Kendrick or Chaulklin case that I referred to.

Chair DeGracia: Thank you, and also, on what grounds (inaudible) reverse this decision (inaudible) kind of just spell it out.

Mr. Kugle: That's a good...and I was just reading Judge Watanabe's opinion before this. So, for instance, on page 12, and then this is also in the record before the hearing's officer, so it is in the record, ultimately, before you, I know, you probably haven't had the chance to read everything that's in the record, but Judge Watanabe on page 12 of her July 2020 decision, says, under the heading, the forfeiture of appellants NCUC violates state statute and county ordinance. She says, in paragraph 19, the Planning Department

denial of appellants renewal packet violates (inaudible) Statute 46-4, and County Zoning Ordinance Section 8-13.2. She talks about the standard of review for the ordinances there. She says, the Planning Department and the Planning Commission did not find or conclude that appellants Nonconforming Use was discontinued, the Planning Department submitted no evidence that appellants Nonconforming Use was discontinued. To the contrary the only evidence before the Planning Commission was the appellant's renewal packet, which documented that appellant's had continued their Nonconforming Use between December 2016 and December 2017. She then goes on to explain that the county derives its own power from the state and that state statute that Commissioner Streufert and I discussed. Trying to find her pithy summary of all this, constitutional law, and state law. She says it is undisputed that appellants had a lawful Nonconforming TVR Use prior to 2000 for their property and the Planning Department has acknowledged and renewed the Nonconforming Use Certificate annually until in this case, 2017. The forfeiture letter stated in appellants must cease and desist use of their lawful TVR because their renewal packet was not submitted on time and the Planning Department denied appellants renewal packet without further explanation. Neither the forfeiture letter nor the denial of the renewal packet provides the finding that the appellants discontinued use of their Nonconforming TVR. Because the Planning Commission concluded that appellants forfeited their Nonconforming Use without appellants having ceased that use, the Planning Commission decision violates state law and county ordinance, and then she says, because the court decides this case on those due process rounds, she doesn't need to reach other arguments like this as a taking of property without compensation and so forth. She didn't have to reach those.

Chair DeGracia: Thank you. Commissioners, anything further for (inaudible)?

Ms. Barzilai: Chair, excuse me, I'd like to ask Mr. Kugle a question. Mr. Kugle, (inaudible) things that you discussed...

Mr. Hull: Laura, Laura, your (inaudible).

Ms. Barzilai: Can you hear me? Are you able to hear me? Mr. Kugle, out of the nine reversals that you discussed, which of those are on the specific grounds of 8-17.10 H? Annual Renewal Provision.

Mr. Kugle: All of them.

Ms. Barzilai: Thank you. With the court siding to that specifically? Because the decision that you just read, you cited 8.13.2.

Mr. Kugle: Yes, that's the (inaudible) ...

Ms. Barzilai: (Inaudible).

Mr. Kugle: ...county zoning code that says you...

Ms. Barzilai: The abandonment provision.

Mr. Kugle: ...can lose...

Ms. Barzilai: The abandonment provision, correct?

Mr. Kugle: Yes.

Ms. Barzilai: Yes, so, I'm talking about the annual renewal that is in this case (inaudible) 17.10 H.

Mr. Kugle: Yes, that's how every one of them came up because they had missed the deadline, so she does talk about that provision elsewhere in her opinion but she's saying that applying that violates both the states statue and this other provision of the county zoning code, which says, you have to abandon (inaudible).

Ms. Barzilai: Thank you.

Mr. Kugle: Yeah.

Chair DeGracia: Thank you. Commissioners, if no further questions, I'm gonna invite the, the responding (inaudible).

Mr. Ako: Mr. Chair, can I ask one more question?

Chair DeGracia: Sure.

Mr. Ako: Real quick. So, just to clarify in my mind. What's before us is pretty much this one question whether the ordinance that they put out by the County of Kaua'i is legal or not. Is that kind of where you're going?

Mr. Kugle: I suggest to you that is the issue, and obviously it's not, your role to pass on the legality of a county ordinance, I'm just here to tell you what the legal problems with the ordinance and then how it's been implemented by the Planning Department what those problems are, and you are the necessary step to then have this problem dropped in your lap.

Mr. Ako: Thank you.

Mr. Kugle: I promised not to take 15 minutes and I guess it went longer. I hope you know that wasn't my intention, but I do appreciate the very insightful questions that you all had, and I do appreciate the shows you both read the material and you understand, the issues and, I've not had such what we call a hot bench before, and I appreciate that. I would still reserve three minutes.

Mr. Ako: Thank you.

Mr. Kugle: Thank you.

Chair DeGracia: Thank you.

Deputy County Attorney Chris Donahoe: Morning Chair.

Chair DeGarcia: Morning.

Mr. Donahoe: Commissioners, Deputy County Attorney Chris Donahoe on behalf of the Department. I will try to (inaudible). Just to address what council brought up regarding the reversals. My understanding is 9 out of 10 of those reversals, they never got appealed to the Intermediate Court of Appeals. The two matters that are up with the Court of Appeals, is the Kendrick matter and the Regatta matter, both issued about three months apart in 2020. What is unique is, the Kendrick situation, there was an extended time, I believe it was like eight or nine days after the application was due. With the other case, it was only one day, and it was because of an extenuating circumstance of the flood, and the court (inaudible) said, shall means shall, it's a mandatory provision, so that is now up on appeal. Completely which was three months later, diametrically opposed to that was the other (inaudible) so it's kind of a, it would be the department's

position that those issues are still being resolved at the (inaudible) level. In looking at the legislative history of 864. It's true as originally drafted, there was no provision regarding late applications, so the County Council to (inaudible) that specifically put it in place to stop that by coming up with the current language, which is shall, and even if it's one day late and it is interesting that the Turley's or the Petitioners submitted their application on time in 2015 (inaudible) 2021, if it was ministerial and arbitrary, then why did it only become ministerial and arbitrary when they missed it? Because the statute according to the ordinance according to the language, and this was a...there's a case that was cited in, the Petitioners exceptions, the (inaudible) Trust case, which actually dealt with 8-17.10 2016, and the Hawai'i Supreme Court said that the purpose of 8-17.10 was to provide a process to identify and register the TVRs as non-conforming uses and to allow them to continue subject to obtaining a nonconforming use certificate as provided in this section, which means the application had to come in on time, otherwise that (inaudible) it's due to the inaction or the late action of the applicant that cause the forfeiture, not the regulation itself. The regulation is so long as the applicant puts in the application on time. Continues to lawfully use the nonconforming use. Once it is late then the Planning Department has no discretion because under the ordinance, they must deny accepting the application. Once they do that, the nonconforming use becomes unlawful at that point and then gets forfeited, so it's not the regulation itself, so that's why it doesn't violate 46 4. In the court in reviewing the (inaudible) it states that, states that 8-17.10 is consistent with the requirements of HRS 46 4 as well as the contribution to constitutional protection provided to property owners, so it isn't in conflict with that. A regulation, a reasonable regulation, is not a prohibition and that's what we're dealing with here, and regarding the specific language, why is it mandatory? Well, the Supreme Court of Hawai'i, Leslie, in the case of Leslie, said that shall means must, mandatory, there is no discretion. So, the Planning Department has no discretion. Why? Because the County Council intended that because they're the ones that actually amended it. To saying even if it's one day late, we cannot accept it, you shall get this in, in order for your nonconforming use to continue. And so, it was forfeited as of June 7 2022, when the application was late, and then it's the Planning Department's position that the commission nor the, based on the specific language of the statute that the commission doesn't have discretion to consider equitable exception, if that was the case and I agree with the commission, in your earlier question, that this County Council would have put that in. They would have said, well, it's mandatory, and it's strict unless there's an unfortunate circumstance (inaudible) that's not in there. In other parts of the code that is in there. So, there's a purpose for that deadline, and why would the County Council set a deadline if it didn't mean any, and so that deadline does mean something. You know there's a Supreme Court case that said, the concept of filing deadline is to have any content the deadline must be enforced any less rigid standard would risk encouraging a lacked attitude towards filing dates. So, and that was a Supreme Court in Loch. And I understand the case to deal with it wasn't factually on point, but it made it was United States Supreme Court, so to that court, a deadline meant something, and in that case, the court upheld the forfeiture of missing a deadline by one day, so there is Supreme Court law that supports the Department's position. It was a mandatory deadline. They did not comply with it. Regarding and I talked on this briefly, it's not a prohibition if the regulation itself doesn't prohibit anything, it's the non-compliance with it, it's the inaction. Regardless of the circumstances by the applicant in this case or the petitioners that cause the unlawful use, which was therefore considered a forfeiture. And I did wanna touch upon a couple of things in the exceptions, regarding forfeiture, again forfeiture occurred in this matter, not because of the regulation itself, but because of the inaction of the failing to comply with the mandatory deadline that they knew about and forfeiture it can't be based, the argument is forfeiture can't be based because this is a (inaudible) of the penalty, but there are examples of lawful forfeiture, such as, let's say, tax lien, you could be a property owner, have no mortgage on your residence but if you don't pay property taxes, (inaudible) probably mean that could actually lead to forfeiture, which I believe is a more harsh remedy then in this case, the petitioners is who don't lose their asset, they just failed to comply with the provision that allowed them to run a TVR outside of a visitor destination area. I disagree that the commission can sit in equity and make an equitable decision because of the specific language of the statute, I believe the commission is bound by that. And there's law that says, if the commission is bound by the legislative body, which is in this case

the County Council, they made a specific ordinance. If in the future, they want to be changed to allow late files then that's where it gets amended. At that process, not at this process. So, allowing this late submission renewal application, it's not fair and equitable to those who have complied with it. It defeats the intent of the purpose, which was to regulate TVRs, and it's equal and fair treatment. The Petitioners in this case were treated just as equally and fairly as anyone else would (inaudible) and they didn't comply and there's consequences of that because deadlines have meaning, and in this case, it does have a meaning, and it's always, of course, the deadline is gonna be most harsh against the person who didn't need it but that doesn't mean that the deadline itself, somehow violates the Constitution. So, I don't believe there are equitable remedies, even in the in the matter of it was an agent, it was my agent that, that submitted it, again, Supreme Court's clear in a case called (inaudible). The principle is held liable for the acts, even in negligent and intentional or even if the principal did not know of the acts that the agent committed, they're still responsible for it. In this case, Petitioner is the homeowner, they're responsible for complying with 8-17.10 when they didn't, and so, the Department's position is that the commission approved and affirmed the hearing officer's report and recommendations in its entirety, and with that, if the commission has any questions.

Chair DeGracia: Commissioners, any questions? Commissioner Ako?

Mr. Ako: I think you answered it, but just for clarity in my mind, I'm not sure whether I actually understood it or not, but I think when I read the language itself, for me it's pretty clear that it shall be filed by this date and if not, this is the consequences, and yet I think argument is coming up that, well that's not a legal, that's not a legal ordinance in there because it's over ruled by a HRS. If, let's say just theory wise, if I agree with that argument, so I have to the right as a commissioner now here to say, yeah, I agree with that and I will vote in a way that would be contrary to what I believe the law reads now or do we have to change the law first? Because as I read, to me it's clear what it says, but in the back on my mind it says, well, maybe that's gonna be over me by the HRS law. Can I (inaudible) my conscience and vote, yeah, I think this is illegal, so I will vote because it's illegal or...

Mr. Donahoe: Well, the argument is that it isn't in contradiction with 46-4 because the case is specific on point. That it says it's consistent and therefore the regulation, the regulation of a specific area of zoning in this case, the TVR is outside (inaudible), is different than the overall zoning authority that (inaudible) and counties are given the authority by the, each county...if the County Council is the legislative body, it gives the commission authority and they do that by making the ordinances and drafting the ordinances then it is in compliance with this because 46-4 gave them the authority to do that (inaudible). So, I do not believe it's in contradiction (inaudible). Hope that answers your question.

Mr. Ako: Yes, thank you.

Chair DeGracia: Commissioners, any further questions? If no further questions, then I'm gonna invite the Petitioner backup for three minutes.

Mr. Kugle: Thank you. I won't even take three minutes. I did wanna mention, the county attorney suggested that the (inaudible) case involve the Intermediate Court of Appeals actually blessing this process, that's absolutely not true, I was the attorney, who the (inaudible) trust on that appeal, and just for your benefit, what that was, was not a renewal case, so it wasn't considering whether this renewal provision that we're discussing today was valid or not, rather that case dealt with the initial 2008 application and what had happened in that case was it was an Ag condominium and the Planning Department said we will not consider an application from somebody from somebody for a Nonconforming Use Certificate unless you have 75% of the owners signing off on the application and the property owner had only 50% of the thing, so the Planning Department never considered the application to begin with, so what the ICA was deciding and that just like these cases worked its way through the

Planning Commission, the Circuit Court to the Intermediate Court of Appeals and they said, the failure or the refusal of the Planning Department to even consider an application for somebody who has a protected constitutional right would be a violation of the Constitution and of the statute so they ordered the Planning Department to accept the application, that's what the (inaudible) case was. And if you want the, not that you need it, but if you want the (inaudible) to the (inaudible), it's 130 a Hawaii 307 2016, (inaudible) Court of Appeals decision, oh, which I think when we these other cases, that you've heard about that are on appeal, I think we know how the ICA's gonna rule, but I can't predict the future, so, that's all I wanted to say, other than, Mr. Donahoe mentioned the US Supreme Court decision in a case called (inaudible), that had nothing to do with zoning, it had nothing to do with Transient Vacation Rentals, it was a deadline established for mining claims of all things. And I can tell you there is a very nuanced body of law about mining rights on the mainland, we don't deal with that out here, and it has nothing to do with the things that you're considering today. I have nothing further to add. I really do appreciate your interest and your questions each and all of you and for affording us a lot of time this morning which I didn't expect, so thank you.

Mr. Ako: Thank you.

Chair DeGracia: Thank you very much.

Ms. Apisa: It's an important decision because there's a lot of implications beyond this case.

Chair DeGracia: Mr. Donahoe, would you like additional three?

Mr. Donahoe: Just to respond. Thank you, Chair. Deputy County Attorney Donahoe again. In the law case, that yes, it dealt with mineral rights, but it also nowhere in the case does it mention that it only applies for minimal rights, so that's the Supreme Court of the United States saying that you missed your deadline, deadlines mean something, you forfeit your right, it's not a taking, so with that clarification. And then the (inaudible) Trustee case, specifically says when interpreting County Charters, initial ordinances and administrative rules, the general principles of statutory construction apply, which is the starting point is the language of the statute itself. So, the language is the statute itself here is pretty clear. So that's all. Thank you for your time.

Chair DeGracia: Thank you very much. So, Commissioners, at this time we could deliberate to discuss, or we could enter into an executive session if you wish, but the appropriate actions would be to reverse, modify our thoughts of recommendations of the hearings officer, so, I'll entertain any motion.

Ms. Apisa: I'm feeling...

Ms. Barzilai: Chair, I think the commission's ready (inaudible).

Ms. Apisa: I'm feeling a need for an executive session.

Ms. Otsuka: I agree.

Mr. Ornellas: I second that.

Chair DeGracia: Okay, could we get a motion on the floor?

Ms. Apisa: Move to go into executive session for this particular matter.

Mr. Ornellas: Second.

Chair DeGracia: We'll take a voice vote. All in favor to go into executive...

Ms. Barzilai: (Inaudible).

Chair DeGracia: Okay. Roll call please.

Ms. Barzilai: Roll call on entering into executive session. Commissioner Ako?

Mr. Ako: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Commissioner Apisa?

Ms. Apisa: Aye.

Ms. Barzilai: Chair DeGracia?

Chair DeGracia: Aye.

Ms. Barzilai: Motion carries. 6:0.

Chair DeGracia: Thank you.

Mr. Hull: Chair, before you guys go into executive session, real quick, we have some (inaudible) community members (inaudible) I know there's an intention to break at 12:30 for lunch. Do you folks intend to break, to go into executive session and then break for lunch or return, say, at 1:30, just to give some of the folks here that time to go do their thing and then come back.

Chair DeGracia: I think that's a great timeframe. Commissioners, you agree.

Ms. Streufert: I agree.

Chair DeGracia: So, we'll reconvene after executive session at 1:30 for those in the public.

EXECUTIVE SESSION

Pursuant to Hawaii Revised Statutes Sections 92-4 and 92-5(a)(4), the purpose of this executive session is to consult with the County's legal counsel on questions, issues, status, and procedural matters. This consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Commission and the County as they relate to the following matters:

In the Matter of Petition to Appeal Decision of the Planning Director's Decision Related to the Planning Director's Cease and Desist and Forfeiture of TVRNCU #4250 (Nami Nori) for the Failure to Renew by June 6, 2022 Regarding the Property located at 4895 Weke Road, Hanalei, Kauai, Hawaii, identified by Kauai TMK No. (4)5-5-001: 040 containing 12,197.0 square feet, Patrick & Patricia Turley, Contested Case No. CC-2023-1.

Chair DeGracia: a. Hearing Officer's Report and Recommendation of Contested Case related to the Planning Director's decision to deny the Renewal Application and Forfeit TVRNCU #4250 for the reasons therein.

b. Petitioners' Exceptions to Hearing Officer's Report and Recommendation of Contested Case; Request for Oral Argument; Certificate of Service.

c. Respondent Planning Department of the County of Kaua'i Support of the County of Kaua'i Support of Hearing Officer's Report and Recommendation of Contested Case; Certificate of Service.

Ms. Barzilai: (Inaudible) there's no interaction (inaudible) so, I think (inaudible).

Chair DeGracia: Could we take a short brief restroom/recess before we get into it? Thank you.

Commission went into recess at 12:37 p.m.

Commission went into Executive Session at 12:57 p.m.

Commission returned to Open Session at 1:40 p.m.

Chair DeGracia: Commissioners, before we entertain a motion or thereafter, once again the appropriate motion could be either to reverse the findings and conclusions of the hearings officer to modify the findings and conclusions of the hearings officer or motion to adopt the recommendations of the hearings officer (inaudible) unless any of the commissioners want to make a motion. I'd like to open up the floor to discussion before we proceed. Commissioners, any comments?

Mr. Ako: Everybody looking at me. Okay, I'll start. After going through this case in my mind I think, especially today we'll be dealing with a lot of cases about timeliness and timeliness issues. Whether it be dealing with the renewal of nonconforming TVR or be it about interveners in this case. I really do see a difference in terms of the way the language is written in both instances. I think when we're talking about interveners there is a phrase in there which allows for those that are filing untimely that there is a phrase about having good cause you know for the filing after the fact, but in this case here, when I look at it there is no clause, which allows for a good cause finding, or reason for a good cause after that, so when I look at that because it's placed in the same document, it's placed one place, but it's not placed on the another one. I'm thinking that it was purposefully left out in one section and purposely put it in another section, and this section that we're dealing with right now, I think, it's not in there and because of that my feeling is you come to this conclusion that there is no discretion because when I read the language from there, it's pretty clear in terms of when the filings shall be done and what happened what are the consequences after that if there was a good clause in there then I think my mind would kind of lead more towards, well, you know, there was a death of a person, you know, there was an agent involved, you know, there was a difference in the time of when it needed to be filed in, you know, as it passed through the years, but I think right now when I'm looking at it, yeah, I'm looking at there was no good clause in there, they were aware of the deadline and the language is clear and in my mind that left no discretion, in terms for the Director to decide, so I think if there is a motion on this that comes up right now, I think I'm feeling like yeah I would go ahead and affirm the decision of the hearings officer.

Ms. Apisa: I'll just add my opinion, I would agree with that primarily because I believe the law-making body is the County Council and if there is to be any change it would need to originate with that body, and I don't think it is up to the Planning Commission to have that discretion. I guess I would also point out, I knew Scott Lindman, great man, loved working with him, sorry we miss him, but I believe the date of death was December 5 and the renewal was due on June 6th, so there was still a 6-month period in there. Which is quite a long time to, I know there are a lot of details to tend to, but that 6 months is a pretty substantial time, but I basically would agree with you, Commissioner Ako.

Ms. Streufert: One of the issues in here is that if one were to try to be equitable, I'm not sure how you would define that, and what would constitute equitable for all of the other cases that we've had either. The fact that it may be reversed at a higher court is fine with me. Doesn't say that we are doing anything, we're still operating within our bounds as to what we can and cannot do and it is to follow the law is it states right now, although I have to admit that there are times this, this is one of them, but there are many times when I do believe that some of our rules are a little harsh, but, the fact the matter is, that's not for us to decide if it's for the County Council to decide and to put it together, so based upon what we know of what the County Council has wanted, I'm more into the recommending adoption of hearings officer, now let the chips roll where they may when whether it gets appealed.

Chair DeGracia: Commissioners, any further comments, discussion?

Mr. Ornellas: Yes, with all due respect to the Director, and counsel for the Department, and my fellow commissioners, I will be voting no in the motion. My decision is based on extenuating circumstances in this case. Furthermore, I believe the (inaudible) does have discretion in this matter. Planning Commission and the Planning Department in my opinion are not one and the same.

Chair DeGracia: Thank you. Any other commissioner's comments, discussion?

Ms. Streufert: I do agree with Commissioner Ornellas that the commission is not the Department and there have been times when we have denied. (Inaudible) or not accepted, rejected the hearings officers' recommendations, and we are a body of seven or six people right now and we are all independent we should absolutely have the right to have our own opinions on this, I think that's why we have seven people on here and this is not just one person.

Ms. Apisa: I also see this as bigger than this one case. This is not our first, similar situation and it won't be our last, so I think it is an important decision.

Chair DeGracia: Thank you. Commissioners, anything further? If not, for myself, you know, going through this. I, like a few of the commissioners here, actually I think I (inaudible) with Commissioner Ornellas as well, in this situation, but as I read through the hearing officer's findings on (inaudible), fairly clear cut, and I'll be willing to have this move forward, adopt the hearings officers recommendations and if it's appealed which chances are it will be, then we'll have to go that route and as far as the ruling and the rule in itself where there is no flexibility in the time frame, I believe that if County Council created the rules that way, it wasn't on a whim or an accident. When they pass rules, they're pretty thorough, and every word is scrutinized before it gets adopted. That's the way I'll be (inaudible). With that, if we don't have any further discussion, I'll entertain a motion.

Ms. Streufert: I move to adopt the recommendations of the hearing officer.

Ms. Otsuka: Second.

Chair DeGracia: Commissioners, motion on the floor is to adopt the recommendations of the hearings officer. Could we have a roll call vote, Ms. Barzilai?

Ms. Barzilai: Yes, Chair. Commissioner Ako?

Mr. Ako: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: No.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Commissioner Apisa?

Ms. Apisa: Aye.

Ms. Barzilai: Chair DeGracia?

Chair DeGracia: Aye.

Ms. Barzilai: Motion carries. 5:1.

Chair DeGracia: Thank you. Mahalo to parties and counsel, a written order of the commission will follow.

Mr. Hull: The commission will be moving on to the next Agenda Item. Item H.2.

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2021-8) for the development of an affordable housing project involving the construction of seventeen (17) housing units containing 8 duplexes and a single-family residence, and associated site improvements involving 2 parcels in Waipouli, located along the makai side of Kuhio Highway in the vicinity of property identified as 4-870 Kuhio Highway, further known as Tax Map Keys: 4-3-009:051 & 071, and containing a total area of 36,861 square feet = **Kaua'i Habitat for Humanity.**

Mr. Hull: This is an extension request for timelines. Before going into the Department report. We don't have anybody signed up. Is there anybody...I apologize, we do have one person signed up, Roslyn Cummings, Ros Cummings? Shan, you want to check with Romio outside to see if Ms. Cummings is outside. Not present, with that we don't have any other individuals signed up. Is there anybody who did not sign up for this agenda item but would like to testify on this agenda item, if so, please approach the microphone. Seeing none, I'll turn this over to the staff for the report pertaining to this matter. And with your indulgence Commissioners, Romio, it's been a long day, we still have a lot of agenda items, so if you can be as brief as possible reading the summary.

Staff Planner Romio Idica: Good afternoon, Planning Chair, and Commissioners.

Mr. Idica read the Summary, Project Data, Project Description and Use, Additional Findings, Preliminary Evaluation, and Preliminary Conclusion sections of the Director's Report for the record (on file with the Planning Department).

Mr. Idica: That pretty much sums up my Director's Report, any questions for myself or the applicant?

Chair DeGracia: Any questions for the Department?

Ms. Apisa: No questions. I think Habitat does a lot of good work.

Chair DeGracia: Do we have the application or the applicant's representative? Thank you.

Mr. Douglas Haigh: Good afternoon, Douglas Haigh, President of the Board Kaua'i Habitat for Humanity.

Chair DeGracia: Would you like to add anything to the...

Mr. Haigh: No, just that, it's really hard to build these things on Kaua'i. It's really hard, and it's not just the government, in fact, the government's been awesome. We got approval from SHPD on our grating permit within a month, faster than our engineer got his from (inaudible). Department of Water approved our plans, and we had our groundbreaking for the off-site water work last week. Our contractor waited a year to get water to get water (inaudible). Planning has been super supportive helping us, the lot consolidation process went really well. Engineering division has been very helpful. Building division of course he's always been wonderful, but you know, and our CPR process we have a parcel in Kalaheo, we're going on two years to get our CPR done, it's hard, and everybody's facing the same problem, some of the same problem, personnel. We're challenged on personnel, our engineers are challenged, the attorneys are challenged, so it's just hard and appreciate any help you can give us. If you want further detail on our plans, we are pushing as hard as we can to move forward. We wanna get affordable housing, I'm super excited bringing habitat to the east side, (inaudible) at this location, you know, original proof of the SMA permit by this body. This is a super location for affordable housing. And just looking forward, I can ride my bike down and help volunteer, so I'm looking forward to seeing this project (inaudible).

Chair DeGracia: Any questions, Commissioners, for the applicant?

Mr. Ako: So, may we never (inaudible) government employee, a committed and dedicated one inside this room as well as outside this room for any delays.

Mr. Haigh: Right. I've been, you know, I retired 29 years 3 months from the County of Kaua'i. I've never seen a better Planning Department than the Planning Department we have. Your director and his staff is as strong as I've ever seen. Department of Water right now, is by far the strongest I've ever seen in 29 years. Engineering Division, Michael Moule (inaudible). We're getting super support from (inaudible), and yes, (inaudible) I just say I was the previous (inaudible).

Mr. Ako: Thanks for what you did.

Chair DeGracia: I have a quick question. Where are you guys at, as far as building those 17 units?

Mr. Haigh: We really are gonna start the process. We will be starting the process, but we can't finalize it till we get the CPR documents, so that's kind of the key, cause then we can lock in the (inaudible).

Chair DeGracia: I was curious if we had a whole bunch of (inaudible) out there crossing our fingers.

Mr. Haigh: We, you know, it's a challenge, in fact that's one of key issue for us that we serve the community our transparency in our selection process and how that goes, in fact, we're gonna have a special training for the board within the next couple of months to bring us all to refresh us on exactly how that process goes because the transparency of that is a key for us in rightfully serving the community.

Chair DeGracia: Thank you, and I would agree with that with so many out there looking for a home. Commissioners, any questions, anything further for the applicant and/or the Department?

Ms. Apisa: Just accolades for what Kaua'i Habitat does.

Mr. Haigh: Thank you.

Chair DeGracia: If not, Commissioners I'll be seeking a motion to amend Condition 13 outlined in the Director's recommendation.

Ms. Streufert: Just a question for you on that one, within the brackets, it says within two years, but then other line is by July 13, 2026, which one is it?

Mr. Idica: It's July 13, 2026.

Ms. Streufert: Okay, so it's three years.

Mr. Idica: That is correct.

Ms. Streufert: Thank you.

Ms. Apisa: So, it's within three years.

Ms. Streufert: Yes.

Ms. Apisa: Can I motion?

Chair DeGracia: Please.

Ms. Apisa: I move that we approve Special Management Area Use Permit SMA(U)-2021-8 to allow an extension for the completion of the project, and the applicant to be subjected to the applicable requirements.

Ms. Barzilai: Chair, may I simplify the motion (inaudible).

Chair DeGracia: Please.

Ms. Barzilai: I would view Vice Chairs as a motion to modify Condition 13.

Chair DeGracia: Okay.

Ms. Streufert: I second.

Ms. Apisa: That works.

Chair DeGracia: Okay, Commissioners, motion on the floor is to modify Condition 13 as outlined in the Director's Report. Could we get a roll call vote?

Mr. Hull: Roll call, Mr. Chair. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner Apisa?

Ms. Apisa: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: Aye.

Mr. Hull: Commissioner Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: Aye.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Aye.

Mr. Hull: Motion passes, Mr. Chair. 6:0. I'll turn the next agenda item back over to the county Attorney's Office and be back after.

Ms. Barzilai: (Inaudible) Do you want to take 3 or 4, Gregoire or Murray? (Inaudible).

Mr. Hull: Skip that.

Ms. Barzilai: No problem at all. H.3. (Inaudible).

Mr. Hull: I apologize (inaudible). Sorry, I stand corrected, H.3.

Class IV Zoning Permit Z -IV- 2015 -39, Use Permit U- 2015 -38 to allow conversion of an existing residence into a homestay operation on a parcel located along the mauka side of Nohea Street within the Kakela Makai Subdivision in Kalaheo, situated approx. 450 ft. west of its intersection with Kakela Makai Drive and further identified as 1196 Nohea Street, Tax Map Key 2-3-023:119, and containing a total area of 10,017 sq. ft.= **David & Melinda Murray.**

Mr. Hull: This is a previously established use permit for a homestay operation in Kalaheo. What the commissioners (inaudible) is a letter from David and Mindy Murray requested cancellation or withdrawal of the Class IV Zoning Permit and Use Permit and the memorandum from the Clerk of the Commission, myself recommending approval to cancel and withdraw Class IV Zoning Permit Z-IV-2015-39, Use Permit U-2015-38. Unless there are disagreements, a relatively simple recommendation. The property owner is asking to withdraw these permits. We've seen the past sometimes these things rise up out of the dead and say, well, the commission never actually accepted the withdrawal, so out of abundance of caution, we're providing on this agenda, for your consideration to accept and with no withdrawal and cancel the respective zoning permits.

Ms. Streufert: So, do we need to vote or motion on this then?

Mr. Hull: We request a motion and a formal vote.

Ms. Barzilai: Along these lines, Chair, I would suggest a motion to revoke, under Rule 112-9, at the applicants' request.

Chair DeGracia: Okay.

Ms. Otsuka: Motion to revoke homestay permit for David and Melinda Murray.

Ms. Apisa: Second. And I commend them for coming in to ask for a cancellation and not just kind of letting it be out there floating.

Chair DeGracia: Commissioners, motion on the floor is to revoke the Class IV Zoning Permit and Use Permit for David and Melinda Murray. Could we get a roll call vote?

Mr. Hull: I apologize, we want to ask for public testimony just in case (inaudible). We don't have anyone signed up but would anyone like to testify on this agenda item prior to action. Okay, with that.

Chair DeGracia: Roll call vote.

Mr. Hull: Roll call for motion to revoke. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner Apisa?

Ms. Apisa: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: Aye.

Mr. Hull: Commissioner Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: Aye.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Aye.

Mr. Hull: Motion passes, Mr. Chair. 6:0. Now I'll turn it back over to the county attorney's office.

Ms. Barzilai: Our Clerk will now transition back to his role as Director, and I'll read the notice on H.4.

In the Matter of Petition to Appeal Decision of the Planning Director's Decision Related to the Planning Director's Cease and Desist and Forfeiture of TVRNCU #4287 (Mau Loa Ohana) for the Failure to timely renewal by April 18, 2023, **Edmund & Linda Gregoire**, 4650 Arnio Road, TMK 26011019, Koloa, Kauai, appeal received on June 2, 2023, for referral to Board and

Commissions as Contested Case File No. CC-2023-4. The renewal packet was hand delivered to the Department on April 28, 2023.

Ms. Barzilai: a. Cease & Desist, and Forfeiture of Non-Conforming Use Certificate TVNCU #4287 letter dated 5/3/2023.

b. Letter (6/2/2023) from Jonathan Parrish, The Parrish Collection, LLC requesting petition to appeal.

c. Petition to Appeal of the Decision of the Planning Director, Exhibits 1-6, Certificate of Service dated (6/2/2023}

d. Memorandum of the Clerk of the Commission Memorandum (6/5/2023) recommending referral of the matter to a Hearings Officer for hearing of the appeal.

Ms. Barzilai: Do we have anyone present who would like to testify on this item? Are we taking...

Chair DeGracia: Public testimony.

Ms. Barzilai: Public testimony at this time.

Chair DeGracia: Yes.

Ms. Barzilai: We're not taking argument off counsel right now, we're taking public testimony, a 3-minute public testimony. Would counsel like to speak? We have counsel here, (inaudible) speak.

Chair DeGracia: Okay.

Mr. Mark Valencia: Good afternoon, Commissioner, and members of the Commission, and this is Sam King, we are (inaudible) we represent The Parrish Collection. Just wanted to make one item of verification, there is indicated in 4.b. a letter from The Parrish Collections (inaudible) and a petition that was submitted by the Gregoire's through their counsel, Cades Schutte Law firm under 4.c. it doesn't appear as though these are filed as separate appeals with one contested case file number, I just wanted to confirm that the letter submitted by The Parrish Collection and the appeal submitted directly by the Gregoire's (inaudible) counsel are all part of the same appeal.

Ms. Barzilai: (Inaudible) clear upon the record. Does that satisfy counsel?

Mr. Valencia: That sounds like a (inaudible). Thank you.

Ms. Barzilai: Any questions for counsel?

Ms. Barzilai: Thank you.

Mr. Mauna Kea Trask: Aloha, Chair and Commission members. Mauna Kea Trask for the record on behalf of (inaudible), so just in abundance of clarity, we had filed, so the Parrish Collection is the property managers, and we represent the landowners, and so there was not communication between our respective law firms when these are filed, so I just wanna say that it'll be consolidated. Mr. Valencia and Mr. King will take over the appeal, I will no longer be part of it, but they will be understandably

(inaudible) pleading that petition be subsumed in the record they're gonna take the argument from there, so I won't be here anymore, but they will be, to know (inaudible). Thank you.

Ms. Barzilai: (Inaudible) commissions, the Contested Case No. is CC-2023-4.

Chair DeGracia: Commissioners, I'd like to take a motion to refer this to Boards & Commissions as Contested Case File No. CC-2023-4.

Ms. Streufert: I move to refer this case to Boards & Commissions as Contested Case File No. CC-2023-4

Ms. Otsuka: Second.

Chair DeGracia: Commissioners, motion on the floor is to refer this item to Boards & Commission as Contested Case File No. CC-2023-4. Could we get a roll call vote, Ms. Barzilai?

Ms. Barzilai: Yes. Commissioner Ako?

Mr. Ako: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Vice Chair Apisa?

Ms. Apisa: Aye.

Ms. Barzilai: Chair DeGracia?

Chair DeGracia: Aye.

Ms. Barzilai: Motion carries. 6:0.

Mr. Hull: Next up we have...I've requested, sorry it took some time to coordinate, we were finally able to coordinate about the Planning Commission meeting as well as a very coveted slot in his very busy agenda, but the Director for Housing, Adam Roversi, is here to give a presentation, and update the commission. You've done this a couple of years ago, you did, I believe have an update on the housing measures and activity going on so, Adam's here to give a presentation. All set, Adam or are you still logging in?

Housing Director Adam Roversi: (Inaudible).

Chair DeGracia: We'll take a 5-minute recess due to technical issues.

Commission went into recess at 2:10 p.m.
Commission reconvened from recess at 2:13 p.m.

Chair DeGracia: I'd like to call the meeting back to order.

Mr. Hull: I'll turn it over to Adam Roversi of the Housing Agency to give the housing update.

Mr. Adam Roversi: Aloha, Chair, Planning Director, and members of the Commission. Thanks for inviting me to share an update on programs and projects that the housing agency is undertaking. This slideshow contains information on all of our programs, not just housing projects, so if you folks are primarily interested in projects that directly connect with zoning, I could sort of skim over some of this, but I'll just plan to go through it all fairly quickly and be happy to answer any questions that you have. So, this is a basic roadmap of what I was gonna cover, if I mute my own computer so it's not echoing. This is a roadmap of what I'm gonna cover briefly. So, very quickly, the Housing Agency was established back in 1976, but for many years we did virtually nothing except administer the Section 8 Rental Assistance Program. From '99 to 2007, it was a combined, Office of Community Assistance with Elderly Affairs and Transportation, and it wasn't until 2007 that it was re-established as an independent agency. So, our office is divided broadly into a developments division and a rental assistance division. I'm only gonna talk real briefly about the rental assistance division, but currently we provide, direct rental assistance to almost 900 households on Kaua'i, (inaudible) we've got 75 additional households with vouchers in their hands searching for housing, and we did a recent pull of 200 people from our waitlist. We provide approximately 12 million dollars a year, through these programs funneled into the Kaua'i economy to assist people with housing.

Ms. Streufert: Can I ask you a question? This is your waitlist; how many do you think actually need (inaudible)?

Mr. Roversi: Our waitlist actually has, over a thousand people on it at the moment. So, 887 are the people who are actively receiving assistance. That when I say waitlist pull, those are 200 names that were taken from the existing waitlist, which is over a thousand, waiting for assistance. I would offer just (inaudible) that when we do a waitlist pull of say 200 people from our waiting list, we typically get less than 50% of those people actually respond to us, and then, probably 50% of those people succeed in completing all the required documentation to actually be issued a voucher, and then, oh, maybe half again of those succeed in finding a place that will actually rent to them (inaudible), so, our clients have a very difficult time finding actual physical housing units, even when they have effectively have a rent check in their pocket, guaranteed to the landlords.

Ms. Streufert: So, if I did the math right, that only about 4% of the people (inaudible).

Mr. Roversi: On a good process we get about 20%, that's a high number. Just quickly I wanna mention this family self-sufficiency program. So, the families, so there is a, when you're when you're receiving rental assistance there is you know on a certain level there is a distance incentive to increase your income because the more your income goes up the less rental assistance you receive, so the family self-sufficiency program is designed to counteract that so people can enter into this program, and if they're accepted, they receive counseling and different trainings to help them with education, financial counseling, financial management and debt consolidation, things like that, and if their income increases while they're in the assistance programs yes, their monthly assistance will be reduced and their rent will go up, but the difference gets set aside, on a escrow account for them, so when they graduate from this program, which can take several years, they get a lump sum check. And we've had people who graduate from this program with as much as 35, \$38,000, which they could use for anything they want, a down payment on house, college tuition, whatever, so, we think it's a great program. This is a little bit behind

us, but just for the record and for everyone's information, I need to update these numbers actually, so, we distributed almost 30 just over 30 million dollars in rental assistance to Kaua'i residents during the COVID emergency, those were federal funds administered by Kaua'i Federal Credit Union and overseen by the Housing Agency, that program has since closed because it expended all of its funds, but we do have an agency. That program has since closed because it expended all of its funds, but we do have an ongoing, mortgage assistance program that's still that is has good deal of money left, so we encourage any Kaua'i homeowners who have difficulty with their mortgage arising from financial problems dating back to COVID, that's still available and there's information on our website about that. And then lastly, connected to the COVID emergency program, we also funded Kaua'i WCAs case management services for domestic violence victims related to housing, legal aid for leadership assistance, financial counseling and we've created a housing navigator program to assist anybody who's receiving government assistance for rents and actually finding how kind of get better at that 20% number so that we're helping the people who receive vouchers and actually finding this allowed units. So, this is about our development division, which is essentially the other half of our office. We have traditionally been largely dependent on, federal housing grants under the home program and HTF program which we receive about 3.5 million dollars every 3 years, so, for 2 years we'll get it nothing and then in year 3 we'll get between 3 and 4 million dollars. And Kaua'i projects are the way it typically works is that the housing agency will identify a piece of property and we'll do infrastructure work, and we will offer that property through an RFP process to private and nonprofit partners, then they will, using any subsidy money that we have, in those every third year allocations, they will apply to the state, to the Hawai'i Housing Finance Development Corporation for additional funding. So, this graph is showing the share of funding that goes to Kaua'i projects historically over time and you can see from this map that Kaua'i is the red lines which you can see as virtually indistinguishable from the (inaudible) axis on this graph, so, in my opinion, Kaua'i has gotten the short end of the stick historically. The big exception is 2022 where we, Kaua'i based project received almost 98 million dollars (inaudible), which we'll take a small amount of credit for that although most of it goes to our private partners, I think we've created a more fertile development environment for them, attracting more developers to try to do projects here that we can partner with them and help drive the state funding to their projects. So, our other source of funding for housing development aside from the federal grants that I refer to is Kaua'i County Council or County general fund contributions to the Housing Development, so, it's a revolving fund, so any funds spent in one year will roll over, not spent in one year will roll over to the next. Going back prior to 2018 there wasn't really annual contributions to the Housing Development Fund, beginning in 2018, the council started allocating between 2 and a half and 3 million dollars a year to the Housing Development Fund. Last year the County Council attempted to pay the charter amendment for an automatic allocation of funds to the housing development fund that failed to pass, but then subsequently, the council did pass bill 2888, which establishes a minimum of 2% of your property tax revenue to go into the Housing Development Fund moving forward and for the current physical year that amounted to an allocation of 4.4 million dollars to the Housing Development Fund. We typically use those funds to do predevelopment work, infrastructure work, property acquisition, and provide limited subsidies when we do request for proposals to develop county control of land into affordable housing. Also, to remedy the, the fact that in that graph, Kaua'i County doesn't get much state funding for projects. A large portion of the state's funding that they allocate once a year through a competitive application process comes from private activity bonds so, under state law every county has an allocation of private activity bonds but traditionally all the counties have not used it and they've just given it to the state and then the state is administering the program and the state is in charge of where the funding goes, so we elected, just last year to keep our own private activity bond allocation and use it ourselves by issuing bonds ourselves so that we can control, which projects on Kaua'i get funding and when they get funded, so both the timing, and the nature of the projects. So, just this past month we completed our first ever private activity bond issuance, and we issued 25 million dollars in private activity bonds to fund multi-family housing development in Phase 1 of our Lima Ola affordable housing project, so that bond process is closed and the projects have both broken ground so, we're doing with those funds, we're doing a 40 unit senior housing project, and a 45 unit workforce housing project, both of which will

be income restricted to Kaua'i families and will be affordable in perpetuity, so with the projects are on county land, offered to a development partner who will operate them under long term ground leases and the ground needs to set up a requirement of permit and affordability. I'm gonna highlight some of our recent projects that we completed in the last couple of years, then I'll move on to some current projects and then some future projects. So, this is Koa'e in Koloa on the road down to Po'ipū, it's the largest affordable housing project that has ever been developed by the county, so this project was originated as a requirement imposed on Kukui'ula, they were originally required to provide housing, then it turned into they were gonna provide land, and then they were gonna provide different, it changed many times, but eventually Kukui'ula provided this piece of property as a condition of their resort development, with available infrastructure in the county to an RFP process with various subsidies partnered with Mark Development to build this 132 unit project, 132 or 134 in Koloa, but it's been fully occupied and it's had a waiting list ever since.

Ms. Apisa: Yeah, when you drive by, I didn't realize it was that large.

Mr. Roversi: And there's, it appears like you're just pulling into the parking lot, but the road through the center of that project connects to additional properties behind, could potentially be developed into additional affordable housing in the future. This is the Waimea Huakai project, I believe, 36 units, developed in partnership with Habitat for Humanity, the county and again, AHE Group, again using some of the federal subsidy funds that I referred to before This is our Kealaula project on Pua Loke Street by the Department of Water. This was a pilot program, funded a little over 50% by the county, 50% by the state. This is the first project that we've done on Kaua'i, other than the KEO emergency shelter, which is now more than 20 years old that was, expressly designed specifically to address homelessness and, homeless families, so while all of our affordable housing projects might benefit someone who's currently homeless, a requirement of entry into this project is it's only available for people who are currently homeless, and condition of tenancy is also that, someone moving in has to agree to participate in a customized social services program that's designed for whatever their needs are, so it's not it's not a one size fits all program but we offer continue in education, help finding employment, there's even nutritional classes about you know healthy cooking for your kids, there's substance abuse assistance, debt counseling, it said the list goes on, but condition of occupancy is to participate. We've had since this project opened almost, almost 2 years ago now, more than 50% of the homeless families that moved in have successfully moved out and onto permanent housing, and I believe we've only had of the well more than a hundred people who have entered and have left this project, we've only had 2 people end up back on the street.

Ms. Apisa: Good success record.

Mr. Roversi: This is immediately across the street on Pua Loke Street. This is a 54-unit workforce housing project, so many of the people who have left homelessness and moved into the Kealaula project across the street find permanent housing here, which is immediately next door, so this is a workforce housing project of 56 units. Again, on county land, operated, owned by the AHE Group, and operated by EAH housing, they manage the property. Okay, this is, a now somewhat outdated master plan image of Lima Ola, but gives the idea this is our 75-acre affordable housing subdivision in 'Ele'ele, and this represents sort of our new model of affordable housing development for the county on Kaua'i. So, prior to this project, the county's mode of operation was to identify relatively small lots, a couple of acres, like the Pua Loke Street project or like the Koa'e project to parent with our once every 3-year federal pool of funds and find a developer to build that project. With this we've kind of entered a new scheme or plan of attack by doing large scale subdivisions and the county in partnership with the state and the federal government putting in all the infrastructure, with the goal of keeping the future developments that take place in the in the project more affordable and to provide a range of housing products for different income groups, so when we are utilizing, when we're dependent only on those federal program funds and we're

doing the Pua Loke or the Koa'e style project, because we're dependent on those federal money we can only serve people who are at low and very low incomes, but with projects like this where we have a mixture of multi-family housing, mental housing and single family for sale homes, we can provide housing for a much broader income range of people up to 120% of your immediate income, which are a family of 4 nowadays is almost a \$140,000, so with projects like this, we're able to, yes, continue helping low income individuals, but also help your typical school teacher or a fireman or police officer who make too much money to qualify for traditional affordable housing projects, but still can't compete in the market on Kaua'i these days.

Ms. Streufert: Is this integrated somehow with that there's (inaudible).

Mr. Roversi: They're immediately to the left. So, those blank lots you see to the left are already built out by Habitat, (inaudible) that's the 'Ele'ele Iluna Subdivision. So, this is, here you see the habitat houses built out. This is back from November, this looks a good, different now and that we've broken ground on many of these homes as of today. So, this is 75 acres, it will be developed in 4 phases, Phase 1, all of Phase 1 was completed about a year ago, the infrastructure work and as I mentioned all the multifamily homes in Phase 1 are already under construction, we had to break ground on 38 single family homes, but we hope to have the development (inaudible) for those completed in August, in July rather and then break ground, hopefully not too far here and after. So, this shifting to current upcoming projects so we already talked about the bond program. In Lima Ola, which we just showed you the overall image, this is the 40-unit Senior Housing project that I mentioned which is on the bottom right of the map that I just showed moments ago. 40 units of Senior Housing, this is a 45 unit, workforce housing project restricted, generally restricted to people making 60% of area median income and below with a few higher income units mixed in, and then lastly this is, we're building a second supported housing project for homeless families modeled after the Kealaula project by the Department of Water on Pua Loke Street, so, this will be ultimately another 32 units, they're effectively tiny homes, but they're duplexes, so they're tiny home duplexes. It's got one bedrooms and studios, the one bedrooms are about 400 square feet, the studios are about 250 square feet, so we'll have another 32 units, exclusively for, families who are currently homeless on Kaua'i. This is just another overview of the Lima Ola project. These are the 38 single family lots that we're working to build out. We'll be selling these homes, again, to families earning up to 120% of area median income, under 99-year leaseholds, the goal being to maintain them as permanently affordable. So, they will not flip to market rate homes after 10 years or some arbitrary time period. The owners of the leasehold homes can sell them at any time they want, but their resale price is restricted, we call it a limited appreciation leasehold so, that they have they share the appreciation with the county and then the county has a buyback right, and then we would utilize our share of the appreciation to then resell the property at a reduced price to another qualifying homebuyer. And they have an ocean view to rival the 1-million dollar lots at Kukui'ula. It's in a pretty amazing location. This is a picture of the community center that we're building at Lima Ola, so there's gonna be, it's changed a little bit, we're not doing a skate park anymore because they just made one in Hanapēpē, so instead we're doing some pickle ball courts. There's a community center with a commercial kitchen, a meeting room, an open-air amphitheater, basketball, an imu pit, picnic gazebos, should be great. We receive some federal funds to pay for about 50% of this, and this is just another overview of the Lima Ola project, so Phase 1 and in the bottom Phase 2, we're right now completing the engineering and design drawings for Phase 2, and we hope to break ground on Phase 2 next year, and part of that is we're going to be putting in a new half 1 million gallon water tank, which will serve not just Lima Ola but the whole 'Ele'ele community. This is another of our future projects. This is the 400 acres in Waimea that the county purchased several years ago. The Planning Department rather completed a master planning process for this lot, this is the result of the final master plan and the right-hand corner there is designated for housing. That ends up to be just about 34 acres I think, and we're getting ready to execute your contract for a more refined master community-driven master plan for the area that's actually designated for housing, so we'll be starting that hopefully before the end of the summer, having a series of community meetings kind of a drill down on exactly what the community

wants to see and we're expecting a minimum of a 150 new housing units to be developed in that area of various types (inaudible) Lima Ola model of serving many income levels with different types of housing, not just low-income rental housing. Another long-term project we're currently working to acquire 50 acres.

Ms. Streufert: Before you (inaudible) the westside, these are a lot of units that are going on the westside from Lima Ola to Waimea. These are quite a few units that are on the westside now. Is there any plan for improving the roads so that the transportation system from the west side to Līhu'e or wherever they're working is going to be improved because that's adding already to what we have as (inaudible) pretty packed road system that we have on the westside, and going through 'Ele'ele to Kalaheo to 'Ōma'o is usually a mess already, so is there anything?

Mr. Roversi: I can only really speak to highway improvements that are directly connected to these projects, so we are required, for instance at Lima Ola we were required to put in new turning lanes, and new stop lights as part of our project. At this project, there's an expectation that there'll be new roundabout, and improved roads in the vicinity of the project, but I can't speak to general state highway improvements on that (inaudible). So, as I mentioned, we are working to acquire 50 acres in Kilauea, so the area that looks like dirt sort of in the upper right, that's the new Hunt Commercial Center, which is now fully built out in Kilauea. We're under contract to acquire the 25-acre parcel that's in green, and we are in the midst of a condemnation action to acquire the parcel, it's a 23-acre parcel that's in red. So, in total that'll be just under 50 acres that the county is acquiring in Kilauea. The parcel that's in yellow, is the planned future main entrance at Kilauea that is intended to take traffic out of the primary residential area, so the cars are directed from the highway to the commercial center and then tourists which can add up to thousands a day will be able to not have to drive through town to get to the wild, to the lighthouse, the National Wildlife Refuge at the lighthouse.

