

KAUA'I PLANNING COMMISSION  
REGULAR MEETING  
November 12, 2024

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair Donna Apisa at 9:02 a.m. - Webcast Link: <https://www.kauai.gov/Webcast-Meetings>

The following Commissioners were present:

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

Excused or Absent

Ms. Helen Cox

The following staff members were present: Planning Department - Director Ka'aina Hull; Staff Planner Dale Cua, Romio Idica; Planning Staff Services Leila Kim; 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 Donna Apisa: Call the meeting to order.

**ROLL CALL**

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

Commissioner Ako: Here.

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

Commissioner Francis DeGracia: Here.

Mr. Hull: Commissioner Ornellas?

Commissioner Jerry Ornellas: Here.

Mr. Hull: Commissioner Otsuka?

Commissioner Lori Otsuka: Here.

Mr. Hull: Commissioner Streufert?

Commissioner Glenda Streufert: Here.

Mr. Hull: Chair Apisa?

Chair Apisa: Here.

Mr. Hull: You have a quorum, Madam Chair.

### **APPROVAL OF AGENDA**

Mr. Hull: Next we have is the Approval of the Agenda. It's a pretty lengthy agenda, so, the department would recommend that each of the respective actionable items that have an agency hearing or a public hearing that the, excuse me that the Business Matter immediately follow the Agency or Public Hearings so that would require moving L.1. through 4 under respectively F.1. through 4. Then I'd be able to only recommend an amendment we have.

Deputy County Attorney Laura Barzilai: We need a motion, please.

Chair Apisa: Motion please.

Ms. Streufert: I'm sorry, could you repeat that.

Mr. Hull: We would just recommend that the actionable items immediately precede their agency hearing or public hearing.

Ms. Streufert: I so move to accept the agenda as amended.

Ms. Barzilai: Commissioner, your mic, please.

Ms. Streufert: I move to accept the amended agenda.

Ms. Otsuka: Second.

Chair Apisa: We have a motion on the floor, all in favor, a voice call, please. Aye (unanimous voice vote). Any opposed? Abstentions? Motion carried. 6:0.

### **MINUTES OF THE MEETING(S) OF THE PLANNING COMMISSION**

Mr. Hull: Next we have the minutes of the meeting for August 8th, 2024.

Chair Apisa: Motion to approve.

Mr. DeGracia: I move to approve the minutes of October 8<sup>th</sup>, 2024.

Mr. Hull: Of August, August 8.

Mr. DeGracia: Oh.

Commission Support Clerk Lisa Oyama: The minutes are for September 8.

Chair Apisa: Oh, it's a typo. It should be September 8?

Ms. Oyama: Yes.

Mr. Hull: Oh, apologies.

Ms. Barzilai: I'm sorry I have October.

Ms. Oyama: It was October.

Ms. Otsuka: It was October because I was absent.

Ms. Barzilai: The draft in the agenda packet is October 8th, 2024.

Chair Apisa: Okay, so we need a motion to approve the minutes of the October 8th. The 8 is correct? Motion to approve the minutes from the October 8th, 2024 meeting.

Mr. DeGracia: I move to approve the minutes for October 8th, 2024.

Ms. Streufert: Second.

Chair Apisa: We have a motion on the floor, all in favor of the minutes for October 8th 2024. A voice call please. Aye (unanimous voice vote). Any opposed? Abstentions? A motion carried. 6:0.

### **RECEIPT OF ITEMS FOR THE RECORD**

Mr. Hull: Next, we have Receipt of Items for the Record. We didn't receive any items for the record prior to agenda posting. However, a number of testimonies were received subsequent to the posting of the agenda. If you'd like to take a 5- or 10-minute recess for Commissioners to receive and review.

Chair Apisa: Take a 10-minute recess.

Mr. Hull: We'll be back at 9:15.

The Commission went into recess at 9:05 a.m.  
The Commission reconvened from recess at 9:17 a.m.

Chair Apisa: Call the meeting back to order.

### **HEARINGS AND PUBLIC COMMENT**

**Continued Agency Hearing (None)**

## New Agency Hearing

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2025-1) to allow construction of a new single-family residence and associated site improvements on a parcel situated on the makai side of Kuhio Highway in Hanalei Town, directly across Hanalei Elementary School, further identified as 5-5428 Kuhio Highway, Tax Map Key: (4) 5-5-004:023 containing a total area of 7,914 square feet = **BULA TREE HOUSE, LLC.**

1. Transmittal of Agency Comments to Planning Commission.
2. Director's Report pertaining to this matter.

Mr. Hull: We have one individual signed up to testify. Roslyn Cummings.

Ms. Roslyn Cummings: Aloha, good morning. This testament is for SMAU 2025-1, Bula Treehouse, LLC., on the record for the record. Ignorance and indifference to the law is not an excuse. Aloha, my name is Roslyn Cummings. (Speaking in Hawaiian). I mailed out an affidavit and declaration notice and received by the County Attorney's Office on (inaudible) for all county agents and agencies, along with the State Attorney General's Office to give all state agencies and agents formal notice. There is a judicial notice filed as 5 CCV 24000102, and I'm here to express my strong opposition to agenda item, which seeks to allow the construction of a new single-family residence on Makai side of Kuhio Highway in Hanalei Town. Firstly, we must recognize the cultural significance of this area. It is situated directly across Hanalei Elementary School with an actual reinternment lot, making it a vital part of our community and its history. However, it is essential to understand that this site is also a burial site for nā iwi kūpuna in accordance to Hawaiian Kingdom (inaudible) of Law of 1860, any person who willfully disturbs a burial site faces significant penalties, including imprisonment of up to two years and fines not exceeding \$1000. Adjusted for inflation, this fine today with approximate at \$37,988, a reflection of how seriously our ancestors regarded the sanctity of our burial sites. Given the historical context, it is imperative that we prioritize the protection of these sacred spaces, and the proposed construction could disrupt and desecrate these burial sites, which would not only be a violation of the law, but also disrespect to our ancestors and cultural heritage. Moreover, I urge the Council to ensure transparency in this process, if this proposal is to move forward, it is crucial that all archaeological reports, environmental assessments and community consultations are made available to the public, including all contractual agreements as signatory authorization. Do not hire, what's qualified archaeologists, Nancy McMahon, Cultural Associations, and Hallett Hammatt of Cultural Surveys Hawaii. There is no trust, and a complaint has been filed against these permitted archaeologists doing business here in Hawai'i. Ignoring these steps could be seen as an intent to harm. This is my testimony. Mahalo.

Chair Apisa: Thank you.

Mr. Hull: We have no other individuals signed up to testify on this agenda item. If there's anyone else that would like to testify on this agenda item, you can approach the microphone. Seeing none, the department would recommend closing the Agency Hearing.

Chair Apisa: Motion to close the Agency Hearing on this matter.

Ms. Streufert: I move to close the Agency Hearing on this matter.

Ms. Otsuka: Second.

Chair Apisa: We have a motion on the floor. Voice call okay?

Ms. Barzilai: Yeah.

Chair Apisa: Voice call. All in favor? Aye (unanimous voice vote). Any opposed? Abstentions? Motion carried. 6:0.

Mr. Hull: And now I'll turn it over to the Staff Planner for the report on this agenda item.

Staff Planner Romio Idica: Good morning. Aloha, Madam Chair, 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's pretty much the summary of my report. So, this is when I pause and willing to take any questions from the Commissioners for myself, for the applicant.

Ms. Streufert: Can I ask a question? At one point earlier, not, a year or so ago, Bula House was supposed to have relocated their galleries somewhere.

Mr. Idica: Yes, it was supposed to be relocated within the Hanalei Commercial area where they allow these types of uses to operate. That did not happen. So, the permits for that use was revoked, and then now we are here today in regards to the building of the ADU.

Ms. Streufert: How many structures are actually on this project?

Mr. Idica: Right now, there's two.

Ms. Streufert: There's two.

Mr. Idica: Yes, a single-family residence and the 288 square foot structure.

Ms. Streufert: And they're proposing to relocate that 288 square foot structure.

Mr. Idica: That is correct. That is correct.

Ms. Streufert: Thank you.

Chair Apisa: Are there any other questions for the Director? Would the applicant come up please.

Mr. Ian Jung: Morning, Chair, and members of the Commission. Ian Jung, on behalf of the applicant. Just for the record we did note that Bula Tree House, LLC. was the prior owner and has since been transferred to Mike and Leila Rodger, but and we provided for that in the supplement based on a recent quick claim deed within the members of Bula Tree, but just for the

record it's been memorial that way. One of the things I'd like to at least bring to the attention of the commission is we had Supplement No. 1 filed. I don't know if you folks had a chance to review that, but during the course of the notice that went out to the respective neighbors, we also reached out to the Hanalei to Hā'ena Community Association to make sure they are aware of the project. In their review of the project, they had some concerns which we were able to mitigate with the terms that we agreed to in the Supplement No. 1. Conditions, No. 1 and 2 of that Supplement No. 1 are already proposed conditions that the Planning Department has suggested. The remaining conditions would be additional conditions that Mr. Idica has prepared, I think, for his Director's Report, and I believe a letter of support was also filed from the Hanalei to Hā'ena Community Association. In response to some of the community testimony, one of the issues is you know, how to deal with the archaeological component of it. We did have Nancy McMahon prepare a reconnaissance survey of the property. It is a developed property, it's existing residential. There is that 288 square foot structure on the property current, and the stipulated ratification was intended to cease the use by December 31st of last year, after getting all the studies prepared and ready and filing of the application, this application before you would be for the ADU, which would then allow for that 288 square foot structure to be relocated off the property. So, they're still trying to find a home for that structure, and it is, you know, it's there's no plumbing and no electrical, it's just relatively straightforward structure. So, it's it could be used for storage or an office, but they're working through with Kikiaola Construction how to relocate it, whether or not you can traverse certain bridges and whatnot. So, what, if this permit is approved and that would be the step to file the demo permit to relocate that structure and then follow up on the building permit for this particular, this proposed new structure. That's all I have in my presentation to the commission. I'm happy to answer any questions you may have regarding the project.

Chair Apisa: Commissioners have questions for the applicant? So the use of the building has been terminated now?

Mr. Jung: That's correct, Chair. So, based on the stipulated revocation, and just for context, you know, a lot of these kind of ancillary commercial uses that are outside of the commercial corridor of Hanalei have been, you know, scrutinized quite a bit and so, when this came up, there was an investigation into it and as a result, the stipulation was a response to the order show cost. And so, the use has ceased, and now it's converting back to its zoned use for residential.

Chair Apisa: Thank you.

Mr. Jung: Yeah.

Mr. Hull: I can state that among some agencies that we're still waiting for to comment on this application, we haven't received the comments from State Historic Preservation Review Division and as the department is currently recalibrating how coastal projects are assessed and analyzed, particularly when it comes to historic preservation purposes and the potential for iwi kūpuna, the department recommend deferring this agenda item until we actually get the formal comments from State Historic Preservation Division. Everything else is pretty much short up, but again, because we don't have those comments and because of the recent developments, that kind of shown that there are some, I'll say, I won't say loopholes, but there are some issues in how we've possess permits in the past and how we need to recalibrate that. This isn't the scenario that's

currently occurring in Wainiha, but out of an abundance of caution, the department would still recommend the commission consider deferring it until SHPD's comments are received.

Chair Apisa: Since the Historical Preservation is a major issue, it would make sense that we defer this.

Mr. Jung: If I can respond, the only issue I would raise sometimes it takes quite a while for SHPD to provide any comments. I had one where it came back a year later, so one of the issues is the cesspool to septic conversions. In this particular case, there is an existing septic that would be tied to this proposed new residence, so there's no major ground disturbance for any septic system, and the other is we do have an archaeological monitoring plan that our archaeologist has recommended based on the survey that was done for this particular project. So, the general blanket condition, I believe that's already proposed would cover that and the applicant has already committed to doing a monitoring plan as a part of this proposed with the new footings, which go in about one and half to two feet deep. In this particular case, I don't really believe a deferral is warranted because there's already a septic system and we will have a monitor on site for the foundation that goes in.

Chair Apisa: Questions from the Commissioner?

Mr. DeGracia: To clarify, so you guys are looking at maybe ground disturbance between one to two feet for footings?

Mr. Jung: Yes, that's in the, if you look at the, if you look at Exhibit B sheet AO5, you can see the footing there is, there's a measure of three feet and it's within that three-foot mark. Because there's it's, there's a slab on grade within a 8 inch thick CMU wall with the footings that extend down in there.

Mr. DeGracia: Thank you.

Mr. Jung: Sure.

Chair Apisa: Hearing no further...oh, we have a comment.

Ms. Streufert: All of these photos that were provided seem to indicate that it overlaps on a roofline of another building right next to it.

Mr. Jung: I think that might be the shadowing based on the imaging.

Ms. Streufert: Is that the shadow?

Mr. Jung: Yeah, because Mr. Imperato, who's the President of the Zoning Committee for Hanalei and Hā'ena Community Association, he actually raised that same question. But if you look at the site plan, you can see the roofline, which is still well within the five-foot site back on SP1.

Ms. Streufert: Okay:

Mr. Jung: And if you look at SP1 it also notes the existing septic system. It's a relatively small lot, so they can't have two...yeah...

Ms. Streufert: Yeah. How far is the septic system, how far would you have to go to attach it to the septic system to be this (inaudible) ADU?

Mr. Jung: It is on the, is 6 point, so 6 feet 9 inches from the proposed ADU. That's also noted on SP1.

Ms. Streufert: Has a request already been made to SHPD?

Mr. Hull: It was routed to SHPD for comments, we just haven't received those comments.

Mr. DeGracia: I have a question for the department. As far as our receiving comments from SHPD, what is your normal turnaround time?