Ms. Apisa: So, that bypass road is a reality? It's quite a bit iffy (inaudible).

Mr. Roversi: It's a legal reality on paper in that the parcel has been subdivided out of surrounding property, the county, the Housing Agency actually has funds in the current budget, do the engineering and design work, and come up with the drawings to actually build that road. When we will have funds to do the actual construction work, that's a little bit more of an open question, but hopefully now that we are going to be the owner of the property and working towards, concrete plans to develop up to 300 homes in this area, have ownership of the road, have the design and construction plans for the road, hopefully that will drive the desire to add this, to move this higher on the roadways priority list.

Ms. Apisa: Definitely going in the right direction, thank you.

Mr. Roversi: And this has nothing to do with the Housing Agency, but since we're in Kilauea, I think it's been publicly announced that the newly approved, North Shore middle and high school, charter school is in escrow to purchase the property immediately above county acquisition, so there could, if everything goes well, be a new North Shore high school and middle school immediately across the street from the county's new housing development. Be an exciting thing. Okay, so, I've highlighted so far just the projects that the county is itself doing directly on county land, but importantly we do have private partners, who as I mentioned got a record amount of funding from the state in 2022 to do Kaua'i projects, and I'm (inaudible) highlight four that the county has participated in in relatively minor ways. Like small amounts of subsidy or providing a (inaudible) project-based vouchers to the developments which give them a guaranteed rental income that helps them with their financing in their projects. So, this is a habitat project immediately next door to the existing the Waimea Huakai rental project that I showed you earlier is on the left, but this is a 32-acre single family project in Waimea right next to the hospital and the school and the existing county park, so habitat is developing 32 self-help homes here. The county help out, in a relatively

minor way with, second mortgage financing for (inaudible). Then this is an aerial image of Port Allen and the AHE Group is, and the area that's in red is going to be building in 2 phases, first 48 affordable rental units, and then Phase II will be another 27, two and three bedroom units, again these are... This is an old A&B development that was planned as luxury condos, but, it fell apart and never happen, and that would be affordable housing with a fairly amazing ocean view above the small boat harbor in Port Allen. Next one this is, which you guys may have seen before because I think this came before the Planning Commission, but this is the planned Rice Street apartment project where Central Pacific Bank is located at the corner of Rice Street and Umi Street. It will be 66 affordable rental units on top of first floor retail, directly across the street from the county council building, and they are on the verge of receiving their building permits. Lastly, this is a project that's planned for, I forget the name of the church, but the church property that's immediately across the highway to the Department of Water, which has been for sale for quite a while. This is a planned 96-unit apartment complex in development by Mark Development. They also have a second phase planned, after completion of the first, I believe 54 additional units so, essentially across the street from Kukui Grove and the Department of Water. This, lastly, I'm almost wrapped up almost finished. This is some data from the homelessness point in time count that's conducted every year. 2023 numbers are at the top. You will see that the number of homeless households on Kaua'i have increased this year compared to last. We're hoping as we continue to develop these supportive housing programs to be able to make a dent in that, but it's a troubling trend. This is my second to last slide, I think. A few more things to mention, so in addition to the multi-family projects that we've, that I've highlighted, we have an exist, an ongoing single family home buyer program. So, we typically buy a couple of houses a year, rehab them, and then resell them at affordable prices to Kaua'i families. We sell those homes under that 99-year leasehold model that I described, and we currently have 36 homes, leasehold homes in that program on the island. A recent example, we sold a house in Wailua, it was a 2-bedroom house that we rehab, I think our sale price was \$320,000. We also administer an annual CBDG block grant program, which is designed for economic development, we get about \$600,000 a year, which we grant out to local nonprofit groups, does things like pay for ADA upgrades to our emergency shelter, it pays for park improvements, any nonprofit organizations can apply. We also, counsel instituted an affordable ARU program back in 2021 where we offer subsidies to any homeowner that wants to build an ARU on their property and we'll offer it at a local rent for a period of 5 years, we'll pay their FRC charge, which is \$15,000 now, and an array of other fees, we will either pay or waive them, so it's a benefit of about \$20,000 in savings to a homeowner in exchange for a pledge to rent your ARU at affordable rates for 5 years. And we're working to get a cesspool conversion off the program, off the ground using state funds. I'm just gonna skip over that (inaudible). That's the conclusion, but I'm happy to answer any questions if there's anything you'd like to know more about.

Ms. Apisa: Actually, I'm impressed there's more housing coming up that I was aware of. We need lots (inaudible). I know there's some concern location. Just a comment, the one that was on Rice Street, by CPB, wasn't that 4 stories, doesn't Līhu'e now allow higher? I was just curious why it didn't go higher.

Mr. Roversi: Well, it's not a county project, that's a private developer that we offered some assistance to, so, the design was up to them. At 4 stories they're matching the existing highest structures in Līhu'e down in the Līhu'e Townhomes, I believe is the highest structures.

Ms. Apisa: And there's probably no elevator, that's I think the maximum without an elevator.

Mr. Roversi: They do have elevators.

Ms. Apisa: Oh, they do have.

Mr. Roversi: Yeah. I would offer that our Pua Loke Street project by the Department of Water was also 4 stories. Is that correct? Anyway, they, the developer confided in us after the fact that they would never do

that again because the cost increase to go to 4 stories from 3 stories, it is an exponentially, it increases the cost of the whole, the whole building exponentially because of the fire requirements and the elevator requirements and some structural engineering requirements.

Ms. Apisa: 5 and 6 would probably...

Mr. Roversi: If you're going to go above 3, you want to go 6 or 8 because it doesn't pay to do 4. Doesn't make financial sense.

Ms. Apisa: It'll be interesting who's the first one if they get any rotten eggs thrown out for just being different the leader to go above 4 stories.

Mr. Hull: Well right now and to the point is that Rice Street was freed up to go up to 50 feet in the height with additional height to allow for the slope of the roof. So, nowhere right now currently has the ability to go higher than that, but I think to Adam's point, is the...

Ms. Apisa: The cost.

Mr. Hull: Well, the cost is bearing out and the fact that, AHE Group, which has done a sizeable amount of affordable housing units on Kaua'i, they said, we'll never do it again because it doesn't quite (inaudible).

Mr. Roversi: And notably for the, I skipped over the last slides because it was years ago that we did amendments to the housing policy, but one of the things that we did notable to the Līhu'e area, and a couple of other zones is, exempted Līhu'e town (inaudible) completely from the housing policies affordability requirements if the developer builds to the maximum density possible off a lot trying to incentivize in build projects with the assumption that if someone builds to the maximum density in a Līhu'e town (inaudible), they will be relatively small units, they can't be vacation rentals in this area, so the assumption was that they would be, hopefully affordable by default, and that's a, the pilot program that (inaudible) in 10 years and it's 2 years old already. We haven't had many takers of that, increase density provision, although we did see, the residential portions of Koloa Village did go once we passed that (inaudible) and went back to the drawing board to doubled the number of the residential units (inaudible) commercial center.

Mr. Ornellas: How many housing units do we have to build in order to take care of the shortfall that we have on Kaua'i right now?

Mr. Roversi: Well, the last number is that were generated were from a 2019 study, and we're updating that study right now, so we should be able to publish sort of a new, it's a state wide analysis, but it's broken down by island, so there should be some updated data later in 2023, but the 2019 studies were just under 5,000 new housing units by 2025 to meet current demands.

Mr. Ornellas: On Kaua'i?

Mr. Roversi: Kaua'i.

Mr. Ako: Mr. Roversi, I'm one of those rambunctious guys that run through your hall every Friday over there, so I apologize for doing that. We deliver food but we need to pass through their offices. But you know you mention about those 5,000 units that I guess the goal is by 2025. Are you able to break that down by, how many people with the AMI, I don't know, 60% and lower or 80%, is there a breakdown about how many units each category would be?

Mr. Roversi: There is a breakdown on the end of 2019 study, I can't rattle those off the top on my head, but it but it is notable that, so the way that study operated it asked people questions of like, you know, do you wish to move in the next 5 years? And it, it had no income basis, so it's when it says 5,000 units that includes everybody including people who want to move into a luxury home so that not just laying out a demand for affordable housing or it's not laying out just the demand about housing stress or anything like that, it's just the total number of housing units that are estimated people want and desire based on a survey. I think that whole survey is available on our website.

Mr. Ornellas: What is the percentage of homes on Kaua'i purchased by mainlanders?

Mr. Roversi: The Board of Realtors or Title Guarantee, I think publishes that monthly and I don't know. I've heard, 25, 30%. I don't have clear data on that. I know according to the American Community Survey that the US government puts out, by their definition of vacant home, which includes vacation rentals more than I think it's close to 24, 25% of the homes on Kaua'i are considered vacant, that doesn't mean that they're actually completely empty, but they're not resident occupied.

Mr. Ornellas: As commissioners, what can we do?

Mr. Roversi: Well, as far as affordable housing goes, statewide one of the main complaints is always about planning and permitting and so many, but I think on Kaua'i, we've got a great Planning Department and as far as affordable housing projects go, I can't say that that's ever been an impediment to us getting things done. Our primary impediments are infrastructure and funding. I know Commissioner Streufert brought up that, you know all these houses that were building way out in 'Ele'ele, wouldn't it be nicer if they were in Līhu'e town (inaudible) where most of the employment is, but as you folks know, we've got we're in a water restriction period in Līhu'e, until the surface water treatment plant and the legal issues surrounding that can be addressed, Grove Farm has thousands of homes available in on paper, but they're not, there's no water available to actually build those homes right now. And we have the same exact restrictions as far as wastewater goes, you know, so many of our, our (inaudible) project for example, there is no wastewater treatment system (inaudible) to support the number of homes we would like to build, so we're gonna, if we're going to do what the density of the land could handle, we'll be looking at having to build our own sewer treatment plant, it's quite expensive.

Ms. Streufert: There's no possibility of building closer to maybe the cane haul roads and opening up the cane haul roads as we're paving over those roads for additional infrastructure, transportation infrastructure.

Mr. Roversi: (Inaudible).

Ms. Apisa: The roads are maybe private, anyway.

Ms. Streufert: Well, I know they're private, but you know, then you don't have to do a lot of grading (inaudible) it just seems to be a be a way to get around some of the transportation problems because there is no industry out on the west side really, other than PMRF, so they're gonna (inaudible) come in here or come east and there needs to be infrastructure (inaudible).

Mr. Roversi: I won't step on the toes of the DOT or the roads division by trying to answer that.

Mr. Hull: I'll just add real briefly to that, (inaudible) while the highways look like they're just payment on grade and not expensive, highways are insanely expensive to do, and so, I know it's been flowed a lot of, well let's just use the cane haul roads, and they're there, we easily pave them and that is accurate they're there and in fact, many of those landowners would look at possibly friendly, you know, not combination

but friendly exchanges of those lands. Is the cost actually to improved unimproved roads to certify highways with the drainage that's necessary that is in the tens of millions of dollars, and even looking at the one to go across Wailua River, DOT had to walk away from it because it was over a billion dollar price tag 10 years ago, and so, there's a part (inaudible) back to Adam's other point is, putting roads on the side, the biggest hurdle right now is wastewater and water.

Mr. Roversi: And we all know that many of our existing roads are not in great shape, so I know that the roads division for better or worse is doing their best with the funding they've got to fix our current roads and is hesitant to do a lot of work, at least from the county level putting in new roads until we can get our maintenance backlog taken care of.

Mr. Ako: Mr. Roversi, one slide that just caught my attention with, you know, your project you have down at Port Allen, you mentioned that initially that project was supposed to be done by A&B, as a luxury project there, but that fell through and now we have affordable housing there instead of, I guess this high priced luxury homes or not sure what it was initially gonna be, but how did that happen? I think that would, you know from listening to all the testimony we have, I think that's what people are looking at instead of the luxury site, they coming up with these affordable homes in there, so that was a default by A&B or...

Mr. Roversi: Well, I don't wanna speak out of turn for A&B, but I have been told by folks at A&B that, that property was zoned and permitted for luxury condominiums, multi-story, luxury condominiums with an ocean view, they built the neighboring single family subdivision as affordable housing, that they were required to do in connection with those planned luxury condos, and they had put in all the infrastructure for the condos, they even have the pool is still there, and then the 2008 housing crisis hit and the banking collapse and (inaudible) collapse and I think they made a decision at the time that it just wasn't financially feasible to invest the amount of money it was going to take at the time to build out the condominiums. And I was told a story that they actually had pre-purchased all of the appliances and had them in a warehouse and ended up giving them away to employees and friends of employees when they decided not to build the units.

Mr. Hull: (Inaudible). You have Adam's program that definitely looks at and can set restrictions when they come in, whatever assistance it is, whether it's funding or being on the grants or just county land, they can put those restrictions on from a zoning perspective we don't really have that ability to get when we get the permit application, so that's why, you know, a lot of the things you're seeing right now are things are permitted years ago and I think quite poignantly and not on disagreeing with those, some of the statements that the public sector, in that we don't need this type of housing product that we're seeing you folks have to rehash week over, week over and there is no objection and contestation from the department on that viewpoint. And I told those developers we're not here to help you. We don't need that product in the middle of a housing crisis. At the same time, they have the zoning for it and they have the legal right to go for it, so they're doing it and in no way shape or form are we attempting to roll out the red carpet and we do have to respect their legal rights and entitlements, but figuring out how we bend over backwards to help the projects that Adam is talking about and working with, but also to in looking at the form and the market, which is why we've looked at freeing up a lot of regulations in places like Līhu'e, in places like Kalaheo, or in places like Waimea where there isn't really a market demand on the global speculative side to buy 1,000 square foot units in Līhu'e and by doing that kind of free up that market product. The (inaudible) is a special case because we would never entertain, say, upzoning, or bending over backwards to help any type of condominium right on the ocean, (inaudible) generally for high-end speculative markets. You've seen the luxury market really shift to those large scale 5, 6, 7,000 square foot housing, no longer so much of the condominiums that we saw in the eighties and nineties along the coastline. (Inaudible) happening. And you had a very savvy, was very fortunate to have her and her team over here working sometimes with Adam, sometimes in just looking at these vacant parcels and saying I

can use things like (inaudible) credits and various federal grants to actually convert what should be a luxury high end product and ensure those can go to the affordable market, so that's kind of what happened there, is without any impediments or restrictions imposed by us (inaudible) chasing federal tax credits to make it pencil out (inaudible).

Mr. Roversi: And they came along at a moment when A&B was working to divest itself of this land hold on all of his landholders on Kaua'i and become a, you know, real estate commercial real estate firm, yet they didn't want to be in charge of an empty land anymore.

Ms. Apisa: Okay, last question for me. That line was that was flat of all the money for affordable housing coming into Kaua'i and then it (inaudible) what was that, because as a realtor, developers were never interested in doing affordable housing until about a year or so ago and then now, I mean, I hear from various developers about looking and doing affordable housing. What's changed? Is there more funding available or tax benefits or why? In the last year or 2, did the attitude change.

Mr. Roversi: I think it's a couple of things and even though I'm the current housing director, I don't like to take credit for it because I think my predecessors did a good job in, and took a little while for the word to spread among the development community, but Kaua'i compared to some of the other counties has done a very good job leveraging our limited resources to assist our development partners. So, I mentioned that we add those federal grant programs, they're not a lot of money, but when we pair those with our motto of, we are providing the land for free, we're providing infrastructure, we're providing these this stack of federal grants and in addition we throw in a little bit of county money it's not much, but all of those things put together, the way the state gives out its money, is based on a scoring system, so by the county assisting and partnering with the private developer or a non-private developer, it boosts their score, which means they are more likely to get state tax credit financing, and I think we just over the last decades had created a sort of a track record of successful projects and none of them have failed, they've all being fully occupied, the developers are making their cuts, so I think that our, we as a good place to do business for those people is to become known on the street. You pair that with the fact that there is, housing and affordable housing at the federal level, at the state level, and even at the county level has become more and more in the news and an upfront issue and there's been influx of additional federal and state funds into housing (inaudible) large, so we've been a beneficiary of that because we've established an attractive environment for developers of a certain type at least, we've been able to attract more of those funds.

Ms. Apisa: Well, good job. Actually, I thought what about the Waipouli Courtyard, I think it's called, is that looking like that's going to go back to affordable or...

Mr. Roversi: I can offer, I'm aware that they apply for state funding to assist in the acquisition. They're applying for low-income housing tax credits, and I know just from informal conversations with the folks at (inaudible) that they have well more than 20 projects applying for funding, and they have enough funding to award maybe 6, so there's a lot of competition out there for the funds that are a small pool of funds.

Ms. Apisa: Thank you. Excellent. Very good update.

Ms. Streufert: Thank you very much.

Mr. Ako: Thanks for coming.

Mr. Roversi: Thanks for inviting me.

Mr. Hull: Thanks for the briefing, Adam.

Ms. Apisa: Keep up the good work.

Mr. Hull: With that, I'm (inaudible) the formal motion to move on. We have no Communication. I'll turn it over to the Subdivision Committee Chair for the Subdivision Committee Report.

COMMITTEE REPORTS

Mr. Ako: (Inaudible) the Kaua'i Planning Commission Subdivision Committee did meet this morning. I was there with Donna, as well as Jerry. We had 1, 2, 3, 4, 5 items on our agenda. Four of them were request for extensions, which two were deferred, two were approved and one was just a subdivision (inaudible) of the property, all of those passed. So, we met at...

Ms. Apisa: 8:30 sharp we started.

Mr. Ako: We met at 8:30 and we ended at 11:05.

Chair DeGracia: Commissioners, seeking a motion to approve the report.

Ms. Streufert: I'd like to approve Subdivision Committee Report.

Ms. Apisa: I second and accolades to Jerry running a good meeting.

Chair DeGracia: Motion on the floor is to approve the Subdivision Report. We'll take a voice vote. All in favor say aye. Aye (unanimous voice vote). Oppose? Hearing none, motion carries. 6:0.

Mr. Hull: I can say, Commissioner Apisa, that your statement calling Commissioner Ako, Jerry might've been an accident (inaudible) Jerry Ornellas...

Ms. Apisa: Gerald.

Mr. Hull: I can state that when Mr. Ako played professional minor league baseball, I have actually seen baseball cards in which is Jerry Ako, so...

Ms. Apisa: I meant Gerald.

Mr. Ako: I don't think that's streamlined to the topic we have.

Mr. Hull: Moving on. Next Agenda Item L. New Business.

NEW BUSINESS

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2023-11) to allow construction of a new single-family dwelling unit on a parcel situated along the makai side of Kealoha Road in Kapa'a, situated approximately 200 feet east of its intersection with Keaka Road and further identified as 1004 Kealoha Road, Tax Map Key: (4) 4-5-001:012, affecting an area of approximately 10,125 square feet = **Craig and Jill Schwed.**

Mr. Hull: Before I turn over to the Planning Staff for the Director's Report. Technically this is a separate agenda item. We don't have any additional member signed up to justify. Is there anybody in the public that would like to testify on this agenda item? If so, please approach the microphone. Seeing none, I'll turn it over to Dale for the director's report pertaining to this matter. Dale, (inaudible) I think we can be as brief as possible. The report has been on the record for some time.

Staff Planner Dale Cua: Good afternoon, Planning Commissioners. I'd like to summarize the Director's Report.

Mr. Cua read the Summary, Project Data, Project Description and Use, Additional Findings, Preliminary Evaluation, and Preliminary Conclusion sections of the Director's Report for the record (on file with the Planning Department).

Chair DeGracia: Thank you, Dale. Commissioners, any questions for the department?

Ms. Streufert: We've heard today many times that people were afraid of wastewater and disposal, and this one has a Septic system, and it is theoretically enough for five bedrooms. Is that correct?

Mr. Cua: Existing wastewater system...I think, if I remember correctly can serve up to five bedrooms, per system. Though that would probably include existing residence as well as this proposal.

Ms. Streufert: So, there would be less than five bedrooms?

Chair DeGracia: Any further questions, Commissioners? If not, I'll welcome the applicant to come up and give a presentation or representative.

Mr. Jonathan Chun: Good afternoon. Jonathan Chun on behalf of the applicants, Craig and Jill Schwed. We have the reports and the recommendations, and we have no comments other than what we want to apologize for on the report, on our (inaudible) elevation, it was noted that we did not include, the one foot and the 3 foot, as Dale noted, we are the first to go through that. That information was on the plans, but I believe what they wanted was to actually show the elevation, so we will correct it all future ones, but for benefit of the commission. It is a one foot and that is noted on the plans as a notation not on the elevation but the notation that there is a one-foot requirement, and the bottom level is raised up to four feet, so there's a one foot requirement, an additional two foot as required under the flood zone, so that means minimum is a three feet and that has to be fitted up overground for the main living area. The main living area according to the floor plans is four feet so we meet that requirement, we just need to work with our, plan prepared to make sure that those things are on the things, but the information is there. We do have enough (inaudible) design was made to comply definitely with the flood zone, the new requirements. Also, in regard to the question that Commissioner Streufert indicated, yes, there is a current, waste, septic system ISW on there. It is designed or was designed for five bedrooms the current house only has three. This one is designed only for one, so we're well within the current existing, improved based water system, so that would not be an issue. I believe there was no (inaudible) form (inaudible) on that for the need to upgrade. This project is for the, I don't want to say affordable, but what is for a long-term rental. It is not going to be used for a tans vacation rental, that can't be done. It is intended strictly for a long-range rental for a family to rent and to live in the Kapa'a area, well, hopefully they can work in the Kapa'a area. It is well within the design or the idea of the of the general plan (inaudible) have communities and houses and developments, so that people can live and work in the same area. It is definitely within a walkable and bicycle and bicycling area of the shopping areas of Kapa'a. This would be a good addition to it and a good place for somebody who wants to stay in the Kapa'a area to live and work in the Kapa'a area. So, it is something it is, we'll meet the needs of the affordable housing, on needs of this island. So, we ask the commissions, consideration of this application. If there's any questions that you have, the applicants are all here to answer your questions in terms of, what they're using the house for and what they're intended to do, but that is what our project and application is for today. And we're happy to answer any questions you have.

Chair DeGracia: Thank you, Jonathan. Any questions, Commissioners?

Ms. Streufert: I think this is a question more for Dale, but somewhere in here it has, I read that there was an erosion rate of .66 feet per year. That's 8 inches per year.

Mr. Chun: If I can answer, yes, the SOEST, reports from the university report, indicate that area has the erosion rate of .66 per year.

Ms. Streufert: That's 8 inches per year.

Mr. Chun: Correct.

Ms. Streufert: Okay.

Chair DeGracia: Commissioners, any further questions? Hearing none, I'll entertain a motion. Sorry, Dale, can we have the recommendation.

Mr. Hull: (Inaudible). Recommendation stands on as is, as we provided, unless the commission has a strong urge to hear us read it verbatim onto the record, it has (inaudible).

Mr. Ornellas: Move to approve Special Management Area Use Permit (SMA(U)-2023-11).

Ms. Streufert: Second.

Chair DeGracia: Commissioners, motion on the floor is to approve SMA Use Permit 2023-11. Could we get a roll call vote, Mr. Clerk?

Mr. Hull: Roll call, Mr. Chair. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner Apisa?

Ms. Apisa: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: Aye.

Mr. Hull: Commissioner Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: Aye.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Aye.

Mr. Hull: Motion passes, Mr. Chair. 6:0.

Mr. Chun: Thank you, Mr. Chair, and members.

Ms. Otsuka: Thank you.

Mr. Hull: Thank you for your patience today.

Chair DeGracia: Okay, before moving forward we're gonna take a five-minute recess. Thank you.

Commission went into recess at 3:17 p.m.
Commission reconvened from recess at 3:25 p.m.

Chair DeGracia: Call the meeting back to order.

Mr. Hull: Moving on to the last agenda item before executive session and adjournment,

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2023-10), CLASS IV ZONING PERMIT (Z-IV-2023-10), USE PERMIT (U-2023-7) to allow construction of public shared use path extending from Nawiliwili Park to Ahukini Landing and associated improvements involving a new comfort station, drainage ways, protective fencing and paved parking area, and SHORELINE SETBACK VARIANCE PERMIT (SSV-2023-1) to deviate from the shoreline setback requirement involving properties along makai side of the Lihue Airport, further identified as Tax Map Keys: 3-5-001:004, 005, 008, 009, 085, 092, 102, 128, 158 & 160; 3-7-002:001 (Por.) and affecting a total area of approx. 9.2 acres = **County of Kaua'i, Department of Public Works.** [Director's Report Received 4/25/2023.]

Mr. Hull: We don't have any signed up for this second go around on the agenda, but is there anyone in the public who would like to testify this agenda item? If so, please approach the microphone. Seeing none, I'll turn it over to Romio for the very brief Director's Report pertaining to this matter. This is a reminder, I know this is a bit déjà vu for the commission, this was before the planning commission at last meeting the commission or the meeting prior to that. The commission did take action in the affirmative of approving the application, however, after the application was approved, it was brought to our attention that the adjacent property notification requirement have not been met and with that informed the applicant that we have to go through the hearing again as well as allowing the public to provide any additional testimony now that they're, the adjacent property owners have been formerly noticed. We have not received any written testimony from adjacent property owners that have been noticed., or I stand corrected (inaudible). Ultimately it is a for lack of a better term, a redo, if you will of the application, in which everybody was formerly noticed. Romio is going to give the Departments report again. We are (inaudible) public testimony. Testimony was received this morning during the agency hearing portion of this agenda item, with that, I'll turn it over to Romio (inaudible).

Mr. Idica: Aloha, Chair and Commissioners, for your consideration of Class IV Zoning Permit (Z-IV-2023-10), Use Permit (U-2023-7) and Special Management Area Use Permit (SMA(U)-2023-10), and Shoreline Setback Variance SSV-2023-1.

Mr. Idica read the Summary, Project Data, Project Description and Use, Additional Findings, Preliminary Evaluation, and Preliminary Conclusion sections of the Director's Report for the record (on file with the Planning Department).

Mr. Idica: Any questions for myself or the applicants?

Ms. Streufert: I know that we talked about the ASR, but I assume that also includes the airport facilities as it is it's still behind the fence, but that is also a security thing, but I presume that's also included in there, in that amendment. Not just the ASR but also the airport security.

Mr. Idica: Right now, the amendment that was stated on May 9th that it was pointed to the radar in ASR, so I guess we need to amend the amendment.

Mr. Hull: (Inaudible) include the airport, (inaudible).

Ms. Streufert: It would make sense to do that.

Chair DeGracia: (Inaudible) right? (Inaudible).

Mr. Hull: It would be State Department of Transportation, Airports Division, I believe.

Mr. Idica: (Inaudible) department. We will get comments from Department of Transportation Airports.

Mr. Hull: Yeah.

Mr. Idica: Regarding that.

Mr. Hull: So, if you could read that fully on the record, Romio.

Mr. Idica: So, Condition No. 9 will read prior to the building permit approval the applicant shall secure written confirmation from the Federal Aviation Administration, Transportation Security Administration, Department of Transportation Airports, Department of Homeland Security and Air Traffic Control that the security of the radar and ASR will not be compromised by the proposed projects. No comments received by any of the agencies within 60 days shall be considered no objections and the applicant may proceed to building permit review.

Ms. Streufert: Can we add, and airport? The airport...

Mr. Hull: Airport facilities.

Ms. Streufert: Airport facilities

Mr. Idica: (Inaudible) noted.

Chair DeGracia: Commissioners, any further questions for the Department, or comments? If not, I'd like to hear from the applicant.

Mr. Jim Nierman: Good afternoon, Commissioners. My name is Jim Nierman. I'm a planner with R.M. Towill Corporation and serving as agent for the DPW in this action. I just want to say one, it's good to see you all again and I apologize for having to see you all again for this particular agenda item, but I'd be happy to go through the presentation or to address any specific questions or to speak to the comments that were made earlier. (Inaudible).

Ms. Streufert: Could you speak to some of the comments that were made this morning about the iwi kūpuna, and, what you're doing? You have told us about it before in pretty much detail, but because this is going to be on the television, it may be useful to restate it so that everybody knows it, because as I heard this morning there was a lot of comments and a lot of angst about it.

Mr. Nierman: Yeah, understood. There are kind of two points that I took away from this comments that I'll speak to. One is just the presence of iwi kūpuna, and other cultural resources in our project corridor (inaudible), so, we did expensive studies of the project corridor going from Ahukini Point to Ninini Point and actually through the entire scope of Phase 6 of this project of which we're presenting Phase A, which

ends it's pretty much at Kapule Highway. So, for any of the resources, one of the concerns, cause I know the views expressing concern about iwi kūpuna and the Hanamā'ulu section, I think to my understanding, those have been adequately addressed and studied, and mitigation measures are proposed for those resources, but I would be speaking out of turn in asserting that, but I did want to say this, is that the subject of segmentation of the project, so, in the previous presentation that I gave, I did describe a cynical view of these types of projects where the strategy of rolling them out is, you know, there may be some strategy to it and building up segment by segment to a certain point, but at the same time each project is, does have its own logical terminus and this project does, so what happens in our project as an extend to the Hanamā'ulu section, and it doesn't, doesn't it require that segment to be built, it stands on its own. Within our segment from Ahukini to Ninini, we're on a rocky shoreline. An archaeological inventory survey that was conducted did identify one site that was potential burial, a potential burial mound that consisted of 'ili'ili stone. It was also interpreted potentially as a (inaudible) file. In any event, the mitigation measure was to avoid it with a (inaudible) buffer of 50 feet, and so the path avoids that feature and then it's not intended to be called out in any interpretive signage or any attention drawn to that feature. In addition an archaeological monitoring plan is required, is one of the mitigation measures and that would need to be approved by SHPD prior to any ground breaking activities, and that would include, having archaeological monitors either on site or on call that will be determined as they develop that plan as well as education for all the construction workers on what types of conditions to look for when they're in the field, should they encounter any cultural remains, whether they're iwi kūpuna, or other cultural artifacts. The conditions in the site, we don't go through any (inaudible) sand deposits that are typically indicative of burials or frequently associated with burials, and the site has also then pretty extensively disturbed with agricultural activity over the years. So, we think we've done some very diligent work to determine what's there, what the potential are, and then through consultation with the kānaka maoli community, through the NHPA (inaudible) process, and develop mitigation that we think will safeguard those (inaudible) wishes.

Chair DeGracia: Commissioners, any further questions? Hearing none, I'll hear the Directors recommendation.

Mr. Idica: Based on the foregoing evaluation and conclusion, it is hereby recommended that Class IV Zoning Permit Z-IV-2023-10, Use Permit U-2023-7, Special Management Area Use Permit SMA(U)-2023-10, and Shoreline Setback Variance Permit SSV-2023-1 be approved with conditions as outlined in the Director's Report and as amended on the floor.

Chair DeGracia: Thank you. Commissioners, I'll entertain a motion.

Ms. Streufert: I move that we approve Class IV Zoning Permit Z-IV-2023-10, Use Permit U-2023-7, Special Management Area Use Permit SMA-2023-10, and Shoreline Setback Variance SSV-2023-1.

Ms. Barzilai: Chair, I would add, with conditions as amended.

Ms. Streufert: with conditions as amended.

Chair DeGracia: Commissioners, motion on the floor is to approve with condition as amended.

Ms. Apisa: Second.

Chair DeGracia: Okay (inaudible). Motion on the floor is now, motion to approve with conditions as amended. Can I get a roll call vote, Mr. Clerk?

Mr. Hull: Roll call, Mr. Chair. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner Apisa?

Ms. Apisa: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: Aye.

Mr. Hull: Commissioner Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: Aye.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Aye.

Mr. Hull: Motion passes, Mr. Chair. 6:0.

Mr. Nierman: Thank you.

Chair DeGracia: Thank you.

Mr. Hull: Next, (inaudible) executive session. (Inaudible) with adjournment.

Ms. Barzilai: (Inaudible) the commission must vote (inaudible).

Mr. Hull: Oh, I stand corrected.

Ms. Barzilai: So, they're going to come back out (inaudible). Mr. Bradbury presents (inaudible).

(Multiple people talking)

Ms. Barzilai: (Inaudible) a short statement right now and also (inaudible) us to come back into open.

Mr. Hull: Yeah.

Chair DeGracia: Fellow Commissioners, being consistent with my position of recusing the last time this item came up on the agenda, it's because of my employer's relationship with a Pacific Research Partnership that I will recuse.

Ms. Barzilai: Chair, (Inaudible). This item is a litigation update from our Deputy County Attorney, Mark Bradbury. I recommend that we enter into an executive session by motion. (Inaudible).

Ms. Streufert: I move that we go into executive session.

Mr. Ornellas: Second.

Vice Chair Apisa: There's a motion on the floor to go into executive session. All in favor?

Ms. Barzilai: I'll call a roll call on that.

Vice Chair Apisa: Okay, thank you.

Ms. Barzilai: Commissioner Ako?

Mr. Ako: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: And now, Chair Apisa?

Vice Chair Apisa: Aye.

Ms. Barzilai: Motion carries. We (inaudible). Deputy County Attorney, Mark Bradbury, my colleague, and he will present on the (inaudible)

Commission Support Clerk Lisa Oyama: Hold on, we're not ready yet.

Ms. Barzilai: Oh, we're not ready.

Ms. Oyama: Shan has to mute...

Commission went into Executive Session at 3:43 p.m.

Commission returned to Open Session at 4:04 p.m.

Ms. Barzilai: We're back in open session. Pursuant a new state law, Act 19, I'm obligated to read the following statement: The commission has concluded its executive session on (inaudible). The matters discussed in this executive session are subject to nondisclosure under Hawaii Revised Statute, Section 19-584. The commission will now proceed with their final action on this item. They can be someone to discussion on the record if you like.

Vice Chair Apisa: Does anyone have, any further discussion in open session on (inaudible) number 22, I'm sorry, it's actually 55.

Ms. Streufert: I move to forego filing an appeal to the Intermediate Court of Appeals in Fifth Circuit Court, Case No. 5CCV-22-0000055 (inaudible) Association of Poipu Aina Estates vs. Planning Commission and HPM.

Vice Chair Apisa: We have a second?

Mr. Ornellas: Second.

Vice Chair Apisa: Thank you. Is there any further discussion on this? Hearing none, I'll call for a roll call.

Ms. Barzilai: I'll do by roll call. I can do this. Commissioner Ako?

Mr. Ako: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Chair Apisa?

Vice Chair Apisa: Aye.

Ms. Barzilai: Motion carries. 5:0. Motion to forego filing of an appeal and Poipu Aina Estates vs. Planning Commission and HPM. We will now require a second motion.

Ms. Streufert: I moved forego filing an appeal to the Intermediate Court of Appeals in the Fifth Circuit Court Case No. 5CCV-22-000049 and 5CCV-22-0000060 consolidated. Pacific Resource Partnership vs. Planning Commission and HPM.

Vice Chair Apisa: Is there a second?

Ms. Otsuka: Second.

Vice Chair Apisa: Any discussion on this? Hearing none, I'll call for a roll call.

Ms. Barzilai: Roll Call. Commissioner Ako?

Mr. Ako: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Chair Apisa?

Vice Chair Apisa: Aye.

Ms. Barzilai: Motion carries. 5:0. Motion to forego appeal (inaudible) Pacific Resource Partnership vs. Planning Commission and HPM.

Mr. Bradbury: Thank you.

Ms. Otsuka: Thank you.

Vice Chair Apisa: Thank you very much.

Ms. Barzilai: Did we call for public testimony (inaudible)?

Mr. Hull: So, with that, Our topics for future meeting:

ANNOUNCEMENTS

Mr. Hull: We have some deferrals today. For the next meeting we did publish in the agenda that we anticipate if being held in the same Boards & Commissions room, however we do anticipate (inaudible) we will do it officially at least six or seven days prior to the meeting and we, but we do anticipate that meeting to be held at the Historic County Council Chambers on July 11th, but we'll finalize that once we have gotten there. With that we don't have further announcements, but if there's any questions, discussion, requests to agendaize, we're all ears.

Mr. Ako: I have a question; you know when we publish on the website (inaudible). Why is that? That the pointer right next to the commission agenda.

Mr. Hull: The Subdivision Committee Agenda should be a separate, should be part of the packet.

Mr. Ako: The Packet, the packet, I think is at the top, right. The (inaudible) when you go to the subdivision notice (inaudible) it's at the very (inaudible) bottom, gotta scroll all the way down.

Planning Secretary Shanlee Jimenez: We changed it. I think that's the old website, right.

Mr. Ako: Oh, I don't know.

Ms. Oyama: They have a new one.

Mr. Hull: Yeah, so we do have a new website, and before we used to have both the subdivision and the Planning Commission published separately and then also part of the main packet, but I'm not sure if the reformatting, if they (inaudible), we can take a look though. It should have its own agenda.

Mr. Ako: There's only one place now, I mean there's Planning Commission and there's the commission (inaudible) as well, and the subdivision in one.

Chair DeGracia: There's three drop down menus that (inaudible) they now (inaudible) and the packets within separate (inaudible). Subdivision and the main body (inaudible).

Mr. Hull: We can double check (inaudible). (Inaudible) Commissioner Ako...

Mr. Ako: (Inaudible) because that lady this morning saying that she didn't know that it was 8:30 (inaudible).

Mr. Hull: She mentioned that to me, while (inaudible) that I did verify that the Subdivision Agenda was publicized at 8:30 a.m., so...she was mistaken. (Inaudible). Other than that, I think the Department or the commission (inaudible) ready for adjournment. Sorry, I know it's been a long day.

Ms. Otsuka: Motion to adjourn.

Ms. Streufert: Second.

Chair DeGracia: Commissioners, motion on the floor is to adjourn. All in favor say aye. Aye (unanimous voice vote). Oppose. Hearing none, meeting is adjourned. Thank you. 6:0.

Chair DeGracia adjourned the meeting at 4:10 p.m.

Respectfully submitted by:

Lisa Oyama,
Commission Support Clerk

() Approved as circulated (date approved).

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

Chair DeGracia: Yes, the Commission would like to take a 15-minute recess to review this current item, so we'll reconvene in about 15-minutes, at 9:25.

Commission went into recess at 9:09 a.m.
Commission reconvened from recess at 9:25 a.m.

Mr. Hull: Moving on, we have no further items on Consent Calendar or General Business, so, we move into the Subdivision Committee.

COMMITTEE REPORTS

Subdivision Committee

EXECUTIVE SESSION

Chair DeGracia: Pursuant to Hawaii Revised Statutes Sections 92-4 and 92-5(a)(4), the purpose of this executive session is to consult with the County's legal counsel on questions, issues, status, and procedural matters. This consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Commission and the County as they relate to the following matters:

Subdivision Application No. S-2005-41
Visionary LLC. DBA Lihu'e Land Company
Ahukini Makai Subdivision
Proposed 49-lot Subdivision
TMK: (4) 3-7-002: 001 (por.)
Hanama'ulu, Lihu'e, Kaua'i

Chair DeGracia: Motion on the floor is to go into executive session. We'll take a voice vote. All in favor say aye. Aye (unanimous voice vote). Oppose? Hearing none, before we go in, how much time? 15 minutes?

Mr. Hull: Probably.

Chair DeGracia: Okay, so we'll go into executive session to reconvene in approximately 15 minutes.

Commission went into Executive Session at 9:45 a.m.

Commission returned to Open Session at 10:36 a.m.

Chair DeGracia: Okay, time is 10:36, I'd like to call the commission meeting back to order, and to the public, thank you very much for your patience, there's a lot to discuss. At this time, Commissioners, before we take any actions and motions on accepting this Subdivision Committee Report, do we have any discussions? Or would you like to have any discussion on this agenda item? Being that there's been a whole bunch of information and testimonies from...

Mr. Ako: If I can, Mr. Chair. Sitting in as the Chair for the Subdivision Committee meeting, we did go ahead and have discussions regarding the permit, in the Ahukini area regarding the industrial area, and we think we had some discussion on that and yet as we come to this portion of the meeting here, where it referred to the entire Commission itself having had new testimony on it, I think there's been new information that has been passed on to hear that I think we'd like to consider. I know a lot of times going back into some of the testimonies that come out, I know part of the criticism has always been, we come up here for what, and it's a matter of, we come up here, we spill our guts out and then come 30 seconds later it's done like that without any real major consideration on it, so I think this one because of what has been testified to the entire Commission here, new information, I think I will have a different view and approach on this issue at this time.

Chair DeGracia: Thank you, Commissioner Ako, and then for myself, in addition to new information and testimony, there's also, I personally felt that there's some requirements in this application concerning the Ka Pa`akai O Ka`Aina Analysis that I'd feel a lot more comfortable if it was completed before taking action on it.

Ms. Cox: I think it was also helpful to have the executive session, so we had learned from the attorney what our job as a full commission at this point is, what our options were, so that was helpful to know since we heard additional testimony.

Chair DeGracia: Commissioners, before I move forward, I'd like to invite the applicant back up.

Mr. David Hinazumi: Good morning, David Hinazumi on behalf of Visionary.

Chair DeGracia: Good morning, David. Commissioners, any questions? I have, I'd like to reserve it, unless you guys have any at the moment. Just to clear the air, I believe I sat in the Subdivision Committee, and I overheard, I guess a commitment towards completing a Ka Pa`akai O Ka`Aina Analysis moving forward. Just a question, you guys have a time frame or has that been set in motion already?

Mr. Hinazumi: Yes, so just a little bit of history, again, this is an old subdivision, unfortunately from 2005, at the time of subdivision there was no requirement to do the Ka Pa`akai, of course recently there's a much larger focus on finishing the Ka Pa`akai, so even though it wasn't a requirement we still went ahead and ordered a Ka Pa`akai to be done, so it's in progress right now, there's been two rounds of outreach, there has been some input coming in, I believe some of the input is kind of been in relation to

some of the testimony that you've heard today. Throughout today, yes, we've been given new information as well and our commitment is to finish that Ka Pa`akai Analysis. We've got additional people that we've been made aware of that should also be consulted throughout the process. The consultant did have a fairly lengthy list of people that they already did the outreach to and as we get more information there's outreach that we will do, so we are committed to finish the Ka Pa`akai Analysis for this project.

Chair DeGracia: Okay, thank you. Commissioners, any questions, comments for the applicant, anything further?

Ms. Streufert: If this is already in progress, when do you anticipate that this would be completed?

Mr. Hinazumi: Unfortunately, we're not quite sure yet, of course, what I mentioned as for new information of additional people to speak to, we'll get that process going as soon as possible, (inaudible) right after this meeting or by tomorrow, start working on getting those additional contacts, hopefully we can get the input in a reasonable time, I couldn't tell you what that is but as soon as can, yes we want to complete it because this analysis we're doing it for other subdivisions as well, that we want to get them finished.

Ms. Streufert: One final question from me, if we were to approve this subdivision application, and you're continuing this Ka Pa`akai Analysis, during the time between now and when you complete it, what kind of work would you do on the land? Would all work stop until it's been completed?

Mr. Hinazumi: There's no work to be done immediately after subdivision approval is granted, it will take some time before any construction could occur as there's steps that need to be taken, and yes, we want to complete this Ka Pa`akai to make sure there's, within the industrial area where construction will occur and there will be disturbances to the ground, we want to make sure we're going to be clear. We've gone through SHPD, there was an inventory study done, we want to get the additional information from this Ka Pa`akai Analysis in those areas. There is a remainder parcel that is created out of this subdivision, that is the cliff side, overlooking Hanamā'ulu Bay, and that area we know, we've been aware that that is an area of definite interest, we want to make sure that we take a look at that area and see what can be done to preserve that.

Chair DeGracia: Commissioners, anything further for the applicant? Okay, David any last comments for this Commission?

Mr. Hinazumi: No.

Chair DeGracia: Okay, thank you.

Ms. Streufert: Okay, I think then that I'm ready to propose a motion.

Ms. Otsuka: Thank you.

Ms. Streufert: Based on the information that we have received today and the testimonies that we have received, I move that we refer this application back to the Subdivision Committee until there is a completed Ka Pa`akai Analysis and based upon what I heard just now it may have any impact upon the time frame because they were not going to do anything until it was completed anyway.

Ms. Cox: I will the second the motion.

Chair DeGracia: Okay, Commissioners, motion we have on the floor is to refer it back to the Subdivision Committee to address the Ka Pa`akai O Ka`Aina Analysis. Could we get a roll call vote, Mr. Clerk? Actually, any further discussion before we take a vote?

Ms. Cox: Is it important that we put in the motion that they are waiting for a completed Ka Pa`akai Analysis? You said that...

Chair DeGracia: Yeah, I believe...

Ms. Cox: ...but Francis (inaudible) restated it, so I just wanted to make sure that it is, that the sub committee going to waiting for a completed Ka Pa`akai Analysis and then...

Mr. Hull: It will be reflected by the motion maker.

Ms. Cox: Okay, thank you.

Mr. Ako: If anything, Mr. Chair, I'd just like to thank those that came out to testify on this issue over here and hopefully it makes a difference in terms of why people come out and hopefully this will encourage other people to come out also.

Chair DeGracia: Good point, Commissioner. Nothing further. Mr. Clerk?

Mr. Hull: Roll call. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner Cox?

Ms. Cox: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: Aye.

Mr. Hull: Commissioners Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: Aye.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Aye.

Mr. Hull: Motion passes, Mr. Chair. 6:0.

UNFINISHED BUSINESS (For Action)

In the Matter of Planning Director Kaaina S. Hull's Petition to revoke Applicant Bula Tree House LLC Use Permit U-90-38 and Class IV Zoning Permit Z-IV-90-51 (former Mark Daniells art

gallery approved in 1990), and Use Permit U-19-78 and Class IV Zoning Permit Z-IV-78-28 (former Diane Daniells pre-school approved in 1978) for failure to comply with conditions of approval by the Planning Commission and Issue an Order to Show Cause and Set Hearing; Memorandum in Support of Petition; Declaration of Kaaina S. Hull; Notice of Meeting; Certificate of Service, TMK (4) 5-5-004: 23, Hanalei, Kaua'i. [Deferred 2/14/2023, Deferred 4/11/2023.]

Mr. Hull: This is petition for revocation that you folks received from myself several months ago. It was not received in time to place it on the agenda and transmit it to you ahead of time of the meeting, but you folks are all in possession of a stipulated revocation of the subject permits from the applicant's representative, Ian Jung. The Department has reviewed the stipulated agreement and are fine with the stipulated agreement. Being that you folks have just received it, I know you folks read it, ultimately the Department is asking for a deferral until the next Planning Commission meeting for you folks to review it if necessary and if there's any proposed amendments, if not, I'm getting quizzical looks, that some of you folks are maybe willing to take action today, I have no problem taking action today, we are in agreement with the stipulated agreement draft. You may want to ask the attorney representing the applicant if he's okay with action today, otherwise if any individual wants deferral on this item, to further review, the Department has no objections to that as well.

Mr. Ian Jung: Good morning, Commission, Ian Jung on behalf of Bula Tree LLC. I actually drafted the proposed stipulation, so if you want to sign it today that's fine with us, and I've been in contact with the, one of the complainants and I gave them an opportunity to review it and I got an email saying that they're fine with the approach and the terminology. Essentially there's two older entitlements that were associated with this property, one with a regard to a pre-school operation that is no longer in use and there other one for a small 288 square foot little commercial space that's been used for an art gallery, which we worked with the Planning Department and the complainant to try and cease the use by December 31st of year, 2023, and based on those terms of the stipulated revocation, the operation would cease by that date, on or before that date, so they had a new tenant come in and they want to just give them time to wrap up operations. So, I did speak with the Deputy County Attorney if they want time, it's fine with us but if you guys are fine with the draft now, once it's signed by the Planning Director, we will sign it and the Commission, I believe signs it thereafter. And it basically functions like a stipulated finding of fact, conclusions of law, decision and order, so just a formal mechanism to terminate the permit on the records.

Mr. Hull: Just a little further background, if you recall, this is an art studio that was supposed to be temporary in nature has been operating for years, and without the associated school use that was occurring there previously that was considered an accessory too, so the Department did finally make a move this past year to look at revocation of those permits, and quite honestly, in a contested case hearing, revocation proceedings would take a minimum of a year and a half to possibly two years, with the applicants right, should they choose to do so to appeal on up to the further court system, so Mr. Jung coming in here with a proposed stipulated agreement to end that within this calendar year is a much quicker resolution than what could get to contested case, which is why the Departments amendable to it.

Ms. Otsuka: It's nice for me to be able to see, so on page 5, it does state, tenant to cease the art gallery use on or before December 31st. 2023. So, it's nice for me to see, visually.

Chair DeGracia: Commissioners, any questions? Comments?

Ms. Streufert: So, the Department is in agreement with the stipulated?

Mr. Hull: Yes. I guess if there are no further questions for the owner's representative or the Department, it is an agenda item, we should ask for public testimony.

Chair DeGracia: Thank you, Ian.

Mr. Jung: Thank you.

Chair DeGracia: Is there anybody in the public who wishes to testify on this agenda item?

Mr. Hull: Sorry, we've been dinged enough by OIP.

Chair DeGracia: Hearing none. Commissioners, I'm willing to receive a motion for this agenda item, whether to defer it or to approve the stipulated revocation of use permit.

Ms. Otsuka: So, it's approve not accept? Approve?

Mr. Hull: Approve.

Ms. Cox: I'll make a motion to approve the stipulated revocation of Use Permit U-90-38 and Class IV Zoning Permit Z-IV-90-51 and Use Permit U-19-78 and Class IV Zoning Permit Z-IV-78-28, that was brought to us today.

Ms. Otsuka: Second.

Ms. Cox: Or do I have to say something else?

Deputy County Attorney Chris Donahoe: Just also the findings and facts.

Ms. Cox: Findings that support conclusions of law and decision and order Exhibits A through D.

Ms. Otsuka: Second.

Chair DeGracia: Okay, Commissioners motion is on the floor to approve the stipulated revocation of Use Permit and other stuff. We'll take a roll call vote, Mr. Clerk.

Mr. Hull: Roll call, Mr. Chair. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner Cox?

Ms. Cox: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: Aye.

Mr. Hull: Commissioners Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: Aye.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Aye.

Mr. Hull: Motion passes, Mr. Chair. 6:0.