Mr. Hull: Sometimes it can be fairly lengthy, I'll concur with Ian on that. In this, in this and in this scenario, the SMA permit was granted, we wouldn't move on the building permit in general practice until those comments are received. I think what happened out in Wainiha, where it's a different situation, but it isn't forming how our process moves forward in the future. What happened in Wainiha is that it was a renovation project in which the septic system was proposed, and septic systems have generally been administratively interpreted as part of renovation, therefore exempt. The applicant in that situation did have archaeological monitoring, but that just means the ground's going to be disturbed and only after it's disturbed, if there are iwi kūpuna present, then SHPD gets involved, after they've been discovered and there there's a limited amount of time that SHPD can provide response to those discoveries and the appropriate acceptable way to move forward. And so, that's kind of why looking in this situation, and I will say, this is different because we still have the building permit leverage point, we wouldn't approve the building permit until, should this be approved with the Planning Commission, we wouldn't approve the building permits till we got SHPD's comments, but being that we're living in, this kind of new world order of trying to figure out to make sure that things don't slip through the administrative review cracks, that's why the department is recommending, at least at this point, that a deferral still be done until we can receive comments from them.

Ms. Barzilai: Chair, maybe a status in January is appropriate.

Chair Apisa: So, it is suggested that there be a deferral till January. That's what I'm hearing from the department.

Mr. Hull: Well, I'd say this because we recognize and Mr. Jung and his client, I'm open to an open-ended deferral and at the same time the Commission has deadlines in which it has to act upon, so if there was an open-ended default, and I put this really to you Ian, as the clients representative, if there is an open-ended deferral then you know SHPD could get back in two weeks and the comments could be there, and we could therefore go on the November agenda. Excuse me, December agenda, but if they take two or three months and it wouldn't be till January, February, or March, at that point, Mr. Jung and his client could determine whether or not they're going to exert their timeline for process rights, in which they need to come back to the Commission to have it reviewed, under that timeline or whether or not they're willing to waive



that timeline in order to ensure that SHPD is provided whatever time, they need to comment to the Commission. So, that's why I'm recommending an open-ended deferral, but I also respected that Mr. Jung might have a difference of opinion on that.

Ms. Barzilai: Mr. Jung would have to waive the timeline on behalf of his client, because the January meeting is the 14th, which is the 60 days expires on the 11th, so you would have to either set for December or receive consent from the applicant.

Chair Apisa: So...

Mr. Hull: No, no, no, sorry. What I was recommending is that it be an open-ended deferral...

Ms. Barzilai: With consent.

Mr. Hull: ...and that ultimately in the December agenda, when we're setting the December agenda, if we received SHPD comments, then this application will go on the December agenda. If SHPD comments have not been received, then it's ultimately up to Mr. Jung and the property owner to determine whether or not they're going to waive their timeline requirements or they are going to exert the right to be on that December agenda for action to be taken.

Ms. Barzilai: Sounds fair. That sounds fair.

Mr. Jung: But, you know, I think Condition No. 3 addresses all this because we'll be bound by the recommendation of SHPD either way, and it still has to go through building permit review process, so I mean, I understand the request to defer in scenarios, but this isn't a shoreline parcel where there is the likelihood in sandy soil where there could be finds. This is right alongside Kūhiō Highway, and it's already on, there's a building on, the proposed structure is 1,600 square feet and the existing 288 square foot structure is already there with foundations, so I feel it's a bit extreme to require that on this particular application, if it was a shoreline parcel then I totally get it, but in this case I think we can hinge on Condition No. 3, and if SHPD does respond, which hopefully they'll start responding timely, then we can rectify it within and have the monitoring plan we already, my client has already paid for, submit it to planning before they release the building permit. I think that's a reasonable solution rather than bringing it back up on the agenda to this body for just a, what would probably be just a monitoring plan.

Mr. Ornellas: So, the initial recommendation from staff was for approval, so (inaudible)...

Mr. Hull: It's for tentative approval. That recommendation also says that that doesn't count and include any potential input provided by the community, neighbors or state or county agencies. We haven't received a response from a state agency that, again, the department's recalibrating how it processes all SMA permits and on that, on that basis, you know, we recommend a deferral to give additional time to hear back from SHPD. Now the December agenda is ample time, and is still within the purview of timelines that the Commission has to act on the permit. So, (inaudible) at the same time, part of me is very much in agreement with Mr. Jung, there are dual levels of protections to ensure that what happened out in Wainiha recently won't happen on this application. I'm in agreement with Ian on that. At the same time, like I said, we're recalibrating the system in which out of abundance of caution still recommending deferral, but at the same time, (inaudible) respect for where the Commission wants to go.

Ms. Streufert: But Condition 3 is after the ground, after the ground has been disturbed, so this is after it has been found. It's not prior to, it's not a preventive action.

Mr. Jung: Yeah. Okay, so, under the archaeological monitoring approach, then we would have a monitor on site with our archaeologist who's prepared the report as Exhibit F, and then they would be out there to monitor the ground disturbance. And then if there's something found then they would cease all work and then move forward on trying to determine what to do with the historic remains. So, that's what the archaeological monitoring plan would require.

Ms. Streufert: And I think what we're looking at is trying to prevent anything happening prior to any ground disturbing or prior to any iwi being found, but I have no idea, how would SHPD know whether there...

Mr. Hull: They may have requirements that they survey the site at a level where they're not under construction, but actually going in and checking out what's in the soil ahead of the actual construction activity. I'm not saying that they're going to require that in this scenario, but they can require it where they feel it's appropriate.

Ms. Streufert: Just for my edification, how deep did they go in Wainiha before they found the iwi?

Mr. Hull: I don't even...there's some signaling in the audience, but I don't have that off the top of my head.

Ms. Streufert: Is it really deep? Is it, you know, close to the surface?

Chair Apisa: That could always vary anyway, I would think. Any other questions or are we...call for a motion?

Mr. Ako: Madam Chair, do I have it correct that if SHPD doesn't come in with a response that the project doesn't move forward?

Mr. Jung: It's my understanding from past practice that they, the planning and I'm conscious about this for my particular projects, where like in Hanalei we always, if it's not a shoreline property, we'll have at least have a monitor on site. If it's a shoreline property then you'd want to have typically an archaeological inventory survey to do test trenching and you can kind of see that like for the last one that I had we actually, that was in Hā'ena and we did test trenching and nothing was found in the last two out there, but on properties that are more in the developed corridor along the highway where the highway was built and whatnot, it's less of a chance of finding potential remains there from the report of our archaeologist, right. So...

Mr. Ako: So, if the report comes back in one year, I think we got a problem, right? It comes back in one month and is able to be put on the December agenda, what would be that first effect to the project itself?

Mr. Jung: And there's, I mean the I mean I get it, if it's to the December agenda, that's fine, but if we wait for SHPD, they sometimes don't respond at all. And I know they're understaffed, and I know they have their regulatory team is, you know, has to do all islands. But in in most scenarios

where it's not on a shoreline property, they always come back with a monitoring plan, and we've committed to doing that in our application and in our conditions.

Chair Apisa: Anyone ready to make a motion?

Mr. Ako: Okay, let's do it then, yes. I so move to defer this Special Management Area Use Permit for the construction of an additional dwelling unit, SMA(U) 2025-1 till the December meeting.

Chair Apisa: Do we have a second?

Ms. Streufert: Did you want it to December meeting or do we want to have it open...

Chair Apisa: Well, we have to make a decision by December, or the applicant has to agree to extend.

Mr. Hull: I think (inaudible) in these for discussion.

Chair Apisa: Yeah, that will come up in discussion. We need a second.

Ms. Streufert: Second.

Chair Apisa: Okay, we have a motion on the floor, now it's open for discussion. To answer your question, I believe my understanding is that we have to make a decision before our January meeting or the applicant needs to agree to an extension.

Mr. Hull: Again, the departments recommendation was an open-ended deferral until comments received by State Historic Preservation Division.

Chair Apisa: Which is an unknown.

Mr. Hull: Which is unknown, and so if someone puts the ball in the applicants court as to whether or not they want to go on the December meeting if the comments have not been received.

Chair Apisa: Do we want to say, subject to receiving SHPD comments or just suggestions...

Mr. Hull: And completely (inaudible) that was our original recommendation. Commissioner Ako may have different reasons why he wants it on the December agenda, not necessarily agreeing with the department, which is totally fine. I was just saying, that was the recommendation. What I'm hearing is the motion was to defer it to December.

Ms. Barzilai: That's the motion.

Chair Apisa: Would the client agree to trenching and maybe have a little more data?

Mr. Jung: Well, that, and that's a part of the process, is you prepare a reconnaissance survey and then they provide that, and it gets uploaded in HICRIS. We can check to see how long it's been sitting in HICRIS, which is the SHPD process and review time. But typically what I've

experienced for these areas is they require monitoring and typically only require archaeological inventory survey for near shore properties.

Chair Apisa: So even the test trenching, they would have to monitor.

Ms. Barzilai: Ian?

Mr. Jung: Yeah.

Ms. Barzilai: I think what Chair is asking you is whether your client would agree to test trenching for this matter. What's involved in that?

Mr. Jung: I could ask him. Yeah, he's fine with it. So, it's...

Chair Apisa: Or would you, would your client...

Mr. Jung: It's two footings to test trench.

Mr. Hull: Yeah, I would. Sorry, I have some reservations about the Commission imposing that as a Condition of Approval, because it would essentially rely on the Planning Department to assess the viability of the trenching and we don't have any archaeologists on site, or in staff and so that's why we have to rely heavily on SHPD in their direction on that.

Mr. DeGracia: Could we describe what test trenching is, I'm not familiar?

Mr. Jung: Yeah, I'll take a stab at it if you want. So, because I ordered this on (inaudible) shore projects, where if there's, they will take the, about a 50% of the footing locations and the last one you probably have seen is the one in Kekaha for the variance we did for the boat shed, and so we test trench, the septic system pit and then we test trenched four locations around the perimeter of the structure and they dig a trench, typically about two to three feet, about where the footing would be, and then they observe that while they're doing the test trenching, and then they report back. Our biggest challenge is also, you know, finding an archaeological consultant that will do the work timely, and then there's only one really, one on site and all the other ones are on O'ahu and Maui, and one on Big Island, so if the one on Kaua'i is busy then we have to go report back for someone on O'ahu, like ASM affiliates or Hal Hammatt with Culture Surveys Hawai'i or Mike Dega's another one that does it. So...

Mr. DeGracia: Okay. Thank you.

Mr. Jung: And they're all stacked.

Mr. DeGracia: Jog my memory. Now I remember the Kekaha one.

Mr. Jung: Right.

Chair Apisa: We have a motion on the floor. Any other discussion on it?

Ms. Streufert: If we were to go to an open deferral, what would that mean in comparison to...how would that work?

Mr. Hull: The only, the only I'm recommending an open deferral is because it could end up on the December agenda and not have a comment from SHPD, at which point the department would recommend that the applicant waive their timeline requirements to allow for SHPD to comment. In situations where and, I'm not saying that this applicant would do it. We've had one situation that I can remember where the applicant said no, I will not waive that timeline, and I think it was specifically to afford us the opportunity to do further outreach concerning cultural impacts, and so when the applicant would not waive that timeline, the department's recommendation, and that application was that the Commission deny the permit because the Commission did not have adequate information. The Commission denied that permit. It was challenged at court and ultimately be upheld. So, not having the information necessary for taking action can be used as a reason to say we're going to, the Commission is going to deny the permit. I don't think it will get to that level with this property owner, but I'm saying that's, (inaudible) anything, what would happen in this scenario if it was an open-ended deferral, but it ultimately puts the responsibility back on the applicant to reach back out to SHPD to try and get those comments provided to the Commission before action.

Ms. Streufert: So, an open deferral would actually be, afford more flexibility to help the department as well as to the applicant.

Mr. Hull: I believe it does, if Ian objects, I can respect that too, but I believe it affords flexibility for both the applicant and the land owner.

Mr. Jung: If I could object, because I've seen how long SHPD takes, you know, unfortunately, it's just the reality of the situation is, SHPD takes a long time to review things and, you know, there is, like the Director said, a secondary layer in this particular case, because there's a building permit, I think if you look at it sequentially, you have an SMA Permit first, then followed by a building permit. The SMA Permit gets deferred indefinitely then you can't really start the building permit, so there's a separate layer of review which, you know, my gut on this one is telling me just be a monitoring plan, but if it's not then the Planning Director has the ability in the EPR System to hold that building permit. And we could modify Condition No. 3 to say the building permit shall not be issued until SHPD provides comments. Because we're already subjecting ourselves to a monitoring plan and that might be the solution rather than having to pay another visit on a small issue.

Mr. Hull: At the very least, we have until the December meeting within the timeline of parameters for this body to take action. So, with the land owners representative objecting to an open ended deferral, I have no problem saying that with that objection I would be, we would recommend that the December deferral occur.

Mr. Ako: So, pretty much all that means is that if we don't get anything back from SHPD in time for the December meeting, we just kicking the can down the road and you're back up there again.

Chair Apisa: Well, I think the applicant just made a suggestion that is possible solution.

Mr. Hull: It could be a possible solution. But like I said, we're still within this body's timeline parameters in the December meeting at the very least affording SHPD that time to provide

comment, if they don't provide comment essentially there's two options that are going to go down. One, is the applicant is going to provide potential amendments that may help the Commission feel comfortable in moving forward without SHPD comments or, the Commission could be composition of denying the application because SHPD hasn't provided comments and the body doesn't have enough information, or the third option, at the December meeting, the landowner may be open to waiving the timeline requirements for SHPD (inaudible) comments, so those would be the three potential scenarios that would play out in the December meeting.

Chair Apisa: So, it sounds like a deferral, but is the motion on the floor?

Ms. Barzilai: Yes.

Chair Apisa: Without change, so are we ready for the vote? I would like it individual call please. And the motion is to defer the matter, until our December meeting.

Mr. Hull: Motion deferred will December 10th. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner DeGracia?

Mr. DeGracia: Aye.

Mr. Hull: Commissioner Ornellas?

Mr. Ornellas: No.

Mr. Hull: Commissioner Otsuka?

Ms. Otsuka: Aye.

Mr. Hull: Commissioner Streufert?

Ms. Streufert: No.

Mr. Hull: Chair Apisa?

Chair Apisa: Aye.