NEW BUSINESS (For Action)

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2023-10), CLASS IV ZONING PERMIT (Z-IV-2023-10), USE PERMIT (U-2023-7) to allow construction of public shared use path extending from Nawiliwili Park to Ahukini Landing and associated improvements involving a new comfort station, drainage ways, protective fencing and paved parking area, and SHORELINE SETBACK VARIANCE PERMIT (SSV-2023-1) to deviate from the shoreline setback requirement involving properties along makai side of the Lihue Airport, further identified as Tax Map Keys: 3-5-001:004, 005, 008, 009, 085, 092, 102, 128, 158 & 160; 3-7-002:001 (Por.) and affecting a total area of approx. 9.2 acres = County of Kaua'i, Department of Public Works. [Director's Report Received 4/25/2023.]

Mr. Hull: Before turning it over to Romio. We don't have anybody signed up; we closed the agency hearing but it is a separate agenda item. Is there any member of the public that would like to testify on this agenda item? Seeing none, I'll turn it over to Romio for the Directors Report pertaining to this matter.

Staff Planner Romio Idica: Aloha, Chair and Commissioners.

Mr. Idica read the Summary, Project Data, Project Description and Use, Additional Findings, Preliminary Evaluation, and Preliminary Conclusion sections of the Director's Report for the record (on file with the Planning Department).

Mr. Idica: That concludes my brief summary of the Director's Report. Before I read the recommendations are there any questions from the Chair or Commissioners?

Ms. Streufert: I do have a couple of questions. This bike path which is something that we all would like to see completed, goes over very sensitive areas, pass very close to the airport, pass a radar surveillance, there's radar ESR, it's on page 24, and they have worked with the DOT, the FAA, as well as the TSA and air traffic control but is there any specific written document that says that all of these entities have agreed to this and that have agreed that this is not a safety issue.

Mr. Idica: We have not received any formal documentation from Dot Airports, TSA, or FAA. We haven't received any formal letters or comments. The applicant did however complete some meeting with DOT Airports and TSA, and they have some written comments from those agencies, but nothing formally written to the Department or the applicant.

Ms. Streufert: Because the radar station is apparently outside the perimeter of the airport, so it's not protected in any way, but the pull boxes are, or they will be modified so that they can be locked against vandalism and theft but there's nothing about the radar station that's out there, which I think is a pretty important piece of our safety, and while I don't think that...this is one of those issues where there's, I think a low risk right now, but a high consequence if something were to happen, but once this goes on to the internet and it will, once it becomes a bike path, there will be lots of people out there and there's no, I think protection right now for that radar station which is outside of that. Who has control of that when it is outside of the perimeter of the airport?

Mr. Idica: That I'm not sure. I would have to do some research and probably get back to you and the Commissioners.

Mr. Hull: We can also ask the applicant, if they can provide any further insight into that particular concern.

Ms. Cox: I have two questions. One of them is because we just got the Department of Waters comments this morning. I haven't seen them before and they did mention that there is no water out to the parcel and isn't going to be a comfort station at Ninini Point, can you just speak to that.

Mr. Idica: I would like to defer to the applicant regarding that and what source of infrastructure there is out there right now.

Ms. Cox: Okay, and then this one I think you can answer but I'm not sure, and that is the drainage 3 that's going to have the long bridge that is 25-foot deviation from what it should be. Is there any danger...I can't picture exactly where it is, but could you speak to the danger of coastal erosion.

Mr. Idica: Right now, the existing shoreline is a rocky shore, it's about a 50-foot-high cliff bluff, so, there is erosion, rocky shores are not indestructible. There is erosion but it's very, very minimum, unless there is a catastrophic event that would pull the whole cliff down to the ocean the Department feels because this is a public access area and yes, we do not take a deviation from our shoreline setbacks to kindly or easily, but we feel that it is necessary to place that bridge in that particular area because of the topography and the existing landscape to avoid any extra grating or excavation.

Ms. Cox: Okay, thank you, Romio.

Mr. Hull: I'll just add to that too because it's a good question, Commissioner and as the path gets expanded it's continuously one of our points of concern. When the original paths in Wailua and Kapa'a were built or even designed, the State of Hawai'i and definitely (inaudible) the County of Kaua'i did not have the studies concerning coastal erosion and sea-level rise at that time. Now having those studies, that path has been put in places that are extremely susceptible to coastal hazards, and there's definitely a good discussion and debate and dialogue that needs to occur around public facilities, proximity to the coastline versus private structures. Private structures close proximity to erodible shoreline that's just bad idea because they're going to have to seawall it and that will make a coastal beach access gone, but from a public facilities park aspect, the park itself, park facilities are intended to create close proximity access to what are sometimes, hazardous areas. Having said that though, your general park, you need to get those restrooms and park facilities close to the beach because that's why the people are going to go to that park, that's the purpose of the park. When you're looking at a bike path or multi-mobile path I should say, I think we definitely in reviewing these new applications, have learned our lesson from the original path, saying, yes, the path can serve a very wonderful public purpose, but having a path next to an erodible shoreline, a sandy erodible shoreline, you need to consider moving that path away so can address and accommodate that coastal erosion, so pretty much in the past five years that has been one of our key focus. Luckily for this proposal there are not many sandy areas, really it's mostly all rocky shorelines, and like I said, those areas that the path is being proposed, like the previous one you folks reviewed last year as well as this one, our position has been, if it's going to be near a sandy shoreline, you need to be located at a distance that can accommodate for erosion without having to necessarily either remove the path and certainly not create a seawall to erase that beach.

Ms. Cox: Thank you.

Chair DeGracia: Commissioners, any further questions for the Department? No?

Mr. Hull: I'm not sure if you guys wanted to bring the applicant up for...

Chair DeGracia: Yes. We can have the applicant's representative.

Mr. Jim Niermann: Good morning, Commissioners. I'm Jim Niermann with R.M. Towill Corporation on behalf of the Department of Public Works. Should I launch in?

Chair DeGracia: Yes, please.

Mr. Niermann: Okay, didn't know if you wanted me to (inaudible) questions. Okay, see if I can share screen here and get this going. Fortunately, I get to spare you a lot of the presentation because Romio covered it. Here we go. So, as he mentioned, I'll kind of go through quickly through the first half of this then we can get to the need of the questions that we've been discussing. As he mentioned, we're Segment 6 of Ke Ala Hele Makālae and these are all of the segments, we're down here and our original scope of work, so we're focused in right now on Phase A of Segment 6. The original scope of work for Segment 6 is Ahukini to Nawiliwili Harbor to Līhu'e and the project purpose, obviously there are multi-fold to develop a multimodal path system to connect both regionally as well locally alternatives to internal combustion of automobile transportation, create a nice recreation amenity for both the residents and the visitors to Kaua'i to promote healthy lifestyles, to build island resiliency by providing this alternative mode of transportation or a infrastructure to support alternative modes of transportation and this speaks to the, right now as far as connecting these communities the highway doesn't have facility other than for internal combustion vehicle other than automobiles, so if you want to get from point A to point B, you're taking your chances or you're either brave, stupid, or skilled or a little combination of all three to navigate the highway to get through this particular 16-mile area. Then in addition on the subject of resiliency this may sound far fetched in some circles but in the potential future where we may have a more volatile energy markets where gas prices may compel more and more people who have already seen it quite a bit to get out of their cars or to make hard choices about transportation and having an alternative mode of transportation would support the resiliency to be able get from point A to point B without having to rely on an automobile or a gas powered automobile. This is our overall Segment 6, kind of our initial objectives. I'll kind of go through this. As you can see all the dash lines in there, that was a total scope of Segment 6 and we're focused in on Phase A, which this we might need to clarify a little bit because Segment E and F, I think, are not part of this application. That's why you don't see them on the screen here, I think, E and F we were initially considering including them, but those would have connected the back of the Kaua'i Marriott down to Nawiliwili Park, two separate sections here. So, everything in yellow here is what's being proposed to be developed by the county. The blue, that's Segment B and D, those will be developed by Timbers Resorts, so separate. And (inaudible) should be looking down here, hopefully the colors are coming through, but the blue highlight is the SMA area of the 17,000 linear feet of path that's within the SMA, about 8,000 of that is within the conservation district as well, and that's essentially stretching from right here at this point, which is the drainageway 3, where the new bridge is proposed, that prefabricated bridge. You can see the cursor here, so right here all the way to right here this is all the conservation segment. There are few places like in drainageway 4, it dips out a little bit, and I think there's one or two others where the conservation line and the SMA line don't exactly align. Zoning, I know Romio mentioned, but we have a little bit of the blue down here is the Ag, Conservation is the yellow, we're actually all on the makai of Ahukini Road, down at Ahukini Point. We go into the IG STP zoning in the gray around the airport, conservation when we drop, dip back down into this parcel, which is county owned, and then once we leave the SMA, here, we're into open zoning. The SMA does not include, I just want to point out, doesn't include the very end of Ninini Point. That is outside of the SMA, and that's where it's the comfort station is proposed, but we will speak of that, we'll provide some more description of that. State Land Use Districts, so we're in urban, industrial, and Ag, there's a little bit of Ag down here, in the red, urban is the orange, I'm sorry red is conservation, urban orange, and then the green is Ag. Okay, back to this but we're gonna come back and rephrase this, I can come back to this if the

Commission is interested. This is basically a timeline of the project, but I don't wanna get lost in the weeds of this, it's been a long process, we started in 2007. We have quite a few delays that we're mostly related waiting for the Federal (inaudible) agencies and State to work through the NHPA 106 process. Okay, moving down, so path improvements as you mentioned, we're proposing a 10-to-12-foot path wherever feasible and 8 feet where we're constrained, including across that prefabricated bridge. Some of the statistics up there that 17,000 linear feet within the SMA for Segment A, so the only two segments, I'll go back to this drawing, that are in the SMA, is Segment A, from Ahukini Point or Ahukini Landing up to Ninini Point and then a short portion, about 1200 linear feet is Ahukini Road, Segment G. The rest of Segment C, and the others are outside of the SMA. These are just some examples from the Lydgate Project of the type of improvements that are being proposed. The most substantial, probably improvements between Ahukini Landing and Ninini Point, setting aside the comfort station, would be interpretive signage, you know, the more kiosk type of signage, otherwise it's all either just path or more informational signage on poles, kind of like more utility signage. Bollards, so at four locations, actually, I think, might've had five locations, I apologize, confusing with drainageways. One of the issues that came up from day 1 of the project was access to the fishing sites along the shoreline, which are currently accessed by the dirt road, that public access dirt road that circles the airport, they're numerous roads, or just little turn offs that provide vehicle access almost down to the shoreline where people fish, so we're preserving five of those access points for motor vehicle access. All segments to the shoreline would remain open, and for the most part the path will be or actually entirely would be on the side of the makai side of that existing dirt road providing access so where are the driveways have to come across, we're proposing some type of bollard just to protect, prevent vehicles from getting onto the paved pathway, and just to protect the users of the path from motor vehicle traffic across the pathway and these are just some examples we understand those had to be designed to prevent easy (inaudible) I know those could get moved pretty. These are just a focus on the four drainageways, two of which are outside of the SMA, that's drainageway 1 and 2, starting on the north end. What we're proposing is to come up to the existing airport perimeter road and use the existing culverts. We've only done the preliminary alignment and the basis of design, right now we don't anticipate needing to widen those two culverts, but that's still a possibility that they would have to be widened to accommodate the path, looks like there's enough room in those two, and then once we're across them, we're diving up and down, basically getting right back to the shoreline as quickly as we can, and I'll come back to drainageway 2 and runway 21 in a sec. Drainageway 3 is where the bridge is proposed, a 140 foot bridge, so a couple of things that we're setting the location of that bridge, one, as Romio said, the primary reason is, where the topography, where the path wants to go or should go to minimizing the amount of grating, we are also aligning the path, one to get it as close to the shoreline as we could, so part of that was to move it as far away from the airport as we could, and this was in response to the comments from both the Federal Airport or Federal Aviation Authorities, as well as the State, and then also to, it kind of push down by the shoreline and then we pushed it back outside of the shoreline setback. Initially we had an alignment that was even closer to the shorelines, we moved that out of the setback. I think that the bridge was in the same place just because of the topography, but that's what you're seeing in the approximate location here. Of the bridge crossing, the existing dirt road access, there's another access road right here that's also used, so we're trying to stay away from that road as well, and then drainageway 4, we come up again outside of the 60-foot shoreline setback and intersect with the existing dirt road, and the plan at this location, which is within the SMA, is to expand that road on the mauka side, either through a retaining wall or through embankment and then shift the road mauka and keep the pathway along the existing road alignment, and then drop back down closer to the shoreline as we proceed. These are just photos of drainageway 1 and 2, the crossings there, so it looks like there's plenty of room to accommodate both the path as well as the roadway. Just a preliminary schematic of the bridge abutments just showing a 140-foot range across, so as Romio said, about 75 feet setback from the certified shoreline, and we're at an elevation of about 55 feet above sea level with the abutments, so we're staying outside of the VE inundation and set pretty far back in terms of potential for effect from erosion. And drainageway crossing 4, this is what it looks like. This is the closest we get to the sand, and probably the biggest concern for erosion along this stretch of coastline. In the

analysis that we did, and in talking to the folks at (inaudible) Chip Fletchers crew, they didn't do an analysis of this segment of shoreline, it's generally considered to be stable as stable as shorelines come in the State. And then the sketch below in that drawing makai is on the top, mauka is on the bottom. The gray one here is the path, and that's following the edge of...so right at this point you can see the cursor there, that's where the existing culvert comes out, so be holding that line, not going any further makai of the exiting improvements and then shifting everything on the mauka side. And then just wanted to point out at Ninini Point, the lighthouse was proposed out there, this again, is a concept drawing, the design might look something different, but the comfort station is proposed to be located on a former site of the caretaker's house, where that existing foundation was, and then having some type of pave or gravel parking area and a turnaround. Everything in the light green there, is outside of the SMA, so most of that those improvements would be outside of the SMA, but that's what's conceived. The sketch below I think has been used in a couple of other segments. We know that this is one of the conditions, it was part of the NHPA 106 and the (inaudible) mitigation commitments by the county, was when it comes time to design a comfort station and develop the interpretative programming for that area, additional consultation will have to occur both with SHPD, Historic Kaua'i Foundation, Kaua'i Historic Preservation Review Committee, as well as the native Hawaiian organizations who expressed interest in participating, so that will be the outcome of another consultation process. And just for the record, also the mitigation commitments, both on that particular part of the development as well as an overall interpretive programming also require a consultation with those groups. Let's see, environment, I'll kind of go through this more quickly than it deserves, but we have, this is just an example of some of the fishing access that I mentioned here on the left. We do have the path crossing the stabilized slope, that portion that used to be a dump, that was then stabilized with geofiber/geotextile, and the path that's crossing that stabilized portion in this area, and then just an image of the rocky shoreline, this is pretty characteristic of the shoreline there. From this vantage, the path would be up above the top of the bluff here, this is more of a kind of a visual of the environment. Flora and fauna in the area there are numerous protected species, primarily (inaudible) fauna, but others as well. So, there are four that are in danger, the Nēnē, Koloa, 'Alae 'ula, 'Alae ke'oke'o, 'ua'u kani, oh no, I'm sorry, the 'ua'u kani is not. Those are all listed species, or they're not endangered, but they are listed and protected, and that's the wedge-tailed shearwater, the petrel, Newell Shearwater, also the Hawaiian hoary bat as possible, monk seals, we know pull up on the sand pocket beaches, green sea turtles and hawksbill turtles as well. There was no endangered flora found in the area and there's no critical habitat identified according to both DLNR and Fish and Wildlife Service and no (inaudible). So, the mitigation, though, is essentially for the Nēnē and the shearwater nesting that's at the south end of the runway, kind of between Ninini Point and the Timbers Resort, is to fence that area off to prevent dogs on the trail from accessing the ground nests, and then also there would be no lighting other than at the comfort station and any lighting would be shielded and angled downwards, so the normal mitigation for shielding, lighting, and other than that, it's limited to informational and interpretive signage for the echo environmental resources and ecosystem function there. Historic and cultural resources, there's quite a bit on this coastline. So, there are approximately, depending on how you break them up, from the clusters, but there are approximately 25 total in the area. Within our Phase A area. Nine of those were considered significant and five were recommended for particular mitigation, the remainder where it was mostly the significance was for data recovery, but the highlighted ones here, which are identified here, consisted of a (inaudible) in placement, there were two terraces, habitation, identified as habitation areas, there are rock terraces, and there was one potential burial site, and the background in the burial site was it was a mounds of stones, 'ili'ili stones, the initial interpretation by the field archaeologists was either a push pile or potential burial, and it was treated as potential burial and the mitigation commitments follow through on that. The subsequent interpretation right now is that that might have been an overzealous interpretation, but nobody knows, but the recommendation was to pull the recommendation for a burial treatment plan and preservation, not make it a requirement, and to avoid that site altogether, but these are specifically identified in the mitigation commitments to avoid these by some distance between 20 and 50 feet, and that's what's showing in the path of alignment here. Let's see, Maintenance a Monitoring, probably well known to you, but Public Works and Parks and Rec would be responsible for

maintenance of the path and then security the DPR Park Rangers, and then HPD would be called in if necessary, and then DLNR in and around the airport, the Federal agencies as necessary, and then overall construction costs within the SMA it's about, I'm gonna say, 6 million. I'm squinting, yes, and just shy of 13 million outside of the SMA, for a total just of 19 million is the estimated construction costs for this Phase A. I already talked about path benefits. So, I want to go back and just talk quickly, well not quickly, but speak about the airport, the airport concerns. Okay, so early in the process, we had, we did have meetings with TSA, FAA, Air Traffic Control, DOT Airports, Homeland Security, they were all part of the consultation for this is as we were preparing EA. The concern that they had was, of course, proximity to the airport and proximity to the navigational aids. Their request was to stay as far away from those as possible, for the navigational aids, he said, 200 feet if you can, which is what we tried to do by moving the pathway in certain locations. There was also, I think, DOT Air initially the state DOT Airports, initially said, avoid using the airport perimeter road, and it was avoid it, if you can, stay away from it, if you can. They prefer that, for us to stay off of it. They subsequently, just recently, the alignment you see here, they approved in the form of a right of entry agreement, so that is an executed document that has this path alignment where we touch on those two drainageways, 1 and 2. Come back up, so they're good with this alignment. Generally, those agencies, not just generally, but specifically and generally they were supportive of the project, TSA in particular, their opinion was, if you put the path there, you're gonna have more good people in the area with smartphones, keeping an eye on things, so that was the response that they had. We have the meetings notes documented in our correspondence back to them we did get a response from FAA and the ATC, the Air Traffic Control saying no further comment. We didn't receive any final comment from the TSA Homeland Security or, actually DOT we've been working with them continuously through this, so as far as the impact, I think the main concern was out at Ninini Point, here I think the...sorry it's not showing too well on here but this is actually the path, so somewhere back up in here, I think we're closer, we maybe a little closer than 200 feet to the radar at the end of Ninini Point, but that was also part of the discussions with the DOT Air and with Air Traffic Control, and FAA, that this is where the path has to go because we have a pinch point in this location, and they understood that, they just said, stay as far away from those features as you can. With that I'll just save a breath, pause and happy to answer any questions.

Ms. Cox: What about the water at the comfort station?

Mr. Niermann: Oh, yeah, you're correct, there is no water system out to the comfort station, so the comfort station, the furthest we got in concept was either, it would at least be composting toilets, or a new water line would have to be brought in from Ninini Point Street, so that would be determined during design.

Ms. Streufert: I have a question about security, you were saying, with the ASR. You have a security that's around the pull-boxes.

Mr. Niermann: Yeah.

Ms. Streufert: But nothing around the ASR, which is the Airport Surveillance Radar, and you said you're about 200 feet away from it, is that correct?

Mr. Niermann: Yes, that was the distance that they were desiring that we be from that.

Ms. Streufert: You've talked to all of these agencies in consultation, but do you have anything in writing from them that says that they agree with this, or they approve of it?

Mr. Niermann: We don't have a...only from the FAA and ATT and ATC, so from the Federal...DOT Air only...let's see...we don't have something that says like, we agreed with this precise alignment. We do

have the letter from them that was in their comments on the EA, and then we have the executed right of entry for this path alignment.

Ms. Streufert: How long would it take to get a written agreement from them or a written approval?

Mr. Niermann: From DOT Air?

Ms. Streufert: From all of these people and to include Homeland Security and KEMA, for instance, I would think would have an impact on this too, and the reason for saying is because in the State of Hawai'i there are very few airports that are above sea level, Kaua'i is one of the only ones in the whole state, so if anything were to happen, Kaua'i would be the entry point, and yet we're not securing this to the point where the surveillance radar is protected. I understand that more eyes in this area are good, I kind of get that, but the problem with it, is that once this is identified on the internet, and it will be because it's very beautiful and you have done a really good job of presenting all of the good points about or the scenic points about it, it will be on the internet, and there will be a lot more people there who we would not know, who they are or anything like that. Right now, it's primarily for locals that go through there, but when it gets opened up we have no clue, and frankly, I'm a little concerned only because of what I've read about people having all of these TikTok challenges and everything else, and maybe it's overblown, I'm not sure because I'm really not on to the social media, but even one, it's called a low risk. Sorry about that, but even one, all it takes is one right, when you're on the other side of it, when you're on the protective side of it, you have to be vigilant all the time for anyone who wants to create havoc, it only takes one time. So, it's a low risk, but a high consequence of anything where it happened to that radar station or anything else. Is there any mitigation plan for that radar station, or even for the lighthouse for example, has been thought of, like you've done it for the pull-boxes, and how long would it take to get a written approval from all of these agencies to approve the pathway? And the reason for asking this is because I really don't know enough about this, but I do know that there could be security risks and I would like to make sure that everyone who is involved in this has approved it before we get to the point where we are approving it because we're not the experts on this.

Mr. Niermann: So, to answer your question directly about how long, I don't know because...

Mr. Hull: Sorry, if I could just briefly interrupt...if you wouldn't mind stopping share screen and we can turn on our video, sorry. Go ahead, sorry.

Mr. Niermann: I was gonna say, I don't know how long that would take, because all the agencies, even in any given season, they have different speeds with which they respond. DOT Airports has been excellent in this past year in working through the right of entry, and then signing off on the application form which they have to do as the landowner or the authority with control over those lands. So, we and as far as getting an official approval letter we kind of assume we have that by the no objection, by the no further comment from FAA and ATC, as well as the right of entry that the airports approved, that DOT Air approved because they go through their internal review as well for issues of security and the fact that it's a public access now so we were improving the security of that. I know, your point is well taken though, it'll be on the internet, there's good to be much increased traffic that won't just be, you know, the people who can access the bumpy dirt road, you know, and handle that, so if yeah, so, that I guess the response is I don't know how long it would take, it definitely would take some time, it might go very quickly, or it might get, you know, bogged down. I know when we did the initial consultation with those agencies we started at the Summer of 2008 and concluded in May of 2009, so it was a little less than, it was about eight months maybe getting them all together.

Ms. Streufert: 2008 to 2009 is what, 15 years ago.

Mr. Niermann: Yeah.

Ms. Streufert: Conditions have changed since then in terms of the internet and what kinds of risks that we take. Is there any plan to get the approval from these agencies? It's different to have a consultation, because you have different kinds of people at table, and then when you have to have approval and a written document, you've got an official seal that says we have seen this and we approve it, and that's very different from saying in a meeting, yeah, sounds like a good idea.

Mr. Hull: I'll just interject real quickly to Commissioner. I definitely hear the concerns being raised, but also to raise that, they may not legally be able to get approval from some of these agencies in that, say the Department is consulted on an array of different issues, if it's not an actual application and it's a property owner, the Planning Department could never say, we hereby approve of this project, and so, some of these agencies that are being listed may have internal mechanisms that say they can't use the phrase approval, but I think to your point, though, that if there's a desire to specifically list this concern about public access or proximity to sensitive assets that that could possibly be highlighted and transmitted to these agencies. But I just wanted to raise that, he may not be able to get an actual approval letter.

Mr. Niermann: I also just wanted to add on to make the point, that it wasn't just a simple, informal consultation sounds good, and nobody disagreed, and the donuts were delicious. It was more formal than that, and those consultations, this was the consult early and often. That was a very diligent effort to, as a foundation for our EA, our 343 EA, so as we went through that process, it was long time ago, 2008, 2009, the final EA didn't get published till 2017, and I hope I'm not digging myself a hole about these timelines, we can go back to that to that one. When the final EA was published, it was also, of course, distributed to those agencies specifically because of their involvement in the development of the plans and the plans responded to their comments and their input by shifting the path by adding certain features, so there's a lot of diligence involved in that through the final EA. The final EA didn't document any objections or concerns, and it was consistent with the concerns that they initially raised, and our responses to those concerns.

Ms. Streufert: So, who owns the ASR?

Mr. Niermann: Actually, I don't know. It's either FAA or ATC, but I think the land it's on, it's under DOT's jurisdiction.

Ms. Streufert: I'm not really concerned about the land so much as I'm concerned the safety and security because it is a radar station for the airport.

Mr. Niermann: Yeah, then it's FAA and Air Traffic Control are the two that...

Ms. Streufert: If we were to defer this until you had some, at least a written either agreement, doesn't have to be approval, but agreement or something like that, would that set you back?

Mr. Niermann: It would, yes. Right now, the project is Federally funded, and the Federal Highways Administration is carefully watching the schedule. The project was delayed for quite a while as, and I can go back to that, to that timeline slide, if anybody wants to, and a lot of that had to do with just the coordination among the agencies to get through, the first hold up was NHP issues, back in 2012, related to Wailua and other areas that required Federal level guidance to trickle down to Federal Highways to then to come down to the State and the County, and then there were other delays that related to that same process they were procedural, at any rate because of those delays Federal Highways was very concerned about further delays to the project. I know DPW was concerned about Federal Highways saying this project is gonna forever be stuck and they would then ask for the funds that they've contributed to the

project back and the County would on the hook for reimbursing the Federal government, Federal Highways Administration. I know that's not a sound basis for doing planning to say we're just a we're not gonna fulfill something, if we were to delay by six months or eight months, I know it would be a tremendous concern, and would cause ripples back to the Federal Highway folks that are overseeing this, and the State folks that are overseeing the, that their funds are being channeled through, so I don't know if there's a way to crafted it as a condition that would be my first, you know, hope or plea, that is was a condition of the SMA, but then that goes back to the Director's concern that what is it that we can expect to get from those agencies, is it just, no objection? You know kind of...is something more formal of a no objection versus a, we approve or some type of design review. Ordinarily projects around the airports, if you have vertical structures, there's a preconstruction evaluation form that you have to submit to the FAA, and then they take into account all of the aspects of impacts and navigation. It's mostly on navigation, I'm not so sure about security actually (inaudible). Anyways, so that'd be, my plea would be to try to advance it and maybe craft a condition if that's at all possible.

Ms. Streufert: If one were to voice this concern would that, would the Departments preference be for a condition or a deferral. Until there's not approval necessarily but at least an agreement from these different agencies.

Mr. Hull: You know the Department would have no problem with, say a deferral for, say, a month or two, I'm not sure that addresses the applicant's timeline. I know, 6 to 8 months is very concerning to them. The other option that I just quickly jotted it down, a possible condition, of course I'm not sure if it gets to Commissioner Streufert's concerns or might be overly burdensome to the applicant's process, but I can read it out for discussion purposes.

Ms. Cox: Let's hear it.

Mr. Hull: Prior to building permit approval, the applicants shall secure affirmation from the FAA and the ATC, otherwise Air Traffic Control, that security of the radar site will not become compromised by the proposed project.

Ms. Streufert: Could we include DOT as well as Homeland Security? And whatever, I think those are the only agencies, correct? DOT, TSA, FAA, Air Traffic Control those are the ones that were listed in your application. This is not to say that I disagree with this, I do agree with this whole concept, I like the idea of a bike path, just not really sure about security and for me that's one of the primary concerns because we are part of public safety as well as building and zoning permits.

Mr. Niermann: I don't mean to treat your comments lightly at all, either or to, of course I've got a (inaudible) that's wishing things for, of course, but also, you know, our ethic on this has been diligence all the way. One of the things we're trying to good to hear to, and I know that's been a little bit, I won't say tattered, but the amount of time it's taken to get through is, you know, time marches on, so we do want to do the right thing to do this correctly. While you were in the executive session, I was speaking to the young family from Hanamā'ulu, who testified earlier, about well, are you here to oppose the bike path, or the subdivision, and they raised their concerns about bike paths, in general, you know it's all kind of part of the same parcel, and I was like, okay, how do I soothe my conscience tonight, this particular project, at least we're somewhat fortunate in that location, and that we don't have the same level, there's a lot of history there's a lot of archaeology, but we don't have the same level of sensitivity as other segments of the path. The land that the path goes through is either State owned or it's County owned, and that County parcel along the shoreline was fortunately the county saw the value of that when we started the project that was owned by product developer and the county was able to trade, and transfer that land and acquire it to keep it as undeveloped park land, so we don't have that kind of development pressure. The concern that they raised was, first come the paths, then come the hotels, and that comes all the stuff that builds up

alongside of it, and then pretty soon you don't recognize your neighbor anymore, so there's still concerns that they raised about the path, some of which we heard through the process about access to fishing, over burdening of resource in the area. Security didn't come up for the airport, but that was one that it's most definitely a valid concern. So, that's balanced against the opportunity to create, you know, a beneficial public infrastructure, public resource, and that, you know those decisions are always fraught (inaudible).

Ms. Streufert: There's no perfect decision on this thing. It's just, but there are alternate paths I think that could be taken, that would be going through that area behind the Marriott or Sonesta or whatever it's called now, (inaudible) that way, so I'm not sure it has to stop, it's just a question of, from my perspective, it's just a question of security.

Mr. Niermann: Okay.

Ms. Cox: Was that condition that Ka'aina just read. Was that something that you would be able to live with or not?

Mr. Niermann: As far as getting affirmation from those agencies, I think we can go back and see what they're able. Yeah, my only concern would be, can we over promise something that they can deliver, but as far as going back and getting confirmation of those agency (inaudible).

Mr. Hull: Yeah, I jotted down a few more and I'm not sure if it's amenable to Commissioner Streufert's concerns, but I jotted a little bit more down, so I can read it further. And the only reason I jotted down when we were going through this, no objection interpretation is as a county agency, our Department gets queried a fair amount to make determinations above and beyond what we legally or even policy wise are comfortable affirming and so, we do get requests ad nauseam to go beyond no objection and my statement in a lot of these projects to the staff is, that's all this applicant is getting, we're aware of the project, if we had objections we would object, they're not getting a letter of support from us, they're not getting a letter of robust recommendations or acceptance of it, we have to take in to aspect, among other things, various liabilities that our statements can make, and so sometimes I'm just trying to put myself in, can he get what's being asked of, there are many times our Department is like, no all you're getting is no objection, sorry, take it or leave it, and so anyways, I've crafted up what may be amenable, I'm not saying that it is necessarily what we're recommending, but as a possible path forward. Prior to building permit approval, the applicant shall secure affirmations from the FAA, the ATC, DOT Airports, TSA, and Homeland Security that security of the radar will not be compromised by the proposed project. Followed up with, no communication received from any of these agencies within 60 days, shall be consider a no objection, and the permit may proceed, and the applicant may proceed to building permit review.

Ms. Streufert: Could we include in that not just the ARS, but the airport security? In there, that they are...

Mr. Hull: DOT Airports. So, I have FAA, ATC, DOT Airports, TSA, and Homeland Security.

Ms. Streufert: No, I meant to...you're talking about protecting the ASR.

Mr. Hull: Oh, sorry.

Ms. Streufert: ASR and airport security.

Mr. Hull: The security of the radar and the ASR?

Ms. Streufert: Yes, and also could this be a written affirmation as opposed to a telephonic affirmation or email whatever...

Mr. Niermann: Email is...

Ms. Streufert: Whatever is written, there's a signature on that that says, we have seen this, and we've approved it.

Mr. Niermann: Okay.

Ms. Streufert: We've noticed it, we've looked at it, and on the basis of the security.

Mr. Hull: Prior to building permit approval, the applicants shall secure written affirmation from the FAA, the ATC, the DOT Airports, the TSA, Homeland Security, that security of the radar and ASR will not be compromised by the proposed project. No communication received by any of these agencies within 60 days, shall be consider no objection, and the applicant may proceed to building permit review.

Mr. Ornellas: Yeah, I think it's encouraging that none of these agencies have objected. They're well aware of what's happening.

Mr. Niermann: Yeah.

Mr. Ornellas: I think, and I think in a climate of heightened security, they would simply close the path.

Ms. Cox: Yes.

Mr. Ornellas: That's my own opinion. I mean, that whole coastline, I recall when they were lined with pillboxes, left over from World War II, that entire stretch, so, it is a sensitive area, no question about it. But I think the fact that none of these agencies objected is indicative of their level of concern.

Mr. Niermann: They certainly wanted to make sure that in the event of an incident and then in just case they were talking about a malicious incident, that we have the ability to lock down the path or to gate the path, and so at those points of connection with the roadway, that was where they identified the gates to be placed, so that was part of it. But yeah, that's reactive. I know you're suggesting proactive.

Ms. Streufert: Proactive.

Mr. Niermann: But yeah, they're aware of it. We may have had just half leverage that, you know represented on the folks, it's a pretty extensive number of people that were in those meetings, and there was that general sense, I don't know overstate it, but it was a real general sense that pretty more good people in the area was the benefit, the security.

Mr. Ornellas: My concern when the stretch from Kapa'a heading out to Kuna Bay, my concern was one of security, see you gonna have people walking on this path there's no where around it, there's some lonely stretches, which I use the path, and I was presently surprised that there were no incidences. I think the good drives out the bad in this case.

Mr. Niermann: I will say, outside of Phase A, sorry to prolong the meeting, initially when we were looking at the entirety of Segment 6, we were looking at an alternative to go up Nawiliwili Stream all the way to here, and so we basically trespassed our way up the stream and then we have one meeting, we had a public meeting where we heard a little bit of feedback, that we contacted all the owners on that stream, and we tried the idea of, well you're worried about bad things happening, you know, more good people on the path, they weren't buying it in that case, and we abandoned that approach, but I'm a believer that probably in certain contexts, maybe going through jungle and forest not as much security benefit, but I think in these wide open spaces there's stuff that I know TSA wasn't happy that was happening down

there right (inaudible) time we were meeting with them anyways around the airport. So yeah, that condition would be acceptable. I mean, I'm sure that would be alright.

Mr. Hull: Without any (inaudible), I know Romio has proposed conditions of approval, it's been a long day, if you'd like him to read each and every single one of them or have them accept it as part of the report, I think we have just for the record the last condition of approval be added as I read on to the record, as a recommendation to this body.

Ms. Streufert: (Inaudible, microphone not on). I move that we accept the planning Department's recommendations, with the additional condition.

Chair DeGracia: Before I move forward, is there anybody in the audience that would like to testify on this agenda item before we make a motion?

Mr. Ako: Mr. Chair, can I ask one question of the applicant? I'm so sorry. This is not a sensitive topic at all, and not technical in anything, but the vision is to create this to connect with the existing path that's there right now.

Mr. Niermann: Yes, yes, and it's also like each of the segments, I think, and this one probably more so than the others are also envisioned as stand-alone segments, if that makes sense. But yes, the envision was that it creates regional corridor all the way up to Anahola.

Mr. Ako: So, this will eventually connect up to, down by Lydgate Park, that walkway there.

Mr. Niermann: Yeah, exactly.

Mr. Ako: My question is, what is that theory about starting from, I don't want to tell you my age and all of that but (inaudible) the Honolulu viaduct, as they're doing. They're starting from two different ends and then they meet six feet apart at the top. What is the theory about starting, effect rather than expanding from what we have, that's starting from one end and trying to eventually connect up at the other end.

Mr. Niermann: Various series, but sorry, there's a really good book called The Power Broker, that it's like all the dirty tricks of planning, but this is not necessarily a dirty trick, I shouldn't characterize it that way. It's a great book, not to learn dirty tricks, but just to see how things get, anyways I'll shut-up. The theory is that you start with the least critical segment, and then you work towards the most critical, because as the project goes it builds momentum, and then you can't but built that last segment because you needed it to make all the rest of it activated. That's the theory. The stock gap on that, a lot of it has to do with Federal Highways and DOT and the concept of segmentation, and that's embedded also in the 343 block you know, you can't segment a project to seek it through, you have to look at the totality of environmental impact. But if that project has the kind of language we use, is it has its own utility, has its standalone function, it has a logical terminus, so if you build it in isolation of all the other stuff, it still has value, it still has, it still has its own utility and that's essentially how these larger regional kind of projects are, they have to be conceptualized or conceptualized both for funding for both (inaudible) getting through the (inaudible) getting through the 343, but from the from the dirty tricks perspective, it's okay, you start with the one that is going to the least controversial, that it kind of builds a...

Ms. Streufert: Least resistance.

Mr. Niermann: Yeah.

Mr. Ako: So, that window you talk about the six-to-eight-month period regarding the putting the Federal funds in jeopardy at that point.

Mr. Niermann: So, I don't want that to be considered a hard, fast date. The concern has been so, we were delayed in getting the EA published, and that was held up that for the NHPA 106, getting through that. It wasn't that the conditions changed, it wasn't that the consultations, you know, were controversial and mired in any issue, it was just the bureaucratic process of going between State agency, the Federal agency, and every time we get to a point where one of the agencies is ready to move on the action, there were personnel changes, and so a new set of eyes wanted to revisit it and so that was just dragged out ad nauseum, and Federal Highways even though they were a party to some extent, they were also looking at it saying, hey we're funding this thing, you had a schedule, could the county commits in the schedule and in the contract. You said it was going to be done here then it gets delayed, and there's good rationale, and so they improve that they approve it, so, it's just that, since when you look at that timeline from 2007 to now, and what are the things that are holding it up? What can we control to move forward? We know that just in general, not on this particular subject of six to eight months, but they really been holding the DPWs feet to the fire on the schedule and we're living and dying by the schedule now, so there are monthly reports, back to Federal Highways, how's it going? How are we moving forward? And that the concern like right now the county is requesting an extension of that schedule, and every time that, you can't take it for granted that there's gonna be another extension, at any time they could, you know the forces that be at the Federal level, in Washington, or wherever could pull the plug on the project so, we're just being very sensitive to the amount of time, you know, we're up against right now to complete the project, to commit the funds under the current commitment that the County has to Federal Highways, so six to eight months because I was just fine tuning the schedule, and they're saying, we want you to try to squeeze another three months out of it, we want you to shorten it, try to finish this and get the commitment by the end of 2024. They're still trying to squeeze blood from a stone, so to speak, in compressing processes that I just from experience, I know they take a lot of time, and on paper, yes you could compress it, but your practice doesn't always work that way right, so if they're asking me to compress four months and now, if I say it's gonna be another eight months or we're gonna push out six months or eight months then I know that that's going to translate up to with some concern from the County, and I'm not the one communicating directly with Federal Highways, this is the County, the County reps and the State reps. I hope that answers, I hope I didn't say too much to get myself in trouble.

Chair DeGracia: Any further questions for the applicant? Thank you. Please state your name and you have three minutes.

Mr. Kaniela Matsushima: Aloha, my name is Kaniela Kaleikaumaka Matsushima. Thank you for having me to speak on this issue. I didn't know in depth to what this bike path was until, and I'm just hearing his side of it, and what's gonna to come about it, and his. I have a few concerns, I think we should just make aware of, is I grew up on that coastline, I fished my entire life on that coastline. That's probably one of the most dangerous coastlines, I think, on the island, beside the Nāpali, just mainly because that's eastside always catch that, it's always rough and we always like pick opihi on that side and there's a lot of opihi because, I just gave away the spot, but a lot of opihi because only the experienced people that know the area or can go there, because it's very dangerous and I think just having that bike path there would access, the public have access to now would have access to, and majority of the people that use that bike path are visitors, tourists that come here, and they may not know how dangerous it is, and then you know they might go down there to some selfies at the last rock on the bottom and they get swept away and that's just a liability and more, just dangerous to people in general. So, it is open to fishing and gathering rights, but there's only a select few people that actually go there because it's dangerous, but this bike path would actually change the subsequent part of the traditional, native Hawaiian practices if this bike path does go through there is also a lot of houses and people that live there that actually some of them are my ohana and they were displaced from other areas that they were from and they just kept moving around, and I

think, just kicking them out of some place, and then they having to find somewhere else not really a solution to it, so I think you have to take that into account. I'm not sure if any of you ever been on that coastline before, but it's like it's really dangerous, and there's like maybe two beaches there and those beaches are rarely open like, sandy area, they're normally underwater. There's a lot of big boulders that are loose and I just foreseeing this, I can just imagine people like tourists come here and want to come and enjoy that place, or just local people that never in the area want to go out on the rocks and get hurt, or worse. There's a lot of iwi kupuna in the area, regardless of the plantation area, they're a little deeper. So, that is a main concern. There's the beach line that he's talking about, Nukoli'i area, there's like numerous articles and research on it, that there's burials all throughout that area. I've been on burial sites of desecration, I just don't want to see anymore, so I think there, kind of need to thread lightly on it, but at the same time, know what's at play before we actually make decisions on going forward with this, so I think just the demographic of who you (inaudible) actually use the bike path. I know he mentioned that he used the bike path, but I never used the bike path in my life.

Mr. Hull: Three minutes.

Mr. Matsushima: And I don't see myself using it. Oh, three minutes, okay. But I think we just need a look at the demographic of who uses the bike path, and we'll see, I'm just gonna put out there, probably about 80% is not from here and we can see all the tourists that go to the companies that rent those bicycles out, so they will actually make their way to those spots which is actually dangerous. Mahalo for your time and thank you.

Mr. Hull: Thank you.

Chair DeGracia: Thank you. Any further testimony? Hearing none, recommendation?

Mr. Hull: Well, we gave the recommendation, and we stand by it, I'm not sure if you wanted to bring the applicant up to address any issues that was raised by testimony (inaudible).

Chair DeGracia: Okay.

Mr. Niemann: As far as response is known, (inaudible) I didn't wanna speak for you up here with the other concerns that you raised, and I don't have a probably satisfactory answers that will satisfy the main concern. Our approach then for issues of danger along the shoreline would be essentially information, signage, warning signs, but we wouldn't seek to block people from accessing off of the bike path, it would make it more accessible, certainly, so I think the, there's no curing stupid and it's that, sorry that was really glit making it glib an issue, but I'm just thinking about the blowhole on Oahu, and the guy from California who though it'd be great to straddle it and get a picture and he ended up inside of it, and dead and then the family wanted to put a grade over it, you know, so there's a certain amount of personal responsibility that's required and certainly signage the only tool in our toolbox along the shoreline there, possibly with the addition of (inaudible) there was, and this is outside of what we're proposing, but (inaudible) or konohiki system of lining people on the path and their behaviors on the path, so that's one thing. The houseless in the area, that is, that is a concern. It was a concern from day one of the project that was brought up and I recall, saying, in the first public meeting is, that's an issue that's much larger than the bike path to solve, and then just an encouragement to solve it with compassion, and not just treat it as what it is in our process is a nonconforming land use, and when we get to the conservation district use permit process which would be the next step after this, it's going to be an issue right? So, they're looking at it as nonconforming use, clean it up. What are you going to do to take care of that? And then all the other agencies that have a role in that, from DOH, HPD, Health and Human Services, take a part in that that's outside of DPW's kind of mandate, so, I don't have an answer for that other than the use down there is one of things that puts more of a face on it is, the idea that if these families are displaced from

Hanamā'ulu and now they're getting pushed over there it's not just an assemblage of the homeless kind of faceless down there family members, so there really needs to be a community response, and I don't mean to wash my hands with it's lighter than this project, because this project is going to shine a light on it, and I think that the resolution of that will, it will have to come up or it will come up at some point before project construction and ground breaking. It will probably be, or maybe continued, as a condition of some, or a way to address it as a condition in the CDUP, but that's something that we'll have to collectively look at. Iwi kupuna in the area, very good point, and there's the stuff we know and there's the things that we don't know, you know we've done the AIS, we did find that one rock mound that appeared to be, or potentially could be, a burial, and so we avoided it. There was some view by the archaeological consultants, that that rocky shoreline is not, certainly not, as it's nice as the (inaudible) sands or I shouldn't say as nice but as typical of burial sites, as the (inaudible) sand deposits that are really prevalent along other segments, so we have the usual conditions of, if anything is discovered, if any artifacts, or iwi kupuna are encountered during construction then everything stops and the perfect consultations take place. What we do know about through that area, were mitigating through avoidance and through signage or through and interpretive program. I think one of the other differences is all of these mitigation measures, are evolving from a planning perspective, from a community perspective, generationally becoming more aware of the language I was using when we were discussing a little bit of this earlier was treating historic properties and sites as something of an artifact or more than artifact, and the way that you do that then is you bring in the community, that knows that the practice is as part of the program, in that conversation that we were having there's (inaudible), yeah there's a whole lot of models, there's a whole lot of personality driven ideas about it, but there isn't a simple solution on how to make it more than the interpretive programming that and are familiar with, signage maybe (inaudible), and then encouraging more practices in those locations. And then on the demographics, as a planner, kind of, I think, professionally obligated to like every bike path I see, and that's true to some extent, so in this case it is. I'm not from Kaua'i and I would use it as a visitor, but I also view it as for those issues of resiliency of providing an alternative to the automobile for people who either can't afford it or in the future may not be able to afford it or in the event that there is destruction to the roadways from natural or manmade events, there's redundancy, I think those are all valid reasons from that broader planning horizon or planning perspective, so the demographics it's probably very true that it's mostly visitors coming right now, for people recreating on it, locals recreating in there. But, going back to, if you build it, they will come, and you know, hopefully, it will become the beneficial infrastructure that the community, to the community that it was originally to be. My sermons over.

Ms. Cox: I have a question, but I think I already know the answer to it, and I guess for both of you, Romio as well. So, no one's ever done a study on who's using that bike path because from my...I use it, and I see an awful lot of local families using it. I'm not saying there aren't tourists out there, too, but I see a lot of local people using it, so your statement of yeah, it's probably mostly tourist, I don't know if that's true, and I don't know if we're not keeping track of it, we don't know that.

Mr. Niermann: Thank you for challenging me on that because I don't know what I'm talking about on that.

Mr. Hull: Yeah, I would say, I agree with this team as well. Once that connection is made, and it is primarily a recreation (inaudible) right now, it is, hands down. One of the concerns, when we were watching it and understand that Public Works and Parks are going to have to figure out is once that connection is made to Līhu'e, there is no cure to the Kapa'a crawl coming. There isn't. It is anticipated that, either slightly or drastically the amount of traffic that will not be commuter traffic on that asset will change. How you navigate that with the advent of ebikes, and the speeds that they can go, and co-existing with recreational purposes is something that's gonna to have to be navigated. But yeah, that is something that's being anticipated with the connection between essentially two residential/work areas.

Mr. Niermann: Just want to say, Kaua'i it seems more than most places to have the ability to integrate that infrastructure, integrate that facility with the community more, and what I mean by that is these concerns that were raised, there's no perfect project, there's no satisfying everybody, but some of the concerns could be mitigated, certainly with, and I was thinking about Lydgate when we started this, that segment of Lydgate with the park and everything that was grassroots all the way, that was taking ownership of the project in that area, and the vision was very much alive, is we can do this rather than this is being imposed from the outside and this is something disrupt what we've, what's familiar and the things we cherish, so making it an asset through not just building it, and then, you know, letting it go, but trying to program it in addition to building it and programming with, you know, the voices of the residents in guiding the programming. Words are cheap, words are easy, I can sit up here and (inaudible), but that's just more of a, there's an extra need to make a facility like that function for a community by...I'll just use the word programming it again, there's whether it's adopting a segment, whether it's, you know, having, yeah, I mean, I like the idea of a konohiki system in there. My only concern was, when we had that discussion, I don't know if you could get the folks in that particular moment to agree on who would be at the top of the heap.

Ms. Streufert: There is a condition in this application, recommendation no.2, which is about archaeological findings and, so I think hopefully that will mitigate some of the concerns that have been expressed because you may other things, you may not.

Mr. Niermann: Sure.

Ms. Streufert: If something is found then it will be protected.

Mr. Niermann: And to the other point that was raised earlier outside the hearing here, was that there are two heiau now along that segment, there's Ninini Point and there's Ahukini. I don't think anybody's even sure where Ahukini Heiau is, some people maybe sure but I know on the archeological inventory survey it was either somewhere in the middle between Ahukini Landing and Ninini Point or it was up above Ahukini Landing where the refinery and the train rails were in. So, but the absence of the material remains of those sites doesn't diminish the significance of the site to the k̄naka maoli community and people understand it, so again, going back to how do you create something that's not just an artifact and a sign saying, here once stood "X" and it's like, wow try to envision it, that's valuable in its own right, but, I'm getting into some kind of...the people that know and having a voice in the programming of the use of the facility. Gotta get creative. I don't have any answers. We're processing permits and coming up with designs and things, but I think, speaking of those values, we have not (inaudible) to use is important.

Chair DeGracia: Thank you, Commissioners. Anything further? Any questions for the Department or applicant? If not, I'll entertain a motion.

Ms. Streufert: I put a motion; I think on the table (inaudible).

Chair DeGracia: Oh okay. Motions on the floor.

Ms. Streufert: To approve, or to accept the proposal recommendations of the Department. To include as amended with the additional condition.

Chair DeGracia: Okay.

Ms. Cox: And it was seconded.

Chair DeGracia: Okay. Motion on the floor is to approve with the amended conditions. We'll take a roll call vote, Mr. Clerk.

Mr. Hull: Roll call, Mr. Chair. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner Cox?

Ms. Cox: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: Aye.

Mr. Hull: Commissioners Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: Aye.

Mr. Hull: Chair DeGracia?

Chair DeGracia: Aye.

Mr. Hull: Motion passes, Mr. Chair. 6:0. Moving on into, we have no further executive session. Agenda Item N.

ANNOUNCEMENTS

Mr. Hull: Topics for Future Meetings. We are anticipating the next meeting actually not being as listed June 13th, but actually on June 27th. We actually have a fairly light, I really shouldn't use that phrase. We have a limited number of agenda items, I think, one of them, which is going to be a subdivision, also a meet the condition of approval of one of the Class IV in south Kaua'i, Class IV Zoning Permits, and then today was tentatively scheduled for the Housing Directors briefing before the Planning Commission, ultimately with the calendars of various State and county officials, including but not the limited to the Mayor, Governor, the Lima Ola groundbreaking was scheduled for today, so the Housing Director, wanted to apologize for not being about to make that briefing but he is set tentatively to appear before us on June 27th to give his housing briefing. And that's what we got a nutshell coming up, if anything you folks want to schedule, by all means let us know or the Chair, or the attorney's office.