Mr. Hull: Motion passes, Madam Chair. 4:2. Next, we have...

Mr. Jung: Thank you, Commissioners. We'll try and push on SHPD to get a response.

Mr. Hull: Next, we have a New Agency Hearing F.2.b.

SPECIAL MANAGEMENT AREA USE PERMIT (SMA(U)-2025-2) to allow construction of two (2) single-family residences, a guest house, and associated site improvements on a parcel identified as Lot 131-A Wainiha Hui Land, situated on the mauka side of Alamihi Road in Wainiha, approximately 500 feet west of

the Kuhio Highway/Alamihi Road intersection, further identified as Tax Map Key: (4) 5-8-012:019 containing a total area of 27,138 square feet = **MATTHEW & PHILLIP C. JOHNSON, TRUSTEES/MANCILLA & JONATHAN D. WICKES.**

1. Transmittal of Supplemental Information to Planning Commission.
2. Transmittal of Agency Comments to Planning Commission.
3. Director's Report pertaining to this matter.

Mr. Hull: We have one member of the public signed up to testify, Roslyn Cummings.

Ms. Cummings: Aloha again. I'm Roslyn Cummings. (Speaking Hawaiian). My testimony for SMA(U) 2025-2, Matthew and Phillip Johnson Trustees. Ignorance and indifference to the law is no excuse. I'm here to provide testimony on the agenda item, which proposes the construction of two single family residents and a guest house on the lot, 131-A Wainiha Hui Land, located on the market side of Alamihi Road. This site is about 500 feet west of Kūhiō Highway. The intersection is not just a parcel of land, it is a culturally significant area as a whole. The construction proposed in this agenda item poses a risk of cultural heritage and the sanctity of these burial sites. I'm giving you guys this testimony, as a notice, because it's clear that this board members or Commission members is not identifying the problems with iwi kūpuna desecration. First and foremost, I'm against hiring of Nancy McMahon of Cultural Associates and Hallett Hammatt of Cultural Surveys Hawai'i and any monitors that they hire because there's been years of covering up of desecration and that's why it has not been known from Kekaha to Waimea to Kōloa, north, south, east, and west of Kaua'i. You guys got to understand the laws of 6E. It's a \$10,000 fine per desecration of iwi bone, and it's per day. Our iwi sits in sand, sometimes for 21 days, months and it's very unfair because it's unjust. So, in this area of this project, I'm asking for these people to hire someone that is trustworthy and understanding of the cultural significance of this area. You had floods in this area, you had tsunami in this area, you had large sand dunes in this area, this is a kahale, a village site. The iwi kūpuna will be in this area because they died of famine, they died of disease they died of old age. They lived there, they died there, they're buried there. So, for the public transparency I strongly urge the Council to mandate the availability of all relevant archaeological reports, environmental assessments and community feedback before making any decisions, we must ensure that qualified experts of the area are present at all times and mahalo for your time. Have a nice day.

Chair Apisa: Thank you.

Mr. Hull: We don't have anyone else signed up to testify, but if anybody in the audience would like to testify on this agenda item, you may approach the microphone. Nope. Seeing none, I'll turn it over to the staff planner for his report on the matter.

Mr. Idica: Good morning, Madam Chair, Commissioners.

Ms. Barzilai: Mr. Idica? I'm sorry, Chair. Did we close the Agency Hearing on this on?

Mr. Hull: I apologize, we did not, sorry.

Ms. Barzilai: Sorry about that.

Mr. Hull: (Inaudible) for the testimony, the department would recommend closing the Agency Hearing.

Ms. Barzilai: Thank you so much.

Mr. Hull: (Inaudible).

Chair Apisa: Do we have a vote to close the Agency Hearing on this matter?

Ms. Barzilai: You need a motion.

Chair Apisa: Yes.

Ms. Barzilai: Motion, please.

Ms. Streufert: I move to close the Agency Hearing on this matter.

Mr. Ornellas: Second.

Chair Apisa: Okay, we have a motion on the floor. All in favor to close this Agency Hearing? Aye (unanimous voice vote). Motion carried. 6:0.

Ms. Barzilai: Thank you.

Mr. Idica: For the record, should I start all over?

Chair Apisa: Not...

Mr. Idica: Or pick up...

Chair Apisa: Pick up where you left off.

Mr. Idica: Okay.

Chair Apisa: Thank you.

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: So, I would pause there and answer any questions that the Commission has for yourself and the applicant.

Chair Apisa: Questions from the Commissioners?

Ms. Streufert: According to the application it was a violation that's currently in remediation with the Planning Department, has that been resolved?

Mr. Idica: Yes, the, as of July 24, 2024, no violations are existing on the property.



Ms. Streufert: So, right now according to the application, there's an accessory structure as well as the shed, which is what the two yurts are now...

Mr. Idica: Right now, the two yurts are being used as storage sheds, yes.

Ms. Streufert: And one of them will be deleted, one will be removed in order for the single family and guest house.

Mr. Idica: Yurt #1, okay, currently there are two yurts on the property that are used as storage, as of July 24, 2024. One of the yurts will remain as a storage building, and the other yurt will be converted from a storage building to a single-family dwelling. So, basically the applicant is coming in to go through the proper process into having that storage building be converted back into the single-family dwelling.

Chair Apisa: And then they're adding a guest house.

Mr. Idica: That is correct.

Chair Apisa: I know there was a question if it was one or two houses.

Mr. Idica: Yes, in the submission of the original application, it was shown on the site plan that there was a proposed single family dwelling on Unit A, however in talking with the applicant, I explained that I needed some sort of plans or some sort of rendering to show the Commission, because, one, I do not feel comfortable coming in front of the Planning Commission asking for an approval for a rectangle on a site plan, so after working with the applicant, the applicant, kind of agreed that, yes, he cannot come up with the plans to show the Commissions, so we are, per his supplemental to his application, now we are just coming in for the conversion of the storage building and a new guesthouse. So, the single-family residence will have to go through another SMA Use Permit when they are ready to construct, when they're ready to submit for a building permit.

Chair Apisa: That's a whole separate process.

Mr. Idica: That is correct. That is correct.

Chair Apisa: Thank you for clarifying that. I hope everybody got that. What's before us today is the conversion of one yurt to a residence, and the addition of a guest house.

Mr. Idica: Yes.

Ms. Streufert: On page 2 of the supplemental that they submitted, on the bottom, the last sentence on that page. The applicant wishes to reserve those building rights and submittal to a later date and time. Do we allow that? To...that they could come in at a later time and have no, some setting of this, so that they can come in 10 years from now?

Chair Apisa: Is that additional house allowed by zoning?

Mr. Idica: Yes, that is correct.

Chair Apisa: Yeah. It's allowed by zoning.

Mr. Idica: The density is allowed by zoning.

Ms. Streufert: It's to reserve the rights to build at a later time, non-specified. The last sentence on that second page.

Mr. Hull: Yeah. The way I think Romio and I both interpreted that, is that they're reserving or recognizing that they still have the right to build one more dwelling unit, however, they still would have to apply for an SMA Use Permit and come before the Commission to have that reviewed.

Ms. Streufert: This is an SMA Permit. This is an SMA Use Permit.