Ms. Otsuka: So, confirming, no meeting on June 13th.

Mr. Hull: Right now, we say tentatively, unless we receive something in the next week or two that necessitates from a timeline standpoint, we have to schedule that meeting. Right now, tentatively there's not anticipated to be a meeting.

Ms. Otsuka: Okay, how will we be informed? Shan will email.

Mr. Hull: We'll let you know within a week whether or not (inaudible). I don't want to say the likelihood given the way today's meeting went, so just...but that's all we have.

Chair DeGracia: With that, I'll entertain a motion to adjourn.

Mr. Ornellas: So, moved.

Ms. Streufert: Second.

Chair DeGracia: We'll take a voice vote. All in favor say aye. Aye (unanimous voice vote). Oppose? Hearing none, motion carries. 6:0.

Chair DeGracia adjourned the meeting at 4:10 p.m.

Respectfully submitted by:

Lisa Oyama

Lisa Oyama,
Commission Support Clerk

() Approved as circulated (date approved).

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

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



DEREK S.K. KAWAKAMI, MAYOR
REIKO MATSUYAMA, MANAGING DIRECTOR

Supplement #1 to Subdivision Report

RE: Subdivision Application No. S-2021-7

APPLICANT: 5425 Pa'u A Laka, LLC.

At Subdivision Committee Meeting held on June 27, 2023, the subject subdivision application was heard for a Preliminary Subdivision Extension Request for an extension of time to file the Final Subdivision Map. At the meeting, there were concerns raised regarding the timeliness of the subdivision extension request as it relates to Section 9-3.8(c)(1) of the Subdivision Ordinance, Kaua'i County Code (K.C.C.), 1987, as amended. As a result of the concerns, the Subdivision Committee deferred action on the preliminary subdivision extension request to the July 11, 2023, Planning Commission Meeting in order to obtain a legal opinion from the Office of the County Attorney. The Planning Department subsequently referred the subject matter to the Office of the County Attorney for review.

At the subsequent Subdivision Committee Meeting held on July 11, 2023, the Planning Department requested to defer Planning Commission action on the preliminary subdivision extension request as the subject matter was still under review by the Office of the County Attorney. The Subdivision Committee voted to defer action on the preliminary subdivision extension request to the full Planning Commission at their meeting held shortly after the Subdivision Committee Meeting on July 11, 2023. The Planning Commission deferred action on the preliminary subdivision extension request until the Office of the County Attorney could provide a legal opinion on the matter.

After consultation with the County Attorney's Office, the Department transmitted the attached correspondence (Refer to Exhibit 'A') to the Applicant via Certified Mail on August 21, 2023, clarifying the status of the above referenced subdivision.

The subject subdivision received tentative, preliminary map approval on August 10, 2021. In accordance with Kaua'i County Code, Section 9-3.8(c)(1), Final Subdivision Map, the Applicant failed to timely file with the Department a subdivision final map, or a request for an extension of time, prior to the preliminary subdivision map expiration. The preliminary subdivision map is therefore deemed void as a matter of law.

Kaua'i County Code, Section 9-3.8 Final Subdivision Map, specifies:

“(c) Filing of Final Subdivision Map.

(1) The applicant shall file fifteen (15) copies of the subdivision final map with the Planning Department within one (1) year after approval of the preliminary subdivision

map. If no filing is made, the approval of the preliminary subdivision map and construction plan shall become void unless an extension of time is granted by the Planning Commission."

By _____
KA'AINA S. HULL
Director of Planning

Date: 9/5/2023

EXHIBIT 'A'

(Correspondence to Applicant dated August 21, 2023)

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



DEREK S.K. KAWAKAMI, MAYOR
REIKO MATSUYAMA, MANAGING DIRECTOR

AUG 21 2023

Via First Class Mail and Certified Mail, Return Receipt Requested

Mr. Wayne T. Wada
Esaki Surveying and Mapping, Inc.
1610 Haleukana Street
Līhu'e, Hawai'i 96766

Re: Subdivision Application No. S-2021-7
Applicant - 5425 Pau A Laka, LLC.

Dear Mr. Wada,

On August 10, 2021, the above referenced subdivision received tentative, preliminary map approval. In accordance with Kaua'i County Code, Section 9-3.8(c)(1), Final Subdivision Map, Applicant failed to timely file with the Department a subdivision final map, or a request for an extension of time, prior to the preliminary subdivision map expiration. The preliminary subdivision map is therefore deemed void as a matter of law.

Kaua'i County Code, Section 9-3.8 Final Subdivision Map

(c) Filing of Final Subdivision Map.

(1) The applicant shall file fifteen (15) copies of the subdivision final map with the Planning Department within one (1) year after approval of the preliminary subdivision map. If no filing is made, the approval of the preliminary subdivision map and construction plan shall become void unless an extension of time is granted by the Planning Commission

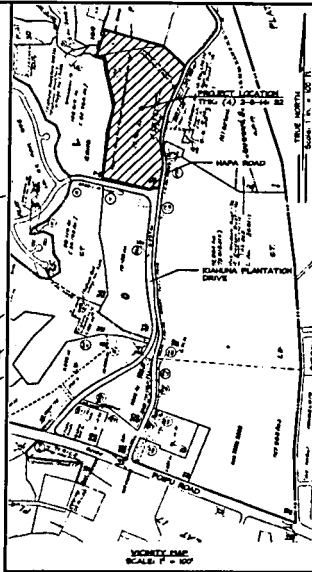
In accordance with Rule 1-9-2(a)(2) of the Rules of Practice and Procedure of the Kaua'i County Planning Commission, this Determination may be appealed to the Department no later than fifteen (15) days after the date of this letter.

Should you have any questions regarding an application for new preliminary map approval, please contact Kenneth A. Estes, Subdivision Planner, at kestes@kauai.gov. Mahalo.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ka'Āina S. Hull", is written over a horizontal line.

KA'ĀINA S. HULL
Director of Planning
Kaua'i County Planning Department



Signature
EJAO SURVEYING & MAPPING, INC.
EXHIBIT A, APRIL 30, 2021

(IN FEET)
1 inch = 50 ft.



McCorryston Miller Mukai MacKinnon LLP
ATTORNEYS AT LAW

Laurel Loo, Partner
ll@m4law.com

September 01, 2023

Ka'āina Hull, Director of Planning
Kauai County Planning Department
4444 Rice Street, Suite A473
Līhu'e, Hawai'i 96766
Via E-mail: khull@kauai.gov

Re: Petition to Appeal Action of the Director Pertaining to
Subdivision Application No. S-2021-7
Applicant- 5425 Pau A Laka, LLC (formerly Yellow Hale, LLC)

Dear Mr. Hull:

This responds to the Director of Planning's letter dated August 21, 2023 addressed to the Applicants' Authorized Representative, Mr. Wayne Wada attempting to void the preliminary subdivision map pertaining to Subdivision Application No. S-2021-7.

The Applicant submitted its subdivision request May 12, 2021. The Applicant then submitted its first Preliminary Subdivision Extension Request on April 24, 2023. This Preliminary Subdivision Extension Request was heard on July 11, 2023 by the Subdivision Committee and Planning Commission. At the July 11, 2023 Planning Commission meeting, the Planning Commission deferred the Applicants' request despite the Planning Department's June 7, 2023 recommendation "[t]hat an extension until August 10, 2023 be granted."

In reference to the Director's August 21, 2023 Determination that "the preliminary subdivision map is therefore deemed void as a matter of law", the Applicants respectfully submit this Petition to Appeal that Determination. Appellants request a hearing before the Zoning Board of Appeals and, additionally, a due process hearing on whether the preliminary subdivision approval is void. Pursuant to 1-9-2 of the Rules of Practice and Procedure of the Kaua'i Planning Commission, we provide the following information:

1. Appellant is the Applicant:

5425 Pau A Laka, LLC (formerly Yellow Hale, LLC),
which is a wholly owned subsidiary of Meridian Pacific, LLC;
c/o Laurel Loo, 4463 Pahe'e Street, Suite 208, Lihue, HI 96766
Phone number: (808) 977-8015.

H.1.b.
9/12/2023

2. The property is identified as TMK: (4) 2-8-014:032. The appellant is the fee-simple owner of the property.

3. The subdivision ordinance in question is Section 9-3.8 Final Subdivision Map of the Kauai County Code.

4. Pertinent facts are:

1. This application for subdivision approval was submitted to Planning Department on May 12, 2021.
2. The Subdivision Application Routing Form (of the County of Kauai Planning Department) dated June 3, 2021 was transmitted to various Departments.
3. Tentative Approval was granted by the Planning Commission at their meeting held on August 10, 2021.
4. Construction Plans for the onsite Improvements, pursuant to Section 9-3.5 of the Kauai County Code were submitted to the Department of Public Works and other County of Kauai agencies on June 27, 2021. State Historic Preservation Division issued a "No Historic Properties Affected" determination on March 1, 2022.
5. These Onsite Improvement Plans received final approval on December 14, 2022, 18 months after appellant's initial submittal. This work has since been commenced and is in progress.
6. Construction Plans for the Roadway Improvement, pursuant to Section 9-3.5 of the Kauai County Code were submitted to the Department of Public Works and other County of Kauai agencies on June 27, 2022. State Historic Preservation Division issued a "No Historic Properties Affected" determination on September 5, 2022.
7. These Roadway Improvement Plans received final approval on March 24, 2023. This work has since been commenced and is in progress.
8. As of today, the appellant has expended \$7.5 M in construction costs related to these two plans.
9. Appellant has diligently worked with the County and agencies to respond to comments. However, Applicants are held to the review process of the County of Kauai, which is experiencing staffing constraints. With its final construction plans, a final map can not be submitted.
10. To support the foregoing facts, appellant has expended in excess of \$10 M overall to process and support this subdivision application. To start again would cause no harm to the County but would be a financial burden on the Applicants as work will have to be duplicated to begin the process again. Additionally, delays in construction of the property cost approximately \$110,000 per month in carrying costs for appellant.
11. Due to unforeseen circumstances, our (previous) Authorized Representative, Mr. Dennis Esaki, suddenly fell ill and passed away in July 2023. Mr. Esaki's tragic illness contributed to the untimely filing of the Extension Request. Mr. Esaki was the primary interface between the County and the Applicant for much of the time for the processing of this subdivision application.

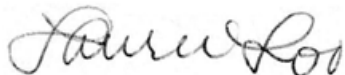
12. Upon knowledge that the Authorized Agent fell ill, the Applicants made a good faith attempt to submit the an Extension Request on April 24, 2023.
13. It is believed this is the first time the Planning Department has attempted to void a preliminary subdivision approval while an extension request is pending. Applicants believe the foregoing sequence of events justify an extension from the Planning Commission pursuant to Section 9-3.8 (c)(1) of the Kauai Subdivision Ordinance which allows the Planning Commission to grant an extension.

5. The appellants appeal the Director's August 21, 2023 Determination that, "the preliminary subdivision map is therefore deemed void as a matter of law". A due process hearing must be held before Appellant's rights are voided, and Appellants therefore request that the Planning Commision in light of the foregoing factors reinstate the preliminary subdivision map and further grant the appellantss April 24, 2023 request for a First Subdivsion Extension.

6. The appellant believes the Director has acted in an arbitrary or capricious manner, or manifestly abused his discretion in this instance because 1) this is a new policy of the Planning Department to immediately void any preliminary subdivision maps where an extension of time has not been submitted or has been submitted untimely; 2) appellant has continuously been working on the project with the County since the filing of this subdivision application and has spent \$3.1 M in resources in reliance of County approvals; and 3) there has been no proffer of a due process hearing prior to the Director's claim that the preliminary approval is void.

Sincerely,

5425 Pau A Laka, LLC



By Laurel Loo
Its Attorney

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



DEREK S.K. KAWAKAMI, MAYOR
REIKO MATSUYAMA, MANAGING DIRECTOR

Supplement #1 to Subdivision Report

RE: Subdivision Application No. S-2022-6
Kukui'ula Parcel HH Subdivision

APPLICANT: Kukui'ula Development Company, LLC. /
MP Kaua'i HH Development Fund, LLC.

At Subdivision Committee Meeting held on June 27, 2023, the subject subdivision application was heard for a Preliminary Subdivision Extension Request for an extension of time to file the Final Subdivision Map. At the meeting, there were concerns raised regarding the timeliness of the subdivision extension request as it relates to Section 9-3.8(c)(1) of the Subdivision Ordinance, Kaua'i County Code (K.C.C.), 1987, as amended. As a result of the concerns, the Subdivision Committee deferred action on the preliminary subdivision extension request to the July 11, 2023, Planning Commission Meeting in order to obtain a legal opinion from the Office of the County Attorney. The Planning Department subsequently referred the subject matter to the Office of the County Attorney for review.

At the subsequent Subdivision Committee Meeting held on July 11, 2023, the Planning Department requested to defer Planning Commission action on the preliminary subdivision extension request as the subject matter was still under review by the Office of the County Attorney. Consequently, the Subdivision Committee deferred action on the preliminary subdivision extension request until the Office of the County Attorney could provide a legal opinion on the matter.

After consultation with the County Attorney's Office, the Department transmitted the attached correspondence (Refer to Exhibit 'A') to the Applicant via Certified Mail on August 21, 2023, clarifying the status of the above referenced subdivision.

The subject subdivision received *revised* tentative, preliminary map approval on February 8, 2022. In accordance with Kaua'i County Code, Section 9-3.8(c)(1), Final Subdivision Map, the Applicant failed to timely file with the Department a subdivision final map, or a request for an extension of time, prior to the preliminary subdivision map expiration. The preliminary subdivision map is therefore deemed void as a matter of law.

Kaua'i County Code, Section 9-3.8 Final Subdivision Map, specifies:

"(c) Filing of Final Subdivision Map.

(1) The applicant shall file fifteen (15) copies of the subdivision final map with the Planning Department within one (1) year after approval of the preliminary subdivision map. If no filing is made, the approval of the preliminary subdivision map and construction

plan shall become void unless an extension of time is granted by the Planning Commission."

By 
KA'ĀINA S. HULL
Director of Planning

Date: 9/5/2023

EXHIBIT 'A'

(Correspondence to Applicant dated August 21, 2023)

DEPARTMENT OF PLANNING

KA'AINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



DEREK S.K. KAWAKAMI, MAYOR
REIKO MATSUYAMA, MANAGING DIRECTOR

AUG 21 2023

Via First Class Mail and Certified Mail, Return Receipt Requested

Mr. Wayne T. Wada
Esaki Surveying and Mapping, Inc.
1610 Haleukana Street
Lihue, Hawai'i 96766

Re: Subdivision Application No. S-2022-6
Applicant – Kukui'ula Development Company, LLC. / MP Kaua'i HH Development Fund, LLC.

Dear Mr. Wada,

On February 8, 2022, the above referenced subdivision received *revised* tentative, preliminary map approval. In accordance with Kaua'i County Code, Section 9-3.8(c)(1), Final Subdivision Map, Applicant failed to timely file with the Department a subdivision final map, or a request for an extension of time, prior to the preliminary subdivision map expiration. The preliminary subdivision map is therefore deemed void as a matter of law.

Kaua'i County Code, Section 9-3.8 Final Subdivision Map

(c) Filing of Final Subdivision Map.

(1) The applicant shall file fifteen (15) copies of the subdivision final map with the Planning Department within one (1) year after approval of the preliminary subdivision map. If no filing is made, the approval of the preliminary subdivision map and construction plan shall become void unless an extension of time is granted by the Planning Commission

In accordance with Rule 1-9-2(a)(2) of the Rules of Practice and Procedure of the Kaua'i County Planning Commission, this Determination may be appealed to the Department no later than fifteen (15) days after the date of this letter.

Should you have any questions regarding an application for new preliminary map approval, please contact Kenneth A. Estes, Subdivision Planner, at kestes@kauai.gov. Mahalo.

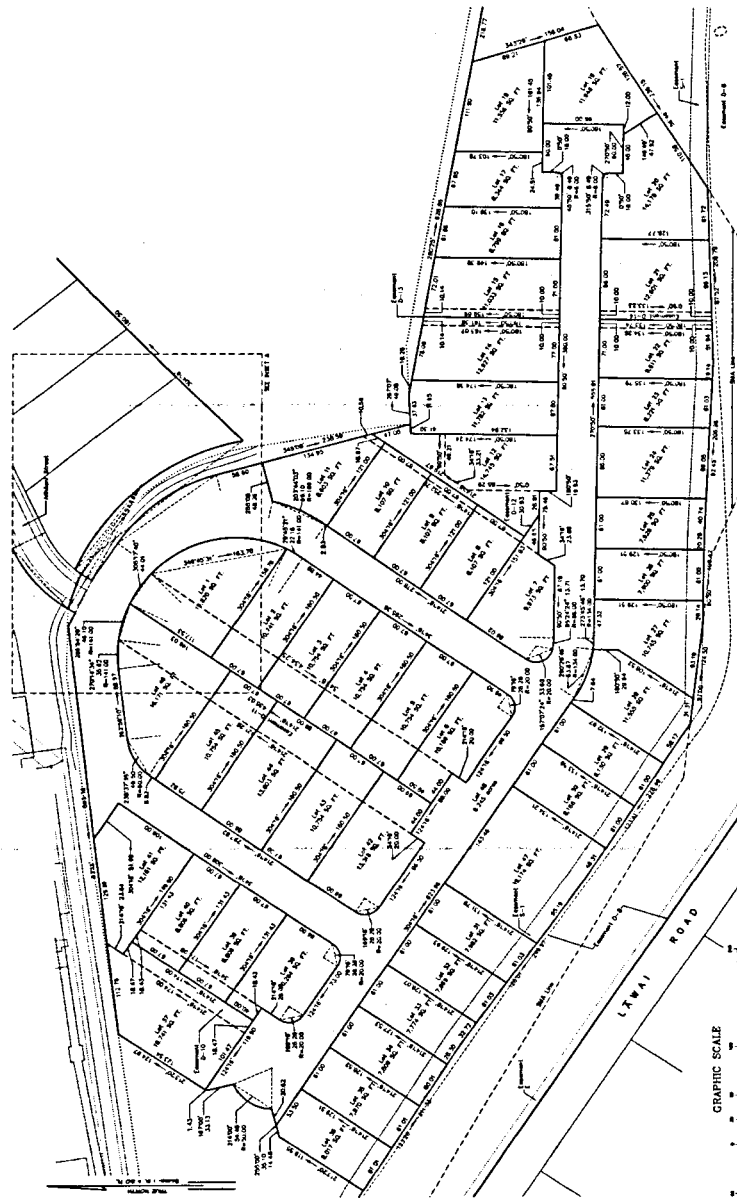
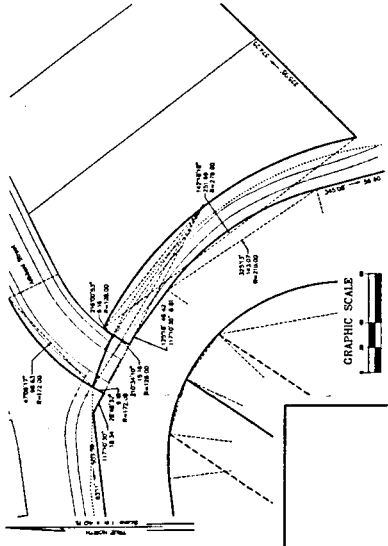
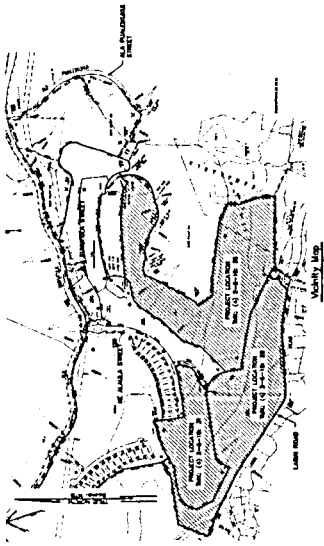
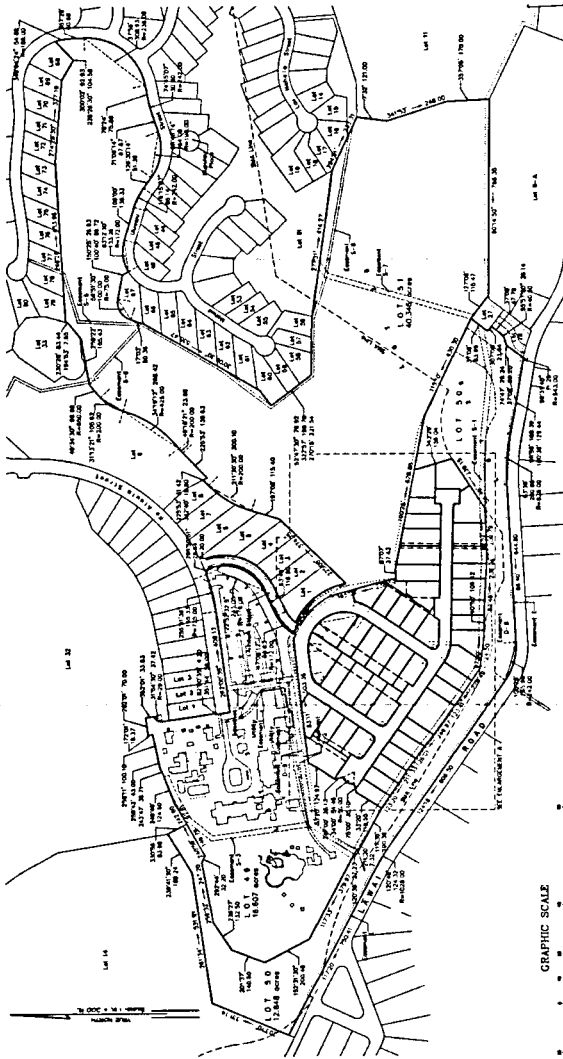
Very truly yours,

A handwritten signature in black ink, appearing to read "K. Hull", is written over the typed name.

KA'AINA S. HULL

Director of Planning

Kaua'i County Planning Department



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF LAND MANAGEMENT
1000 KALANIANAʻOHE BLVD., 10TH FLOOR
HONOLULU, HAWAII 96813

PRELIMINARY MAP
(Parcel HH)
CONSOLIDATION OF LOTS 26, 29, AND 31
Kuku'ula Residential Subdivision, Phase III-A
Being Portion of R.P. 6714,
L.C. No. 7714-B, Ap. 2 to
M. Kekuaia no M. Kekuaia
RESUBDIVISION OF SAID CONSOLIDATION INTO
LOTS 1 THROUGH 31, INCLUSIVE
AND DESIGNATION OF EASEMENTS
D-10 THROUGH D-14, INCLUSIVE
KŪLOA, KAUAI, HAWAII
Owner: Kuku'ula Development Co., LLC
TAK: (4) 2-6-19: 29
(4) 2-6-19: 31
Date: October 9, 2021

Surveyed by: [Name]
Date: [Date]

Surveyed by: [Name]
Date: [Date]



Laurel Loo, Partner
ll@m4law.com

September 01, 2023

Ka'āina Hull, Director of Planning
Kauai County Planning Department
4444 Rice Street, Suite A473
Līhu'e, Hawai'i 96766
Via E-mail: khull@kauai.gov

Re: Petition to Appeal Action of the Director Pertaining to
Subdivision Application No. S-2022-6
Applicants- BBCP Kukui'ula Infrastructure LLC (formerly Kukui'ula
Development Company, LLC) and MP Kaua'i HH Development Fund, LLC

Dear Mr. Hull:

This responds to the Director of Planning's letter dated August 21, 2023 addressed to the Applicants' Authorized Representative, Mr. Wayne Wada attempting to void the preliminary subdivision map pertaining to Subdivision Application No. S-2022-6, filed October 13, 2021 and given a revised tentative approval on February 8, 2022.

The Applicants submitted their first Preliminary Subdivision Extension Request on April 24th, 2023. This Preliminary Subdivision Extension Request was heard on July 11, 2023 by the Subdivision Committee and Planning Commission. At the July 11, 2023 Planning Commission meeting, the Planning Commission deferred the Applicants' request despite the Planning Department's June 5, 2023 recommendation "[t]hat an extension until February 08, 2024 be granted".

In reference to the Director's August 21, 2023, Determination that, "the preliminary subdivision map is therefore deemed void as a matter of law", the Applicants respectfully submit this Petition to Appeal this Determination. Appellants request a hearing before the Zoning Board of Appeals and, additionally, a due process hearing on whether the preliminary subdivision approval is void. Pursuant to 1-9-2 of the Rules of Practice and Procedure of the Kaua'i Planning Commission, we provide the following information:

1. Appellants are the Applicants:

BBCP Kukui'ula Infrastructure LLC
(formerly Kukui'ula Development Company LLC)
c/o Chris Rivera, 2700 Keaula Street, Koloa, HI 96756

Honolulu Office: P. O. Box 2800 • Honolulu, Hawai'i 96803-2800
Five Waterfront Plaza, 4th Floor • 500 Ala Moana Boulevard • Honolulu, Hawai'i 96813
Telephone: (808) 529-7300 • Fax: (808) 524-8293

Kaua'i Office: 4463 Pahe'e St., Suite 208 • Līhu'e, Hawai'i 96766
Telephone: (808) 632-2267 • Fax: (808) 524-8293

Ka'āina Hull, Director of Planning

September 01, 2023

Page 2

Phone number: (808) 742-3044

and

MP Kauai HH Development Fund, LLC

c/o Laurel Loo, 4463 Pahe'e Street, Suite 208, Lihue, HI 96766

Phone number: (808) 977-8015

2. The properties are identified as TMK (4) 2-6-019:029, owned by appellant MP Kauai Development Fund, and TMK (4) 2-6-019:026 and 031, owned by appellant BBCP Kukui'ula Infrastructure LLC.

3. The subdivision ordinance in question is Section 9-3.8 Final Subdivision Map of the Kauai County Code.

4. Pertinent facts are:

1. This application for subdivision approval was submitted to Planning Department on October 13, 2021.
2. The Subdivision Application Routing Form (of the County of Kauai Planning Department) dated November 1, 2021 was transmitted to various Departments.
3. *A Revised* Tentative Approval was made on February 8, 2022
4. Construction Plans, pursuant to Section 9-3.5 of the Kauai County Code were submitted to the Department of Public Works and other County of Kauai agencies on June 27, 2022.
5. On August 30, 2023, 14 months after the initial submittal of the Construction Plans, the County Department of Public works Engineering division provided its comments for its review of the Construction Plans.
6. Appellants have diligently worked with the County and agencies to respond to comments. However, Applicants are held to the review process of the County of Kauai, which is experiencing staffing constraints. Without final construction plans, a final map cannot be submitted.
7. To support the foregoing facts, Applicant MP Kauai HH Development Fund, LLC alone has expended \$1.2 million to process and support this subdivision application. To start again would cause no harm to the County but would be a financial burden on the Applicants as work will have to be duplicated to begin the process again. Additionally, delays in construction of the property cost approximately \$95,000 per month in carrying costs for Applicant MP Kauai HH Development Fund, LLC alone.
8. Due to unforeseen circumstances, our (previous) Authorized Representative, Mr. Dennis Esaki, suddenly fell ill in early 2023 and passed away July 2023. Mr. Esaki's unforeseen illness contributed to the untimely filing of the extension request.
9. Upon knowledge that the Authorized Agent fell ill, the Applicants made a good faith attempt to submit an Extension Request on April 24, 2023.
10. It is believed this is the first time the Planning Department has attempted to void a preliminary subdivision approval while an extension request is

Ka'āina Hull, Director of Planning

September 01, 2023

Page 3

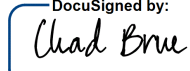
pending. Applicants believe the foregoing sequence of events justify an extension from the Planning Commission pursuant to Section 9-3.8 (c)(1) of the Kauai Subdivision Ordinance which allows the Planning Commission to grant an extension.

5. The appellants appeal the Director's August 21, 2023 Determination that, "the preliminary subdivision map is therefore deemed void as a matter of law". A due process hearing must be held before Appellant's rights are voided, and Appellants therefore request that the Planning Commission in light of the foregoing factors reinstate the preliminary subdivision map and further grant the appellants' April 24, 2023 request for a First Subdivision Extension.

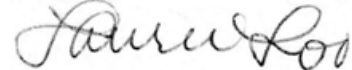
6. Appellants believe the Director has acted in an arbitrary or capricious manner, or manifestly abused his discretion in this instance because 1) this is a new policy of the Planning Department to immediately void any preliminary subdivision maps where an extension of time has not been submitted; 2) Appellants have continuously and diligently worked on the project since the initial filing of this subdivision application and have spent a minimum of \$1.2 M in resources; 3) the Appellants' former authorized representative, Dennis Esaki, suddenly and unexpectedly became ill and died 3 months after time the extension request was made in 2023; and 4) there has been no proffer of a due process hearing prior to the Director's claim that the preliminary approval is void.

Sincerely,

BBCP Kukui'ula Infrastructure LLC

DocuSigned by:

77D875FFB670450...
By
Its

MP Kauai HH Development Fund, LLC


By Laurel Loo
Its Attorney



PLANNING COMMISSION

KAAINA S. HULL, CLERK OF COMMISSION

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

MEMORANDUM

To: Honorable Commissioners
Kauai Planning Commission

Fr: Kaaina S. Hull
Clerk of the Commission

Date: July 28, 2023

RE: Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision Related to the Planning Director's Issuance of a Notice of Violation and Order to Pay Fines for the continued use of a Farm Dwelling as a "Dormitory/Residence Hall and School", ***Kauai Christian Fellowship***, 2799 R Ala Kinoiki, Koloa, Kauai, TMK 28022015-2, appeal received on July 28, 2023, for referral to Board and Commissions as Contested Case File No. CC-2024-2.

Please refer this appeal filed as CC-2024-2 to Boards & Commissions to conduct the required analysis and contested case hearing, as necessary.

Services should include but not be limited to: procure the services of a hearings officer, conduct the hearing, consolidate appeals where necessary, dispose of all pre-hearing motions, receive and record all evidence including subpoenaing any witness, and render a recommended filings of fact, conclusions of law, decision and order for the Planning Commission's Action.

ORIGINAL

CADES SCHUTTE
A Limited Liability Law Partnership

MAUNA KEA TRASK 8418
3083 Akahi Street, Ste 201
Lihu'e, Hawai'i 96766
Telephone: (808) 245-1922
Fax: (808) 521-9210

Attorneys for Appellants
KAUAI CHRISTIAN FELLOWSHIP,
a Domestic Nonprofit Corporation

COUNTY OF KAUAI

'23 JUL 28 A6:44

PLANNING DEPT.

BEFORE THE PLANNING COMMISSION
OF THE
COUNTY OF KAUAI

In the Matter of the Application

of

KAUAI CHRISTIAN FELLOWSHIP Appealing
Notice of Violation & Order to Pay Fines and
Order, dated June 28, 2023, for a property
located at 2799 R Ala Kinoiki, Koloa, Kaua'i,
Hawai'i Tax Map Key No.: (4) 2-8-022-
015:0002

**PETITION TO APPEAL OF THE
DECISION OF THE PLANNING
DIRECTOR;**

EXHIBITS "1" - "6"

CERTIFICATE OF SERVICE

Planning Commission Hearing:

Date: _____

Time: _____

Place: _____

PETITION TO APPEAL OF THE DECISION OF THE PLANNING DIRECTOR

Notice is hereby given that Appellant, KAUAI CHRISTIAN FELLOWSHIP, a domestic Nonprofit Corporation ("Appellant" or "KCF"), by and through its undersigned counsel, and pursuant to Chapters 6 and 9, et seq., of the Rules of Practice and Procedure of the Planning Commission ("Planning Commission Rules"), hereby appeals the decision of the County of Kauai Planning Director ("Director") as set forth in his letters dated June 28, 2023, and

identified as the Notice of Violation & Order to Pay Fines (“**NOV-OPF**”), a copy of which is attached hereto and incorporated herein as Exhibit “1”.

I. Name, Address and Telephone Number of the Appellants.

KCF is incorporated for religious and educational purposes. *See*, Exhibit “2”. KCF is a non-denominational Christian church that puts a high priority on reaching youth and their families and in this regard is proudly self-described as a “youth ministry gone berserk.”

KCF may be contacted via undersigned counsel at the following address and telephone number: 3083 Akahi Street Līhu‘e, #201, Hawai‘i 96766; Phone (808) 245-1922.

II. Identification of the Property and Appellants Interest Therein.

KCF is the current owner of the fee simple interest in that certain parcel of real property located at 2733 R Ala Kinoiki, Koloa, Kaua‘i, Hawai‘i 96756, and further identified as Unit B of the Elysian Fields Condominium, Tax Map Key (“**TMK**”) No. (4) 2-8-022-015:0002 (the “**Property**”). *See*, Exhibit “3”. KCF purchased the Property on or about May 28, 2019, from the Koloa Hawaii Congregation of Jehovah’s Witness. When the Property was purchased, it was entitled with Class IV Zoning Permit Z-IV-2013-11, Use Permit U-2013-10, and Special Permit SP-2013-04. *See*, Exhibit “4”.

III. The Particular Provisions of the Regulations in Question.

The particular provisions of the regulations in question are Sections 8-3.1(a), 8-1.5, 8-3.5(a)(2), (4), and (5) 8-17.10, of the codified Kaua‘i County Code 1987, as amended. Also at issue are Interpretive Administrative Zoning Rules and Regulations (2014) of the Kaua‘i Planning Commission Relating to Chapters 8, 9, and 10 of the Kaua‘i County Code.

IV. Facts.

The Property is 1.893-acres and is one of 8 remnant lots resulting from the subdivision of 10 contiguous agricultural lots in 1994 to accommodate the Ala Kinoiki Koloa/Poipu Eastern Bypass Rd. The eastern boundary of the Property abuts Ala Kinoiki Rd., and on the other side of Ala Kinoiki Rd. is the Poipu Aina gentlemen farm agricultural subdivision. The land to the west of the Property is zoned Residential (R-6) and is owned by the State of Hawaii and currently leased. To the south of the Property is another remnant lot owned by KCF upon which it owns and operates a church complex that includes classrooms, office, children nursery, kitchen guest room and lounge under the authority of Special Permit SP-98-7, Use Permit U-98-33, and Class IV Zoning Permit Z-IV-98-41, as amended (the “**KCF Permits**”). On or about September 11, 2007, the County of Kauai Planning Commission (“**Commission**”) granted KCF an amendment to said permits to allow additions to the church facility in two phases including construction of a gymnasium, staff housing, office complex, barn, and skate park subject to 12 conditions.

On or about March 13, 2013, the Commission approved the Koloa Hawaii Congregation of Jehovah’s Witness’ application for Class IV Zoning Permit Z-IV-2013-11, Use Permit U-2013-10, and Special Permit SP-2013-04 to construct a “new Kingdom Hall” on the Property (the “**Kingdom Hall Permits**”). See, Exhibit “4”. A Kingdom Hall, that is, meeting hall for worship purposes, is a development that is unique to Jehovah’s Witnesses, a millenarian restorationist Christian denomination with nontrinitarian beliefs distinct from mainstream Christianity.¹ Jehovah’s Witnesses consider the Bible to be scientifically and historically accurate and reliable² and interpret much of it literally, while also accepting it contains much

¹ See, Beckford, James A. (1975). *The Trumpet of Prophecy: A Sociological Study of Jehovah’s Witnesses*. Oxford: Basil Blackwell at 118-119, 151, 200-2011; Stark, Rodney; Iannaccone, Laurence R. (1997). *Why the Jehovah’s Witnesses Grow so Rapidly: and A Theoretical Application*. *Journal of Contemporary Religion*. 12 (2): 133-157

² All Scripture is Inspired by God. Watch Tower Society. 1990, at 336.

symbolism³. Jehovah's Witnesses base all of their beliefs on the Bible, as interpreted by the Governing Body⁴. As such, a core tenet of the Jehovah Witness faith is the study and examination of the Bible. *See*, Exhibit "5". Jehovah's Witnesses hold meetings for worship each week where they examine the Bible and how they can apply its teachings in their lives. *Id.* These meetings include audience participation, much like a classroom discussion. *Id.*

According to the Kingdom Hall Permit application, the development, amongst other things, would include a meeting hall (worship space), two (2) meeting rooms, restrooms, office and a pastor's living quarters. The Kingdom Hall Permits do not have an expiration date and KCF is under the information and belief that these permits run with the land and are still valid.

As stated above, on or about May 28, 2019, KCF purchased the Property from the Koloa Hawaii Congregation of Jehovah's Witness with the understanding and belief that they could operate a church/religious facility thereon under the Kingdom Hall Permits. This church/religious facility, dubbed the Anchor House, would be consistent with the Kingdom Hall Permits in that its use would involve a program much like a classroom discussion, and would complement KCF's existing permitted church facility and ministry activities to the south of the Property. Further, Anchor House would not have any practical impact and/or effect greater than that of other allowable uses within the county Agriculture zoning district, including but not limited to Farm Dwelling Units or Farm Worker Housing.

Anchor House specifically adheres to the tenets of the Christian faith as articulated by Matthew 28:18-20, which provides:

Jesus, undeterred, went right ahead and gave his charge: "God authorized and commanded me to commission you: Go out and train everyone you meet, far and near, in this way of life, marking them by baptism in the threefold name: Father, Son, and Holy Spirit. Then instruct them in the practice of all I have commanded

³ Obedience to the Good News a Way of Life. The Watch Tower. October 15, 1977, at 618.

⁴ The Reasoning From The Scriptures. Watch Tower Society. 1989, at 199-208.

you. I'll be with you as you do this, day after day after day, right up to the end of the age."

Anchor House is designed and used principally for religious worship of and services concerning Jesus Christ pursuant to the doctrine contained in Matthew 28:18-20. According to Pastor Rick Bundschuh, the purpose of Anchor House is to:

"[C]reate a one-year experience of intense, challenging and adventurous Bible exploration to help add to the spiritual cement of young people before they launch in a career or head off to college."

Anchor House is a one-year bible and ministry-based program designed for those 18 and older. Anchor House is designed to train adults as disciples of Jesus Christ. Anchor House does not provide grades or diplomas. Instead, it provides its attendees with ministry skill and a deeper understanding of the Christian faith. Anchor House is a church/religious facility that provides a space for Adults to: (1) explore and learn about various books of the Old and New Testament; (2) experience how to live a life of care and discipline in community; and (3) receive personal mentoring and training in a specific area of ministry (Kids, Middle School, High School, Sports Ministry, Worship Music, Media Story Telling) by KCF staff who oversee these various areas.

Although colloquially described as a school, Anchor House does not have an organized curriculum, nor does it offer instruction to children in the grade range kindergarten through twelve (12), or any portion thereof. Further, Anchor House is not a nationally accredited institution of learning that provides full-time or part-time public or private education, nor does it provide facilities for teaching, research, and group learning in the traditional and formal secular sense, nor is it authorized to grant academic diplomas and/or degrees.

Out of respect and to ensure that Anchor House comported with the Kingdom Hall Permits, on or about May-April 2019, officials from KCF met with Mayor Kawakami and his Managing Director, who was the prior County of Kauai Planning Director under Mayor Carvalho

and who signed the Kingdom Hall Permits, to explain the Anchor House concept and show them rough drawings in order to get their blessing. The Mayor's Office was very positive on the idea and so KCF rolled ahead.

On or about May 15, 2023, KCF was served with a First Notice of Violation ("**NOV**"). *See*, Exhibit "6". According to the NOV, on April 24, 2023, a Planning Inspector allegedly verified the change in use of the Property's "Farm Dwelling" into a "Dormitory"/"Residence Hall" and "School" without the required zoning permits. This was alleged to be a violation of The Comprehensive Zoning Ordinance ("**CZO**") and therefore unlawful and a public nuisance. The NOV did not contain any explicit statement(s) in plain language of the issues involved and the facts alleged by the agency in support thereof. In fact, the NOV did not contain any factual statements whatsoever.

On or about mid-May 2023, around the same time KCF was served with the NOV, Anchor House ceased its operations consistent with the demand contained in the NOV.

On June 13, 2023, KCF officials met with members of the County of Kauai Planning Department ("**Department**") to discuss the NOV and matters pertaining to KCF's other church parcel to the south of the Property. KCF officials further requested guidance on the permissibility to temporarily house guests, interns and volunteer work crews on the church property under their current permits as KCF officials were not clear as to what is currently permissible.

Subsequently, on June 28, 2023, a Planning Inspector allegedly verified the continued use of a "Farm Dwelling" as a "Dormitory"/"Residence Hall" and "School" without the required zoning permits. *See*, Exhibit "1".

V. The Action of the Director.

On or about June 28, 2023, the Director sent KCF the NOV-OPF. The NOV-OPF Ordered the following:

1. Pay a fine of ten Thousand (\$10,000.00) for the continued use of a "Farm Dwelling" as a "Dormitory"/"Residence Hall" and "School" without the required zoning permits, which is an unlawful and public nuisance.
2. Pay and additional civil fine of ten thousand (\$10,000.00) per day for each day in which the violation persists.
3. Immediately cease and desist the violation.

VI. Reasons for the Appeal.

For the reasons stated below, KCF is appealing the NOV-OPF because the Director's action was based upon erroneous findings of material facts, the Director had acted in an arbitrary or capricious manner, and/or the Director had manifestly abused his discretion.

KCF notes that the NOV-OPF does not contain an explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof. In fact, the NOV-OPF does not contain any factual statements whatsoever. KCF is assuming that the NOV-OPF relate to the previously described Anchor House program. However, if its assumption(s) is/are incorrect KCF reserves the right to amend this Notice of Appeal to address any new facts that are later disclosed by the Department.

A. The Notice Contained in the NOV-OPF is Insufficient

The Director acted in an arbitrary or capricious manner, and/or manifestly abused his discretion because neither the NOV, nor the NOV-OPF contain an explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof as required by HRS §91-9(4).

Before an agency takes action which adversely affects particular rights and obligations, those affected must be given notice and an opportunity to present their side of the case in a full and fair hearing. Boehm v. Anne Arundel County, 54 Md.Ap.497, 459 A.2d 590 (1983). The due process right to notice includes an adequate formulation of the subjects and issues involved in the case. *Id.*

In the instant matter, the only statement as to any alleged zoning violation was that the subject Planning Inspector, on June 28, 2023, “through her investigation, verified the continued use of the “Farm Dwelling” as a “Dormitory”/ “Residence Hall” and “School” without the required zoning permits.” *See*, Exhibit “1”. This is not adequate notice and constitutes denial of due process under both the State and Federal Constitutions.

B. The Planning Department’s Investigation was Done Without a Warrant

Violation of the CZO is a criminal misdemeanor and shall be punishable by a fine not exceeding two thousand dollars (\$2,000.00), and as such constitutional protections attach.

The Director acted in an arbitrary or capricious manner, and/or manifestly abused his discretion by conducting an administrative search of the Property without a warrant in violation of the Fourth Amendment of the U.S. Constitution and Article 1, Section 7 of the Hawaii State Constitution. *See*, Camara v. Municipal Court of San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967).

C. The Anchor House is Not a “Dormitory”/“Residence Hall”

The Director’s action was based upon an erroneous finding of a material fact because the Anchor House is not a “Dormitory”/“Residence Hall” as those terms are defined by the CZO.

A “**Dormitory**” or “**Residence Hall**” means a building primarily providing sleeping and residential quarters for students and faculty, and visitors affiliated with the university or college.

See, CZO §8-1.5. A dormitory contains multiple private or semiprivate single rooms, usually along with communal bathroom facilities, kitchen facilities, and recreation areas. *Id.*

Relatedly, a “**University**” or “**College**” means a nationally accredited institution of learning that provides full-time or part-time education, whether public or private, including but not limited to community colleges and college-preparatory institutions, providing facilities for teaching, research, and group learning, and authorized to grant academic diplomas and/or degrees. *Id.*

First, Anchor House is not a “Dormitory” or “Residence Hall” because, amongst other things, it does not primarily⁵ provide sleeping and residential quarters for students and faculty, and visitors affiliated with a university or college (emphasis added). Anchor House primarily functions as a “church” and or “religious facility” as those terms are defined in CZO §8-1.5 (emphasis added).⁶ Further, although attendees of Anchor House live there for the duration of the ministry program, Anchor House does not contain multiple private or semiprivate single rooms.

Secondly, Anchor House is not a “Dormitory” or “Residence Hall” because it is not affiliated with a “University” or “College” given that neither KCF nor Anchor House is a nationally-accredited institution of learning that provides full-time or part-time education, whether public or private, nor is it a community colleges or college-preparatory institution, providing facilities for teaching, research, and group learning, and authorized to grant academic diplomas and/or degrees.

D. Anchor House is Not a “School”

⁵ Primarily (adverb) (1) For the most part: Chiefly; (2) In the first place: Originally. <https://www.merriam-webster.com/dictionary/primarily>.

⁶ “**Church**” means a building designed for or used principally for religious worship or religious services. See “Religious Facilities.” CZO §8-1.5. “**Religious Facilities**” means buildings, other structures, and land designed to be used for purposes of worship. *Id.*

The Director's action was based upon an erroneous finding of a material fact because the Anchor House is not a "School" as that term is defined by the CZO.

"School" means an institution with an organized curriculum offering instruction to children in the grade range kindergarten through twelve (12), or any portion thereof (emphasis added). *See*, CZO §8-1.5.

As stated supra, Anchor House does not have an organized curriculum, nor does it instruct children in the grade range kindergarten through twelve (12), or any portion thereof. Instead, Anchor House trains adults as disciples of Jesus Christ by providing its attendees with ministry skill and a deeper understanding of the Christian faith. Therefore, Anchor House is not a "School".

E. Anchor House is Permitted Under the Kingdom Hall Permits.

The Director acted arbitrarily and capriciously, and/or manifestly abused his discretion by finding that the use of the Property for the Anchor House was without the required zoning permits and therefore unlawful and a public nuisance, because the Anchor House may be used under the Kingdom Hall Permits.

The Kingdom Hall Permits allow for the construction of a church facility as noted in the application submitted by the Koloa Hawaii Congregation of Jehovah's Witness. As stated supra, the Kingdom Hall Permit application presented that the church facility would include a meeting hall (worship space), two (2) meeting rooms, restrooms, office and a pastor's living quarters, that would necessarily be in line with the Jehovah Witness faith which studies the Bible much like a classroom discussion.

Similarly, the Anchor House contains meeting hall space and meeting rooms, restrooms, office, pastor living quarters and engages in a program "much like a classroom". It is arbitrary

and capricious and/or a manifest abuse of discretion to allow a Jehovah Witness Church to use a religious facility like a classroom but a non-denominational Christian church like KCF cannot under the same set of permits.

F. Anchor House Ceased Operations Following Receipt of the May 15, 2023, First Notice of Violation.

The Director's action was based upon an erroneous finding of a material fact because the Anchor House ceased operating in mid-May shortly after receiving the May 15, 2023, NOV, and was not operating on or about June 28, 2023.

G. The Imposition or Implementation of the CZO in this Matter Violates RLUIPA.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") prohibits, amongst other things, a governments' imposition or implementation of "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." *See*, 42 U.S.C. § 2000cc(a)(1).

RLUIPA defines a "land use regulation" as a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest. *Id.* § 2000cc-5(5). The sections of the CZO that are subject of this appeal are inarguably "land use regulations".

In the instant case, the Director's actions violate RLUIPA by treating KCF and its Anchor House operation on "less than equal terms with nonreligious assemblies or institutions." *See*, 42 U.S.C. § 2000cc(b)(1).

Further, the Director's action of disallowing the operation of Anchor House under the Kingdom Hall Permits violated the "equal terms" and "nondiscrimination" provisions of RLUIPA, which state that "no government shall impose or implement a land use regulation that "discriminates against any assembly or institution on the basis of religion or religious denomination." *See*, 42 U.S.C. § 2000cc(b)(2).

Finally, the Director's actions against KCF's Anchor House operation violates RLUIPA by "unreasonably limiting religious assemblies, institutions, or structures within a jurisdiction." *See*, 42 U.S.C. § 2000cc(b)(3).


VII. PRAYER FOR RELIEF

WHEREFORE, Appellant prays that the Planning Commission:

- A. Reverse and set aside the Planning Director's June 28, 2023, NOV-OPF;
- B. Determine that KCF's Anchor House program may be held under the Kingdom Hall Permits; and
- C. Grant such further relief as may be just.

DATED: Līhu'e, Hawai'i, July 28, 2023.

CADES SCHUTTE LLP
A Limited Liability Law Partnership



MAUNA KEA TRASK
Attorneys for Appellants
KAUAI CHRISTIAN FELLOWSHIP,
a Domestic Nonprofit Corporation

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



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

JUN 28 2023

NOTICE OF VIOLATION & ORDER TO PAY FINES

VIA CERTIFIED MAIL/EMAIL

KAUAI CHRISTIAN FELLOWSHIP
2731 ALA KINOIKI
KOLOA, HI 96756

**SUBJECT: COMPREHENSIVE ZONING ORDINANCE (CZO) VIOLATION ON
2799 R ALA KINOIKI KOLOA, HI 96756
Tax Map Key: 280220150002**

On May 10, 2023, the Planning Department issued you a First Notice Of Violation (attached) regarding violations on the subject property. To date, June 8, 2023, the Planning Department has verified the ongoing violation of the Kaua'i County Code (KCC) Chapter 8, known as the Comprehensive Zoning Ordinance (CZO), specifically:

VIOLATION(S):

Sec. 8-3.1 Zoning Permits.

(a) When Required. No person shall undertake any construction or development or carry on any activity or use, for which a zoning permit is required by this Chapter, or obtain a building permit for construction, development, activity or use regulated by this Chapter, without first obtaining the required zoning permit.

Sec. 8-1.5 Definitions

"Dormitory" or "Residence Hall" means a building primarily providing sleeping and residential quarters for students and faculty, and visitors affiliated with the university or college. A dormitory contains multiple private or semiprivate single rooms, usually along with communal bathroom facilities, kitchen facilities, and recreation areas.

"School" means an institution with an organized curriculum offering instruction to children in the grade range kindergarten through twelve (12), or any portion thereof.

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties.

(a) Enforcement, Legal Procedures and Penalties.

EXHIBIT 1

...