Mr. Hull: Yes.

Mr. Idica: Yes, it is.

Mr. Hull: For that second unit they'd have to come in for a subsequent SMA Use Permit, another SMA Use Permit to construct.

Ms. Streufert: So, this will be for the second one, not for the first one.

Mr. Hull: Yeah.

Ms. Streufert: But there would be a time limit as to when they can build. I mean, in other words, the SMA permit does expire in two years.

Mr. Idica: Yes.

Mr. Hull: So, the way, and we can clarify this (inaudible) if it's creating some confusion is that, pursuant per the applicant supplemental, which they're saying they're just going to build one single-family dwelling and a guest house, the SMA permit application before you folks today is for one single-family dwelling and a guest house. They (inaudible) a statement in the supplemental that they deserve the right to build the other one and the way we interpret that is, you have the rights to a second dwelling unit, you will need to come back to the Planning Commission for a separate entitlement process via public hearing for that second dwelling unit.

Ms. Streufert: Do we need to have this clarified before (inaudible)?

Mr. Hull: We can...Ultimately, the department, like the previous application, is recommending deferral on this one because we also have not received comments from State Historic Preservation Division on this application. I believe the planner has had that discussion with the landowner on that issue, and I think we can clarify that and say the conditions of approval, if we are still recommending conditions of approval, that these permits pertain solely to one single family dwelling and one guest house.

Ms. Barzilai: Would you like to hear from the applicant, Chair?

Chair Apisa: Any other questions before we hear from the applicant? Okay. The applicant could come forward please. Thank you. If you could just state your name and your presentation.

Mr. Matthew Johnson: My name is Matthew Johnson and...

Mr. Phillip Johnson: Phillip Johnson.

Chair Apisa: Do you have any presentation or any comments you would like to share with us?

Mr. Johnson: Yeah, I think what Romio had just mentioned about the clarification on the addendum is correct. We realize that there's, we'd have to come back in for the SMA process for an additional dwelling unit. Don't really have any other comment, but I would like to just state that in regards to the situation before ours and the other agenda item, I do understand that community's response to the importance of preserving the iwi findings and the kūpuna in the area. I would just like to state that I did cross reference everything in the neighborhood where the subject property is located and there has been no findings of iwi up on that side of the hill. I know it seems like common knowledge that most kūpunas buried along the shoreline and sandy sediment where our property is, is mostly rock terrain, there's big rock boulders in some soil. So, just taking that into consideration of those findings and also the references from the kūpuna in the area that we did reference and cite on the cultural resources have no known historical practices taking place whatsoever on the subject area or property. So, just with those knowing that being able to move forward under the archaeological monitoring process, of course, you know if we, if the project is approved and we're allowed to build, of course, any findings that we would come across, we would want to go through appropriate channels and we just want to ensure everybody that we're on board for, for taking those necessary steps.

Chair Apisa: Thank you. Commissioners, questions of the applicant?

Ms. Otsuka: I had a question and I'm not sure who to ask, but it says here, Yurt 2 will be converted back into a single-family residence, I don't know who to ask. Is it, what is involved in converting it back to residence? Is there any construction? Any (inaudible)?

Mr. Idica: Well, basically my apologies.

Ms. Otsuka: No.

Mr. Idica: Okay, so basically what they would do is they would add the amenities, as like for instance, a kitchen, bathroom, you know, something habitable. So, that's what they were, they're planning to do after Planning Commission consideration, yeah.

Ms. Otsuka: Okay.

Ms. Streufert: Is it that they, prior to this, prior to the violation or that it was used as a residence, as I understand it.

Mr. Idica: That is correct.

Ms. Streufert: How was that possible if it was not attached to a septic system (inaudible) water.

Mr. Idica: They, I will have to defer to the applicant, but I believe that the septic system was installed.

Mr. Johnson: I'm gonna bring up Tejah Mancilla, he's the other applicant on the SMA. He's the property owner with the yurts. I'll let him discuss it, but yeah, it's my understanding that there has been a septic system that was put in and filed with the county and approved, and that was some years back, so...

Mr. Tejah Mancilla: Yeah.

Chair Apisa: Could you just state your name and identify yourself for the record?

Mr. Mancilla: My name is Tejah Mancilla. And yeah, what Matt said is correct. I had Honua Engineering do the plans for the septic and then Michael Olanolan installed it, and that was shortly after I purchased the lot, maybe five or six years ago.

Chair Apisa: Thank you. Any other questions?

Mr. DeGracia: I have a question for the department. Are we on the same timeline as the previous application...

Mr. Hull: We are.

Mr. DeGracia: ...as far as taking action?

Mr. Hull: Correct.

Chair Apisa: No other questions we could hear the recommendation from the department.

Mr. Hull: Well, the recommendation is deferral.

Chair Apisa: Oh, oh, okay.

Mr. Hull: There is a, there's a tentative recommendation of approval, but that was, you know, in insofar as taking testimony from the members of the public members, members of the community as well as receiving the State and County agency comments. And at this point, we don't have, I again, State Historic Preservation Divisions comments, and their analysis.

Chair Apisa: So, again, we would have to make some decision before our January meeting, so...

Mr. Hull: Yeah, and I believe Romio has had this discussion, the discussion that kind of went on with myself and Mr. Jung concerning open-ended deferrals versus December of deferral, I think the landowner, you guys can correct me if I'm wrong, signaled to Romio that they're open to a December deferral.

Ms. Otsuka: Is SHPD the only organization that they're waiting comments from?

Mr. Hull: I believe there might be one or two others generally though the ones that were somewhat cautious with are not receiving comments are State Historic Preservation Division and

The State Department of Transportation Division, and the reason we're a little bit more, give a little bit more leeway to those agencies is because they're not signatories to the building permit. So, they'll still have to get a building permit to meet residential standards and agencies like the State Department of Health, Department of Water, Public Works Building, Public Works Engineering, Fire Department, all those are signatories to the building permit and essentially have that leverage there. Whereas SHPD and State Department of Transportation, and in this case, we don't anticipate State Department of Transportation having any comments, (inaudible) just we generally put those two into a bit more of a higher level of scrutiny until we hear from them.

Mr. Ako: So, for this one here, is the recommendation to defer until the December or open-ended?

Mr. Hull: It...Romio's had this discussion with him. Yeah, it's a recommendation to defer to December 10th.

Ms. Streufert: I move to accept the departments recommendation to defer this to the December meeting.

Ms. Otsuka: Second.

Chair Apisa: We have a motion on the floor. Is there any further discussion on it? I'd like to take...

Mr. Phillip Johnson: (Standing and not speaking directly into microphone) I have a question. So, the deferral to December is, are they all deferring out of that region? Just trying to understand why we're getting deferred here.

Chair Apisa: I believe it's because we don't have the State Historical Preservation comments yet is a primary reason.

Mr. Phillip Johnson: Okay. (Inaudible).

Chair Apisa: It's similar to the previous...

Ms. Barzilai: Same circumstances.

Chair Apisa: Same circumstances as the previous situation.

Mr. Matthew Johnson: Can you just clarify what it is exactly, I mean...