(2) It shall be the duty of the Planning Commission and Planning Director to enforce the provisions of this Chapter and it shall be the duty of all law enforcement officers of the County of Kaua'i to enforce this Chapter and all the provisions thereof.

...

(4) Any building or structure or other improvement or development set up, erected, constructed, altered, enlarged, converted, moved, or maintained contrary to the provisions of this Chapter or any use of land contrary to the provisions of this Chapter shall be unlawful and a public nuisance. The County Attorney shall immediately commence an action or proceeding for the abatement, removal, or enjoinder thereof in the manner provided by law, and shall take such other steps, and shall apply to such courts as may have jurisdiction to grant relief that will abate or remove such building, structure, improvement, development or use, and restrain and enjoin any person from setting up, erecting, building, maintaining, or using any such building, structure, improvement or development, or using any property contrary to the provisions of this Chapter.

(5) The remedies provided for in this Article shall be cumulative and not exclusive.

SECOND AND FINAL NOTICE:

On May 15, 2023, via United States Postal Service, you were served a First Notice of Violation that notified you of the following:

1. The change in use of the "Farm Dwelling" into a "Dormitory"/"Residence Hall" and "School" without the required zoning permits constitutes a violation.
2. In addition, under KCC Section 8-3.5, any improvement, development, or use of land contrary to the provisions of KCC Chapter 8 is unlawful and a public nuisance.

Subsequently, on June 28, 2023, Planning Inspector Joan Ludington, through her investigation, verified the continued use of the "Farm Dwelling" as a "Dormitory"/"Residence Hall" and "School" without the required zoning permits. Thus, the violations remain after reasonable notice was given and requests to correct or cease the violation were made.

Pursuant to Hawai'i Revised Statutes Section 46-1.5(24) and KCC Section 8-3.5, you are hereby subject to the enforcement, legal procedures, and penalties specified in the Order that accompanies this Second and Final Notice of Violation.

Should you have any questions, please feel free to contact Inspector Joan Ludington of my staff at 808-241-4052, or email at jludington@kauai.gov.

A handwritten signature in black ink, appearing to read 'Kaina S. Hull', written over a horizontal line.

KAINA S. HULL
Director of Planning

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



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

JUN 28 2023

KAUAI CHRISTIAN FELLOWSHIP
2731 ALA KINOIKI
KOLOA, HI 96756

ORDER

Pursuant to Hawai'i Revised Statutes Section 46-1.5(24) and Kaua'i County Code Section 8-3.5,

IT IS HEREBY ORDERED that you shall:

1. Pay a fine of ten thousand dollars (\$10,000.00) for the above noted violation(s).
2. Pay an additional civil fine of ten thousand dollars (\$10,000.00) per day for each day in which the violation persists.
3. Immediately cease and desist the violation(s).

This Order shall become final thirty (30) calendar days after the date of its delivery, posting on the property, or publication in a newspaper of general circulation in the County of Kaua'i. Failure to correct the violation or pay the total amount of the civil fine imposed within ninety (90) days of this Order's delivery, posting, or publication may result in a lien placed on the subject property.

Pursuant to Chapter 9 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 form of an appeal must conform to the RPPPC. An appeal to the Planning Commission shall not stay any provision of this Order. The RPPPC are available online at the Planning Department's website: <https://www.kauai.gov/Planning>.

DATED: Lihu'e, Kaua'i, Hawai'i, June 28, 2023,

A handwritten signature in black ink, appearing to read "Ka'aina S. Hull", is written over a horizontal line.

KA'ĀINA S. HULL
Director of Planning

DCCA State of Hawaii

Downloaded on July 20, 2023.

The information provided below is not a certification of good standing and does not constitute any other certification by the State.

Website URL: <http://hbe.ehawaii.gov/documents>

Business Information

MASTER NAME	KAUAI CHRISTIAN FELLOWSHIP
BUSINESS TYPE	Domestic Nonprofit Corporation
FILE NUMBER	122535 D2
STATUS	Active
PURPOSE	FOR RELIGIOUS AND EDUCATIONAL PURPOSES;
ORGANIZED IN	Hawaii UNITED STATES
INCORPORATION DATE	May 21, 2001
MAILING ADDRESS	2731 ALA KINOIKI KOLOA, Hawaii 96756 UNITED STATES
TERM	PER
AGENT NAME	RICK BUNDSCHUH
AGENT ADDRESS	2731 ALA KINOIKI KOLOA, Hawaii 96756 UNITED STATES

Annual Filings

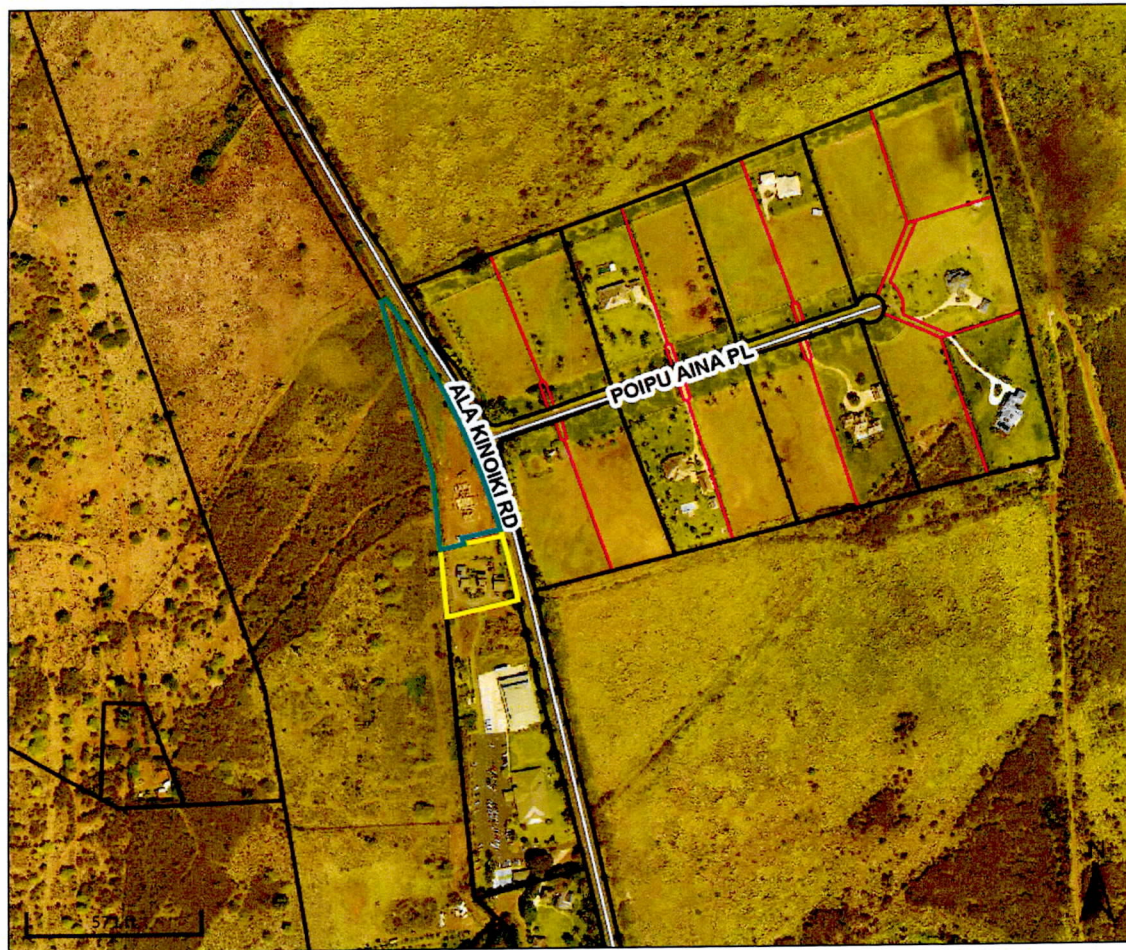
FILING YEAR	DATE RECEIVED	STATUS
2023	Apr 7, 2023	Processed
2022	Apr 2, 2022	Processed
2021	Apr 25, 2021	Processed
2020	Apr 4, 2020	Processed
2019	Apr 8, 2019	Processed
2018	Apr 4, 2018	Processed
2017	Apr 30, 2017	Processed
2016	Apr 9, 2016	Processed
2015	Apr 7, 2015	Processed
2014	Apr 9, 2014	Processed
2013	Apr 18, 2013	Processed
2012	Apr 10, 2012	Processed
2011	Apr 5, 2011	Processed
2010	Apr 11, 2010	Processed
2009	Apr 27, 2009	Processed
2008	Apr 14, 2008	Processed
2007	Jun 13, 2007	Processed
2006	Aug 3, 2006	Processed
2005	Jun 13, 2005	Processed
2004	Jun 9, 2004	Processed
2003	May 28, 2003	Processed
2002		Not Required
2001		Processed

Officers

NAME	OFFICE	DATE
BUNDSCHUH,RICK	P/D	Feb 23, 2023
SPORE,DAIN	V/D	Dec 31, 2001
CIERRAS,MELANIE	S	Apr 1, 2011
MCEVOY,JOE	T	Feb 23, 2023
WELLMAN,MIKE	D	Apr 1, 2007

Trade Names

NAME	TYPE	CATEGORY	REGISTRATION DATE	EXPIRATION DATE	STATUS
SOUTHSIDE SPORTS CENTER	Trade Name	NO CATEGORY SELECTED	Dec 21, 2015	Dec 20, 2020	Expired



Overview



Legend

-  Parcels
-  CPR Units
-  Roads

Parcel ID	280220150002	Situs/Physical Address	2733 R ALA KINOIKI	Total Market Value	\$2,375,200	Last 2 Sales		
Acreage	1.893	Mailing Address	KAUAI CHRISTIAN FELLOWSHIP	Total Assessed Value	\$2,375,200	Date	5/28/2019	Price
Class	AG		2731 ALA KINOIKI KOLOA HI 96756	Total Exemptions	\$672,800			\$453000
				Total Net Taxable Value	\$1,702,400	12/13/2007	\$750000	Reason
								VALID SALE
								VALID SALE

Brief Tax Description UNIT B ELYSIAN FIELDS CM 4465 TOG/UND 50% INT IN ALL COMMON ELEMENTS

(Note: Not to be used on legal documents)

The Geographic Information Systems (GIS) maps and data are made available solely for informational purposes. The GIS data is not the official representation of any of the information included, and do not replace a site survey or legal document descriptions. The County of Kauai (County) makes or extends no claims, representations or warranties of any kind, either express or implied, including, without limitation, the implied warranties of merchantability and fitness for a particular purpose, as to the quality, content, accuracy, currency, or completeness of the information, text, maps, graphics, links and other items contained in any of the GIS data. In no event shall the County become liable for any errors or omissions in the GIS, and will not under any circumstances be liable for any direct, indirect, special, incidental, consequential, or other loss, injury or damage caused by its use or otherwise arising in connection with its use, even if specifically advised of the possibility of such loss, injury or damage. The data and or functionality on this site may change periodically and without notice. In using the GIS data, users agree to indemnify, defend, and hold harmless the County for any and all liability of any nature arising out of or resulting from the lack of accuracy or correctness of the data, or the use of the data.

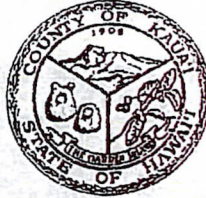
Date created: 7/20/2023
Last Data Uploaded: 7/20/2023 4:09:28 AM

Developed by  Schneider
GEOSPATIAL

Wayne Katayama
Chair

Jan Kimura
Vice-Chair

Hartwell Blake
Herman Texeira
Amy Mendonca
John Isobe
Members



Michael A. Dahilig
Clerk of the Commission

PLANNING COMMISSION
County of Kaua'i, State of Hawai'i
4444 Rice Street
Kapule Building, Suite A-473
Lihu'e, Hawai'i 96766-1326
TEL (808) 241-4050 FAX (808) 241-6699

MAR 14 2013

Dean R. Agcaoili, Authorized Agent
DRA ARCHITECTURE LLC.
905 Makahiki Way, Mauka Suite
Honolulu, Hawai'i 96826-2869

Subject: Class IV Zoning Permit Z-IV-2013-11
Use Permit U-2013-10
Special Permit SP-2013-04
Applicant – Kōloa Congregation of Jehovah's Witness
Tax Map Key: (4) 2-8-022:015, Unit B
Po'ipū, Kaua'i

Dear Mr. Agcaoili,

This letter memorializes the action taken by the Kaua'i Planning Commission effective March 13, 2013 concerning approval of the above subject permits. The approval as amended by the Planning Commission, per your consent, is subject to the following conditions:

1. The church facility shall be limited to the representation as noted in the petition. Any changes to said structures and/or facilities shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.
2. The Applicant shall submit a more detailed landscape plan for the Planning Department review prior to issuance of the first building permit involving the project, residential or commercial section. The landscaping plan shall incorporate, to the extent reasonably possible, native plants and Polynesian-introduced plants.

An Equal Opportunity Employer

V:\2013 Master Files\Regulatory\Zoning Permits\Class IV\Z-IV-2013-11 Koloa Jehovah\Approval-1 3.13 13 DC Koloa Jehovah\Witness_Church Hall.docx

EXHIBIT 4

3. In order to mitigate traffic impacts along Ala Kinoiki, the Applicant shall work with the Department of Public Works and Planning to resolve this matter. The Applicant is advised that additional conditions may be imposed in the process of resolving this requirement.
4. The Applicant is made aware that intensive agriculture, which may entail dust, active pesticide use, and other nuisances associated with agricultural uses, will occur. The approval of this permit shall not limit or prevent the continuation of intensive agricultural activities within the immediate surroundings.
5. The use of this facility shall be as represented. If the noise generated by the church facility adversely impacts the nearby residential subdivision (Weliweli Houselots Subdivision) to the south, the Applicant shall be required to revise their operation hours such that the concerns are properly addressed and mitigated.
6. Based on the proposal, the Applicant shall provide a minimum of 26 off-street parking stalls. However, the Applicant is made aware that in an effort to mitigate unforeseen parking issues, the department reserves the authority to increase the parking requirements when particular uses cause unusual traffic congestion.
7. In accordance with Section 11A-2.2 of the KCC, the Applicant shall submit to the Planning Department an Environmental Impact Assessment Fee (EIA) for the project. The EIA fee is based on \$100 per the minimum number of parking stalls serving the proposed development as required by County Code Section 11A-2.2, and is due at the time of building permit issuance.
8. In order to minimize adverse impacts on Federally Listed Threatened Species, such as Newell's Shearwater and other seabirds, if external lighting is to be used in connection with the proposed project, all external lighting shall be only of the following types: downward facing, shielded lights. Spotlights aimed upward or spotlighting of structures on the project site shall be prohibited.
9. The Applicant shall resolve and comply with the applicable standards and requirements set forth by the State Health Department, and the County Departments of Public Works & Water.

Dean R. Agcaoili, Authorized Agent
DRA ARCHITECTURE LLC.
Page | 3

10. The Applicant shall develop and utilize Best Management Practices (BMP's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.
11. The Applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the Applicant shall contact the State Department of Land and Natural Resources – Historic Preservation Division at (808) 692-8015 and the Planning Department at (808) 241-4050.
12. The Applicant is advised that additional government agency conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agency(ies).

Sincerely Yours,



MICHAEL A. DAHILIG
Clerk, Kaua'i Planning Commission

xc: County – Public Works, Fire, Water, Finance-Real Property Division
State – Health, Historic Preservation Division-DLNR



Congregation Meetings of Jehovah's Witnesses

Learn about our meetings. Find a meeting location near you.

[Find a Location Near You](#)

What Happens at Our Meetings?

Jehovah's Witnesses hold meetings for worship twice each week. ([Hebrews 10:24, 25](#)) At these meetings, which are open to the public, we examine what the Bible says and how we can apply its teachings in our life.

Most of our services include audience participation, much like a classroom discussion. Participation is voluntary. Meetings begin and end with song and prayer.

You don't have to be one of Jehovah's Witnesses to attend our meetings. We invite everyone to come along. Seats are free. No collections are ever taken.

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



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

MAY 10 2023

FIRST NOTICE OF VIOLATION

VIA CERTIFIED MAIL

KAUAI CHRISTIAN FELLOWSHIP
2731 ALA KINOIKI
KOLOA, HI 96756

BUNDSCHUH, RICKI R & LAUREN N TRUST
PO BOX 633
LAWAI HI 96765

SUBJECT: COMPREHENSIVE ZONING ORDINANCE (CZO)
VIOLATION ON:
2733 R ALA KINOIKI KOLOA, HI 96756
Tax Map Key: 280220150002

The Planning Department conducted an investigation of the subject property and verified violation(s) of the following Kaua'i County Code (KCC):

Chapter 8, Comprehensive Zoning Ordinance

Sec. 8-3.1 Zoning Permits.

(a) When Required. No person shall undertake any construction or development or carry on any activity or use, for which a Zoning Permit is required by this Chapter, or obtain a Building Permit for construction, development, activity or use regulated by this Chapter, without first obtaining the required Zoning Permit.

Sec. 8-1.5 Definitions

"Dormitory" or "Residence Hall" means a building primarily providing sleeping and residential quarters for students and faculty, and visitors affiliated with the university or college. A dormitory contains multiple private or semiprivate single rooms, usually along with communal bathroom facilities, kitchen facilities, and recreation areas.

"School" means an institution with an organized curriculum offering instruction to children in the grade range kindergarten through twelve (12), or any portion thereof.

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties.

(a) Enforcement, Legal Procedures and Penalties.

...

(2) It shall be the duty of the Planning Commission and Planning Director to enforce the provisions of this Chapter and it shall be the duty of all law enforcement officers of the County of Kaua'i to enforce this Chapter and all the provisions thereof.

...

(4) Any building or structure or other improvement or development set up, erected, constructed, altered, enlarged, converted, moved, or maintained contrary to the provisions of this Chapter or any use of land contrary to the provisions of this Chapter shall be unlawful and a public nuisance. The County Attorney shall immediately commence an action or proceeding for the abatement, removal, or injunction thereof in the manner provided by law, and shall take such other steps, and shall apply to such courts as may have jurisdiction to grant relief that will abate or remove such building, structure, improvement, development or use, and restrain and enjoin any person from setting up, erecting, building, maintaining, or using any such building, structure, improvement or development, or using any property contrary to the provisions of this Chapter.

(5) The remedies provided for in this Article shall be cumulative and not exclusive.

VIOLATION:

On 4/24/2023, Planning Inspector Joan Ludington, through her investigation, verified the change in use of the subject property's "Farm Dwelling" structure into a "Dormitory"/"Residence Hall" and "School".

The change in use of the "Farm Dwelling" into a "Dormitory"/"Residence Hall" and "School" without the required zoning permits constitutes a violation.

In addition, under KCC Section 8-3.5, any improvement, development, or use of land contrary to the provisions of KCC Chapter 8 is unlawful and a public nuisance.

REMEDIAL ACTION REQUIRED:

Pursuant to Hawai'i Revised Statutes Section 46-1.5(24) and KCC Section 8-3.5, you must correct the violation, remove the construction or development, or obtain the proper zoning permits for the referenced alteration, and cease and desist the unpermitted activity and use immediately.

In addition, should you fail to rectify the violation, you are hereby notified of the following:

1. A fine of up to ten thousand dollars (10,000.00) may be imposed for the above noted violation(s).
2. An additional civil fine of up to ten thousand (\$10,000.00) per day for each day in which the violation persists.

Contact Joan Ludington of the Planning Department at 808-241-4052, or at jludington@kauai.gov, within fifteen (15) calendar days upon receipt of this letter to provide a remedial action plan. Failure to do so provides us with no other alternative but to pursue enforcement action.



KA'AINA S. HULL

BEFORE THE PLANNING COMMISSION
OF THE
COUNTY OF KAUAI

In the Matter of the Application

of

KAUAI CHRISTIAN FELLOWSHIP Appealing
Notice of Violation & Order to Pay Fines and
Order, dated June 28, 2023, for a property
located at 2799 R Ala Kinoiki, Koloa, Kaua'i,
Hawai'i Tax Map Key No.: (4) 2-8-022-
015:0002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 28, 2023, the PETITION TO APPEAL
DECISION OF THE PLANNING DIRECTOR; EXHIBITS "1" - "6", was duly served upon the
COUNTY OF KAUAI PLANNING COMMISSION, via hand delivery, addressed to it at the
COUNTY OF KAUAI PLANNING DEPARTMENT, County of Kaua'i, 4444 Rice Street,
Suite A-473, Lihu'e, Hawai'i 96766.

DATED: Lihu'e, Hawai'i, July 28, 2023.

CADES SCHUTTE LLP
A Limited Liability Law Partnership



MAUNA KEA TRASK

Attorneys for Appellants
KAUAI CHRISTIAN FELLOWSHIP,
a Domestic Nonprofit Corporation

ORIGINAL

CADES SCHUTTE
A Limited Liability Law Partnership

MAUNA KEA TRASK 8418
3083 Akahi Street, Ste 201
Līhu'e, Hawai'i 96766
Telephone: (808) 245-1922
Fax: (808) 540-5015

Attorneys for Appellants
KAUAI CHRISTIAN FELLOWSHIP,
a Domestic Nonprofit Corporation

COUNTY OF KAUAI

'23 SEP -5 P3:48

PLANNING DEPT.

BEFORE THE PLANNING COMMISSION
OF THE
COUNTY OF KAUAI

In the Matter of :

Use Permit U-2013, Special Permit SP-2013-4,
and Class IV Zoning Permit Z-IV-2013-11, Tax
Map Key (4) 2-8-022:015 (Unit B), Poipu,
Kauai.

Koloa Congregation of Jehovah's Witness,
applicant. Property now owned by Kauai
Christian Fellowship.

**MEMORANDUM IN OPPOSITION TO
PLANNING DIRECTOR KA'AINA S.
HULL'S PETITION TO REVOKE
PERMITS INITIALLY GRANTED TO
APPLICANT KOLOA CONGREGATION
OF JEHOVAH'S WITNESS, PRESENTLY
OWNED BY KAUAI CHRISTIAN
FELLOWSHIP, AND ISSUE AN ORDER
TO SHOW CAUSE AND SET HEARING;**

EXHIBITS "1" - "4"

CERTIFICATE OF SERVICE

Planning Commission Hearing:

Date: September 12, 2023

Time: 9:00 a.m.

Place: TBA

**MEMORANDUM IN OPPOSITION TO PLANNING DIRECTOR
KAAINA S. HULL'S PETITION TO REVOKE PERMITS INITIALLY GRANTED
TO APPLICANT KOLOA CONGREGATION OF JEHOVAH'S WITNESS,
PRESENTLY OWNED BY KAUAI CHRISTIAN FELLOWSHIP, AND ISSUE AN
ORDER TO SHOW CAUSE AND SET HEARING**

KAUAI CHRISTIAN FELLOWSHIP, a domestic Nonprofit Corporation (“**KCF**”), by and through its undersigned counsel, and pursuant to Chapters 6 and 12 et seq., of the Rules of Practice and Procedure of the Planning Commission (“**Commission Rules**”), hereby submits this memorandum in opposition to Planning Director Ka‘aina S. Hull’s Petition To Revoke Permits Initially Granted To Applicant Koloa Congregation Of Jehovah’s Witness, Presently Owned By Kaua‘i Christian Fellowship, And Issue An Order To Show Cause And Set Hearing, filed on or about August 15, 2023.

I. Identification of the Property and Appellants Interest Therein.

KCF is the owner of the fee simple interest in that certain parcel of real property located at 2733 R Ala Kinoiki, Koloa, Kaua‘i, Hawai‘i 96756, and further identified as Unit B of the Elysian Fields Condominium, Tax Map Key (“**TMK**”) No. (4) 2-8-022-015:0002 (the “**Property**”). *See*, Exhibit “1”. KCF purchased the Property on or about May 28, 2019, from the Koloa Hawai‘i Congregation of Jehovah’s Witness. When the Property was purchased, it was entitled with Class IV Zoning Permit Z-IV-2013-11, Use Permit U-2013-10, and Special Permit SP-2013-04 (the “**Kingdom Hall Permits**”). *See*, Exhibit “2”.

II. Facts.

The Property is 1.893-acres and is one of 8 remnant lots resulting from the subdivision of 10 contiguous agricultural lots in 1994 to accommodate the Ala Kinoiki Koloa/Poipu Eastern Bypass Rd. The eastern boundary of the Property abuts Ala Kinoiki Rd., and on the other side of Ala Kinoiki Rd. is the Poipu ‘Aina gentlemen farm agricultural subdivision. The land to the west of the Property is zoned Residential (R-6) and is owned by the State of Hawaii and currently leased. To the south of the Property is another remnant lot owned by KCF upon which it owns and operates a church complex that includes classrooms, office, children nursery, kitchen

guest room and lounge under the authority of Special Permit SP-98-7, Use Permit U-98-33, and Class IV Zoning Permit Z-IV-98-41, as amended (the “**KCF Permits**”). On or about September 11, 2007, the County of Kaua‘i Planning Commission (“**Commission**”) granted KCF an amendment to said permits to allow additions to the church facility in two phases including construction of a gymnasium, staff housing, office complex, barn, and skate park subject to 12 conditions.

On or about March 13, 2013, the Commission approved the Kingdom Hall Permits. *See*, Exhibit “2”. A Kingdom Hall, that is, meeting hall for worship purposes, is a development that is unique to Jehovah’s Witnesses, a millenarian restorationist Christian denomination with nontrinitarian beliefs distinct from mainstream Christianity.¹ Jehovah’s Witnesses consider the Bible to be scientifically and historically accurate and reliable² and interpret much of it literally, while also accepting it contains much symbolism³. Jehovah’s Witnesses base all of their beliefs on the Bible, as interpreted by the Governing Body⁴. As such, a core tenet of the Jehovah Witness faith is the study and examination of the Bible. *See*, Exhibit “4”. Jehovah’s Witnesses hold meetings for worship each week where they examine the Bible and how they can apply its teachings in their lives. *Id.* These meetings include audience participation, much like a classroom discussion. *Id.*

According to the Kingdom Hall Permit application, the development, amongst other things, would include a meeting hall (worship space), two (2) meeting rooms, restrooms, office and a pastor’s living quarters.

¹ See, Beckford, James A. (1975). *The Trumpet of Prophecy: A Sociological Study of Jehovah’s Witnesses*. Oxford: Basil Blackwell at 118-119, 151, 200-2011; Stark, Rodney; Iannaccone, Laurence R. (1997). *Why the Jehovah’s Witnesses Grow so Rapidly: and A Theoretical Application*. *Journal of Contemporary Religion*. 12 (2): 133-157

² *All Scripture is Inspired by God*. Watch Tower Society. 1990, at 336.

³ *Obedience to the Good News a Way of Life*. The Watch Tower. October 15, 1977, at 618.

⁴ *The Reasoning From The Scriptures*. Watch Tower Society. 1989, at 199-208.

As stated above, on or about May 28, 2019, KCF purchased the Property from the Koloa Hawai'i Congregation of Jehovah's Witness with the understanding and belief that they could operate a church/religious facility thereon under the Kingdom Hall Permits. This church/religious facility, dubbed the Anchor House, is consistent with the Kingdom Hall Permits in that its use involves a program much like a classroom discussion, and would complement KCF's existing permitted church facility and ministry activities to the south of the Property. Further, Anchor House does not have any practical impact and/or effect greater than that of other allowable uses within the county Agriculture zoning district, including but not limited to the Kingdom Hall development, Farm Dwelling Units or Farm Worker Housing.

Anchor House specifically adheres to the tenets of the Christian faith as articulated by Matthew 28:18-20, which provides:

Jesus, undeterred, went right ahead and gave his charge: "God authorized and commanded me to commission you: Go out and train everyone you meet, far and near, in this way of life, marking them by baptism in the threefold name: Father, Son, and Holy Spirit. Then instruct them in the practice of all I have commanded you. I'll be with you as you do this, day after day after day, right up to the end of the age."

Anchor House is designed and used principally for religious worship of and services concerning Jesus Christ pursuant to the doctrine contained in Matthew 28:18-20. According to Pastor Rick Bundschuh, the purpose of Anchor House is to:

"[C]reate a one-year experience of intense, challenging and adventurous Bible exploration to help add to the spiritual cement of young people before they launch in a career or head off to college."

Anchor House is a one-year bible and ministry-based program designed for those 18 and older. Anchor House is designed to train adults as disciples of Jesus Christ. Anchor House does not provide grades or diplomas. Instead, it provides its attendees with ministry skill and a deeper understanding of the Christian faith. Anchor House is a church/religious facility that provides a

space for Adults to: (1) explore and learn about various books of the Old and New Testament; (2) experience how to live a life of care and discipline in community; and (3) receive personal mentoring and training in a specific area of ministry (Kids, Middle School, High School, Sports Ministry, Worship Music, Media Story Telling) by KCF staff who oversee these various areas.

Although colloquially described as a school, Anchor House does not have an organized curriculum, nor does it offer instruction to children in the grade range kindergarten through twelve (12), or any portion thereof. Further, Anchor House is not a nationally accredited institution of learning that provides full-time or part-time public or private education, nor does it provide facilities for teaching, research, and group learning in the traditional and formal secular sense, nor is it authorized to grant academic diplomas and/or degrees.

Out of respect and to ensure that Anchor House comported with the Kingdom Hall Permits, on or about May-April 2019, officials from KCF met with Mayor Kawakami and his Managing Director, who was the prior County of Kauai Planning Director under Mayor Carvalho and who signed the Kingdom Hall Permits, to explain the Anchor House concept and show them rough drawings in order to get their blessing. The Mayor's Office was very positive on the idea and so KCF rolled ahead.

On or about May 15, 2023, KCF was served with a First Notice of Violation ("**NOV**"). See, Exhibit "4". According to the NOV, on April 24, 2023, a Planning Inspector allegedly verified the change in use of the Property's "Farm Dwelling" into a "Dormitory"/"Residence Hall" and "School" without the required zoning permits. This was alleged to be a violation of The Comprehensive Zoning Ordinance ("**CZO**") and therefore unlawful and a public nuisance. The NOV did not contain any explicit statement(s) in plain language of the issues involved and

the facts alleged by the agency in support thereof. In fact, the NOV did not contain any factual statements whatsoever.

On or about mid-May 2023, around the same time KCF was served with the NOV, Anchor House ceased its operations consistent with the demand contained in the NOV.

On June 13, 2023, KCF officials met with members of the County of Kaua'i Planning Department ("**Department**") to discuss the NOV and matters pertaining to KCF's other church parcel to the south of the Property. KCF officials further requested guidance on the permissibility to temporarily house guests, interns and volunteer work crews on the church property under their current permits as KCF officials were not clear as to what is currently permissible.

Subsequently, on June 28, 2023, a Planning Inspector allegedly verified the continued use of a "Farm Dwelling" as a "Dormitory"/"Residence Hall" and "School" without the required zoning permits.

III. The Action of the Director.

On or about June 28, 2023, the Director sent KCF the NOV-OPF. The NOV-OPF Ordered the following:

1. Pay a fine of ten Thousand (\$10,000.00) for the continued use of a "Farm Dwelling" as a "Dormitory"/"Residence Hall" and "School" without the required zoning permits, which is an unlawful and public nuisance.
2. Pay and additional civil fine of ten thousand (\$10,000.00) per day for each day in which the violation persists.
3. Immediately cease and desist the violation.

IV. Administrative Appeal.

On or about July 28, 2023, KCF filed an administrative appeal to the NOV-OPF (the "**Appeal**") because the Director's action was based upon erroneous findings of material facts, the

Director had acted in an arbitrary or capricious manner, and/or the Director had manifestly abused his discretion.

KCF incorporates the content of the Appeal into this motion by reference, but in summary, the Appeal raised the following issues:

- A. The Notice Contained in the NOV-OPF is Insufficient
- B. The Planning Department's Investigation was Done Without a Warrant
- C. The Anchor House is Not a "Dormitory"/"Residence Hall"
- D. Anchor House is Not a "School"
- E. Anchor House is Permitted Under the Kingdom Hall Permits.
- F. Anchor House Ceased Operations Following Receipt of the May 15, 2023, First Notice of Violation.
- G. The Imposition or Implementation of the CZO in this Matter Violates Religious Land Use and Institutionalize Persons Act ("RLUIPA").

V. Petition.

Instead of simply proceeding with the administrative appeal as provided by the Charter, CZO and Commission Rules, like it does with all alleged secular violations of the CZO, the Department elected to take the unnecessarily aggressive tactic of revoking KCF's Kingdom Hall Permits while KCF's administrative appeal is pending. KCF notes that the Department specifically moved to revoke the church facility permit as opposed to the secular farm dwelling unit permit. Whereas the use of the Anchor House is covered by the Kingdom Hall Permits, the building is covered by the farm dwelling unit permits. Ostensibly, KCF would need both permits to operate the Anchor House but the fact that the Department only chose to petition to revoke the religious use permits is clear evidence of their unlawful discrimination.

The Department's actions are unprecedented and neither KCF nor counsel have ever heard of the Department moving to revoke a validly issued zoning permit that is central to the defense strategy in a pending administrative appeal in any other religious or secular matter.

The only alleged violation of the Kingdom Hall Permits is condition # 1 which required "any changes to said structure and/or facilities shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted." Petition at 4. Not only is the Director's Petition seeking actions that are grossly disproportionate to the alleged violation, but it also totally ignores the May-April 2019 meeting KCF had with the Mayor and the Ex-Planning Director, who KCF thought was still the Planning Director at the time, both of whom approved of the Anchor House idea in concept and gave KCF the impression that they could proceed with operating Anchor House legally.

The Director's actions continue to violate RLUIPA by further treating KCF and its Anchor House operation on "less than equal terms with nonreligious assemblies or institutions" by now seeking to revoke KCF's church facility permits while KCF is appealing the Director's finding that KCF's operation is illegal despite possessing validly issued church facility permits. *See*, 42 U.S.C. § 2000cc(b)(1).

Additionally, the Director's action of revoking the Kingdom Hall Permits during a pending administrative appeal, something it has never been done to any other secular or religious organization, violates the "equal terms" and "nondiscrimination" provisions of RLUIPA, which state that "no government shall impose or implement a land use regulation that "discriminates against any assembly or institution on the basis of religion or religious denomination." *See*, 42 U.S.C. § 2000cc(b)(2).

Finally, the Director's Petition further violates RLUIPA by "unreasonably limiting religious assemblies, institutions, or structures within a jurisdiction." *See*, 42 U.S.C. § 2000cc(b)(3). The fact of the matter is KCF has a church facility permit in the Kingdom Hall Permits. Whether or not the Department likes the Anchor House is inconsequential because the use of the Anchor House as a religious institution that trains Christian ministers is KCF's first amendment right which cannot be infringed based upon a novel and overly aggressive application of the punitive portions of the CZO and Commission Rules.

PRAYER FOR RELIEF

WHEREFORE, Appellant prays that the Planning Commission:

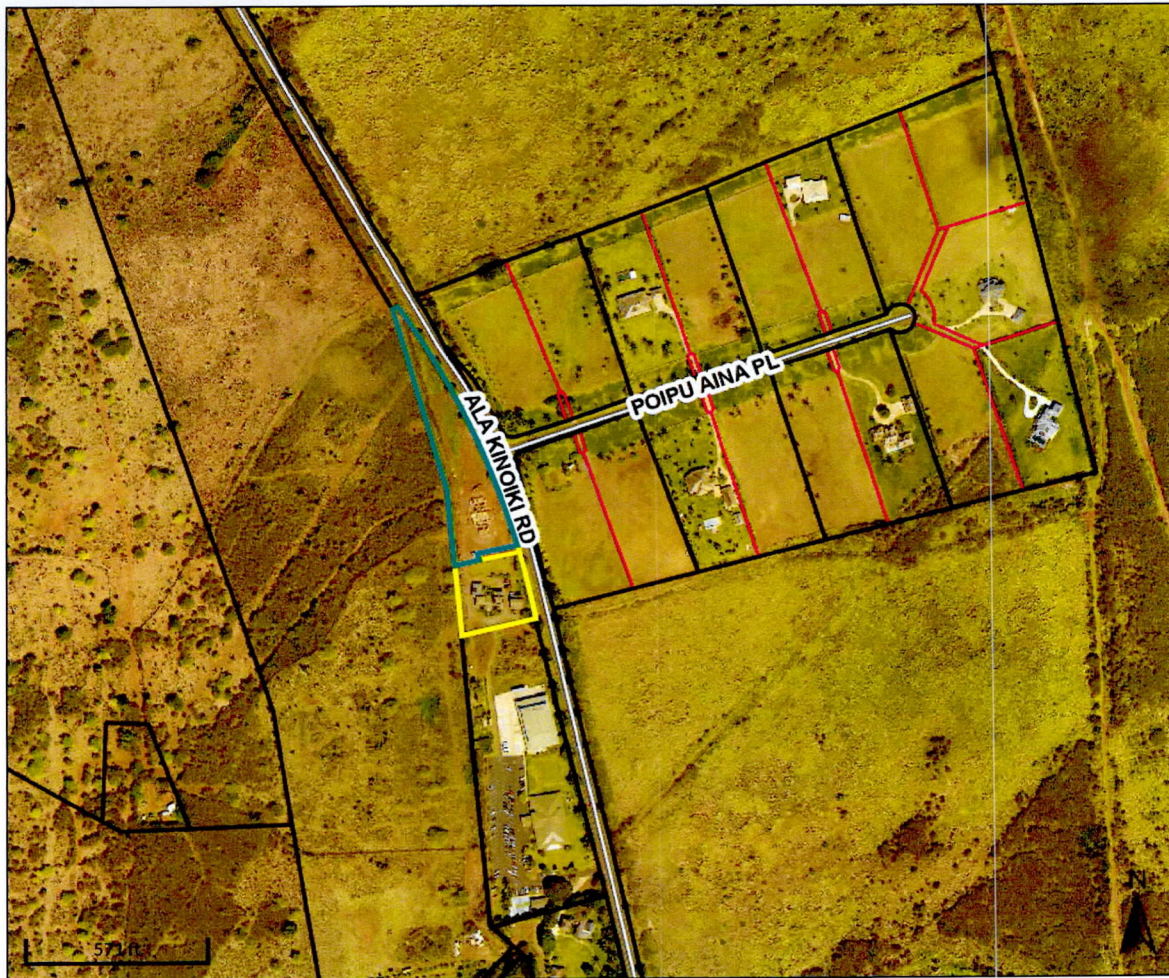
- A. Deny the Director's Petition and refuse to issue an Order to Show Cause; or, in the alternative
- B. Amend or modify the Kingdom Hall Permits to allow KCF a reasonable opportunity to correct, remedy or rectify any alleged perceived violation(s); and
- C. Grant such further relief as may be just.

DATED: Līhu'e, Hawai'i, September 5, 2023.

CADES SCHUTTE LLP
A Limited Liability Law Partnership



MAUNA KEA TRASK
Attorneys for Appellants
KAUAI CHRISTIAN FELLOWSHIP,
a Domestic Nonprofit Corporation



Overview



Legend

-  Parcels
-  CPR Units
-  Roads

Parcel ID	280220150002	Situs/Physical Address	2733 R ALA KINOIKI	Total Market Value	\$2,375,200	Last 2 Sales		
Acreage	1.893	Mailing Address	KAUAI CHRISTIAN FELLOWSHIP	Total Assessed Value	\$2,375,200	Date	Price	Reason
Class	AG		2731 ALA KINOIKI KOLOA HI 96756	Total Exemptions	\$672,800	5/28/2019	\$453000	VALID SALE
				Total Net Taxable Value	\$1,702,400	12/13/2007	\$750000	VALID SALE

Brief Tax Description UNIT B ELYSIAN FIELDS CM 4465 TOG/UND 50% INT IN ALL COMMON ELEMENTS
(Note: Not to be used on legal documents)

The Geographic Information Systems (GIS) maps and data are made available solely for informational purposes. The GIS data is not the official representation of any of the information included, and do not replace a site survey or legal document descriptions. The County of Kauai (County) makes or extends no claims, representations or warranties of any kind, either express or implied, including, without limitation, the implied warranties of merchantability and fitness for a particular purpose, as to the quality, content, accuracy, currency, or completeness of the information, text, maps, graphics, links and other items contained in any of the GIS data. In no event shall the County become liable for any errors or omissions in the GIS, and will not under any circumstances be liable for any direct, indirect, special, incidental, consequential, or other loss, injury or damage caused by its use or otherwise arising in connection with its use, even if specifically advised of the possibility of such loss, injury or damage. The data and or functionality on this site may change periodically and without notice. In using the GIS data, users agree to indemnify, defend, and hold harmless the County for any and all liability of any nature arising out of or resulting from the lack of accuracy or correctness of the data, or the use of the data.

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Wayne Katayama
Chair

Jan Kimura
Vice-Chair

Hartwell Blake
Herman Texeira
Amy Mendonca
John Isobe
Members



Michael A. Dahilig
Clerk of the Commission

PLANNING COMMISSION
County of Kaua'i, State of Hawai'i

4444 Rice Street
Kapule Building, Suite A-473
Lihu'e, Hawai'i 96766-1326
TEL (808) 241-4050 FAX (808) 241-6699

MAR 14 2013

Dean R. Agcaoili, Authorized Agent
DRA ARCHITECTURE LLC.
905 Makahiki Way, Mauka Suite
Honolulu, Hawai'i 96826-2869

Subject: Class IV Zoning Permit Z-IV-2013-11
Use Permit U-2013-10
Special Permit SP-2013-04
Applicant – Kōloa Congregation of Jehovah's Witness
Tax Map Key: (4) 2-8-022:015, Unit B
Po'ipū, Kaua'i

Dear Mr. Agcaoili,

This letter memorializes the action taken by the Kaua'i Planning Commission effective March 13, 2013 concerning approval of the above subject permits. The approval as amended by the Planning Commission, per your consent, is subject to the following conditions:

1. The church facility shall be limited to the representation as noted in the petition. Any changes to said structures and/or facilities shall be reviewed by the Planning Department to determine whether Planning Commission review and approval is warranted.
2. The Applicant shall submit a more detailed landscape plan for the Planning Department review prior to issuance of the first building permit involving the project, residential or commercial section. The landscaping plan shall incorporate, to the extent reasonably possible, native plants and Polynesian-introduced plants.

An Equal Opportunity Employer

V:\2013 Master Files\Regulatory\Zoning Permits\Class IV\Z-IV-2013-11 Koloa Jehovah\Approval-1 3.13 13 DC Koloa Jehovah\Witness_Church Hall.docx

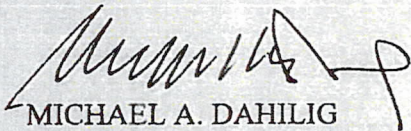
EXHIBIT 2

3. In order to mitigate traffic impacts along Ala Kinoiki, the Applicant shall work with the Department of Public Works and Planning to resolve this matter. The Applicant is advised that additional conditions may be imposed in the process of resolving this requirement.
4. The Applicant is made aware that intensive agriculture, which may entail dust, active pesticide use, and other nuisances associated with agricultural uses, will occur. The approval of this permit shall not limit or prevent the continuation of intensive agricultural activities within the immediate surroundings.
5. The use of this facility shall be as represented. If the noise generated by the church facility adversely impacts the nearby residential subdivision (Weliweli Houselots Subdivision) to the south, the Applicant shall be required to revise their operation hours such that the concerns are properly addressed and mitigated.
6. Based on the proposal, the Applicant shall provide a minimum of 26 off-street parking stalls. However, the Applicant is made aware that in an effort to mitigate unforeseen parking issues, the department reserves the authority to increase the parking requirements when particular uses cause unusual traffic congestion.
7. In accordance with Section 11A-2.2 of the KCC, the Applicant shall submit to the Planning Department an Environmental Impact Assessment Fee (EIA) for the project. The EIA fee is based on \$100 per the minimum number of parking stalls serving the proposed development as required by County Code Section 11A-2.2, and is due at the time of building permit issuance.
8. In order to minimize adverse impacts on Federally Listed Threatened Species, such as Newell's Shearwater and other seabirds, if external lighting is to be used in connection with the proposed project, all external lighting shall be only of the following types: downward facing, shielded lights. Spotlights aimed upward or spotlighting of structures on the project site shall be prohibited.
9. The Applicant shall resolve and comply with the applicable standards and requirements set forth by the State Health Department, and the County Departments of Public Works & Water.

Dean R. Agcaoili, Authorized Agent
DRA ARCHITECTURE LLC.
Page | 3

10. The Applicant shall develop and utilize Best Management Practices (BMP's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.
11. The Applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the Applicant shall contact the State Department of Land and Natural Resources – Historic Preservation Division at (808) 692-8015 and the Planning Department at (808) 241-4050.
12. The Applicant is advised that additional government agency conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agency(ies).

Sincerely Yours,



MICHAEL A. DAHILIG
Clerk, Kaua'i Planning Commission

xc: County – Public Works, Fire, Water, Finance-Real Property Division
State – Health, Historic Preservation Division-DLNR



Congregation Meetings of Jehovah's Witnesses

Learn about our meetings. Find a meeting location near you.

[Find a Location Near You](#)

What Happens at Our Meetings?

Jehovah's Witnesses hold meetings for worship twice each week. ([Hebrews 10:24, 25](#)) At these meetings, which are open to the public, we examine what the Bible says and how we can apply its teachings in our life.

Most of our services include audience participation, much like a classroom discussion. Participation is voluntary. Meetings begin and end with song and prayer.

You don't have to be one of Jehovah's Witnesses to attend our meetings. We invite everyone to come along. Seats are free. No collections are ever taken.

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



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

MAY 10 2023

FIRST NOTICE OF VIOLATION

VIA CERTIFIED MAIL

KAUAI CHRISTIAN FELLOWSHIP
2731 ALA KINOIKI
KOLOA, HI 96756

BUNDSCHUH, RICKI R & LAUREN N TRUST
PO BOX 633
LAWAI HI 96765

SUBJECT: COMPREHENSIVE ZONING ORDINANCE (CZO)
VIOLATION ON:
2733 R ALA KINOIKI KOLOA, HI 96756
Tax Map Key: 280220150002

The Planning Department conducted an investigation of the subject property and verified violation(s) of the following Kaua'i County Code (KCC):

Chapter 8, Comprehensive Zoning Ordinance

Sec. 8-3.1 Zoning Permits.

(a) When Required. No person shall undertake any construction or development or carry on any activity or use, for which a Zoning Permit is required by this Chapter, or obtain a Building Permit for construction, development, activity or use regulated by this Chapter, without first obtaining the required Zoning Permit.

Sec. 8-1.5 Definitions

"Dormitory" or "Residence Hall" means a building primarily providing sleeping and residential quarters for students and faculty, and visitors affiliated with the university or college. A dormitory contains multiple private or semiprivate single rooms, usually along with communal bathroom facilities, kitchen facilities, and recreation areas.

"School" means an institution with an organized curriculum offering instruction to children in the grade range kindergarten through twelve (12), or any portion thereof.

Sec. 8-3.5 Enforcement, Legal Procedures and Penalties.

(a) Enforcement, Legal Procedures and Penalties.

...

(2) It shall be the duty of the Planning Commission and Planning Director to enforce the provisions of this Chapter and it shall be the duty of all law enforcement officers of the County of Kaua'i to enforce this Chapter and all the provisions thereof.

...

(4) Any building or structure or other improvement or development set up, erected, constructed, altered, enlarged, converted, moved, or maintained contrary to the provisions of this Chapter or any use of land contrary to the provisions of this Chapter shall be unlawful and a public nuisance. The County Attorney shall immediately commence an action or proceeding for the abatement, removal, or enjoinder thereof in the manner provided by law, and shall take such other steps, and shall apply to such courts as may have jurisdiction to grant relief that will abate or remove such building, structure, improvement, development or use, and restrain and enjoin any person from setting up, erecting, building, maintaining, or using any such building, structure, improvement or development, or using any property contrary to the provisions of this Chapter.

(5) The remedies provided for in this Article shall be cumulative and not exclusive.

VIOLATION:

On 4/24/2023, Planning Inspector Joan Ludington, through her investigation, verified the change in use of the subject property's "Farm Dwelling" structure into a "Dormitory"/"Residence Hall" and "School".

The change in use of the "Farm Dwelling" into a "Dormitory"/"Residence Hall" and "School" without the required zoning permits constitutes a violation.

In addition, under KCC Section 8-3.5, any improvement, development, or use of land contrary to the provisions of KCC Chapter 8 is unlawful and a public nuisance.

REMEDIAL ACTION REQUIRED:

Pursuant to Hawai'i Revised Statutes Section 46-1.5(24) and KCC Section 8-3.5, you must correct the violation, remove the construction or development, or obtain the proper zoning permits for the referenced alteration, and cease and desist the unpermitted activity and use immediately.

In addition, should you fail to rectify the violation, you are hereby notified of the following:

1. A fine of up to ten thousand dollars (10,000.00) may be imposed for the above noted violation(s).
2. An additional civil fine of up to ten thousand (\$10,000.00) per day for each day in which the violation persists.

Contact Joan Ludington of the Planning Department at 808-241-4052, or at jludington@kauai.gov, within fifteen (15) calendar days upon receipt of this letter to provide a remedial action plan. Failure to do so provides us with no other alternative but to pursue enforcement action.



KA'ĀINA S. HULL

BEFORE THE PLANNING COMMISSION
OF THE
COUNTY OF KAUAI

In the Matter of the Application

of

KAUAI CHRISTIAN FELLOWSHIP Appealing
Notice of Violation & Order to Pay Fines and
Order, dated June 28, 2023, for a property
located at 2799 R Ala Kinoiki, Koloa, Kaua'i,
Hawai'i Tax Map Key No.: (4) 2-8-022-
015:0002


CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 5, 2023, the MEMORANDUM IN
OPPOSITION TO PLANNING DIRECTOR KAAINA S. HULL'S PETITION TO REVOKE
PERMITS INITIALLY GRANTED TO APPLICANT KOLOA CONGREGATION OF
JEHOVAH'S WITNESS, PRESENTLY OWNED BY KAUAI CHRISTIAN FELLOWSHIP,
AND ISSUE AN ORDER TO SHOW CAUSE AND SET HEARING, was duly served upon the
COUNTY OF KAUAI PLANNING COMMISSION, via hand delivery, addressed to it at the
COUNTY OF KAUAI PLANNING DEPARTMENT, County of Kaua'i, 4444 Rice Street,
Suite A-473, Lihu'e, Hawai'i 96766.

DATED: Lihu'e, Hawai'i, September 5, 2023.

CADES SCHUTTE LLP
A Limited Liability Law Partnership



MAUNA KEA TRASK

Attorneys for Appellants
KAUAI CHRISTIAN FELLOWSHIP,
a Domestic Nonprofit Corporation

August 16, 2023

Via Email and U.S. Mail

County of Kaua'i Planning Commission
4444 Rice Street, Suite A473
Lihue, Kaua'i 96766
planningdepartment@kauai.gov

Re: Pacific Resource Partnership's Petition for Declaratory Order

Dear Commissioners:

Petitioner Pacific Resource Partnership ("PRP") respectfully submits this Petition for Declaratory Order ("Petition") for your review and consideration.

I. INTRODUCTION

PRP understands that HPM Building Supply ("HPM") is currently operating an industrial manufacturing facility to produce prefabricated housing materials on land within the State Agricultural Land Use District, **without** the necessary permits. Thus, PRP hereby petitions the Planning Commission of the County of Kaua'i ("Commission") for a Declaratory Order pursuant to Chapter 10 of the Commission's Rules of Practice and Procedure ("Commission Rules") and Hawai'i Revised Statutes ("HRS") § 91-8 that HPM failed to obtain necessary permits to operate an industrial manufacturing facility at the Old Koloa Sugar Mill, TMK No. (4) 2-9-001-001. HPM has improperly circumvented the applicable rules and statutes, including but not limited to, HRS § 205-4.5, Commission Rule 1-13-6, and Kaua'i County Code, Rule 8-3.2, which are meant to give "the greatest possible protection . . . to those lands with a high capacity for intensive cultivation." HRS § 205-2. HPM's actions are particularly egregious considering

that HPM previously sought permits on a neighboring property for the same activity within the State Agricultural Land Use District but the circuit court vacated those permits on appeal.

As set forth below, PRP seeks a declaratory order that HPM is in violation of HRS § 205-4.5, Commission Rule 1-13-6, and Kaua'i County Code, Rule 8-3.2 because it failed to obtain the permits required for its operations at the Old Koloa Sugar Mill. PRP additionally seeks that the Commission declare and order that HPM immediately cease its operations unless and until it obtains the required permits.

II. RELEVANT FACTUAL BACKGROUND

A. HPM Originally Sought Permits to Operate in a Different Location, and Those Permits Were Vacated by the Circuit Court

i. HPM Originally Sought Permits Which Related to a Different Location

On or about February 4, 2022, HPM submitted its Application for a Class IV Zoning Permit (Z-IV-2022-08), Use Permit (U-2022-8), and Special Permit (SP-2022-1) ("Application") to develop a mill that would manufacture prefabricated wooden trusses and wall panels (the "Facility") on a 3-acre portion of that certain parcel of real property, situated at Pa'a, District of Koloa, Island and County of Kauai, State of Hawai'i bearing Tax Map Key ("TMK") No. (4) 2-9-001-001 ("Subject Property"). PRP sought to intervene in HPM's Application. The Commission denied PRP's Petition to Intervene and subsequently granted HPM's Application during the June 14, 2022 Commission Meeting, thereby approving the Special Permit, Use Permit, and Class IV Zoning Permit.

ii. HPM's Permits Were Vacated

As the Commission is aware, PRP filed a Notice of Appeal on June 9, 2022 based on the Commission's denial of PRP's Petition to Intervene. After briefing, the Circuit Court vacated HPM's permits, holding that the Commission had erred in denying PRP's Petition to Intervene. (*See* Attachment A, Findings of Fact, Conclusions of Law and Order, filed on May 10, 2023, in 5CCV-22-0000049 (Dkt No. 111).) Relevant here, the Circuit Court held that:

7. PRP is a market recovery trust fund which represents approximately 7,000 men and women union carpenters and 240 large and small contractors throughout the State of Hawai'i. [Dkt No. 90, FOF ¶ 2; Record on Appeal ("ROA") at 000562-63.]
8. PRP represents approximately 250 individuals and union contractors residing on Kaua'i. [Dkt No. 90, FOF ¶ 3; ROA at 000562-63.]
9. PRP has expertise in, and is committed to, building a stronger, more sustainable Hawai'i in a way that promotes a vibrant economy, creates jobs, and enhances the quality of life for all residents of Hawai'i. [Dkt No. 90, FOF ¶ 4; ROA at 000562-63.]
10. PRP supports the following issues:

Jobs. PRP advocates for job creation in the construction industry along with ensuring that construction workers are paid a living wage.

Wages and benefits. PRP advocates for living wages for construction workers building affordable housing and other types of construction projects. A part of the solution to solving the State and County's housing affordability crisis is also about paying workers a "living wage" to keep up with Hawaii's high cost of living and to ensure that workers can afford the homes they are building. Workers paid a living wage will help to keep residents off government subsidies and create a healthy economy for all residents on Kaua'i.

Skilled workforce. PRP is a proud supporter of a skilled workforce, including but not limited to, the state-approved apprenticeship program that provides high school graduates and job seekers with an opportunity to learn specialized skills in the

construction industry. After completing training in an apprenticeship program, apprentices can earn good middle-class wages and pursue other career options in the future, such as becoming an apprentice supervisor, contractor, or business owner. PRP members go through this training.

Affordable housing. PRP has advocated for affordable housing policies that would reduce the cost of housing by creating state and county incentives to reduce the construction costs for building homes for Hawaii's residents.

[Dkt No. 90, FOF ¶ 5; ROA at 000368-369, 562.]

11. Additionally, PRP and its members – as important members of the local development sector – have an interest in development and land use projects that comprehensively account for the local economy and environment by meeting the statutory environmental, economic, and cultural requirements. [Dkt No. 90, FOF ¶ 6; ROA at 000370-71.]

(See Attachment A.)

As such, the Circuit Court held that:

63. The Court held that “[i]n its Petition, PRP established that it had both organizational and associational standing to intervene inasmuch as its interests, as well as the interests of its members, would be directly and immediately impacted by HPM’s Application.” [Dkt No. 90, COL ¶ 14.]
64. Specifically, the Court concluded that “PRP has organizational standing under the traditional injury-in-fact test, as the goal of the Application – to obtain permits to develop housing packages – directly undercuts PRP’s asserted advocacy efforts and will necessarily force PRP to expend and/or reallocate significant resources related to job creation, a skilled workforce, and living wages for its members.” [Dkt No. 90, COL ¶ 15 (citing *Sierra Club v. Dep’t of Transp.*, 115 Hawai’i 299, 319, 167 P.3d 292, 312 (2007) as corrected (Oct. 10, 2007)).]
65. The Court further concluded that “PRP also has associational standing because its members – union carpenters and contractors – would have standing on their own regarding such issues as job loss and living wages; PRP seeks to protect job creation and

living wages as part of its mission; and the participation of individual members is not necessary.” [Dkt No. 90, COL ¶ 16 (citing *Sierra Club*, 115 Hawai‘i at 334, 167 P.3d at 312).]

66. The Court also concluded that PRP has “a direct and significant interest in ensuring that the proposed industrial manufacturing plant supports local jobs and provides living wages, and also meets the statutory environmental, economic, and cultural requirements,” [Dkt No. 90, COL ¶ 17], and also “an interest in development and land use projects that comprehensively account for the local economy and environment by including community members in the application process,” [*id.*, COL ¶ 18].
67. Accordingly, “PRP’s interest is distinguishable from that of [the] general public in that PRP represents union carpenters on Kaua‘i who may lose jobs as a result of HPM’s proposal and may not be paid living wages based on the industrial manufacturing plant.” [Dkt No. 90, COL ¶ 19.]

(*Id.*)

The Circuit Court further held that “PRP’s right to a clean and healthful environment, as defined by laws relating to environmental quality such as HRS Chapter 205 and 205A, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai‘i Constitution.” (See *id.* at COL ¶ 31 (citing *Matter of Hawai‘i Elec. Light Co., Inc.*, 145 Hawai‘i 1, 16, 445 P.3d 673, 688 (2019)).)

iii. The Circuit Vacated HPM’s Permits

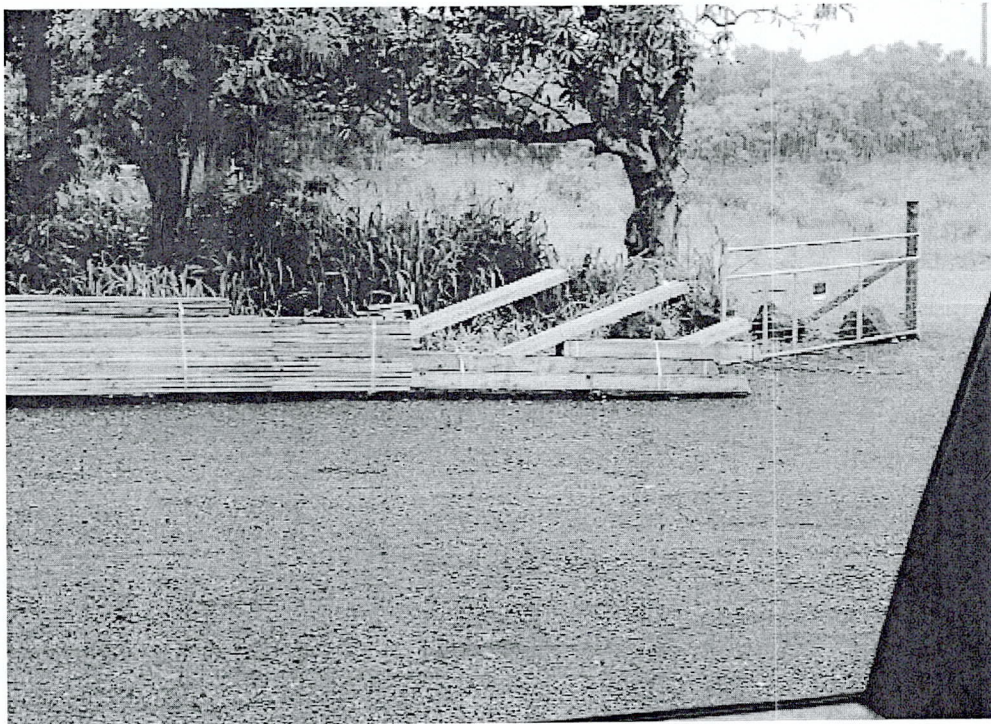
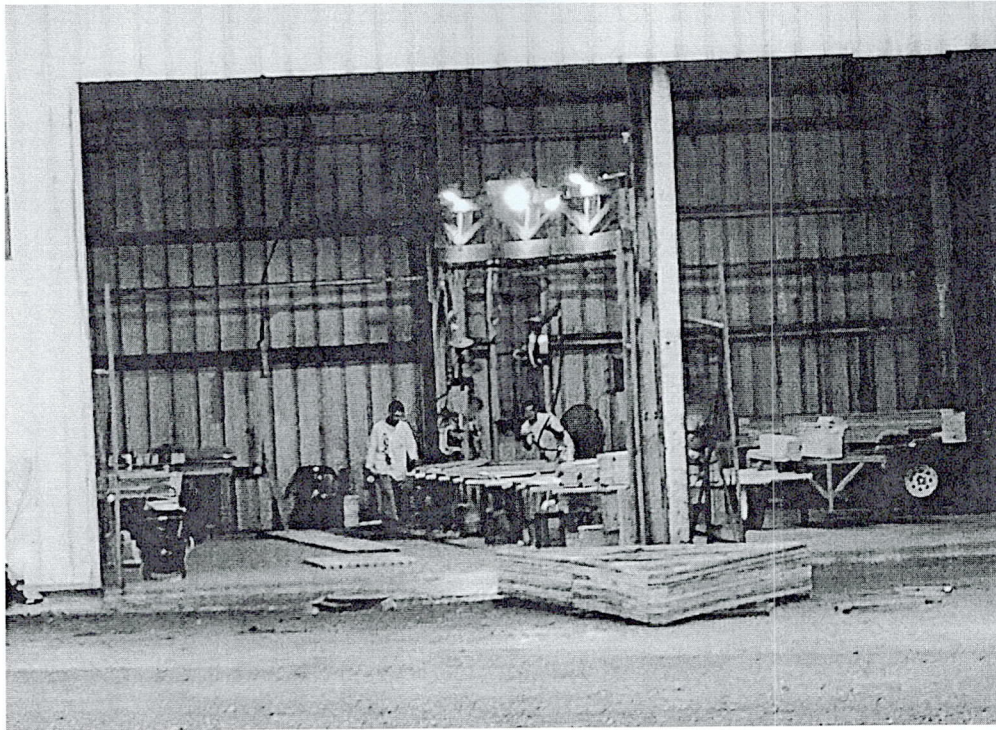
The Circuit Court therefore **vacated** all three of HPM’s permits and remanded the matter to the Commission. (Attachment A at COL ¶¶ 103-104.) PRP understands that HPM has or will withdraw its Application. (Declaration of Abigail Holden (“Holden Dec.”) at ¶ 3.)

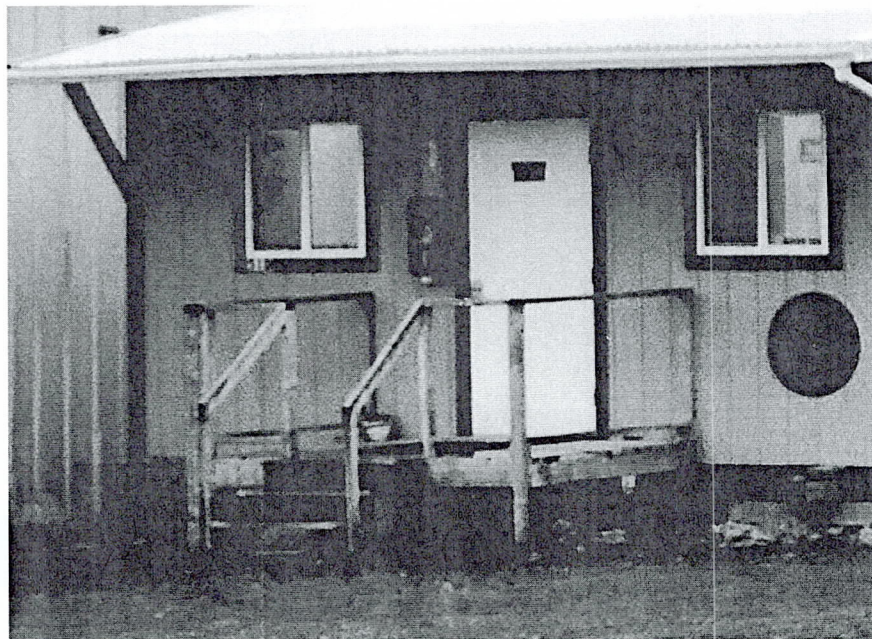
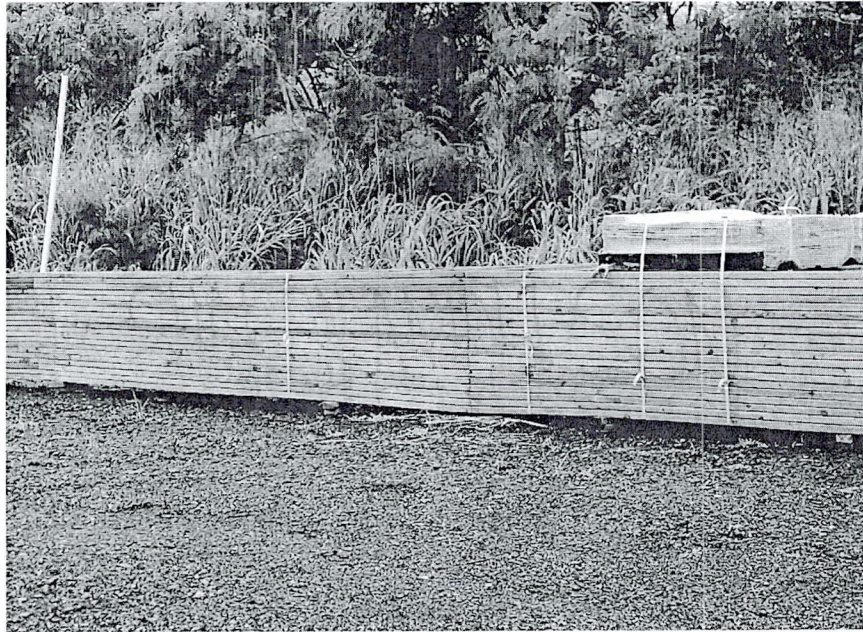
B. HPM Is Operating its Manufacturing Facility Without Permits

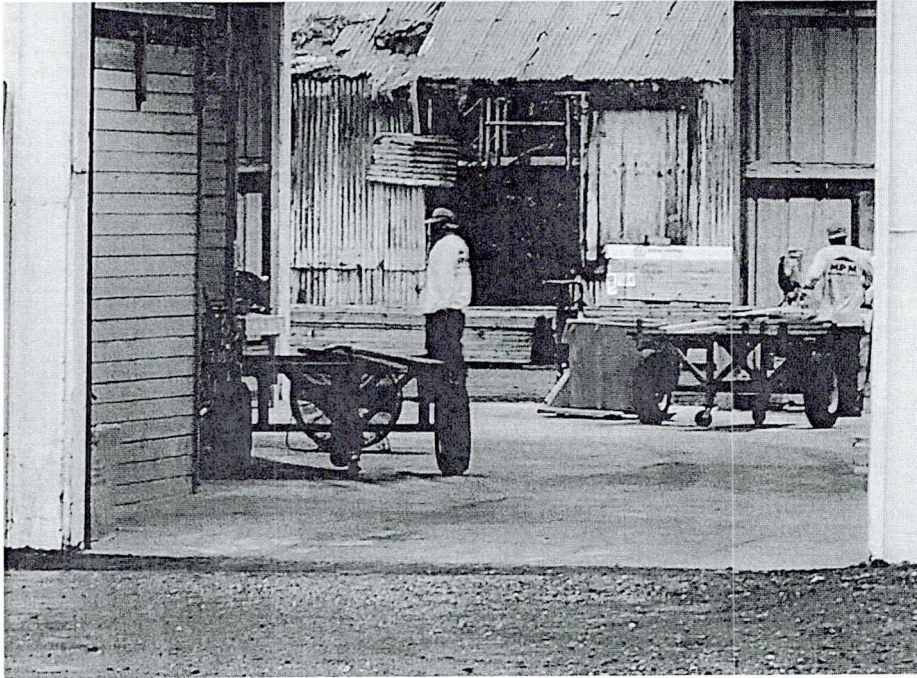
Notwithstanding the foregoing, PRP understands that HPM began operating its manufacturing facility in a different location – out of an old existing structure at the Old Koloa

Sugar Mill – without the necessary permits. Indeed, as shown in the photographs below from March 2023, HPM is currently manufacturing wooden trusses at the Old Koloa Sugar Mill:









These photographs appear to show that HPM opted to operate out of an existing structure at the Old Koloa Sugar Mill instead of the location provided in its initial permits (which permits have been vacated, as discussed above). HPM's use of the Old Koloa Sugar Mill to manufacture materials is improper as HPM does not appear to have the necessary permits. Indeed, PRP submitted a records request to the County of Kaua'i Planning Department for all permits issued to HPM from January 1, 2022 to the present, and the only permits produced were those that were the subject of PRP's agency appeal. (Holden Dec. at ¶ 4.) Moreover, there was no record of permits issued to the Old Koloa Sugar Mill. In contrast, the Planning Department has previously indicated that permits for businesses operating at the Old Koloa Sugar Mill are necessary. (*Id.* at ¶ 5; *See* Attachment B, County of Kaua'i Planning Department Staff Report dated November 9, 2000.) In this regard, it appears that permits are required for commercial operations at the Old Koloa Sugar Mill.

III. A Declaratory Order Is Appropriate

Commission Rule 1-10-1 provides in relevant part:

(a) Petition by Person or Agency. On petition of an interested person, the Commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or regulation or order of the Commission.

Further, Commission Rule 1-10-2 states:

10-10-2 Form and contents. The petition shall conform to the requirements for filing documents before the Commission and shall contain the following:

- (1) Name;
- (2) Address;
- (3) Telephone number of each petitioner;
- (4) The signature of each petitioner;
- (5) A designation of the specific statutory provision, rule, or order in
- (6) question, together with a statement of the controversy or uncertainty involved;
- (7) A statement of the petitioner's interest in the subject matter, including the reasons for submission of the petition;
- (8) A statement of the petitioner's position or contention; and
- (9) A memorandum of authorities, containing a full discussion of reasons and legal authorities in support of such position or contention.

Upon receipt of a petition for declaratory relief, the Commission must act within forty-five (45 days). Commission Rule 1-10-3. As set forth below, PRP's Petition meets all the requirements set forth in the Rules and, as detailed below, the requested declaratory order should issue.

A. Statement of the Controversy

HPM was required to obtain, at a minimum, a Class IV Zoning Permit, Use Permit, and Special Permit prior to operating its industrial manufacturing facility at the Old

Koloa Sugar Mill, which is located within the State Agricultural Land Use District.¹ Indeed, the Planning Director already determined that HPM's manufacturing facility requires such permits to operate within land zoned for agriculture. (*See* Attachment C.)

i. HPM Was Required to Obtain a Special Permit

HRS § 205-4.5 requires that all lands within the agricultural district "shall be restricted to . . . permitted uses[.]" HPM's industrial manufacturing facility is not included on the list of permitted uses. Accordingly, Commission Rule 1-13-6 requires that "[a]ny applicant who desires to use its land within a State Land Use Agricultural or Rural district **other than for an allowable agricultural** or rural use as set forth in Chapter 205, HRS, may petition the Commission for permissions to use its land in the manner desired." (Emphasis added.)

Indeed, the Planning Director previously determined that a Special Permit is required because HPM's industrial manufacturing facility is **not** specifically identified as a permissible use within the State Agricultural Land Use District. (*See* Attachment C, Letter from Ka'aina S. Hull, Director of Planning, to Mauna Kea Trask, Esq. dated January 21, 2022.)

ii. HPM Was Required to Obtain a Use Permit

In addition to the Special Permit above, HPM was also required to obtain a Use Permit. Kaua'i County Code, Rule 8-3.2(a) provides:

The purpose of the Use Permit procedure is to assure the proper integration into the community of uses **which may be suitable only in specific locations in a district**, or only under certain conditions, or only if the uses are designed, arranged or conducted in a particular manner, and to prohibit such uses if the proper integration cannot be assured.

¹ <https://luc.hawaii.gov/maps/land-use-district-boundary-maps/state-of-hawaii-land-use-district-boundaries-map/>

(Emphasis added.) As the facility is located within the Agricultural district and HPM's industrial manufacturing facility is not a permitted use of such land, HPM is required to obtain a Use Permit. Indeed, the Planning Director previously required a Use Permit for HPM's manufacturing facility for the same reasons at a neighboring parcel. (*See* Attachment C.)

Moreover, HPM is in further violation of the regulations, as it was required to obtain a Use Permit **prior** to any activity on the property. Kaua'i County Code, Section 8-3.2(b) provides that "[n]o person shall undertake any construction or development, or carry on any activity or use for which a Use Permit is required by this Chapter, or obtain a building permit for construction, development, activity or use for which a Use Permit is required by this Chapter, **without first obtaining a Use Permit.**" (Emphasis added.)

iii. HPM Was Required to Obtain a Class IV Zoning Permit

A Class IV Zoning Permit is a procedural requirement when applying for a Use Permit. (*See* Kaua'i County Code, Rule 8-3.1; *See* Attachment B.) The foregoing discussion makes clear that HPM operated its industrial manufacturing facility **without** the required permits. As further illustration of HPM's violations, the same types of permits were obtained by Kauai ATV, LLC – Special Permit (SP-2001-5), Use Permit (U-2001-8), Class IV Zoning Permit (Z-IV-2001-10) – to use a staging area and conduct ATV tours near the Old Koloa Sugar Mill, surrounded primarily by Agriculture and Open District lands. (Holden Dec. at ¶ 5; *See* Attachment B.) HPM was therefore required to obtain these permits prior to its operations. HPM cannot be allowed to bypass applicable law, regulations, and court order by covertly moving its operations to a new location, particularly as that location is still within the State Agricultural Land Use District.

B. Statement of PRP's Interest

PRP has “a direct and significant interest in ensuring that the proposed industrial manufacturing plant supports local jobs and provides living wages, and also meets the statutory environmental, economic, and cultural requirements.” (*See* Attachment A at Finding of Fact (“FOF”) ¶ 66.) PRP also has “an interest in development and land use projects that comprehensively account for the local economy and environment by including community members in the application process.” (*Id.*) “PRP’s interest is distinguishable from that of [the] general public in that PRP represents union carpenters on Kaua’i who may lose jobs as a result of HPM’s proposal and may not be paid living wages based on the industrial manufacturing plant.” (*Id.* at FOF ¶ 67.)

Moreover, PRP has standing to submit this petition. PRP is a non-profit market recovery trust fund which represents approximately 7,000 men and women union carpenters and 240 large and small contractors throughout the State of Hawai’i, including approximately 250 individuals and unionized contractors on Kaua’i. PRP has expertise in, and is committed to, building a stronger, more sustainable Hawai’i in a way that promotes a vibrant economy, creates jobs, and enhances the quality of life for all residents of Hawai’i.

Indeed, the Circuit Court has previously recognized that PRP had standing to intervene in HPM’s permit application regarding the same operations. First, as the Circuit Court held, “PRP’s right to a clean and healthful environment, as defined by laws relating to environmental quality such as HRS Chapter 205 and 205A, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai’i Constitution.” (*See* Attachment A at Conclusion of Law (“COL”) ¶ 31 (citing *Matter of Hawai’i Elec. Light Co.*,

Inc., 145 Hawai'i 1, 16, 445 P.3d 673, 688 (2019)).) The Circuit Court further held that "PRP's right to a clean and healthful environment, as defined by laws relating to environmental quality such as HRS Chapter 205 and 205A, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai'i Constitution." (Dkt No. 90 at COL ¶ 31 (citing *Matter of Hawai'i Elec. Light Co., Inc.*, 145 Hawai'i 1, 16, 445 P.3d 673, 688 (2019)).) In this regard, the Circuit Court has held that PRP has "both organizational and associational standing to intervene inasmuch as its interests, as well as the interests of its members, would be directly and immediately impacted by HPM's Application." (*See* Attachment A at COL ¶ 14.)

In sum, PRP and its members have a direct interest in ensuring that development projects support local jobs, conform with environmental laws, and involve responsible planning, industry integrity, and beneficial industry relations. HPM's industrial manufacturing plant will have short-term and long-term economic, environmental, and cultural impacts, which will impact PRP members and residents of the neighboring community and County.

C. Statement of PRP's Position

HPM failed to obtain the necessary permits – including but not limited to a Class IV Zoning Permit, Use Permit, and Special Permit – prior to the operation of its industrial manufacturing facility at the Old Koloa Sugar Mill. Accordingly, HPM should immediately cease operations unless and until it receives the proper permits. HPM should also be subject to penalties.

D. Memorandum of Authorities

As set forth above, it appears that HPM is improperly using the Old Koloa Sugar Mill to operate an industrial manufacturing facility without the permits required by HRS § 205-

4.5, Commission Rule 1-13-6, and Kaua'i County Code, Rule 8-3.2. Indeed, the Planning Director already determined in the January 21, 2022 letter that such a use, located on neighboring Agricultural land, requires the following permits:

1. A Special Permit is required because the industrial manufacturing facility is not identified as a permissible use within the State Agricultural Land Use District.
2. A Use Permit is required because the facility is located within the Agriculture zoning district and the use is not considered a permitted use within that zoning district.
3. A Class IV Zoning Permit is a procedural requirement when applying for a Use Permit.

(See Attachment C.)

Kauai Springs, Incorporated v. Planning Commission of the County of Kaua'i is instructive here. In that case, Kauai Springs operated a water bottling facility in Koloa, Kaua'i, on land designated as agricultural. 133 Hawai'i 141, 146, 324 P.3d 951, 956 (2014). The Hawai'i Supreme Court held that "in order for Kauai Springs to validly operate its water bottling facility in the agricultural district, Kauai Springs was required to obtain" a Use Permit, Special Permit, and Class IV Zoning Permit. *Id.* at 169, 324 P.3d at 979; *see id.* ("Kauai Springs would not have been able to operate legally with just the Use Permit after October 18, 2006, or with just the Use Permit and Class IV Zoning Permit after November 2, 2006. Rather, Kauai Springs was required to also obtain the Special Permit, which had the latest review deadline of January 31, 2007.").

PRP currently understands, based on its records request to the Planning Department, that HPM does not have these necessary permits to operate its manufacturing facility at the Old Koloa Sugar Mill. HPM's manufacturing operations

run counter to the procedures that have been put in place to “protect and conserve natural resources and foster intelligent, effective, and orderly land allocation and development.” *Kauai Springs, Inc.*, 133 Hawai'i at 169, 324 P.3d at 979 (“As with use permits, special permits are guided by more general objectives; special permits may only be granted for uses that ‘promote the effectiveness and objectives’ of HRS Chapter 205, which provides that its ‘overarching purpose’ is to ‘protect and conserve natural resources and foster intelligent, effective, and orderly land allocation and development.’”) (emphasis added). Accordingly, HPM’s operations at the Old Koloa Sugar Mill are in violation of applicable rules and statutes, including but not limited to HRS § 205-4.5, Commission Rule 1-13-6, and Kaua'i County Code, Rule 8-3.2.

Finally, HPM’s disregard of the permitting process should be subject to penalties. HRS § 205-13 provides that “[a]ny person who violates any provision under section 205-4.5, or any regulation established relating thereto, shall be fined not more than \$5,000[.]” Section 8-3.5 of the Kauai County Code further provides penalties, as “any use of land contrary to the provisions of this Chapter shall be unlawful and a public nuisance.”

PRP therefore seeks a declaration that HPM’s operations at the Old Koloa Sugar Mill shall immediately cease until and unless HPM obtains the necessary permits, including but not limited to a Class IV Zoning Permit, Use Permit, and Special Permit.

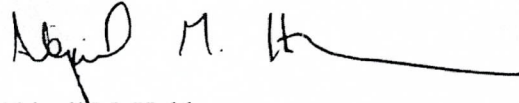
VII. CONCLUSION

Based on the foregoing, Pacific Resource Partnership requests that a Declaratory Order be entered that HPM failed to obtain necessary permits – including but not limited to a

Class IV Zoning Permit, Use Permit, and Special Permit – prior to the operation of its industrial manufacturing facility at the Old Koloa Sugar Mill. Accordingly, HPM should be ordered to immediately cease its operations and be subject to appropriate penalties.

Very truly yours,

COX FRICKE
A LIMITED LIABILITY LAW PARTNERSHIP LLP



Abigail M. Holden
Christine A. Terada

Enclosures: Declaration of Abigail M. Holden
Attachments A – C

cc: Mauna Kea Trask, Esq.

DECLARATION OF ABIGAIL M. HOLDEN

I, ABIGAIL M. HOLDEN, declare and say that:

1. I am an attorney licensed to practice before all of the courts of the State of Hawai'i. I am a partner of the firm of Cox Fricke LLP, counsel of record for Appellant Pacific Resource Partnership ("PRP"). All of the information stated herein is information based on my personal knowledge that I learned in my capacity as counsel for PRP. If called as a witness I could and would testify to the truth of the matters stated herein.

2. Attached hereto as Attachment A is a true and correct copy of the Findings of Fact, Conclusions of Law and Order, filed on May 10, 2023, in 5CCV-22-0000049. (Dkt No. 111.)

3. Upon the Circuit Court's Order vacating HPM's permits and remanding the matter to the Commission (Dkt No. 111), PRP understands that HPM has or will withdraw its Application for the Class IV Zoning Permit (Z-IV-2022-08), Use Permit (U-2022-8) and Special Permit (SP-2022-1).

4. My law firm submitted a records request on behalf of PRP to the County of Kaua'i Planning Department for all permits issued to HPM from January 1, 2022 to the present. The only permits produced by the County of Kaua'i Planning Department were those that were the subject of PRP's agency appeal.

5. The Commission has issued other permits for businesses operating at the Old Koloa Sugar Mill. For instance, in response to PRP's records request discussed above, PRP received Kauai ATV, LLC's Special Permit (SP-2001-5), Use Permit (U-2001-8), and Class IV

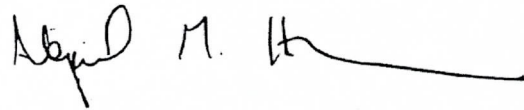
Zoning Permit (Z-IV-2001-10) to use a staging area and conduct ATV tours near the Old Koloa Sugar Mill, surrounded primarily by Agriculture and Open District lands.

6. Attached hereto as Attachment B is a true and correct copy of the County of Kaua'i Planning Department Staff Report dated November 9, 2000.

7. Attached hereto as Attachment C is a true and correct copy of a letter dated January 21, 2022, from Ka'aina S. Hull, Director of Planning, to Mauna Kea Trask, Esq. This attachment was provided as Exhibit J-1 to HPM Building Supply's Application for a Class IV Zoning Permit (Z-IV-2022-8), Use Permit (U-2022-8) and Special Permit (SP-2022-1) in the Kaua'i Planning Commission Agenda Packet dated June 14, 2022.

I do declare under penalty of law that the foregoing is true and correct.

Executed this 16th day of August 2023, at Honolulu, Hawai'i.

A handwritten signature in black ink, appearing to read 'Abigail M. Holden', with a long horizontal line extending to the right.

ABIGAIL M. HOLDEN

APPROVED

COX FRICKE LLP
A LIMITED LIABILITY LAW PARTNERSHIP LLP

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Attorneys for Appellant
PACIFIC RESOURCE PARTNERSHIP

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10-MAY-2023
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Dkt. 111 FOF

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAI'I

PACIFIC RESOURCE PARTNERSHIP,

Appellant,

vs.

COUNTY OF KAUA'I PLANNING
COMMISSION; HPM BUILDING
SUPPLY; JOHN DOES 1-10; JANE
DOES 1-10; DOE CORPORATIONS 1-
10; DOE LIMITED LIABILITY
COMPANIES 1-10; DOE
PARTNERSHIPS 1-10; DOE
GOVERNMENTAL ENTITIES 1-10; and
DOE ENTITIES 1-10,

Appellees.

CASE NO. 5CCV-22-0000049
CASE NO. 5CCV-22-0000060
(Consolidated) (Agency Appeal)

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER; ~~CERTIFICATE OF~~
~~SERVICE~~

No Trial Date Set
Judge: Hon. Kathleen N.A. Watanabe

PACIFIC RESOURCE PARTNERSHIP,

Appellant,

vs.

COUNTY OF KAUA'I PLANNING
COMMISSION; HPM BUILDING

CASE NO. 5CCV-22-0000060
(Agency Appeal)

Attachment A

SUPPLY; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE LIMITED LIABILITY COMPANIES 1-10; DOE PARTNERSHIPS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; and DOE ENTITIES 1-10,

Appellees.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appellant Pacific Resource Partnership's ("PRP") Notice of Appeal to the Circuit Court and Statement of the Case filed on June 9, 2022 (Dkt No. 1); PRP's Opening Brief filed on November 14, 2022 (Dkt No. 92); Appellee HPM Building Supply's ("HPM") Answering Brief filed on December 21, 2022 (Dkt No. 94); and Appellee County of Kaua'i Planning Commission's ("Commission") Answering Brief filed on December 22, 2022 (Dkt No. 96); PRP's Reply Brief to HPM's Answer Brief filed on January 4, 2023 (Dkt No. 98) and PRP's Reply Brief to the Commission's Answering Brief filed on January 5, 2023 (Dkt No. 100), came for hearing before the Honorable Kathleen N.A. Watanabe on March 28, 2023, at 1:30 p.m., with Abigail M. Holden appearing on behalf of PRP, Mauna Kea Trask appearing on behalf of HPM, and Mark L. Bradbury appearing on behalf of the Commission.

Having considered the memoranda of law submitted, the arguments of the parties, and the record and files of these proceedings, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. To the extent that any of the following Findings of Fact shall be determined to be Conclusions of Law, they shall be construed as such for the purpose herein.

HPM's Application and PRP's Petition to Intervene

2. On or about March 24, 2022, the Commission published publicly on its website a May 10, 2022 Planning Commission Public Hearing Notice -- REVISED, which stated in relevant part:

CLASS IV ZONING PERMIT (Z-IV-2022-8), USE PERMIT (U-2022-8) and SPECIAL PERMIT (SP-2022-1) to operate a construction material manufacturing facility on a parcel situated immediately adjacent to the Old Kōloa Sugar Mill site in Kōloa, along the eastern side of Ala Kinoiki, approximately 3,300 feet west of the Weliweli Road/Ala Kinoiki intersection, further identified as Tax Map Key: 2-9- 001:001, and affecting a 3-acre portion of a larger parcel.

("Public Hearing Notice"). [Dkt No. 90, Findings of Fact ("FOF") ¶ 7.]

3. The Public Hearing Notice did not contain any details of the proposed project, including the name of the applicant, as they pertained to the Class IV Zoning Permit (Z-IV-2022-8), Use Permit (U-2022-8), and Special Permit (SP-2022-1). [Dkt No. 90, FOF ¶ 8.]

4. On May 4, 2022, the Planning Commission published publicly on its website the Commission Agenda Packet for the May 10, 2022 Commission meeting ("Agenda Packet"). [Dkt No. 90, FOF ¶ 9.]

5. The Agenda Packet, published just six days before the meeting, provided details that were made easily accessible to the public for the first time regarding the proposed project, such as the name of the applicant (HPM) and the subject of the manufacturing facility (prefabricated housing packages). [Dkt No. 90, FOF ¶ 10.]

6. The Agenda Packet contained (1) HPM Building Supply's Application for a Special Permit, Use Permit and Class IV Zoning Permit, for Real Property Situated at Pa'a, District of Koloa, Kaua'i, Hawai'i ("Application") and (2) the April 26, 2022 Department of Planning Director's Report ("Director's Report"). [*Id.*]

7. PRP is a market recovery trust fund which represents approximately 7,000 men and women union carpenters and 240 large and small contractors throughout the State of Hawai'i. [Dkt No. 90, FOF ¶ 2; Record on Appeal ("ROA") at 000562-63.]

8. PRP represents approximately 250 individuals and union contractors residing on Kaua'i. [Dkt No. 90, FOF ¶ 3; ROA at 000562-63.]

9. PRP has expertise in, and is committed to, building a stronger, more sustainable Hawai'i in a way that promotes a vibrant economy, creates jobs, and enhances the quality of life for all residents of Hawai'i. [Dkt No. 90, FOF ¶ 4; ROA at 000562-63.]

10. PRP supports the following issues:

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Wages and benefits. PRP advocates for living wages for construction workers building affordable housing and other types of construction projects. A part of the solution to solving the State and County's housing affordability crisis is also about paying workers a "living wage" to keep up with Hawaii's high cost of living and to ensure that workers can afford the homes they are building. Workers paid a living wage will help to keep residents off government subsidies and create a healthy economy for all residents on Kaua'i.

Skilled workforce. PRP is a proud supporter of a skilled workforce, including but not limited to, the state-approved apprenticeship program that provides high school graduates and job seekers with an opportunity to learn specialized skills in the construction industry. After completing training in an apprenticeship program, apprentices can earn good middle-class wages and pursue other career options in the future, such as becoming an apprentice supervisor, contractor, or business owner. PRP members go through this training.

Affordable housing. PRP has advocated for affordable housing policies that would reduce the cost of housing by creating state and county incentives to reduce the construction costs for building homes for Hawaii's residents.

[Dkt No. 90, FOF ¶ 5; ROA at 000368-369, 562.]

11. Additionally, PRP and its members – as important members of the local development sector – have an interest in development and land use projects that comprehensively account for the local economy and environment by meeting the statutory environmental, economic, and cultural requirements. [Dkt No. 90, FOF ¶ 6; ROA at 000370-71.]

12. PRP viewed the Agenda Packet when it was published publicly on May 4, 2022 and observed, for the first time, that there were significant deficiencies in the Application, which were explicitly relied on and adopted by the Director’s Report, thereby necessitating PRP’s intervention. [Dkt No. 90, FOF ¶ 11.]

13. In particular, HPM asserted in its Application that it was proposing to construct an industrial manufacturing facility that will be used to manufacture wooden trusses and wall panels for residential housing construction. [Dkt No. 90, FOF ¶ 12; ROA at 000015-16.]

14. HPM indicated it would import lumber materials for the wooden trusses and wall panels from the Pacific Northwest. [*Id.*]

15. HPM stated that it anticipated an initial production level of 10-15 truss and/or wall panel “packages” per month for the first 1-2 years. One “package” is equivalent to one single-family residential home. [Dkt No. 90, FOF ¶ 13; ROA at 000016.]

16. Throughout its Application, HPM asserted that its industrial manufacturing facility would create jobs and promote affordable housing (“HPM anticipates that the Facility will help bring home construction prices down” and “will also create between 20 - 23 new jobs in the Koloa district”) and, thus, HPM should be granted a Use Permit. [Dkt No. 90, FOF ¶ 14.]

17. HPM acknowledged that its proposed industrial manufacturing factory was not specifically a permitted use on agricultural land but argued it should nevertheless be issued a Special Permit because the industrial manufacturing factory was not contrary to the objectives of Hawai'i Revised Statutes ("HRS") Chapter 205 and 205A. [Dkt No. 90, FOF ¶ 15.]

18. Upon reviewing the May 4, 2022 Agency Packet, PRP further realized that HPM's unsupported allegations were explicitly relied on and adopted in the Director's Report, which recommended approval of HPM's requested permits. [Dkt No. 90, FOF ¶ 16; ROA at 000374-75.]

19. Intervention was therefore necessary to support the interests of PRP and its members in retaining jobs and living wages for Kaua'i residents and ensuring that development projects involve responsible planning, environmental use, industry integrity, and beneficial industry relations. [Dkt No. 90, FOF ¶ 17.]

20. Accordingly, on May 6, 2022, PRP filed its Petition to Intervene ("Petition"). [Dkt No. 90, FOF ¶ 18; ROA at 000364-86.]

21. PRP asserted that it should be permitted to intervene because HPM's requested industrial manufacturing plant to produce prefabricated materials for housing "packages" would not actually support the purpose of HRS Chapter 205 and 205A or the Kaua'i General Plan. [Dkt No. 90, FOF ¶ 19; ROA at 000364-86.]

22. PRP asserted that, contrary to HPM's assertions in its Application, granting permits for HPM's requested industrial manufacturing plant would lead to a significant reduction in local jobs, as well as a potential reduction in payment of a living wage on Kaua'i, would present a use of the land that is entirely out of character for the area, which the General

Plan deems as having an “historic ‘old town’ charm” with “vast cultural treasures,” and was an inappropriate use of lands zoned for agriculture. [Dkt No. 90, FOF ¶ 20; ROA at 000364-86.]

23. The Petition established that PRP has a right to intervene in a contested case because PRP is “so directly and immediately affected by the proposed application that [its] interest in the Proceeding is clearly distinguishable from that of the general public.” [Dkt No. 90, Conclusions of Law (“COL”) ¶¶ 14-20; ROA at 000364-86.]

24. The Petition detailed numerous issues with the Application that required intervention and a contested case or, at a minimum, “further study,” including, but not limited to,

- The proposed development does not comply with the requirements for a Special Permit, as it is inconsistent with Hawai‘i Revised Statutes (“HRS”) Chapters 205 and 205A and the rules of the Land Use Commission. An industrial manufacturing plant intended to build factory-built housing has no agricultural connection and is not compatible with the existing land use and designation as agricultural. In addition, there is a whole host of issues, including economic, cultural, and environmental issues, that must be studied in order to determine whether the “desired use would not adversely affect surrounding property[.]” Accordingly, a boundary amendment is likely required here, as opposed to a Special Permit.
- The proposed development does not comply with the requirements for a Use Permit, as it does not adequately address environmental issues, such as the disturbance of impacted soil. The project is also contrary to the Kaua‘i County General Plan, and closer study is necessary to assess the soundness of HPM’s sweeping assertions, including but not limited to: (1) that the facility “will result in lowering the cost of housing construction by decreasing import costs associated with housing construction and reducing the time and expense of construction at the home site”; (2) that “HPM’s practice of providing competitive wages based upon each island’s cost of living and its employee stock ownership plan directly addresses concerns related to stagnant wages and upward economic opportunities”; (3) that the facility will “provid[e] economic opportunities that are not reliant on tourism and will instead be a part of Kauai’s small manufacturing economy and a viable diversified agricultural industry”; and (4) that “[b]y manufacturing prefabricated housing materials on Kaua‘i, the Facility will directly and significantly contribute to decreasing the carbon footprint associated with housing construction.”

- Additional issues relating to the impacts of the proposed development have not been fully studied or addressed, including but not limited to: (1) the presence of Nene on the property, which is endemic to Hawai‘i, as well as the presence of the White-tailed Tropicbird and the Pacific Golden-Plover, which are indigenous to Hawai‘i, which may trigger additional requirements under the Endangered Species Act; (2) the on-site wastewater treatment and disposal system may constitute a trigger under HRS Chapter 343; (3) stormwater runoff from construction activities may require an NPDES permit; and (4) the project may impact the area surrounding the Old Sugar Mill of Koloa, a National Historic Landmark, and the Koloa Heritage Trail, which has been recognized by the National Park Service.

[Dkt No. 90, FOF ¶ 21; ROA at 000365-6.]

25. The Petition also asserted, among other things, that PRP had good cause to file the Petition four days before the scheduled public hearing because the Agency Packet, including the Application and Director’s Report was not made publicly and easily accessible until May 4, 2022 – just six days before the public hearing scheduled for May 10, 2022. [Dkt No. 90, FOF ¶ 22; ROA at 000374-75.]

26. The Petition, citing *Chen v. Mah*, 146 Hawai‘i 157, 457 P.3d 796 (2020), also asserted that good cause existed for the purportedly late filing because there was no deliberate delay or contumacious conduct on the part of PRP, and no harm or prejudice to HPM. [Dkt No. 90, FOF ¶ 23; ROA at 000374-75.]

27. PRP argued that the notice provided by the Commission did not comply with HRS Chapters 91 and 92 or with constitutional rights of due process. [Dkt No. 90, FOF ¶ 24; ROA at 000374-75.]

28. HPM filed an opposition to PRP’s Petition on May 9, 2022. [Dkt No. 90, FOF ¶ 25; ROA at 000404-435.]

29. On May 10, 2022, the Commission held a public hearing on HPM's Application. [Dkt No. 90, FOF ¶ 26; ROA at 000559-566.]

30. During the public hearing on HPM's Application on May 10, 2022, PRP provided oral and written testimony which was made separately from the Petition. [Dkt No. 90, FOF ¶ 26; ROA at 000562-63.]

31. However, the Commission lacked quorum on May 10, 2022 to hold an agency hearing to act on HPM's Application, so the agency hearing was postponed until May 24, 2022. [Dkt No. 90, FOF ¶¶ 28-30; ROA at 000569.]

The Commission's Denial of PRP's Petition to Intervene

32. On May 11, 2022, the Commission issued its written decision ("May 11 Decision"), stating that PRP's Petition was

not placed on the Planning Commission agenda due to its untimeliness. As referenced in Chapter 4 of the Rules of Practice and Procedure of the Kauai County Planning Commission, Section 1-4-3, entitled "Method of Filing: Timing, "the petition for intervention with certificate of service shall be filed with the Commission at least seven (7) days prior to the Agency Hearing for which notice to the public has been published pursuant to law. Untimely petitions for intervention will not be permitted except for good cause shown. However, please note that the document was received by the Commissioners as public testimony.

[ROA at 000590.]

33. The May 11 Decision did not address PRP's good cause arguments, nor did it address the fact that the agency hearing had been postponed to May 24, 2022, mitigating any potential harm and/or prejudice to HPM. [Dkt No. 90, FOF ¶ 33; ROA at 000590.]

34. The May 11 Decision also did not address why PRP's Petition was deemed untimely despite the deferment of the agency hearing. [Dkt No. 90, FOF ¶ 34.]

35. Upon issuing the May 11 Decision, the Commission returned all thirteen (13) copies of the Petition that had been mailed to the Commission, along with PRP's \$25.00 check for the filing fee. [Dkt No. 90, FOF ¶ 35.]

36. On May 17, 2022, the Commission issued the agenda for the May 24, 2022 Commission meeting, which included HPM's Application. [Dkt No. 90, FOF ¶ 34; ROA at 000605-07.]

37. The Agenda for the May 24, 2022 Commission Meeting did **not** include PRP's Petition as an Agenda item. [Dkt No. 90, FOF ¶ 37.]

38. On May 24, 2022, the Commission, once again, lacked quorum to hold an agency hearing to act on HPM's Application, and the Application was again deferred to June 14, 2022. [Dkt No. 90, FOF ¶ 38; ROA at 000678-79.]

PRP's Notice of Appeal From the May 11 Decision

39. On June 9, 2022, PRP timely filed the Notice of Appeal from the May 11 Decision ("Notice of Appeal"). HRS § 91-14 (requiring an appeal be filed within 30 days of the preliminary ruling or service of the certified copy of the final decision and order of the agency). [Dkt No. 90, FOF ¶ 41.]

40. In the Notice of Appeal, PRP raised, *inter alia*, that the Commission erred in denying PRP's Petition and did not appropriately address PRP's good cause argument, despite the requirement within Commission Rule 1-4-3 that it do so. [Dkt No. 1 *passim*, Dkt No. 90, FOF ¶ 42.]

41. The Commission was served with a copy of the Notice of Appeal via email and US Mail on Thursday, June 9, 2022. [Dkt No. 90, FOF ¶ 43; ROA at 000711-747.]

42. Upon the filing of the Notice of Appeal, the Commission was divested of jurisdiction. [Dkt No. 90, COL ¶ 42 (citing *McPherson v. Zoning Bd. of Appeals*, 67 Haw. 603, 607, 699 P.2d 26, 29 (1985) (recognizing that an administrative agency loses jurisdiction after the filing of an appeal) and *Kaheawa Wind Power, LLC v. Cnty. of Maui*, 135 Hawai‘i 202, 206 n.3, 347 P.3d 632, 636 n.3 (App. 2014) (noting that the First Amended Final Judgment was a nullity “because it was entered after the notices of appeal were filed and without any jurisdictional basis”) (“Generally, the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case.”)).]

The June 14, 2022 Agency Hearing and PRP’s Second Notice of Appeal

43. After receiving the Notice of Appeal, on June 13, 2022, the afternoon before the public hearing on the Application, the Commission published a revised agenda on its website (“Revised Agenda”), including explicitly – for the first time – PRP’s Petition as a line item for the hearing on HPM’s Application. [Dkt No. 90, FOF ¶ 44.]