Mr. Hull: I'm sorry, I'm going to have to...the action was taken by the Commission. If you want to have discussions with the planner after this, but this is not the platform to engage in reasonings or dialogues for the action that was taken.

Mr. Phillip Johnson: I was just trying to understand it.

Mr. Hull: And we can have that conversation, Romio or myself can have that conversation with you folks to further clarify the action that was taken.

Mr. Phillip Johnson: We're just a year and a half into this (inaudible) access and...

Mr. Hull: Again, this...

Mr. Phillip Johnson: ...taxes and getting nowhere, you know, I just don't know how to expedite this, that's all we're trying to do. Build a 700 square foot home for, you know, (inaudible) guys who we're working with. (Inaudible) to take care of their families.

Chair Apisa: I understand, but unfortunately, we have a process that we have to follow.

Mr. Phillip Johnson: Okay. (Inaudible).

Mr. Hull: Next, on the agenda...

Chair Apisa: Wait, we have a motion on the floor.

Mr. Hull: Oh, sorry. I thought (inaudible).

Chair Apisa: I'd like to take a roll call vote please.

Mr. Hull: Motion to defer. Commissioner Ako?

Mr. Ako: Aye.

Mr. Hull: Commissioner DeGracia?

Mr. DeGracia: 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 Apisa?

Chair Apisa: Aye.

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

Chair Apisa: Thank you.

Mr. Hull: Next, on the agenda is:

CLASS IV ZONING PERMIT (Z-IV-2025-1), USE PERMIT (U-2025-1), and VARIANCE PERMIT (V-2025-1) involving the replacement of a municipal solid waste (MSW) system and to allow a deviation to exceed the height limitation of a structure pursuant to Section 8-8.2 of the Kauai County Code (1987), as amended, for a parcel situated along on Kahi Road, and further identified as 5051 Kahi Road, Tax Map Key: (4) 4-6- 012:004, and containing a total area of 3.97 acres = COUNTY OF KAUAI, DEPARTMENT OF PUBLIC WORKS, DIVISION OF SOLID WASTE. [Director's Report Received, 10/24/2024.]

1. Director's Report pertaining to this matter.

Mr. Hull: We don't have anyone signed up to testify on this agenda item. Are there any members of the public that would like to testify on this agenda item? If so, please approach the microphone. Seeing none, I'll turn over the Staff Planner for the report pertaining to this matter.

Chair Apisa: A motion to close the...

Mr. Hull: Oh, sorry. (Inaudible) would recommend closing the Agency Hearing pertaining to this matter.

Ms. Otsuka: Motion to close the Agency Hearing.

Ms. Streufert: Second.

Chair Apisa: We have a motion on the floor. Voice vote, please. All in favor. Aye (unanimous voice vote). Any opposed? Motion carried. 6:0. The public hearing is closed.

Mr. Hull: So, I'll turn it over to you, Dale. The Staff Planner can over the report at this time. Sorry about that.

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

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 Apisa: Thank you very much. Does Commissioners have any...do the Commissioners have any questions?

Ms. Otsuka: For me, I believe that because it's something necessary to comply with the present environmental standards, it's for me it's cut and dry that we approve.

Chair Apisa: Yeah, that's, I have a similar understanding that this is a requirement that's necessary for environmental reasons.

Ms. Barzilai: The Department is here if you'd like them to make a presentation.

Chair Apisa: Yes, we would like to have a presentation from the department.

Ms. Allison Fraley: Aloha Commissioners. My name is Allison Fraley. I'm with the Solid Waste Division. We don't have a presentation for you this morning, but we'd be happy to answer any questions that you have about the project.

Chair Apisa: Just state your name for the record.

Mr. Keith Perry: Keith Perry, Office of the Mayor. County of Kaua'i.

Chair Apisa: Okay. Any questions now of the applicant?

Mr. Ornellas: Yeah. So, there's a stream close to the project, that has been channelized and empties into one of the canals in Kapa'a, I'm just curious as to where the wastewater from this project is going to go, runoff.

Mr. Perry: The leachate is contained in a holding tank on the project site.

Mr. Ornellas: Thank you.

Ms. Otsuka: I know this 4 feet is something that is across, I don't know the nation or State of Hawaii'i, but would you know why the reason the machinery is going to be an extra 4 feet high? What is the logical reason for them to have, going to make, create, or build?

Mr. Perry: The current structure is approximately 4, that height. It needs to be that height because of the trailer that parks underneath it. The tipping floor needs to be higher than the trailer, and in the area covering the tipping floor needs to be higher than the height of the machine that dumps the rubbish into the, off of the tipping floor, so it's the same height as it currently is, roughly, you know, within a next few inches, but that's the minimum height that we can have for that.

Ms. Otsuka: Okay. Thank you. I thought the machine was going to be built 4 feet higher. Thank you.

Chair Apisa: I believe we have with us a resident, whose home abuts the property. Will there be any changes in how that may affect that?

Mr. Perry: May have less noise now that we don't have this compactor. The current MSW has a compactor that, when it turns on, it's some noise created to it. The new system will be much like Līhu'e, where it's just dropped down, you're throwing your rubbish off the top. That would be the main change.

Chair Apisa: So, it will be a positive less noise effect.

Mr. Perry: I would...yes.

Mr. Ornellas: So, the facility is already closed, right?



Mr. Perry: Correct.

Mr. Ornellas: So, construction has already started.

Mr. Perry: On certain aspects, correct.

Mr. Ornellas: So, I was just wondering why the permits hadn't been attained before closing the facility?

Mr. Perry: We're doing other aspects of construction now that are needed for the NPDS construction compliance.

Chair Apisa: Any other questions?

Mr. Ako: I will say that I go to the Līhu'e refuse and the green waste part there now that it's paved, it's almost like you don't want to get it dirty.

Chair Apisa: Good.

Mr. Ako: Good job on that.

Chair Apisa: I used the one up in Princeville. Are we ready to make a motion? Is there...Is there a recommendation from the department?

Mr. Cua: Yes, Madam Chair. There's a total of 8 conditions related to the approval of the project. I'd be happy to answer any questions if you may have on any of the conditions.

Chair Apisa: Commissioners have read the 8 conditions. So, the department is recommending approval with the 8 conditions. Do we have a motion?

Ms. Otsuka: I'll make a motion. Motion to approve Class IV Zoning Permit Z-IV-2025-1, Use permit U-2025-1, and Variance Permit V-2025-1, applicant County of Kaua'i, Department of Public Works.

Chair Apisa: Second please.

Ms. Streufert: Second.

Chair Apisa: We have a motion on the floor. Roll call please, is there any further discussion? Okay, roll call vote please.

Mr. Hull: I think there's somebody else here to testify. You want to open it back up for testimony?

Chair Apisa: Oh, We have one additional person that is asking to testify. Yes, we will open it up. We certainly welcome up public testimony.

Mr. Hull: If you could state your name for the record and there's 3 minutes for testimony, sir.

Mr. Ray Peralta: My name is Ray Peralta. I live in one of the lots on the west side of the...

Chair Apisa: Can you pull the microphone...

Mr. Hull: Sir, can you speak into the microphone, sir?