44. The Commission did not provide PRP actual notice of the Revised Agenda. [Dkt No. 90, FOF ¶ 45.]

45. During the June 14, 2022 Commission Meeting, PRP was only given five (5) minutes to argue its Petition, with two (2) additional minutes to respond to questions from the Commission. [Dkt No. 90, FOF ¶ 46.]

46. After some apparent confusion among the Commissioners and concerns regarding the timeframe for automatic approval for the permits, the Commission again orally denied PRP’s Petition, reasoning that PRP did not have a good reason for its “late” filing of the Petition. [Dkt No. 90, FOF ¶ 47; ROA at 000999-0001005.]

47. The Commission did not address that HPM had not suffered any prejudice due to PRP's filing of the Petition three days after the deadline but more than five weeks before the agency hearing on HPM's Application. [Dkt No. 90, FOF ¶ 48; ROA at 001001-05.]

48. The Commission further failed to consider whether PRP's Petition was, in fact, timely filed given that the agency hearing on HPM's Application was twice deferred for lack of quorum. [Dkt No. 90, FOF ¶ 49; ROA at 001001-05.]

49. After orally denying PRP's Petition, the Commission granted HPM's Application, thereby approving the Special Permit (SP-2022-1), Use Permit (U-2022-8), and Class IV Zoning Permit (Z-IV-2000-8), with a few minimal conditions. [Dkt No. 90, FOF ¶ 50; ROA at 001040-43.]

50. On June 24, 2022, the Commission issued its written order denying PRP's Petition ("Order") providing, in relevant part:

In accordance with Kaua'i County Comprehensive Zoning Ordinance § 8-3.1(f)(4), on April 8, 2022, Notice of the proposed public hearing for this Application was published in a newspaper of general circulation in the County. Petitioner's petition for intervention and motion for postpone hearing was filed on May 9, 2022 [sic].¹ On May 10, 2022, the public hearing on this matter was commenced, public testimony was accepted therein, and the hearing was continued to June 14, 2022 due to a lack of sufficient quorum for the Commission to take action. Petitioner's filing is therefore untimely for failure to file no later than May 3, 2022, seven days prior to the commencement of the agency hearing for which notice has been published pursuant to law, as set forth by Commission Rule 1-4-3.

Within its written filing, and during counsel's oral argument, Petitioner failed to demonstrate good cause for untimeliness, as is required by Commission Rule 1-4-3 and under the common law regarding this issue. Petitioner has failed to show a substantial reason amounting in law to a legal excuse for failing to perform an act required by law, i.e., the timely filing of a Petition to Intervene in a matter pending before the Commission.

¹ The Order is incorrect. PRP's Petition was filed on May 6, 2022. [ROA at 000364-86; FOF ¶ 18.]

[Dkt No. 17, Ex. E.]

51. PRP filed a second Notice of Appeal preserving its rights on July 14, 2022, in Case No. 5CVV- 22-0000060 (“Second Notice of Appeal”).

HPM’s Two Motions to Dismiss and the Commission’s Substantive Joinders

52. On June 29, 2022, HPM filed a Motion to Dismiss Appellant’s Notice of Appeal to Circuit Court Filed on June 9, 2022 in Case No. 5CCV-22-0000049 (“First Motion”), arguing that this Court lacked subject matter jurisdiction pursuant to HRS § 91–14 over the Notice of Appeal. [Dkt No. 90, FOF ¶ 54.]

53. The Commission filed a Substantive Joinder to the First Motion on June 29, 2022. [Dkt No. 19.]

54. On July 14, 2022, HPM filed a second Motion to Dismiss Appellant’s Notice of Appeal to Circuit Court filed, filed August 3, 2022 in Case No. 5CCV-22-0000060 (“Second Motion”), arguing that this Court lacked subject matter jurisdiction pursuant to HRS § 91–14 over the Second Notice of Appeal. [Dkt No. 90, FOF ¶ 55.]

55. The Commission filed a Substantive Joinder to the Second Motion on August 4, 2022. [Dkt No. 33 in Case No. 5CCV-22-0000060.]

56. On September 28, 2022, the two cases, Case No. 5CCV-22-0000049 and Case No. 5CCV-22-0000060, were consolidated under Case No. 5CCV-22-0000049.

The Court’s Denial of the First and Second Motions and the Substantive Joinders

57. On October 31, 2022, the Court issued its Findings of Fact Findings Of Fact, Conclusions Of Law And Order Denying (1) Appellee HPM Building Supply’s Motion To Dismiss Appellant’s Notice Of Appeal To Circuit Court Filed On June 9, 2022, Filed June 29, 2022 In Case No. 5CCV-22-0000049, (2) Appellee County Of Kaua’i Planning Commission’s

Substantive Joinder To Appellee HPM Building Supply's Motion To Dismiss Appellant's Notice Of Appeal To Circuit Court Filed On June [19, 2022, Filed June 29, 2022 In Case No. 5CCV-22-0000049, (3) Appellee HPM Building Supply's Motion To Dismiss Appellant's Notice Of Appeal To Circuit Court Filed On July 14, 2022, Filed August 3, 2022 In Case No. 5CCV-22-0000060, and (4) Appellee County Of Kaua'i Planning Commission's Substantive Joinder To Appellee HPM Building Supply's Motion To Dismiss Appellant's Notice Of Appeal To Circuit Court Filed On August 3, 2022, Filed August 4, 2022 In Case No. 5CCV-22-0000060 ("FOF/COL"). [Dkt No. 90.]

58. The Court's FOF/COL are incorporated herein.

59. The Court held that it had jurisdiction over PRP's Notice of Appeal and Second Notice of Appeal. [See Dkt No. 90.]

60. In particular, the Court held that PRP met the requirements of HRS § 91-14:

first, the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing—*i.e.*, a hearing that was [(1) "required by law" and [(2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and finally, the claimant's legal interests must have been injured—*i.e.*, the claimant must have standing to appeal.

[Dkt No. 90 (citing *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* (hereinafter, "*PASHF*"), 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995)).]

61. The Court made the following findings and conclusions relevant here.

The Court Concluded that PRP Has Standing to Intervene
Pursuant to Commission Rule 1-4-1

62. Commission Rule 1-4-1 provides that:

All Persons who have hold interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed application that their interest in the Proceeding is clearly distinguishable from that of the general public, **shall** be admitted as Parties-Intervenors upon timely written application for intervention. In no such case shall intervention be allowed for appeals of actions from the Director pursuant to Chapter 9 of these Rules.

(Emphases added.) [COL ¶ 10.]

63. The Court held that “[i]n its Petition, PRP established that it had both organizational and associational standing to intervene inasmuch as its interests, as well as the interests of its members, would be directly and immediately impacted by HPM’s Application.” [Dkt No. 90, COL ¶ 14.]

64. Specifically, the Court concluded that “PRP has organizational standing under the traditional injury-in-fact test, as the goal of the Application – to obtain permits to develop housing packages – directly undercuts PRP’s asserted advocacy efforts and will necessarily force PRP to expend and/or reallocate significant resources related to job creation, a skilled workforce, and living wages for its members.” [Dkt No. 90, COL ¶ 15 (citing *Sierra Club v. Dep’t of Transp.*, 115 Hawai‘i 299, 319, 167 P.3d 292, 312 (2007) as corrected (Oct. 10, 2007)).]

65. The Court further concluded that “PRP also has associational standing because its members – union carpenters and contractors – would have standing on their own regarding such issues as job loss and living wages; PRP seeks to protect job creation and living

wages as part of its mission; and the participation of individual members is not necessary.” [Dkt No. 90, COL ¶ 16 (citing *Sierra Club*, 115 Hawai‘i at 334, 167 P.3d at 312).]

66. The Court also concluded that PRP has “a direct and significant interest in ensuring that the proposed industrial manufacturing plant supports local jobs and provides living wages, and also meets the statutory environmental, economic, and cultural requirements,” [Dkt No. 90, COL ¶ 17], and also “an interest in development and land use projects that comprehensively account for the local economy and environment by including community members in the application process,” [*id.*, COL ¶ 18].

67. Accordingly, “PRP’s interest is distinguishable from that of [the] general public in that PRP represents union carpenters on Kaua‘i who may lose jobs as a result of HPM’s proposal and may not be paid living wages based on the industrial manufacturing plant.” [Dkt No. 90, COL ¶ 19.]

68. The Court therefore concluded: “Inasmuch as PRP established a right clearly distinguishable from the general public, Commission Rule 1-4-1 mandates (‘shall be admitted’) that PRP be admitted as a party-intervenor ‘upon timely written application for intervention.’” [Dkt No. 90, COL ¶ 20 (emphasis added).]

The Court Also Concluded That PRP Has a Constitutional Right to Intervene

69. The Court held that, as “article XI, section 9 of the Hawai‘i Constitution additionally provides, in relevant part, that ‘[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality,’” [Dkt No. 90, COL ¶ 27], “[a] contested case was . . . required to protect PRP’s right to a clean and healthful environment,” [*id.*, COL ¶ 32].

70. Specifically, the Court held that “PRP asserted in its Petition that HPM’s proposed development does not comply with the requirements for a Special Permit, as the manufacturing factory is inconsistent with the letter and policy of HRS Chapters 205 and 205A.” [Dkt No. 90, COL ¶ 28.]

71. Accordingly, the Court held that “PRP’s right to a clean and healthful environment, as defined by laws relating to environmental quality such as HRS Chapter 205 and 205A, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai‘i Constitution.” [Dkt No. 90, COL ¶ 31 (citing *Matter of Hawai‘i Elec. Light Co., Inc.*, 145 Hawai‘i 1, 16, 445 P.3d 673, 688 (2019)).]

72. The Court concluded: “A contested case was therefore required to protect PRP’s right to a clean and healthful environment.” [Dkt No. 90, COL ¶ 32 (citing *Matter of Hawai‘i Elec. Light Co., Inc.*, 145 Hawai‘i at 17, 445 P.3d at 689; *Protect & Pres. Kahoma Ahupua‘a Ass’n v. Maui Plan. Comm’n*, 148 Hawai‘i 275, 472 P.3d 42 (App. 2020)).]

The May 11 Decision Was a Final Decision and
the Commission Was Divested of Jurisdiction

73. With respect to the second requirement set forth in *PASH*, the Court held that “the [May 11] Decision was a final decision denying PRP’s Petition pursuant to HRS § 91-14.” [Dkt No. 90, COL ¶ 50.]

74. Accordingly, “the filing of the Notice of Appeal by PRP on June 9, 2022 divested the Commission of jurisdiction.” [*Id.*, COL ¶ 58 (citing *McPherson v. Zoning Bd. of Appeals*, 67 Haw. 603, 607, 699 P.2d 26, 29 (1985) and comparing *Kaheawa Wind Power, LLC v. Cnty. of Maui*, 135 Hawai‘i 202, 206 n.3, 347 P.3d 632, 636 n.3 (App. 2014)).]

PRP's Petition Complied With the Commission Rules

75. With respect to the third requirement set forth in *PASH*, the Court held that “PRP complied with the applicable agency rules in submitting its Petition.” [Dkt No. 90, COL ¶ 68.]

PRP Suffered Injury-In-Fact

76. With respect to the fourth requirement set forth in *PASH*, the Court held that “PRP suffered an injury in fact and was adversely affected by the [May 11] Decision for purposes of HRS § 91-14.” [Dkt No. 90, COL ¶ 82.]

77. Specifically, the Court held that “[t]he goal of HPM’s Application – to develop an industrial manufacturing facility to produce prefabricated wooden trusses and wall panels – ‘directly undercuts PRP’s advocacy efforts and will necessarily force PRP to expend and/or reallocate significant resources related to job creation, a skilled workforce, and living wages for its members.’” [Dkt No. 90, COL ¶ 79.]

78. The Court concluded: “The injury to PRP is therefore directly traceable to the denial of its Petition, and favorable judicial action pursuant to this appeal will likely remedy PRP’s injury.” [*Id.*, COL ¶ 80.]

79. The Court further concluded that, as “PRP has hundreds of members residing on Kaua‘i and PRP alleges an injury in fact to the property and environmental interests of its members based on HPM’s improper use of land zoned agriculture under HRS Chapter 205,” [Dkt No. 90, COL ¶ 81], “PRP suffered an injury in fact and was adversely affected by the [May 11] Decision for purposes of HRS § 91-14,” [*id.* ¶ 82].

The Briefing

80. PRP filed its Opening Brief on November 14, 2022, asserting the following questions presented as to the Commission's denial of PRP's Petition and the grant of HPM's application and requested permits:

(1) whether the Commission's [May 11] Decision, denying PRP's Petition was made upon unlawful procedure, was affected by other error or law, or was in violation of constitutional or statutory provisions; and

(2) whether the Commission's [May 11] [D]ecision granting HPM's Application and awarding HPM the subject permits, without granting PRP's request for a contested case hearing, was made upon unlawful procedure, was affected by other error or law or was in violation of constitutional or statutory provisions.

[Dkt No. 92 at 14.]

81. HPM filed its Answering Brief on December 21, 2022 (Dkt No. 94) and the Commission filed its Answering Brief on December 22, 2022 (Dkt No. 96).

82. PRP filed its Reply Brief regarding HPM's Answering Brief on January 4, 2023 (Dkt No. 98) and the Commission's Answering Brief on January 5, 2023 (Dkt No. 100).

83. Oral argument was heard before the Honorable Kathleen N.A. Watanabe on March 28, 2023 at 1:30 p.m.

CONCLUSIONS OF LAW

Based upon the preceding Findings of Fact, the Court concludes as follows:

1. In evaluating this matter, the Court recognizes and is guided by the legislative intent set forth in HRS § 92-1:

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public

policy--the discussions, deliberations, decisions, and action of governmental agencies--shall be conducted as openly as possible. To implement this policy the legislature declares that:

- (1) It is the intent of this part to protect the people's right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and
- (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

2. Commission Rule 1-1-1 similarly provides the "Purpose" of the

Commission's Rules of Practice and Procedures:

The intent and purpose of the Rules of Practice and Procedures of the Kaua'i County Planning Commission is to provide a systematic and democratic method of conducting meetings and hearings in order to insure that all persons and parties will have an opportunity to participate in an open and orderly manner.

3. This Court reviews an agency decision under the standards of

review set forth in HRS § 91-14, which provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g).

4. Under HRS § 91-14(g), conclusions of law are reviewed *de novo*, pursuant to subsections (1), (2) and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under the clearly erroneous standard, pursuant to subsection (5); and an agency's exercise of discretion is reviewed under the arbitrary and capricious standard, pursuant to subsection (6). *Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc.*, 121 Hawai'i 16, 24, 211 P.3d 74, 82 (2009); *see also Paul's Elec. Serv., Inc. v. Befitel*, 104 Hawai'i 412, 420, 91 P.3d 494, 502 (2004), *as corrected* (July 14, 2004).

5. Mixed questions of law and fact are “reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case.” *Save Diamond Head Waters LLC*, 121 Hawai'i at 25, 211 P.3d at 83 (citation omitted).

**The Commission's Denial of PRP's Petition as Untimely Under
Commission Rule 1-4-3 Was Based Upon Unlawful Procedure, Was Affected
by Other Error or Law, and Was in Violation of Constitutional
and/or Statutory Provisions**

The Commission's Denial of PRP's Petition as Untimely
Is Reviewed *De Novo*

6. The Commission's sole reason for the denial of PRP's Petition in the May 11 Decision was that it was untimely. [ROA at 000590.]

7. The Commission's denial of PRP's Petition was based solely on its interpretation of the relevant regulations and statutes.

8. The Hawai'i Supreme Court has held that “whether or not an agency has followed proper procedures or considered the appropriate factors in making its determination is a question of law, and will be reviewed *de novo*.” *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 315, 167 P.3d 292, 308 (2007), *as corrected* (Oct. 10, 2007).

9. Further, the “court does not defer to agency interpretations that are ‘plainly erroneous or inconsistent with the underlying legislative purpose.’” *Kaleikini v. Yoshioka*, 128 Hawai‘i 53, 67, 283 P.3d 60, 74 (2012).

10. The issue before the Court is whether the Commission correctly applied the law and followed proper procedures in denying PRP’s Petition as untimely.

11. The Commission did not find any facts in denying PRP’s Petition as untimely.

12. The facts related to the timing of PRP’s Petition are undisputed and set forth in the record on appeal.

13. Accordingly, the Commission’s denial of PRP’s Petition as untimely is a matter of law and is subject to *de novo* review pursuant to HRS § 91-14(g). *Sierra Club*, 115 Hawai‘i at 315, 167 P.3d at 308.

The Commission Erred When It Denied PRP’s Petition As Untimely

14. Commission Rule 1-4-3 provides the following regarding the timing for submission of petitions to intervene:

Methods of Filing: Timing. Petitions to intervene shall be in writing and in conformity with these Rules. The petition for intervention with certificate of service shall be filed with the Commission at least seven (7) days prior to the Agency Hearing for which notice to the public has been published pursuant to law. Untimely petitions for intervention will not be permitted except for good cause shown.

15. The plain language of Commission Rule 1-4-3 makes clear that a petition for intervention shall be filed “seven (7) days before the Agency Hearing for which notice to the public has been published pursuant to law.” (Emphasis added.)

16. “‘Agency Hearing’ refers only to such hearing held by the Commission immediately prior to a judicial review of a contested case as provided in Section 91-14 HRS,

including but not limited to Class IV, Use, and Variance Permits pursuant to the Comprehensive Zoning Ordinance of the County of Kaua‘i and other applicable laws.” Commission Rule 1-1-2(1)(i).

17. The Agency Hearing on HPM’s Use Permit was held on June 14, 2022.
[ROA at 000977.]

18. Seven days before June 14, 2022 was June 7, 2022.

19. Thus, PRP’s Petition filed on May 6, 2022 was filed more than seven days before the Agency Hearing on June 14, 2022.

20. HPM and the Commission argue that the deadline to submit a petition for intervention was set for seven days before May 10, 2022, the date first set for the Agency Hearing, even though no Agency Hearing on HPM’s Application and Use Permit actually occurred on that day and, in fact, was ultimately continued until June 14, 2022. [Dkt No. 94 at 16-17; Dkt No. 96 at 6-7.]

21. HPM and the Commission rely on Comprehensive Zoning Ordinance (“CZO”) § 8-3.1(f)(4) and Commission Rule 1-13-5(a), which they argue require a different interpretation of the deadline set for submission of petitions to intervene Commission Rule 1-4-3 other than the plain language. [Dkt No. 94 at 16; Dkt No. 96 at 6-7.]

22. CZO § 8-3.1(f)(4) and Commission Rule 1-13-5(a), respectively, require that notice be provided in a newspaper at least twenty days prior to a public and agency hearing.

23. Nothing in CZO § 8-3.1(f)(4) or Commission Rule 1-13-5(a) dictates a date for the filing of a petition to intervene or change the plain language of Rule 1-4-3 stating that a petition to intervene should be submitted seven days prior to the Agency Hearing.

24. Nevertheless, HPM and the Commission argue that PRP and the public should have known that, based on CZO § 8-3.1(f)(4) and Commission Rule 1-13-5(a), the deadline to file a petition to intervene was strictly set for May 3, 2022, no matter when the Agency Hearing was actually held. [Dkt No. 94 at 16; Dkt No. 96 at 6-7.]

25. The interpretation of Commission Rule 1-4-3 urged by HPM and the Commission is absurd. *Coon v. City & Cnty. of Honolulu*, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002) (noting that the court should not hesitate “to reject an incorrect or unreasonable statutory construction advanced by the agency”).

26. Commission Rule 1-4-3 does not state that the petition “shall be filed with the Commission at least seven (7) days prior to the [date of the original] Agency Hearing for which notice to the public has been published pursuant to [Commission Rule 1-13-5(a)],” which is what HPM and the Commission would like it to say.

27. By way of example, in contrast to Commission Rule 1-4-3, the corresponding Maui Planning Commission Rule states:

§ 12-201-40 Petition filing. (a) Petitions to intervene shall be in conformity with section 12-201-20 herein and shall be filed with the commission and served upon the applicant no less than ten days before the first public hearing date. Untimely petitions will not be permitted except for good cause, but in no event will intervention be permitted after the commission has taken the final vote on the matter before it.

(Emphases added.)

28. The Commission could have used its rule making authority to enact a rule that requires submission of a petition to intervene prior to the first public hearing or the date originally noticed for the Agency Hearing, but, it did not.

29. Instead, the plain language of Commission Rule 1-4-3 ties the deadline to submit the petition to intervene to the date of the Agency Hearing.

30. Thus, the Commission erred in interpreting Commission Rule 1-4-3 to require a petition to intervene to be filed by May 3, 2022, seven days before the public hearing, when the Agency Hearing was not actually held until June 14, 2022.

31. This plain language interpretation is also consistent with Commission Rule 1-1-1 (and HRS § 92-1) in that it balances systematic and orderly hearings with the opportunity to participate.

32. PRP's Petition, submitted on May 6, 2022, was timely filed pursuant to Commission Rule 1-4-3, because it was submitted 39 days before the Agency Hearing.

33. Thus, the Commission erred in denying PRP's Petition as untimely.

The Commission Erred When It Denied PRP's Petition
Without Consideration of PRP's Good Cause Argument

34. Pursuant to Commission Rule 1-4-3, cited above, petitions to intervene are permitted to be filed in an untimely manner if there is "good cause" for the late filing.

35. The May 11 Decision recognized that good cause is a basis to allow petitions that are filed in an "untimely" manner.

36. PRP set forth in its Petition "good cause" for its purportedly late filing. [Dkt No. 90, FOF ¶ 22; *see also id.*, COL ¶ 22.]

37. However, nowhere in the May 11 Decision did the Commission address PRP's good cause arguments. [Dkt No. 90, FOF ¶ 33.]

38. Nor did the May 11 Decision address the fact that the agency hearing was ultimately rescheduled until June 14, 2022, rendering the Petition timely filed and/or mitigating any potential harm and prejudice to HPM. [*See id.*; Dkt No. 90, FOF ¶ 33.]

39. Thus, the Commission additionally erred in denying PRP's Petition as untimely without consideration of PRP's good cause arguments set forth in its Petition as plainly required by Commission Rule 1-4-3.

40. The Commission's denial of PRP's Petition is vacated and reversed. *See* HRS § 91-14(g) ("Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced[.]").

41. HPM and the Commission argue that the Commission's actions and interpretation of the subject regulations must be afforded "deference." [Dkt No. 94 at 17-20; Dkt No. 96 at 3-4.]

42. However, the case law is clear that courts "do not apply 'deference' per se, but may choose a more or less deferential standard of review." *Sierra Club*, 115 Hawai'i at 317, 167 P.3d at 310. In this regard, when case law speaks of deference, it is usually in regard to the fact that the "abuse of discretion" standard is more deferential, for example, than the "de novo" standard. *Id.* at 317 n.25, 167 P.3d at 310 n.25.

43. Inasmuch as the Commission erroneously denied PRP's Petition as untimely the Commission's (1) Denial of PRP's Petition; and (2) Grant of HPM's Application for the Special Permit (SP-2022-1), Use Permit (U-2022-8), and Class IV Zoning Permit (Z-IV-2000-8), must be vacated and, as set forth below, the case remanded to the Commission so that PRP may intervene as a party in a contested case hearing regarding HPM's Application for the

Special Permit (SP-2022-1), Use Permit (U-2022-8), and Class IV Zoning Permit (Z-IV-2000-8).²

PRP's Notice of Appeal Divested the Commission of Jurisdiction

44. The May 11, 2022 Decision was a final appealable decision by the Commission. [See also Dkt No. 90, COL ¶¶ 58-59.]

45. On June 9, 2022, PRP timely filed the Notice of Appeal from the May 11 Decision. HRS § 91-14 (requiring an appeal be filed within 30 days of the preliminary ruling or service of the certified copy of the final decision and order of the agency). [Dkt No. 90, FOF ¶ 41.]

46. PRP's Notice of Appeal set forth the errors made by the Commission. [Dkt No. 1 *passim*; Dkt No. 90, FOF ¶ 42.]

47. Upon the filing of the Notice of Appeal, the Commission was divested of jurisdiction. [Dkt No. 90, COL ¶ 42.]

48. The Commission was served with a copy of the Notice of Appeal via email and US Mail on Thursday, June 9, 2022. [Dkt No. 90, FOF ¶ 43; ROA at 000711-747.]

49. Thereafter, although it lacked jurisdiction to do so, the Commission added PRP's Petition to the Agenda for the June 14, 2022 Commission Meeting – the afternoon before the public hearing on the Application – in an apparent attempt to correct its earlier mistakes as

² HPM's Class IV Zoning Permit (Z-IV-2022-8), Use Permit (U-2022-8), and Special Permit (SP-2022-12) were previously vacated in a separate agency appeal before the Court, *The Community Association of Poipu Aina Estates v. County of Kaua'i Planning Commission, et al.*, Case No. 5CCV-22-00000055. See Hawai'i Rule of Evidence 201 (permitting judicial notice of adjudicative facts). Nevertheless, the Court additionally holds here that the permits are vacated based on the facts presented in the instant matter.

set forth in the Notice of Appeal in denying PRP's Petition. [See also Dkt No. 90, FOF ¶ 44, COL ¶ 57.]

50. The inclusion of PRP's Petition in the June 14, 2022 Commission Meeting was in violation of HRS § 92-7 (requiring notice of any rescheduled meeting six calendar days prior to the meeting). [See also Dkt No. 90, COL ¶ 53.]

51. The Commission did not provide PRP actual notice of the Revised Agenda. [See also Dkt No. 90, FOF ¶ 45.]

52. The failure of the Commission to provide adequate notice also violates HRS § 92-1. See, e.g., *Kanahele v. Maui Cnty. Council*, 130 Hawai'i 228, 252, 307 P.3d 1174, 1198 (2013), *as corrected* (Aug. 30, 2013) ("Thus while a continued meeting does not require a board to post a new agenda, nevertheless the means chosen to notify the public of the continued meeting must be sufficient to ensure that meetings are conducted 'as openly as possible' and in a manner that 'protect[s] the people's right to know.'" (citing HRS § 92-1).

53. Indeed, "[w]hen meetings are continued to a later date, people are discouraged from attempting to participate in the process of government decision making." *Id.* at 250, 307 P.3d at 1196 (quoting Stand. Comm. Rep. No. 889, in 1985 House Journal, at 562) (emphasis added in *Kanahele*); see *id.* at 250-51, 307 P.3d at 1196-97 ("The legislature's concern, then, with respect to the Sunshine Law has always been that the public should have a realistic, actual opportunity to participate in the board's processes rather than a theoretical 'right' to participate in name only.").

Even Assuming *Arguendo* That the Commission Had Jurisdiction, its
Order Holding That PRP Lacked Good Cause for its Allegedly Untimely
Filed Petition Was Clearly Erroneous or Affected by Error of Law

54. At the June 14, 2022 Agency Hearing, the Commission purported to orally deny, again, PRP's Petition, reasoning that PRP did not have a good reason for its "late" filing of the Petition.

55. The Commission issued its Order further stating that PRP lacked "good cause," reasoning that "[PRP] has failed to show a substantial reason amounting in law to a legal excuse for failing to perform an act required by law, i.e., the timely filing of a Petition to Intervene in a matter pending before the Commission." [Dkt No. 17, Ex. E.]

56. The term "good cause" means "a sufficient reason, depending upon the circumstances of the individual case." *Eckard Brandes, Inc. v. Dep't of Lab. & Indus. Rels.*, 146 Hawai'i 354, 363, 463 P.3d 1011, 1020 (2020), *as corrected* (Apr. 27, 2020) (citation omitted).

57. Further, the interpretation of "good cause" should advance "the policy of law [that] favors dispositions of litigation on the merits[.]" *Id.* at 364, 463 P.3d at 1021.

58. In addition, "good cause" "is a much lower standard under Hawai'i law." *Chen v. Mah*, 146 Hawai'i 157, 177, 457 P.3d 796, 816 (2020).

59. The Hawai'i Supreme Court held in *Chen* that whether "good cause" exists "will depend upon the circumstances of the individual case," and "good cause" exists "if there is no (1) deliberate delay and/or contumacious conduct; or (2) if deliberate delay or contumacious conduct exist, there is no actual prejudice that cannot be addressed through lesser sanctions." 146 Hawai'i at 180, 457 P.3d at 819.

60. The Commission looked only at whether PRP had a "substantial reason" for purportedly failing to "timely fil[e] . . . a Petition to Intervene." [Dkt No. 17, Exhibit E.]

61. The Commission failed to properly apply this jurisdiction's law related to good cause as set forth above.

62. This Court interprets the Commission's misapplication of the law *de novo* pursuant to HRS § 91-14(g). *Sierra Club*, 115 Hawai'i 299, 315, 167 P.3d 292, 308.

63. Here, PRP had a sufficient reason based upon the circumstances of this individual case for any purported "untimely filing."

64. Significantly, HPM's Application file, including the Director's Report, was not made publicly accessible until May 4, 2022 – just six days before the hearing.

65. Prior to reviewing HPM's Application and the Director's Report, PRP did not know the extent of the manufacturing facility, HPM's reliance on unsubstantiated claims of job creation and housing costs, the land use designations of the property, or the considerations and studies – or lack thereof – involved in the Application.

66. Moreover, there was no deliberate delay or contumacious conduct on the part of PRP and HPM suffered absolutely no prejudice for any purported "untimely filing."

67. Alternatively, there is, at a minimum, a good faith argument that PRP's Petition was timely filed where it was filed more than seven days before the agency hearing that occurred on June 14, 2022.

68. "[G]ood faith misinterpretation of a procedural rule may represent such excusable neglect" for the purposes of determining good cause for a purported late filing. *Lorenzen v. Employees Retirement Plan of Sperry and Hutchinson Co.*, 896 F.2d 228, 232 (7th Cir. 1990).

69. PPR therefore had "a sufficient reason" based under the circumstances for a purportedly untimely filing.

70. Further, “the determination [of whether a party has shown ‘excusable neglect’] is at bottom an equitable one, taking account of all relevant circumstances[.]” *Eckard*, 146 Hawai‘i at 360, 463 P.3d at 1017.

71. The Commission erred in applying the law in this jurisdiction regarding good faith inasmuch as it failed to consider the equities of the situation, particularly as the law favors dispositions of litigation on the merits and HPM did not suffer any prejudice – and has not argued that it would – because it had notice of PRP’s intent to intervene 38 days before the Agency Hearing was actually held.

72. Accordingly, good cause under the law existed for any purported untimely filing and the Petition should not have been denied.

73. Even if the Commission’s May 11 Decision were to be reviewed under an abuse of discretion standard, the May 11 Decision was “arbitrary and capricious” as the Commission “exceeded the boundaries of [its] discretion” by misapplying the law related to the standard for “good cause.” *Cnty. Associations of Hualalai, Inc. v. Leeward Plan. Comm’n*, 150 Hawai‘i 241, 261-62, 500 P.3d 426, 446-47 (2021) (holding that the Planning Commission abused its discretion where the Planning Director “exceeded the boundaries of [his] discretion by precluding Hualalai from participating in a contested case proceeding” and that the Commission’s “failure to grant or deny Hualalai’s petition was arbitrary and capricious, and constituted an abuse of discretion”).

**The Commission's Approval of HPM's Application, Issuing
HPM The Subject Permits, After Improperly Denying PRP's Petition, Was
Made Upon Unlawful Procedure and Was Affected By Other Error Or Law**

PRP Has a Constitutional, Statutory, and Regulatory Right to Intervene

74. PRP has (1) a constitutional and statutory right to intervene and (2) a right to intervene pursuant to the Commission's Rules.

75. At the outset, PRP has established that it has both organizational and associated standing to intervene inasmuch as its interests, as well as the interests of its members, would be directly and immediately impacted by HPM's Application and requested Permits. [See also Dkt No. 90, COL ¶¶ 14-19.]

76. As previously discussed above and incorporated herein, the Court determined that PRP had a statutory right to intervene inasmuch as "PRP suffered an injury in fact and was adversely affected by the [May 11] Decision for purposes of HRS § 91-14." [Dkt No. 90, COL ¶ 82.]

77. Moreover, as discussed above, PRP has a constitutional right to intervene. [See, e.g., Dkt No. 90, COL ¶ 32.]

78. Specifically, with regard to PRP's constitutional rights, the Hawai'i Supreme Court has stated that "[c]onstitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994).

79. Article XI, Section 9 of the Hawai'i State Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through

appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

80. The Hawai‘i Supreme Court has held that “HRS chapter 205 is a law relating to the conservation, protection and enhancement of natural resources, and thus falls within the scope the enforcement right established by article XI, section 9.” *Cnty. of Hawaii v. Ala Loop Homeowners*, 123 Hawai‘i 391, 409, 235 P.3d 1103, 1121 (2010), *abrogated on other grounds by Tax Found. of Hawai‘i v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019); *see also In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i at 269, 408 P.3d at 21 (holding that petitioners have a right to intervene where they have established a “protected property interest in a clean and healthful environment”); *Protect & Pres. Kahoma Ahupua‘a Ass’n v. Maui Plan. Comm’n*, 149 Hawai‘i 304, 311, 489 P.3d 408, 415 (2021) (“*Protect & Pres. Kahoma Ahupua‘a Ass’n I*”), as amended (June 17, 2021), *reconsideration denied*, No. SCWC-15-0000478, 2021 WL 2828030 (Haw. July 7, 2021) (same).

81. Courts use a two-step analysis to determine whether there was a due process right to a contested case hearing: “(1) [whether] the particular interest which [the] claimant seeks to protect by a hearing [is] ‘property’ within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is ‘property,’ what specific procedures are required to protect it.” *Protect & Pres. Kahoma Ahupua‘a Ass’n II*, 149 Hawai‘i at 312, 489 P.3d at 416.

82. “[W]here a source of state law—such as article XI, section 9—grants any party a substantive right to a benefit—such as a clean and healthful environment—that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created.” *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i at 264, 408 P.3d at 16.

83. Thus, PRP's right to a clean and healthful environment, as defined by laws relating to environmental quality such as HRS Chapters 205 and 205A, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai'i Constitution. [See also Dkt No. 90, COL ¶ 31.]

84. With respect to the second step, the Court in *Protect & Pres. Kahoma Ahupua'a Ass'n II* turned to whether the appellant's "right to procedural due process was violated." 149 Hawai'i at 313, 489 P.3d at 417.

85. In determining the procedures required to comply with constitutional due process, courts consider the following factors: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Id.*

86. In its analysis, the Court noted: "the private interest was PPKAA's constitutional right to a clean and healthful environment," (*id.*); the "risk of an erroneous deprivation of PPKAA's interest was high absent PPKAA's participation in the contested case hearing because the Project could have adverse and long-term environmental impacts to the SMA," (*id.* at 313-14, 489 P.3d at 417-18); "[a]s adjacent landowners to the Project, PPKAA's members would likely bear the brunt of adverse impacts to the SMA, and their knowledge of the area could have supplemented the findings of the environmental assessment," (*id.*); and it was not unduly burdensome to allow PPKAA to participate in the contested case hearing as "the Commission was already required to consider the CZMA in making its decision" on the SMA use permit, (*id.*).

87. Further, the Court specifically noted that PPKAA raised such concerns as “loss of scenic and open space resources, drainage and runoff impacts, and impacts on the tsunami evacuation zone,” and that while PPKAA members testified at the public hearing and the hearing on its petition to intervene, “they were not able to submit evidence or cross-examine opposing witnesses, which the Commission’s rules would have allowed them the opportunity to do had their petition been granted.” *Id.*

88. Similarly, here, PRP asserted its members’ constitutional right to a clean and healthful environment under article XI, section 9 of the Hawai‘i Constitution, as described above.

89. For instance, PRP’s members have an interest in development and land use projects that support local jobs and provide living wages, and also meet the statutory environmental, economic, and cultural requirements [Dkt No. 90, COL ¶ 17]; PRP has an interest in development and land use projects that comprehensively account for the local economy and environment by including community members in the application process [*id.* at COL ¶ 18]; PRP is concerned that HPM’s requested industrial manufacturing plant to produce prefabricated materials for housing “packages” would not actually support the purpose of HRS Chapter 205 and 205A or the Kaua‘i General Plan [*id.* at FOF ¶¶ 20, 23]; and PRP is concerned that, contrary to HPM’s assertions in its Application, granting permits for HPM’s requested industrial manufacturing plant would lead to a significant reduction in local jobs, as well as a potential reduction in payment of a living wage on Kaua‘i, present a use of the land that is entirely out of character for the area (which the General Plan deems as having an “historic ‘old town’ charm” with “vast cultural treasures”) and be an inappropriate use of lands zoned for agriculture [*id.* at FOF ¶ 21].

90. PRP is also concerned that the proposed development does not comply with the requirements for a Use Permit, as it does not adequately address environmental issues, such as the disturbance of impacted soil [Dkt No. 90, FOF ¶ 23]; the presence of Nene and indigenous birds on the property may trigger requirements under the Endangered Species Act, [*id.*]; the on-site wastewater treatment and disposal system may trigger requirements under HRS Chapter 343, [*id.*]; stormwater runoff from construction activities may require an NPDES permit, [*id.*]; and the project may impact the area surrounding the Old Sugar Mill of Koloa, a National Historic Landmark, and the Koloa Heritage Trail, which is recognized by the National Park Service, [*id.*].

91. Thus, PRP asserted its and its members' constitutional right to a clean and healthful environment under article XI, section 9 of the Hawai'i Constitution and was therefore denied due process when it was denied the opportunity to intervene. [*See also* Dkt No. 90, COL ¶¶ 31-32.]

PRP Has a Right To Intervene Pursuant to Commission Rule 1-4-1

92. As previously discussed above and incorporated herein, the Court held that inasmuch as PRP established organizational and associational standing, and a right distinguishable from the general public, Commission Rule 1-4-1 mandates ("shall be admitted") that PRP be admitted as a party-intervenor "upon timely written application for intervention." [*See* Dkt No. 90, COL ¶¶ 10-25.]

93. Commission Rule 1-4-1 therefore required that the Commission grant PRP's Petition and order a contested case. [*See id.*]

The Commission's Decision Granting HPM's Application and Awarding
HPM The Subject Permits Must Be Reversed

94. Where procedural error by an administrative agency prejudices the substantial rights of a party, the trial court may, on review and in accordance with law, fashion a remedy appropriate to the prejudice caused. *See* HRS § 91-14(g); *Nakamine v. Board of Trustees of Employees' Retirement System*, 65 Haw. 251, 649 P.2d 1162 (1982).

95. HRS § 91-14(g) provides the following remedies: "Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced" *See Hualalai*, 150 Hawai'i at 259, 500 P.3d at 444 ("Under HRS § 91-14(g), upon reviewing the record, this court may 'remand the case with instructions for further proceedings . . . if the substantial rights of the petitioner[] may have been prejudiced because the administrative findings, conclusions, decisions, or orders are: . . . [m]ade upon unlawful procedure; . . . or [a]rbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'") (citing HRS § 91-14(g)(3), (6)).

96. Under similar circumstances where an agency made errors during the permit approval process, Hawai'i courts have instructed on remand that the grant of a permit is invalid. *See, e.g., Mahuiki v. Plan. Comm'n*, 65 Haw. 506, 519, 654 P.2d 874, 883 (1982) ("As the Commission's approval of the application for an SMA use permit breached this command, the grant of the permit cannot stand."); *Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Plan. Comm'n*, 148 Hawai'i 275, 472 P.3d 42, at *12 (Ct. App. 2020) ("*Protect & Pres. Kahoma Ahupua'a Ass'n F*"), *aff'd*, 149 Hawai'i 304, 489 P.3d 408 (2021), *as amended* (June 17, 2021) ("On remand, we note that the Commission is required under HRS § 205A-26(2)(C) to make a specific finding on the Project's consistency with the Maui County General and Community

Plans before it may approve Carr Development's SMA permit application."); *Diamond v. Dobbin*, 132 Hawai'i 9, 28, 319 P.3d 1017, 1036 (2014) (holding "that the BLNR's ultimate shoreline determination is invalid because the agency made errors of fact and errors of law in its Amended Decision").

97. As detailed above, the Commission erred in denying PRP's Petition.

98. Thus, the grant of HPM's Application and the issuance of Class IV Zoning Permit (Z-IV-2022-8), Use Permit (U-2022-8) and Special Permit (SP-2022-12) was in error.

99. The Hawai'i Supreme Court has held that where a request for a contested case hearing complied with all applicable agency rules but was neither granted nor denied on the merits prior to approval of a permit, the agency "should have held a contested case hearing as required by law and requested by [the organization] prior to decision making on" the permit application. *Kilakila 'O Haleakala*, 131 Hawai'i at 205-206, 317 P.3d at 39-40 (remanding to the circuit court for further proceedings regarding the organization's request for stay or reversal of the permit granted by the agency, although the agency's subsequent grant of a contested case hearing while the appeal was pending).

100. Indeed, had PRP been afforded its due process rights to have its Petition heard on the merits and to be admitted as a party-intervenor, PRP would have had an opportunity to present evidence and cross-examine opposing witnesses. *See* Commission Rules Chapter 6; *Protect & Pres. Kahoma Ahupua'a Ass'n II*, 149 Hawai'i at 314, 489 P.3d at 418 (noting that the association's members, who were erroneously denied intervenor status, "were not able to submit evidence or cross-examine opposing witnesses, which the Commission's rules would have allowed them the opportunity to do had their petition been granted").

101. PRP's right to due process was therefore violated when its Petition was improperly denied in violation of the law and HPM's Application was thereafter granted.

102. Accordingly, inasmuch as the Commission erred in denying PRP's Petition, HPM's permits were erroneously granted as they were procedurally and substantively flawed.

103. The Court therefore vacates the Class IV Zoning Permit (Z-IV-2022-8), Use Permit (U-2022-8), and Special Permit (SP-2022-12).

104. The Court further remands this matter to the Commission for action consistent with these Findings of Fact, Conclusions of Law and Order.

PRP's Request for Declaratory Relief Is Denied Without Prejudice

105. Based on the foregoing and as discussed above, PRP was deprived of its right to due process inasmuch as its Petition was erroneously denied as untimely. Haw. Const. art. I, § 5 ("[n]o person shall be deprived of life, liberty or property without due process of law[.]).

106. The Commission's interpretation and application of Commission Rule 1-4-3 under the circumstances presented here violated PRP's right to due process and HRS Chapter 92.

107. The Court's findings of facts and conclusions of law set forth herein and the decision and order provide PRP with an appropriate remedy.

108. Thus, PRP's request for declaratory relief pursuant to HRS § 91-7 is denied without prejudice.

DECISION AND ORDER

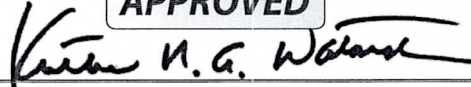
In accordance with the foregoing Findings of Fact and Conclusions of Law, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

For the reasons discussed above, the Commission erred in denying PRP's Petition as untimely and, alternatively, determining that PRP lacked "good cause" for its purported untimely submission. Therefore, the Commission's (1) Denial of PRP's Petition; and (2) Grant of HPM's Application for the Special Permit (SP-2022-1), Use Permit (U-2022-8), and Class IV Zoning Permit (Z-IV-2000-8), are vacated. The case is remanded to the Commission so that PRP may intervene as a party in a contested case hearing regarding HPM's Application for the Special Permit (SP-2022-1), Use Permit (U-2022-8), and Class IV Zoning Permit (Z-IV-2000-8).

DATED: Honolulu, Hawai'i, May 10, 2023.

APPROVED



JUDGE OF THE ABOVE-ENTITLED COURT

CASE NO. 5CCV-22-0000049, *Pacific Resource Partnership vs. County Of Kaua'i Planning Commission, et al.*, Findings of Fact, Conclusions of Law and Order

NOTICE OF ELECTRONIC FILING

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Title: Pacific Resource Partnership v. County of Kauai Planning Commission, et al.

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Filing Parties:

Case Type: Circuit Court Civil

Lead Document(s):

Supporting Document(s): 111-Findings/Fact Concl of Law-Ord

Document Name: 111-(APPROVED) Appellant PRP's FOF, COL, and Order

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai'i Electronic Filing and Service Rules.

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Abigail Holden (aholden@cfhawaii.com)

**COUNTY OF KAUAI
PLANNING DEPARTMENT
LIHU'E, KAUAI**

STAFF REPORT

HEARING DATE: November 9, 2000

PROJECT: Special Permit SP-2001-5
Use Permit U-2001-8
Class IV Zoning Permit Z-IV-20001-10

APPLICANT: Kauai ATV, LLC

FINDINGS

LOCATION: Koloa, Kauai Beginning at the Koloa Mill area approx. one mile east of intersection of Weliweli Road and Waikomo Road.

TAX MAP KEY: 2-9-1: Por 1; 2-9-2: Por 1;
3-4-6: Por 1; 3-4-01: Por 1

AREA: 9 acres \pm

ZONING: Ag/Open

SLUD: Ag

GEN. PLAN: Ag/Open

EXIST. USE: Former Sugar cane Mill,
cane haul roads, and trails

I. ACTIONS REQUIRED:

A Special Permit is required, as the proposed activities are not generally permitted uses in the State Agricultural Land Use District. A Use Permit is also required, as the proposed activities are not generally permitted uses in the Agriculture and Open Districts. A Class IV Zoning Permit is a procedural requirement in obtaining a use permit in the Ag/Open Districts.

II. PROJECT DESCRIPTION AND USE:

The applicant is requesting the subject permits to allow a staging area in the vicinity of the Koloa Mill and for guided ATV adventure tour along existing cane haul roads and trails.

III. LEGAL REQUIREMENTS:

The applicant has satisfied public hearing notification requirements of Section 8-19.6 of the Kauai County Code, 1987 and Chapter 13.5 of the Rules of Practice and Procedures of the Planning Commission has been satisfied.

IV. APPLICANT'S REASONS/JUSTIFICATION:

Please refer to application.

F. 6.

NOV 09 2000

FINDINGS cont'd:

Project Information – As presented by the applicant, the tours will occur on existing cane haul roads and trails which traverse over several large tracts of lands which was previously in sugar cane cultivation. The applicant has determined that the total land area of the roads, trails, and staging area will not exceed 15 acres in size.

The staging area is located in an open area nearby the Koloa Sugar Mill and encompasses approximately 18,000 square feet (150 ft. by 120 ft.). Structures on the site consist of steel containers, tent(s), and portable toilets. The staging area is used for customer orientation for the ATV tours (ATV operation and safety instructions), for cleaning, maintenance and storage of vehicles at the end of each day.

As contained in the application, the applicant conducts a maximum of four tours per day, with a maximum of 14 vehicles (ATVs) per tour. According to the applicant, the number of participants averages 25 per day. The applicant also indicated that that it currently owns one multi-passenger ATV and 18 single-passenger ATVs.

Based on the exhibits in the application, no portion of the staging area or ATV tours will occur within the Special Management Area of the County of Kauai.

Soils – Map Panels 75, 76, and 77 of the Detailed Land Classification, Island of Kauai, classifies the soil rating of the project site (tour) from “B” to “E”

AGENCY COMMENTS: Please see attached.

PRELIMINARY EVALUATION:

The proposed request is to be evaluated pursuant to Section 8-20.5 of the Kauai County Code, 1987, relating to the standards of issuance for a Use Permit, and Chapter 13-6 of the Rules of Practice and Procedures of the Planning Commission relating to the guidelines for Issuance for a Special Permit.

Based on the nature of the operation, the tours will occur on existing cane haul roads and trails on a limited basis and will not occur on any of the productive agricultural lands formerly used for sugar cane cultivation. Relative to impacts to the surrounding properties, the majority of the tour is situated several miles from most of the residential subdivisions in the Koloa and Puhi area. A portion of the tour is situated approximately 2,500 feet to the east of the Weliweli Houselot Subdivision (TMK: 2-8-024:).

As indicated by the State Office of Planning and State Land Use Commission, portions of the tour may traverse over Conservation District Lands. The County Planning Department and Commission does not have zoning authority within the Conservation District and the applicant should consult with the State Department of Land and Natural Resources regarding the use of Conservation District lands.

Also, additional consideration may be given to the public hearing process whereby testimony may be received from the applicant and members of the public.

By 
Myles Hironaka, Planner

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



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

January 21, 2022

Mauna Kea Trask, Esq.

CADES SCHUTTE

PO Box 1205

Līhu'e, Hawai'i 96766

Subject: Preliminary Use Permit Application
Proposed Construction Material Manufacturing Facility
Tax Map Key: (4) 2-9-001:001 (Por.)
Kōloa, Kaua'i
HPM Building Supply, Applicant

Thank you for the opportunity to review the preliminary permit application for the proposal referenced above and based on the information provided, please note the following:

1. PERMIT(S) REQUIRED

- a. **Special Permit** – The proposed development is not identified as a permissible use within the State Agricultural Land Use District, pursuant to HRS §205-2(d). As such, the project will be evaluated by the standards set forth in Chapter 205 HRS and Chapter 13 of the County of Kauai, Planning Commission Rules of Practice and Procedures.
- b. **Use Permit** – The proposal is situated within a portion of a larger parcel that is located within the Agriculture (A) zoning district and the proposed use is not considered a permitted use within that zoning district. Please cite and evaluate the project pursuant to the Use Permit criteria contained in Section 8-3.2(e) of the Kaua'i County Code (1987), as amended (attached for your reference).
- c. **Class IV Zoning Permit** – A Class IV Zoning Permit is a procedural requirement when apply for a Use Permit.

Based on the permitting requirements noted above, the permitting fee for this application is **\$1,250.00**. (Special Permit = \$150; Use Permit = \$300; Class IV Zoning Permit = \$800)

Please resubmit a copy this document with the necessary information to support and finalize the review of your application. Once transmitted, the department will then conduct its final review to determine the application "complete" and once it is deemed complete, processing of the permit shall commence accordingly.

4444 Rice Street, Suite A473 • Līhu'e, Hawai'i 96766 • (808) 241-4050 (b) • (808) 241-6699 (f)
An Equal Opportunity Employer

EXHIBIT J-1

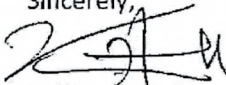
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Attachment C

Mauna Kea Trask, Esq.
CADES SCHUTTE
Proposed Construction Material Manufacturing Facility
Page | 2

Should you have any questions, please feel free to contact project planner Dale A. Cua of my staff at 808.241.4050. Aloha!

Sincerely,

A handwritten signature in black ink, appearing to read 'Ka'aina S. Hull', written over a horizontal line.

Ka'aina S. Hull
Director of Planning

LAW OFFICE OF BIANCA ISAKI, A LAW CORPORATION

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1720 Huna St. 401B
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Honolulu, Hawai'i 96817
ryan@rdhlawhi.com
808.738.7610

Attorneys for Petitioners FRIENDS OF MĀHĀ'ULEPU and SAVE KŌLOA

BEFORE THE PLANNING DIRECTOR, COUNTY OF KAUA'I

STATE OF HAWAII

In the Matter of the Petition to revoke:	) LUC DBA 76-418; County Permit Nos. Z-IV-
	) 2006-27, U-2006-26, and PDU-2006-25
(1) Land Use Commission District Boundary)
Amendment under Decision and Order A76-418,	) PETITIONERS FRIENDS OF
as amended August 5, 1997; and (2) Class IV Zon-	) MĀHĀ'ULEPU AND SAVE KŌLOA'S
ing Permit (Z-IV-2006-27), Use Permit (U-2006-	) PETITION FOR REVOCATION OF
26), and Project Development Use Permit (PDU-	) PERMITS; DECLARATION OF BRIDGET
2006-25) for a development situated at the Pau A	) HAMMERQUIST; APPENDIX "A";
Laka Street/ Kiahuna Plantation Drive, 5425 Pau	) CERTIFICATE OF SERVICE
A Laka Street, Tax Map Key: 2-8-014:032, and)
<u>containing a total area of 27.886 acres</u>)

PETITIONERS FRIENDS OF MĀHĀ'ULEPU AND SAVE KŌLOA'S PETITION FOR TO
INTERVENE AND, ALTERNATIVELY FOR DENIAL OF APPLICATIONS

Petitioners FRIENDS OF MĀHĀ'ULEPU, a non-profit corporation and SAVE KŌLOA, an unincorporated association, (collectively, "Petitioners"), pursuant to Hawai'i Revised Statutes (HRS) chapter 91 and the Rules of Practice and Procedure of the Kaua'i County Planning Commission (Commission Rules) §§ 1-12-1, -2, -3, and -5,¹ respectfully submit this petition for

¹ Petitioners are submitting a Petition to Intervene in pending permits concerning the development to the Commission concurrently with the instant petition to intervene pursuant to Commission Rules §§1-3-1 and 1-4-1 through 1-4-6. Declaration of Bridget Hammerquist (Hammerquist Decl.) ¶5; Appx. "A" (petition to intervene).

revocation of permits issued to Applicant 5425 MERIDIAN PACIFIC, LTD. (Applicant)² and its predecessors and successors for: (1) Land Use Commission (LUC) District Boundary Amendment under Decision and Order A76-418, as amended August 5, 1997; and (2) the Class IV Zoning Permit (Z-IV-2006-27), Use Permit (U-2006-26), and Project Development Use Permit (PDU-2006-25) (collectively “permits”) all of which concern a development situated at the Pau A Laka Street/ Kiahuna Plantation Drive, 5425 Pau A Laka Street, Tax Map Key (TMK): 2-8-014:032, and containing a total area of 27.886 acres (“property” or “development”).

I. PETITIONERS’ INTERESTS IN THE LAND

Petitioners are entitled to petition for revocation of the permits because they entities “who otherwise can demonstrate that they will be so directly and immediately affected by the Permit that their interest is clearly distinguishable from that of the general public[.]” Commission Rule § 1-12-2. Petitioners, their officers, directors, members, and supporters (collectively “Petitioners”), hold constitutionally protected interests in the rights to a clean and healthful environment as defined by Hawai‘i Revised Statutes (HRS) chapter 205, including enforcement of land use redistricting conditions applicable under the permits. Hawai‘i Const. art. XI, §9.

As discussed further *infra*, Applicant’s permit violations have risked, and likely caused, the destruction of irreplaceable resources – native listed species, their habitat, iwi kūpuna (Hawaiian traditional burials), and water resources through their blatant disregard for LUC and County permit conditions incorporating LUC conditions. Appx. A (Intervention Petition at 2-8).

Petitioners include Kānaka Maoli who exercise traditional and customary rights on and near areas affected by Applicant’s improper development of the property. Hawai‘i Const. art. XII, §7. Kānaka Maoli supporters include those whose practices include protecting aumakua, revering ancient native species, and protecting iwi kūpuna on the property.

Petitioners have interests clearly distinguishable from the general public consequent to their ownership of and residence within adjacent property under article I, § 5 of the Hawai‘i Constitution and the U.S. Constitution, amendments V and XIV.

All of these interests are more fully described in their concurrently filed Petition to Intervene. Appx. A (Intervention Petition at 9-12).

² Kiahuna Poipu Golf Resort, LLC was listed on the initial September 15, 2006 zoning and use permit approval letter. Exh. 13. On December 14, 2022, Laurel Loo, partner at the McCorriston Miller Mukai McKinnon LLP, represented to this Commission that it represents MERIDIAN PACIFIC, LTD., which is the “parent company of MP ELKO II, LLC”, a Nevada limited liability company, “which owns and is developing the above-referenced parcel.” Appx. A (exh 17, Loo Letter).

II. PERMIT VIOLATIONS & FACTUAL BASIS OF VIOLATION

Applicants' permits include the following condition:

1. The Applicant is advised that the property is subject to the conditions of LUC Decision and Order A76-418 (D&O) and County of Kauai Ordinances No. PM-31-79, PM-148-87 and PM-334-97 ("the Ordinances"), which shall run with the land. All conditions of the Ordinances are enforceable against any party seeking to use the entitlement. The following conditions are deemed complete, ongoing or to be resolved with LUC, or not applicable to the subject property: LUC Docket A76-418 #1-6, 17, 19-22; PM-31-79, PM-148-87, and PM-334-97 #1 3, 4, 8, 15, 17, 19(c), 25.

Appx. A (exh. 13, 2006 Planning Director letter). The referenced LUC Decision and Order was amended by LUC order dated August 5, 1997, which modified and added conditions on its earlier 1977 district boundary amendment.³ The LUC's conditions include:

7. That Petitioner commission and complete a comprehensive archaeological and biological study with actual inventories of archaeological sites and flora and fauna on the subject property, and that the Petitioner preserve any archaeological sites which archaeologist conducting such archaeological study believes to be significant and worthy of preservation and protect and preserve the present habitats of any blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers, which the biologist conducting the biological study believes to be worthy of preservation. The Petitioner may commission such archaeological and biological study to any archaeologist and biologist or firm connected therewith who is qualified to conduct such a study to satisfy the foregoing condition. The Petitioner may apply to the County of Kauai for rezoning of the subject property before the completion of the archaeological and biological study, provided that no actual work on any portion of the subject property begins until the archaeological and biological study for that portion to be worked on has been completed. Actual work on any portion of the subject property may be commenced by the Petitioner upon certification by the archaeologist and biologist that the area for which work is to commence does not contain any archaeological sites deemed significant and worthy of preservation, nor contains any habitats of any blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers deemed worthy of preservation.

Appx. A (exh. 14, LUC order, amended 1997). Applicant has not complied with LUC Condition 7 and therefore also violated Condition 1 of the County permit.

Since at least December 14, 2020, Petitioners observed developers clearing and excavating the property. Appx. A (Declaration of E. Okinaka, ¶23). Such grading work, constitutes "actual work" and, specific to Condition 7, compromises the ability of endangered native Kaua'i cave

³ See also Appx. A (exh. 14) "Order Granting Kiahuna Mauka Partners, LLC's Motion to Amend or Modify Condition No. 9 of Decision and Order, as amended August 5, 1997; and Eric A. Knudsen Trust's Motion to Modify Condition No. 9a of Decision and Order", In the Matter of the Petition of Moana Corporation, Docket no. A76-418 (Mar. 25, 2004) *available at*: luc.hawaii.gov/wp-content/uploads/2014/03/A76-418_Moana-Corporation_DO-Grant-Kiahuna-Amend-Cond-9-Knudsen-9a_3-25-2004.pdf.

spiders and cave amphipods to inhabit the underlying substrate. *Id.*; Appx. A (exh. 03, Hull deposition at 74). No actual work should have occurred until the Planning Department received the certification.

It was not until May 12, 2022 that Applicant submitted a report from Steven Montgomery that was purported to comply with LUC Condition 7 (“Montgomery report”). Appx. A (exh. 11, Montgomery report). The five page Montgomery report could not constitute the “comprehensive . . . biological study with actual inventories of . . . flora and fauna on the subject property” required by LUC Condition 7. Appx. A (exh. 14, 1997 amended LUC order). The Montgomery Report is contradicted by the Applicant geotechnical report upon which it relied for information about the property’s subsurface conditions. *See* Appx. A at 17-20; *id.* (exh. 10, geotechnical report).

As of May 25, 2023, the Planning Department has still made no determination that Applicant complied with LUC Condition 7. Appx. A (Exh. 18, Tr. 5/25/2023 at 100-101 (Sayegusa direct)).

In any case, the May 12, 2022 Montgomery Report could not have been completed before “actual work” commenced on at least December 14, 2020 or earlier.

Subsequent, and prior to May 12, 2022, Applicant conducted clearing, excavating, and blasting with explosives on the property. Hammerquist Decl. ¶9. The community protested these actions. Appx. A (exh. 02-03, newsmedia).

Applicant’s failure to comply with LUC Condition 7, and therefore County permit Condition 1, has resulted in the needless destruction of habitat for valued aumakua, including “blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers” and iwi kūpuna and underground aqueducts that exist through the subterranean Kōloa caves. Appx. A (Declaration of L. Kaohelaui’i ¶¶17-20).

Applicant’s failure to comply with permit conditions materially deprived Petitioners of their constitutionally protected rights to a clean and healthful environment as defined by HRS chapter 205, and their constitutionally protected Kānaka Maoli traditional and customary rights in the property and its environs as discussed in the Petition to Intervene. Appx. A (Intervention Petition at 8-11)

Applicant’s failure to comply with LUC Condition 7 cannot be remedied by post-hoc submissions of alleged-certifications by Montgomery. Denuding vegetation and excavations with heavy machinery occurred in months including April 2022, prior to the May 7 and 8, 2022 dates that Montgomery walked the property. Appx. A (Hammerquist Decl. ¶¶10-11). Such actual work on the

property in April 2022, and in prior periods, compromised the property's fitness as habitat for listed cave species. *Id.* Because Montgomery did not view the property's conditions prior to at least December 14, 2020, when actual work commenced, the conclusions of the Montgomery Report, even if supported by the geotechnical report, cannot establish Applicant's compliance with LUC condition 7.

Petitioners thus seek revocation of both the LUC district boundary amendment as applied to the subject property and the County's zoning and use permits for development of the property.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Director find this petition is complete and recommend that the Commission grant this petition for revocation of Applicant's permits and for further proceedings before the LUC to revoke district boundary amendments applicable to the property.

DATED: Honolulu, Hawai'i

July 3, 2023

/s/ Ryan D. Hurley
LAW OFFICE OF RYAN D. HURLEY, LLC
RYAN D. HURLEY

/s/ Bianca Isaki
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Petitioners FRIENDS OF
MĀHĀ'ULEPU & SAVE KŌLOA

BEFORE THE PLANNING DIRECTOR, COUNTY OF KAUAI

STATE OF HAWAII

In the Matter of the Petition to revoke:	) LUC DBA 76-418; County Permit Nos. Z-IV-
	) 2006-27, U-2006-26, and PDU-2006-25
(1) Land Use Commission District Boundary)
Amendment under Decision and Order A76-418,	) DECLARATION OF BRIDGET
as amended August 5, 1997; and (2) Class IV	) HAMMERQUIST
Zoning Permit (Z-IV-2006-27), Use Permit (U-)
2006-26), and Project Development Use Permit)
(PDU-2006-25) for a development situated at the)
Pau A Laka Street/ Kiahuna Plantation Drive, 5425)
Pau A Laka Street, Tax Map Key: 2-8-014:032, and)
<u>containing a total area of 27.886 acres</u>)

DECLARATION OF BRIDGET HAMMERQUIST

I, BRIDGET HAMMERQUIST, do declare under penalty of law that the following is true and correct.

1. I make this declaration upon personal knowledge.
2. I currently reside in Kōloa on the island of Kauaʻi.
3. I am the president of Petitioner FRIENDS OF MĀHĀʻULEPU, a nonprofit corporation, which is based on Kauaʻi and is comprised of Kauaʻi citizens who are entitled to a clean and healthful environment, including the protection of endangered species endemic to the South Shore of Kauaʻi. Friends of Māhāʻulepū officers, directors, and supporters are and include Kānaka Maoli traditional and customary practitioners who utilize areas within, adjacent, and near to the subject property.
4. Friends of Māhāʻulepū officers and directors include those that utilize the area subject to the application for recreational and aesthetic purposes, including hiking along Hapa Trail and enjoying scenic views and native wildlife species, including but not limited to endangered sea birds, the Newell Shearwater and uaʻu and ʻakēʻakē. Petitioners have also photographed a threatened species, nēnē, on the property at issue in the above-captioned proceedings, located at 5425 Pau A Laka Street, Tax Map Key: (4) 2-8-014:032 ("property").
5. Attached as Appendix "A" is a true and correct copy of the Petition to Intervene filed by Friends of Māhāʻulepu and co-petitioner Save Kōloa, an unincorporated community association.
6. Petitioners Friends of Māhāʻulepu and Save Kōloa (collectively "Petitioners") have

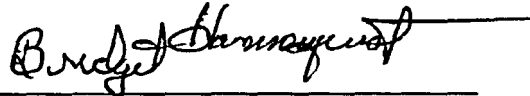
attempted to seek relief through public testimony to this Commission, writing letters and seeking audiences with various agencies and the Office of the Mayor, by attempting to talk to Applicant's consultants, and by litigating to the Circuit Court of the Fifth Circuit in Civil No. 5CCV-22-0000036.

7. Upon information and belief, the Planning Department has no prescribed form for petitions for revocation of permits.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Kōloa, Kaua'i

July 2, 2023

A handwritten signature in black ink, appearing to read "Bridget Hammerquist", is written over a horizontal line.

BRIDGET HAMMERQUIST
Declarant

BEFORE THE KAUAI PLANNING COMMISSION

COUNTY OF KAUAI

STATE OF HAWAII

In the Matter of the Application for) Permit Nos. Z-IV-2006-27, U-2006-26, and
Amendment to Class IV Zoning Permit (Z-IV-) PDU-2006-25
2006-27), Use Permit (U-2006-26), and Project) CERTIFICATE OF SERVICE
Development Use Permit (PDU-2006-25) for)
modification to Condition No. 26 relating to)
drainage requirement for a development situat-)
ed at the Pau A Laka Street/ Kiahuna Plantation)
Drive, 5425 Pau A Laka Street, Tax Map Key: 2-)
8-014:032, and containing a total area of 27.886)
acres)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing was filed, hand-delivered or sent via U.S. mail, postage prepaid pursuant to Kauai Planning Commission Rule §1-3-3 to the following:

5425 PAU A LAKA LLC
94-050 Farrington Hwy Ste E1-3
Waipahu, Hawaii 96797

MP ELKO II, LLC
1136 Union Mall Ste 301
Honolulu, Hawaii 96813

KAUANOE O KŌLOA Phases 1 through 4
94-050 Farrington Hwy Ste E1-3
Waipahu, Hawaii 96797

KAUAI HALE, INC.
1136 Union Mall Ste 301
Honolulu, Hawaii 96813

MERIDIAN PACIFIC
94-050 Farrington Hwy Ste E1-3
Waipahu, Hawaii 96797

MP FINANCIAL GROUP, LTD.
94-050 Farrington Hwy Ste E1-3
Waipahu, Hawaii 96797

DATED: Honolulu, Hawai'i

July 3, 2023

/s/ Ryan D. Hurley
LAW OFFICE OF RYAN D. HURLEY, LLLC
RYAN D. HURLEY

/s/ Bianca Isaki
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Petitioners FRIENDS OF
MĀHĀ'ULEPU & SAVE KŌLOA

DEPARTMENT OF PLANNING

KA'ĀINA HULL, DIRECTOR

JODI A. HIGUCHI SAYEGUSA, DEPUTY DIRECTOR



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

DIRECTOR'S REPORT

I. SUMMARY

Action Required by Planning Commission:	Consideration of Petitioners Friends of Mahulepu and Save Koloa's Petition for Revocation of Permits.
Permit Application Nos.	Class IV Zoning Permit Z-IV-2006-27 Use Permit U-2006-26 Project Development Use Permit PDU-2006-25
Name of Applicant(s)	MERIDIAN PACIFIC (Formerly KIAHUNA POIPU GOLF RESORT, LLC.)

II. PROJECT DATA

PROJECT INFORMATION			
Parcel Location:	The project site is located along Kiahuna Plantation Drive in Po'ipū, Kaua'i.		
Tax Map Key(s):	2-8-014:032	Area:	Approx. 27.886 acres
ZONING & DEVELOPMENT STANDARDS			
Zoning:	Residential (R-10) & Open (O) Districts		
State Land Use District:	Urban		
General Plan Designation:	Resort		
Height Limit:	55 feet		
Max. Land Coverage:	60% of lot area		
Parking Requirement:	N/A		
Front Setback:	10 feet min.		
Rear Setback:	10 feet min,		
Side Setback:	5 feet min.		
Community Plan Area:	South Kaua'i Community Plan (SKCP)		
Community Plan Land Use Designation:	NA.		
Deviations or Variances Requested:	NA.		

III. PROJECT DESCRIPTION AND USE

On August 22, 2006, the Planning Commission approved the subject permits to allow for the construction of a 280-unit multi-family resort residential project. In addition, two (2) single-family

residential dwellings would be located within the Open (O) zoning district portion of the parcel. A total of 554 parking stalls would be provided on-site within parking garages and parking lots, and there will also be 6 parking stalls along Kiahuna Plantation Drive and designated for public use for Hapa Trail users.

The parcel is a portion of the 457-acre Moana project area that received zoning entitlements in the late 1970's. The project area included single and multi-family residential zoning, open zoning for recreational uses and archaeological preserves, and Neighborhood Commercial zoning to serve the Po'ipū area.

The subject parcel is primarily zoned Residential District (R-10) with a portion zoned Open District (O) along its western boundary (adjacent to golf course).

IV. **PETITION FOR REVOCATION**

In accordance with Rule 1-12-5 of the Rules of Practice and Procedure of the Kaua'i County Planning Commission, this will serve as the Director's Report to the Commission regarding the Petition for Revocation brought by Friends of Maha'ulepu and Save Koloa. The Petitioner's reason for **revocation of Applicant Meridian Pacific's development permits** is based on the Applicant's failure to comply with LUC Condition No. 7. The condition currently reads:

"7. That Petitioner commission and complete a comprehensive archaeological and biological study with actual inventories of archaeological sites and flora and fauna on the subject property, and that the Petitioner preserve any archaeological sites which archaeologist conducting such archaeological study believes to be significant and worthy of preservation and protect and preserve the present habitats of any blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers, which the biologist conducting the biological study believes to be worthy of preservation. The Petitioner may commission such archaeological and biological study to any archaeologist and biologist or firm connected therewith who is qualified to conduct such a study to satisfy the foregoing condition. The Petitioner may apply to the County of Kauai for rezoning of the subject property before the completion of the archaeological and biological study, provided that no actual work on any portion of the subject property begins until the archaeological and biological study for that portion to be worked on has been completed. Actual work on any portion of the subject property may be commenced by the Petitioner upon certification by the archaeologist and biologist that the area for which work is to commence does not contain any archaeological sites deemed significant and worthy of preservation, nor contains any habitats of any blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers deemed worthy of preservation."

The Petition further contends that since Condition No. 7 has not been satisfied, it violates Condition No. 1 of the County permit.

V. **BACKGROUND**

On May 11, 2022, the Petitioner filed a Complaint in the Fifth Circuit Court, State of Hawai'i, for (1) a declaratory ruling that the County violated LUC Condition No. 7, which requires that no actual work may begin on the subject property until archeological and biological studies certify that it contains no significant archeological sites or habitats of blind, eyeless, big-eyed, hunting spiders or blind terrestrial sandhoppers, and (2) an injunction preventing any work on the subject property pending compliance with Condition No. 7.

On the same day, the Petitioner also filed with the Court a Motion for Preliminary Injunction seeking an order prohibiting the County from granting final subdivision approval and prohibiting the developer from conducting any ground-disturbing activity. Hearings were conducted throughout 2022 and early 2023, and on July 7, 2023, the Court denied the Petitioner's Motion with prejudice, effectively ending the case. The following represents findings and conclusion taken directly from the Court's order (refer to Exhibit 'A').

VI. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION FILED ON MAY 11, 2022 WITH PREJUDICE

By way of Order of the Fifth Circuit Court, State of Hawai'i, dated July 7, 2023, Judge Kathleen Watanabe found that Applicant and County complied with LUC Condition 7, and that no threatened habitat is affected by this Development. The Court Order is attached hereto as Exhibit A. ("the Order.")

A. LUC Condition No. 7

1. On July 11, 1977, the State Land Use Commission (LUC) issued its decision and order relating to a petition to amend the district boundaries for approximately 457.54 acres of land situated in Po'ipū, Kaua'i that would reclassify the affected lands from Agricultural to Urban through LUC Docket No. A76-418.
2. The areas affected by LUC Docket No. A76-418 included certain properties located along Hapa Road and Pau a Laka Street further identified by Tax Map Key Nos. (4) 2-6-004:015, (4) 2-8-012:001 & 009, (4) 2-8-013:002, 004 & 005, (4) 2-8-014:001, 005-008, and (4) 2-8-015:077.
3. Pursuant to LUC Docket No. A76-418, the State Land Use designation of the affected properties were reclassified from "Agricultural" to "Urban", subject to nine (9) specified conditions to be substantially complied with during the course of subsequent proceedings to amend the district boundaries for the affected properties.
4. Condition No. 7 of LUC Docket No. A76-418 related to the preservation and protection of habitats of any blind, eyeless, big-eyed, hunting spiders (also known as Kaua'i cave spiders, or pe'e pe'e maka'ole) and blind terrestrial handhoppers (Kauai cave amphipods, or 'uku noho ana), as well as certain flora and fauna, on the reclassified properties.
5. On July 3, 1978, the LUC issued its decision and order on motion to amend condition under LUC Docket No. A76-418 that amended Condition No. 7 in its entirety to currently read as noted above.
6. On March 20, 1979, the County passed Ordinance No. PM-31-79 which amended the zoning for Tax Map Key Nos. (4) 2-8-013:005, and (4) 2-8-014:005 & 006, all located within the reclassified properties through LUC Docket No. A76-418, from "Open District (O)" to "Neighborhood Commercial District (C-N) and Residential Districts (R-20), (R-10), (R-6), (R-

4),” as recommend by the County Planning Commission and subject to twenty-one (21) specified conditions:

- a. Condition No. 5 therein related to the preservation of the archaeological sites identified in the 1978 Survey, as well as two lave tubes apparently containing habitats of Kauai cave wolf spiders; and
- b. Condition No. 6 specified that no grading, grubbing, bulldozing, or other destruction may occur on any sites identified in the 1978 Survey unless in accordance with an archaeologist-approved plan, whereby archaeological salvage will be accomplished by means of coordinating any grading, grubbing or similar work.

B. Relevant Studies of the Subject Property

1. From June 5 to July 28, 1987, the Archaeological Research Center Hawaii, Inc. (“ARCH”) conducted an intensive archaeological and biological survey of the affected areas by LUC Docket No. A76-418. In September 1978, the ARCH incorporated its findings in its Archaeological and Biological Survey of the Proposed Kiahuna Golf Village Area (“1978 Survey”). The archaeological survey consisted of the locating, mapping, and describing of all surface archaeological features, sites, and complexes in accordance with standard archaeological field methods, while the biological survey provided for an inventory and description of the major vegetation zones and wildlife habitats and the identification, if present, of rare and endangered species.
2. In April 1989, Cultural Surveys Hawaii (“CSH”) prepared its Data Recovery and Preservation Plan for the Kiahuna Golf Club (“1989 Plan”). In the 1989 Plan, CSH provided a summary of its recommendation for data recovery and preservation for the affected areas by LUC Docket No. A76-418 in response to Condition Nos. 5 and 6 in Ordinance No. PM-31-79.
3. From 2000 to 2003, the U.S. Fish and Wildlife Service (“USFWS”) conducted three (3) field surveys. The most recent survey during that time period occurred on September 17, 2003, with the USFWS reporting that neither Kauai cave wolf spiders nor cave amphipods were found in the last four years of USFWS surveys.
4. Between October 2003 and August 2004, several more studies were conducted by CSH to address the archaeology within the affected areas by LUC Docket No. A76-418.
5. On September 13, 2004, the State Department of Land and Natural Resources (“DLNR”) deemed the reports conducted between October 2003 and August 2004 adequate and accepted as final.
6. In March 2005, CSH prepared its Summary of Inventory Survey and Data Recovery Results and Archaeological Interpretations, Volume III (“2005 Report”). The 2005 report summarized the findings and interpretations of the extensive inventory surveys and data recoveries that were previously performed on the affected properties by LUC Docket No. A76-418.
7. In December 2021, CSH prepared its Final Archaeological Literature Review and Field Inspection of the Proposed Kauanoe o Koloa Project. Therein, CSH recommended that the County make a determination of “no historic properties affected” for the proposed project area on the subject property and indicated that no further archaeological work was necessary to be performed.

8. In December 2021, Tetra Tech, Inc. prepared its Draft Biological Resources Survey Report ("2021 Draft Biological Report"). The report identified nearby critical habitats of the Kaua'i cave wolf spider and cave amphipod, all of which are located outside of the subject property. The 2021 Draft Biological Report additionally provided recommended measures to avoid and minimize impacts to state and federally-listed species, though CSH concluded that no cave opening was found in the area nor were caves identified as suitable habitats for the Kaua'i cave wolf spider and cave amphipod while conducting the biological survey.
9. On March 1, 2022, DLNR issued a letter to the County Departments of Planning and Public Works making its determination of "no historic properties affected" as to the archaeological portion of the proposed project area on the subject property. DLNR further stated that the permitting and/or project initiation process may continue.
10. On May 9, 2022, CSH issued its archaeological certification to the County that the subject property did not contain any archaeological sites deemed significant and/or worthy of preservation.
11. On May 21, 2022, biologist Steven Lee Montgomery, Ph.D. issued his biological certification to the County that the subject property did not contain any habitats of the Kaua'i cave wolf spider and cave amphipod deemed worthy of preservation.

C. Motion for Preliminary Injunction

1. In the Motion filed on May 11, 2022, the Petitioner was seeking injunctive relief from the Court based on their allegations that Condition No. 7 had purportedly not been satisfied.
2. The Court found that the Petitioner failed to present any credible evidence to refute that the County, the Applicant and its contractor complied with their obligations under the applicable State and Federal statutes, rules, and/or regulations with respect to their work related to the project.
3. To the contrary, the Court found that the County, the Applicant and its contractor have presented credible evidence to demonstrate their respective compliance with the applicable Federal and State statutes, rules, and/or regulations, including Condition No. 7, regarding their actions in relation to the project.

VII. RECOMMENDATION

In considering the petition for revocation, the Petitioner has not demonstrated any threatened irreparable harm to the Kaua'i cave wolf spider and cave amphipod at the subject property. This is affirmed by the Fifth Circuit Court's July 7, 2023 Findings of Fact, Conclusions of Law and Order Denying the Petitioner's Motion for Preliminary Injunction. The Petitioner's attempt to re-litigate this case before the Planning Commission after the Court issued its Findings of Fact and Conclusions of Law affirming that Condition No. 7 had been satisfied is not appropriate.

As such, the Planning Director asserts that there is no reasonable cause to believe that there currently is a failure to perform according to the conditions imposed, and that there are no grounds for the Commission to issue an Order to Show Cause. It is recommended that the Commission **DENY** the petition for revocation of the Applicant's permits.

Approved & Recommended to Commission:

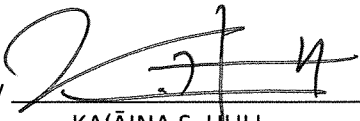
By 
KA'AINA S. HULL
Director of Planning
Date: 9/1/2023

Exhibit A

APPROVED

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Attorneys for Defendant
MP ELKO II, LLC; KAUAI HALE, INC.;
MP FINANCIAL GROUP, LTD., dba MERIDIAN
PACIFIC; 5425 PAU A LAKA LLC; MP ELK GROVE LLC;
and EARTHWORKS PACIFIC, INC.

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI'I

E OLA KAKOU HAWAII, also known as	)	NO. 5CCV-22-0000036
SAVE KOLOA, a Hawai'i non-profit)	
corporation; FRIENDS OF MĀHĀ'ULEPŪ,	)	FINDINGS OF FACT, CONCLUSIONS
a Hawai'i non-profit corporation,	)	OF LAW, AND ORDER DENYING
	)	PLAINTIFFS' MOTION FOR
Plaintiffs,	)	PRELIMINARY INJUNCTION FILED
	)	MAY 11, 2022 WITH PREJUDICE [DKT.
vs.	)	3]
)	
COUNTY OF KAUA'I; 5425 PAU A)	
LAKA LLC, a Hawai'i limited liability)	
company; MP ELKO II, LLC; a Nevada)	
limited liability company; KAUAI HALE,)	
INC., a Delaware corporation; KAUANO)	
O KOLOA (PHASE 1); a Hawai'i	)	HEARINGS
condominium project; KAUANO	)	JUDGE: Hon. Kathleen N.A. Watanabe
EOLOA (PHASE 2), a Hawai'i	)	HEARING DATES: February 3, 2023
condominium project KAUANO	)	and May 25, 2023
EOLOA (PHASE 3), a Hawai'i	)	HEARING TIME: 8:30 a.m.
condominium project KAUANO	)	TRIAL DATE: None

KOLOA (PHASE 4), a Hawai‘i)
condominium project; MP FINANCIAL)
GROUP, LTD., dba Meridian Pacific, a)
Nevada corporation; EARTHWORKS)
PACIFIC, INC., a Hawai‘i corporation; and)
DOE DEFENDANTS 1-100,)
))
Defendants.)
))
_____)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
DENYING PLAINTIFFS’ MOTION FOR PRELIMINARY
INJUNCTION FILED MAY 11, 2022 WITH PREJUDICE [DKT. 3]

On May 11, 2022, Plaintiffs E Ola Kakou Hawaii and Friends of Maha‘ulepu (collectively, “**Plaintiffs**”) filed their *Motion for Preliminary Injunction* (the “**Motion**”). Dkt. 3.

On June 30, 2022, Defendant County of Kaua‘i (the “**County**”) filed its memorandum in opposition to the Motion (Dkt. 59), and on July 12, 2022, Defendants MP Elko II, LLC (“**MP Elko**”); Kauai Hale, Inc.; MP Financial Group, Ltd. dba Meridian Pacific; 5425 Pau a Laka LLC (“**PAL**”) (collectively, the “**MP Entities**”), and Earthworks Pacific, Inc. (“**Earthworks**”) filed their memorandum in opposition to the Motion (Dkt. 71). On July 15, 2022, Plaintiffs filed their reply memorandum in support of the Motion. Dkt. 98.

On July 20, 2022, the parties came before the Court for hearing on the Motion. For reasons not relevant to the merits of the Motion, the hearing on July 20, 2022 was continued several times until the first evidentiary hearing on the Motion commenced in February 2023.¹

Evidentiary hearings on the Motion commenced on February 3, 2023 and May 25, 2023. On February 3, 2023, Peter Morimoto appeared on behalf of Plaintiffs, Charles A. Foster appeared on behalf of the County, David J. Minkin and Megan A. Coburn appeared on behalf of the MP Entities, and Laurel Loo appeared on behalf of Earthworks. Party representatives present on February 3, 2023 included Roselyn Cummings and Bridget Hammerquist on behalf of Plaintiffs. Kenneth Estes and Ka‘aina Hull were sworn in and testified. All Joint Exhibits J-1 through J-13 were admitted and accepted into evidence as they were Joint Exhibits. Defendant’s

¹ A comprehensive background on the procedural history of this litigation can be found in the memorandum in support submitted with MP Entities and Earthworks’ *Motion to Strike Erin Wallin, Ph.D. from Plaintiffs’ Amended List of Witnesses, Filed February 24, 2023 [Dkt. 207]*, filed on March 17, 2023. Dkt. 211.

Exhibit DMP-25² was admitted into evidence over objection. On May 25, 2023, Peter Morimoto appeared on behalf of Plaintiffs, Charles A. Foster appeared on behalf of the County, David J. Minkin appeared on behalf of the MP Entities, and Laurel Loo appeared on behalf of Earthworks. Party representatives present on May 25, 2023 included Roselyn Cummings and Bridget Hammerquist on behalf of Plaintiffs. Joseph Niezgodzski, Jody Higuchi Sayegusa, and Elizabeth Okinaka were sworn in and testified. Plaintiffs' Exhibit P-2 admitted into evidence with qualification. Based on objections, Plaintiffs' Exhibits P-1, P-3 through P-12 were not admitted into evidence.

By way of the Motion, Plaintiffs seek interlocutory injunctive relief prohibiting:

- (a) The County, its agents, employees, assigns, and all persons acting in concert or participating with them from granting final approval of Subdivision S-21-7 and/or issuing a grading and grubbing permit relating to the real property located at 5425A Pau a Laka Street, Koloa, Kaua'i, Hawai'i, and
- (b) All other defendants from grading, grubbing, drilling or any other ground disturbing activity on the real property located at 5425A Pau a Laka Street, Koloa, Kaua'i, Hawai'i.

For the reasons stated herein, the Motion is DENIED WITH PREJUDICE.

FINDINGS OF FACT

1. To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall so be construed.

LUC Condition No. 7

2. On July 11, 1977, the State of Hawai'i's ("***State***") Land Use Commission ("***LUC***") issued its *Decision and Order in The Matter of the Petition of Moana Corporation, for reclassification of certain lands situated at Poipu, Island of Kauai*, under LUC Docket No. A 76-418 (the "***1977 Decision***"). (J-1)³ The 1977 Decision related to a petition to amend the district boundaries for approximately 457.54 acres of land situated at Poipu on Kaua'i and to reclassify said land from Agricultural to Urban.

3. The areas affected by the 1977 Decision included certain properties located along Hapa Road and Pau a Laka Street, identified by Tax Map Key Nos. (4) 2-6-004-015,

² "DMP" shall mean and refer to Defendants MP Elko II, LLC; MP Financial Group, Ltd., dba Meridian Pacific; 5425 Pau A Laka LLC; MP Elk Grove LLC; and Earthworks Pacific, Inc.'s Hearing Exhibits.

³ "J" shall mean and refer to Joint Hearing Exhibits.

(4) 2-8-012-001, (4) 2-8-012-009, (4) 2-8-013-002, (4) 2-8-013-004, (4) 2-8-013-005, (4) 2-8-014-001, (4) 2-8-014-005, (4) 2-8-014-006, (4) 2-8-014-007, (4) 2-8-014-008, and (4) 2-8-015-077 (collectively, the “**Reclassified Properties**”).

4. Pursuant to the 1977 Decision, the Reclassified Properties were reclassified from Agricultural to Urban, subject to nine specified conditions to be substantially complied with during the course of subsequent proceedings to amend the district boundaries for the Reclassified Properties, as set forth therein.

5. Condition Number 7 contained in the 1977 Decision related to the preservation and protection of the habitats of any blind, eyeless, big-eyed, hunting spiders (also known as Kaua‘i cave wolf spiders, or pe‘e pe‘e maka‘ole) and blind terrestrial handhoppers (Kaua‘i cave amphipods, or ‘uku noho ana), as well as certain flora and fauna, on the Reclassified Properties (“**Condition No. 7**”).

6. On July 3, 1978, the LUC issued its *Decision and Order on Motion to Amend Condition* under LUC Docket No. A 76-418, thereby amending Condition No. 7 (“**Amd. Condition No. 7**”). (J-2) Therein, Condition No. 7 was amended in its entirety as follows:

7. That Petitioner commission and complete a complete a comprehensive archaeological and biological study with actual inventories of archaeological sites and flora and fauna on the subject property, and that the Petitioner preserve any archaeological sites which archaeologist conducting such archaeological study believes to be significant and worthy of preservation and protect and preserve the present habitats of any blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers which the biologist conducting the biological study believes to be worth of preservation. The Petitioner may commission such archaeological and biological study to any archaeologist and biologist or firm connected therewith who is qualified to conduct such a study to satisfy the foregoing condition. The Petitioner may apply to the County of Kauai for rezoning of the subject property before the completion of the archaeological and biological study, provided that no actual work on any portion of the subject property begins until the archaeological and biological study for that portion to be worked on has been completed. Actual work on any portion of the subject property may be commenced by the Petitioner upon certification by the archaeologist and biologist that the area for which work is to commence does not contain any archaeological sites deemed

significant and worthy of preservation, nor contains any habitats of any blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers deemed worthy of preservation.

7. On March 20, 1979, the County passed Ordinance No. PM-31-79, entitled *An Ordinance Amending Ordinance No. 164, Comprehensive Zoning Ordinance of the County of Kauai* (“**Ordinance No. PM-31-79**”). Ordinance No. PM-31-79 thereby amended the zoning for Tax Map Key Nos. (4) 2-8-013-005, (4) 2-8-014-001, (4) 2-8-014-005, and (4) 2-8-014-006, all located within the Reclassified Properties, from “Open District (O)” to “Neighborhood Commercial District (C-N) and Residential Districts (R-20), (R-10), (R-6), (R-4),” as recommended by the County Planning Commission and subject to 21 specified conditions:

a. Condition No. 5 therein related to the preservation of the archaeological sites identified in the 1978 Survey (as defined and discussed further *infra*), as well as two lava tubes apparently containing habitats of Kaua‘i cave wolf spiders; and

b. Condition No. 6 specified that no grading, grubbing, bulldozing, or other destruction may occur on any sites identified in the 1978 Survey unless in accordance with an archaeologist-approved plan, whereby archaeological salvage will be accomplished by means of coordinating any grading, grubbing or similar work.

The Subject Property

8. MP Elko and PAL are the current fee simple owners of the property located at Tax Map Key No. (4) 2-8-014-032, CPR Nos. 0001 through 0019 (the “**Subject Property**”).

9. The Subject Property is located within the Reclassified Properties and is thus subject to the conditions imposed by the 1977 Decision and Amd. Condition No. 7.

Relevant Studies of the Subject Property

10. From June 5 to July 28, 1978, the Archaeological Research Center Hawaii, Inc. (“**ARCH**”) conducted an intensive archaeological and biological survey of the Reclassified Properties. In September 1978, the ARCH incorporated its findings in its *Archaeological and Biological Survey of the Proposed Kiahuna Golf Village Area* (“**1978 Survey**”). The archaeological survey consisted of the locating, mapping, and describing of all surface archaeological features, sites, and complexes in accordance with standard archaeological field methods, while the biological survey provided for an inventory and description of the major vegetation zones and wild life habitats and the identification, if present, of rare and endangered species.

11. In April 1989, Cultural Surveys Hawaii (“*CSH*”) prepared its *Data Recovery and Preservation Plan for the Kiahuna Golf Club* (“*1989 Plan*”). In the 1989 Plan, CSH provided a summary of its recommendations for data recovery and preservation for the Reclassified Properties in response to Condition Nos. 5 and 6 contained in Ordinance No. PM-31-79.

12. From 2000 to 2003, the Fish and Wildlife Service for the United States Department of the Interior (“*USFWS*”) conducted three field surveys of the Reclassified Properties. The most recent survey during that time period occurred on September 17, 2003, with the USFWS reporting that neither Kaua’i cave wolf spiders nor cave amphipods were found in the last four years of USFWS surveys.

13. In October 2003, CSH prepared its *Plan for an Inventory Survey of 460 Acres at Kiahuna, Koloa, Kaua’i* (“*2003 Plan*”). The 2003 Plan included CSH’s inventory survey plan for archaeological sites within the Reclassified Properties situated at Tax Map Key Nos. (4) 2-8-014-007, (4) 2-8-014-008, (4) 2-8-014-028, (4) 2-8-014-031, (4) 2-8-014-032 (the Subject Property), (4) 2-8-014-033, (4) 2-8-014-034, (4) 2-8-014-035, (4) 2-8-014-036, and (4) 2-8-015-077. The Subject Property encompasses what has been identified in the 2003 Plan as Parcel 4.

14. In April 2004, CSH prepared its *Kiahuna Archaeological Inventory Survey and Testing Project, Parcels 3, 4, and 5* (“*2004 AIS*”). The 2004 AIS documented the first phase of a two-phase archaeological inventory survey, *i.e.*, a report on the archaeological inventory survey for Parcels 3, 4 (the Subject Property), and 5.

15. In August 2004, CSH prepared its *Kiahuna Archaeological Data Recovery at Development Project Areas 3, 4, and 5* (“*2004 Report*”). The 2004 Report addressed the archaeological data recovery excavation conducted by CSH for parcels 3, 4 (the Subject Property), and 5. Based on the 2004 Survey, however, no archaeological sites were recommended for data recovery on Parcels 4 and 5. Following the excavations conducted on Parcel 3, CSH recommended that grubbing and grading on Parcels 3, 4, and 5 be permitted, with stop protocols in place in the event unanticipated finds are discovered during the construction work.

16. On September 13, 2004, the Department of Land and Natural Resources for the State (“*DLNR*”) deemed both the 2004 AIS and 2004 Report as adequate and accepted the same as final.

17. In March 2005, CSH prepared its *Summary of Inventory Survey and Data Recovery Results and Archaeological Interpretations, Volume III* (“**2005 Report**”). The 2005 Report summarized the findings and interpretations of the extensive inventory surveys and data recoveries that were previously performed on the Reclassified Properties.

18. In December 2021, CSH prepared its *Final Archaeological Literature Review and Field Inspection of the Proposed Kauanoë o Koloa Project*. Therein, CSH recommended that the County make a determination of “no historic properties affected” for the proposed project area on the Subject Property and indicated that no further archaeological work was necessary to be performed.

19. In December 2021, Tetra Tech, Inc. prepared its *Draft Biological Resources Survey Report* (“**2021 Draft Biological Report**”). (J-11) The 2021 Draft Biological Report identified nearby critical habitats of the Kaua‘i cave wolf spider and cave amphipod, all of which are located outside of the Subject Property. The 2021 Draft Biological Report additionally provided recommended measures to avoid and minimize impacts to state and federally-listed species, though CSH concluded that no cave openings were found in the area nor were caves identified as suitable habitats for the Kaua‘i cave wolf spider and cave amphipod while conducting the biological survey.

20. On March 1, 2022, DLNR issued a letter to the County’s Departments of Planning and Public Works (“**Planning Department**” and “**DPW**,” respectively) making its determination of “no historic properties affected” as to the archaeological portion of the proposed project area on the Subject Property. DLNR further stated that “[t]he permitting and/or project initiation process may continue.” (J-12)

21. On May 9, 2022, CSH issued its archeological certification to the County that the Subject Property did not contain any archaeological sites deemed significant and/or worthy of preservation (“**Archaeologist Certification**”).

22. On May 12, 2022, biologist Steven Lee Montgomery, Ph.D. issued his biological certification to the County that the Subject Property did not contain any habitats of the Kaua‘i cave wolf spider or cave amphipod deemed worthy of preservation (“**Biologist Certification**”). (J-14)

23. Thereafter, the Planning Department determined that the Archaeologist Certification and Biologist Certification satisfied Amd. Condition No. 7 with respect to its

requirement for “certification by the archaeologist and biologist that the area for which work is to commence does not contain any archaeological sites deemed significant and worthy of preservation, nor contains any habitats of any blind, eyeless, big-eyed, hunting spiders and blind terrestrial sandhoppers deemed worthy of preservation.”

The Project and Subdivision Application

24. MP Elko and PAL acquired the Subject Property in May 2021 for the development of their proposed project, Kauanoē o Kōloa, which is planned to consist of approximately 279 fee simple condominium homes in Poipu (the “***Project***”).

25. On May 12, 2021, Yellow Hale, LLC submitted its “***Subdivision Application***” for the Project to the Planning Department for approval.⁴ (J-7)

26. On August 11, 2021, the Planning Commission granted tentative approval for the Subdivision Application and indicated that final approval would be granted subject to certain requirements being met. Among these requirements, the Planning Commission provided that “[p]rior to building permit approval, [MP Elko and PAL] shall provide to the Planning Department evidence that the [Subject Property] is clear of habitats for the Kaua‘i cave amphipod or cave spiders worthy of preservation.”

27. The Planning Department received testimony and/or concerns from the public, including from Plaintiffs, in response to the Subdivision Application.

28. Following the receipt of said public testimony and/or concerns, the Planning Department conducted a review of its records kept in the normal course of business and concluded that Amd. Condition No. 7 had already been determined to be satisfied by previous administrations of the Planning Department, as evidenced by the surveys conducted by the USFWS in 2000 through 2003. Notwithstanding this internal determination, the Planning Department requested that based upon the public concerns raised, the MP Entities halt work on the Project until additional documentation was provided, *i.e.*, the Archaeologist Certification and Biologist Certification provided in May 2022.

29. On September 30, 2021, in an abundance of caution, the Planning Department contacted the USFWS for further guidance.

30. On October 27, 2021, the USFWS issued a letter in response to the Planning Department further confirming that the Subject Property did not contain critical habitats for the

⁴ Yellow Hale, LLC was the owner of the Subject Property during this time.

Kaua'i cave wolf spider or the Kaua'i cave amphipod. In its letter, the USFWS identified several critical habitats for the Kaua'i cave wolf spider and cave amphipod, none of which were located on the Subject Property, and indicated that certain critical habitats were being surveyed periodically for the presence of both species.

31. On December 13, 2021, a national pollutant discharge elimination system (NPDES) permit was issued for the Project by the State Department of Health, File No. HIR10G537, as required by Chapter 11-55 of the Hawai'i Administrative Rules before beginning construction activities.

32. On March 23, 2022, the grading permit for the Project was issued by DPW under Eng. Permit No. 22-0716. (J-13)

33. On May 10, 2022, the State Department of Health granted and issued a community noise permit under Permit No. K 22-006.

Motion for Preliminary Injunction

34. In the Motion, Plaintiffs seek the following interlocutory injunctive relief from the Court: (a) an order prohibiting the County from granting final approval of the Subdivision Application and/or issuing a grading and grubbing permit relating to the Subject Property; and (b) an order prohibiting the MP Entities and/or Earthworks from grading, grubbing, drilling or any other ground disturbing activity at the Subject Property based upon their allegations that Amd. Condition No. 7 has purportedly not been satisfied.

35. However, Plaintiffs failed to present any credible evidence to refute that the County, MP Entities, and Earthworks complied with their obligations under the applicable state and federal statutes, rules, and/or regulations with respect to their work related to the Project.

36. To the contrary, the County, MP Entities, and Earthworks have presented credible evidence to demonstrate their respective compliance with the applicable state and federal statutes, rules, and/or regulations, including Amd. Condition No. 7, regarding their actions in relation to the Project.

CONCLUSIONS OF LAW

To the extent that any Conclusions of Law are more properly construed as Findings of Fact, they shall so be construed.

1. The Court has jurisdiction over this action pursuant to Chapter 603 of the Hawai'i Revised Statutes.

2. “An injunction is an extraordinary remedy.” *Morgan v. Planning Dept., Cty. of Kauai*, 104 Hawai‘i 173, 188, 86 P.3d 982, 997 (2004) (citation omitted).

3. In determining whether preliminary injunctive relief is warranted, Hawai‘i courts apply the following three-part test: (1) Is the party seeking the temporary injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a temporary injunction? (3) Does the public interest support the granting of a temporary injunction? *See Life of the Land v. Ariyoshi*, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978).

4. The burden rests squarely on the movant, to set forth sufficient *facts* demonstrating that each element of the test has been met. *See, e.g., Nuuanu Valley Ass’n v. City & Cty. of Honolulu*, 119 Hawai‘i 90, 107, 194 P.3d 531, 548 (2008) (denying motion for preliminary injunction because movant failed to meet its burden in proving irreparable damages); *Haw. Cty. Green Party v. Clinton*, 980 F. Supp. 1160, 1170 (D. Haw. 1997) (denying motion for temporary restraining order where plaintiffs failed to provide sufficient evidence on one element).

5. The burden is significant:

Injunction is considered to be **an extraordinary remedy that should be exercised sparingly and cautiously** after thoughtful deliberation and with the court’s full conviction of its necessity to protect the legal rights of the plaintiff pending the litigation. It is a drastic remedy that should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected. **The relief should be awarded only in clear cases** that are reasonably free from doubt and **when necessary to prevent great and irreparable injury. The complainant has the burden of proving the facts that entitle him or her to relief.**

42 Am. Jur. 2d Injunctions § 15 (2000) (entitled “Necessity of clear case”) (emphases added).

6. Plaintiffs have failed to meet their burden in setting forth sufficient facts to demonstrate that a preliminary injunction is warranted in this case.

7. To the contrary, the MP Entities have demonstrated their compliance with Amd. Condition No. 7 with respect to their work at the Project, and the County has demonstrated its adherence to the applicable state and federal statutes, rules, and/or regulations regarding its actions in relation to the Project.

8. Thus, Plaintiffs’ likelihood of prevailing on the merits is futile.


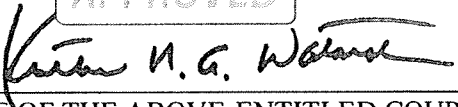
9. Plaintiffs have not demonstrated *any* threatened irreparable harm to the Kaua'i cave wolf spider or cave amphipod at the Subject Property, and the public interest does not support the granting of an injunction based upon the circumstances presented.

10. Further, to the extent Plaintiffs seek an order prohibiting the County from issuing a grading and grubbing permit relating to the Subject Property, said relief is moot as the County already issued the relevant grading and grubbing permit prior to the filing of the underling Motion.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for Preliminary Injunction, filed May 11, 2022 (Dkt. 3) is DENIED WITH PREJUDICE.

DATED: Lihue, Hawai'i, July 7, 2023.

JUDGE OF THE ABOVE-ENTITLED COURT

E OLA KAKOU HAWAII, also known as SAVE KOLOA, et al. vs. COUNTY OF KAUAI, et al.;
CIVIL NO. 5CCV-22-0000036; FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION FILED
MAY 11, 2022 WITH PREJUDICE [DKT. 3]