Chair Apisa: Thank you.

Mr. Peralta: ...on the west side of the dump (inaudible). I have some thoughts about it for you to consider (inaudible). When the dump was donated or given to the county, that was a couple of years back, there were no houses around, now it's full of houses. Now when the dump is in operation it starts making a noise at 4:00 in the morning for the beep, beep, beep sound and the smell also travels to the mountain side. I was wondering if all these constructions (inaudible) would be so expensive taking out all this plumbing underneath it and doing all this work, wouldn't it be more prudent for it to be transferred somewhere else, because it is no longer like, it is a residential area as of now. And I think it would be more proper for the county to relocate it, put it somewhere where in it would that be smelly and the traffic is also bad. The access towards the dump is a one lane traffic. What if there will be more improvement, which is good, but it would also attract more traffic. Will there be a traffic sign signal on it to address it? So, I think it's just a concern. It is, I think nobody has thought about it that the transfer station is not right for that place. Although I used to own 2 properties in there, one is already on by my neighbor who was here, I don't know if she will speak, but she is the one who is really focused on the, on the scenery where if they construct additional 4-feet high, it would really be a sore thumb. All those residential. My property is appraised for 1.4 million, but with the dump being there...

Mr. Hull: Three minutes, Madam Chair.

Mr. Peralta: ...yeah, with the dump being there I think it might get lower than that and also all the properties, I think that it's just a concern that I have, and for you folks to think about it. Why spend money in there (inaudible) we still have a lot of (inaudible). Digging up all this for almost a year. What kind of construction would it be? Banging the heading machinery going on. I think that's all I think and expressing what it is on my mind.

Chair Apisa: Alright, thank you for sharing.

Mr. Peralta: Thank you very much.

Chair Apisa: Thank you for speaking up. Thank you.

Mr. Hull: Is there anyone else still like to testify on this agenda item that hasn't previously testified? Seeing nothing. I don't know if you want to see if the applicant has any responses.

Chair Apisa: Applicant, do you want to respond to or you have any response to his further comments? I just know from the difficulty the county is having of trying to find the Kekaha relocation, it is not an easy task, but I do, we do hear you.

Ms. Streufert: I do have a question of the applicant. Is it my...

Chair Apisa: Do we sort of hold our motion in a advance for, until we...

Ms. Barzilai: I don't think you need to withdraw at this point. Just leave it.

Chair Apisa: Okay.

Ms. Streufert: Is it, is it true that it has not been an operation for a while now.

Mr. Perry: No, that's not true.

Ms. Streufert: It's always been in operation, and it still is, it's an existing operation.

Mr. Perry: It is an existing operation as of November 2nd.

Ms. Streufert: And prior to that how was the trash handled?

Ms. Fraley: How was the trash managed there?

Ms. Streufert: Yes.

Ms. Fraley: So, for the refuse, it's put into a compactor unit, which is a, it crushes, it compacts the waste before it goes into a trailer.

Ms. Streufert: Prior to November?

Ms. Fraley: I'm sorry.

Ms. Streufert: Prior to...you said it was in in operation since November, is that correct?

Ms. Fraley: Yeah.

Ms. Streufert: So prior...

Ms. Fraley: Until November.

Ms. Streufert: ...to November...

Ms. Fraley: Right.

Ms. Streufert: ...was, how did, how was that?

Ms. Fraley: That, as I just described, was through November and then there's going to be a newer system where we're not going to have a compactor unit on top, the waste will go directly into the transfer trailers.

Ms. Streufert: Does this have any impact upon smell or anything else? The smells that might emanate from it? I can see the scenery moving or changing with four feet, an additional 4 feet, but that smell thing is just...

Mr. Perry: I would say again, it's not an additional 4 feet, it matches what's the existing structure is there. So, it's not really an additional 4 feet. The location and the size would be roughly the same of what's existing. The amount of trash we can take would be matching existing, it's what can go into the container or into the trailer. And leachate or what comes out of the trash that will now be contained, whereas before it sat on the ground or sat on the surface, now it will be contained in holding tanks and then shipped off site.

Ms. Streufert: So, that should decrease the amount of smell.

Mr. Perry: It should.

Ms. Streufert: Okay. Thank you.

Chair Apisa: And I know the, that's been a location for many, many, many years.

Mr. Perry: Correct. That structure was built in the 1970s.

Chair Apisa: Okay, any further...Thank you. There's no further discussion. We have a motion on the floor. I'd like to do a roll call vote, please.

Ms. Barzilai: Please restate the motion (inaudible).

Chair Apisa: Restate the motion.

Ms. Barzilai: Just motion to approve is fine.

Chair Apisa: Did you, yeah you had made a motion to approve. So, just to restate it, since we had...

Ms. Otsuka: The whole thing?

Chair Apisa: No, just...

Ms. Otsuka: Motion to approve.

Ms. Barzilai: That's fine.

Chair Apisa: Alright, so the motion on the floor is to approve.

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

Mr. Ako: Aye.

Ms. Otsuka: Did somebody second?

Mr. Hull: Commissioner DeGracia?

Mr. DeGracia: 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 Apisa?

Chair Apisa: Aye.

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

Chair Apisa: Thank you. And I guess just to repeat that the size will be the same, so they're not adding anymore height to it. And then hopefully without having the compactor, there will be less noise and less smell.

Mr. Ornellas: They are adding to the height of it.

Chair Apisa: I thought they just said they are not.

Ms. Otsuka: Not to the lower part. They said they lifting it.

Chair Apisa: Yeah.

Mr. Perry: So, it is roughly the same size, again, maybe inches less than a foot to what's existing, but what's existing is over the 30 feet, is over the code already.

Chair Apisa: See, it's what's existing is already over the regulation. So, that's the reason it's here, but it's not, its mere inches being added in height. It is not an additional 4 feet. Thank you for clarifying. I'd like to take a 10-minute recess.

The Commission went into recess at 10:36 a.m.  
The Commission reconvened from recess at 10:59 a.m.

Chair Apisa: Call the meeting back to order.

**Continued Public Hearing (None)**

**New Public Hearing**

Mr. Hull: Move on to Agenda Item No. F.4. New Public Hearing.

Amendment of Administrative Rules which details the applicability of Act 39 of the Thirty-Second Legislature of the State of Hawaii, Regular Session of 2024 that grants administrative authority to the Planning Director to review and act on subdivision applications for residential-zoned properties. A summary of the proposed amendments are as follows:

Applicability

The proposal clarifies the process that would allow the Planning Director to enforce the requirements of administrative subdivisions.

Exceptions

The proposal identifies exceptions where a subdivision, consolidation, or re-subdivision of a parcel requires Planning Commission approval, pursuant to Section 9-3.4 of the Kauai County Code.

1. Director's Report pertaining to this matter.

Mr. Hull: We don't have anyone signed up to testify on this agenda item. Is there anyone in the audience that would like to testify on this agenda item? If so, please approach the microphone. Seeing none, I'll just give a brief summary of the proposal. So, some of you folks may remember during the end of this past legislative session, there was a somewhat controversial housing bill at the legislature that the primary focus was to outright allow two additional dwelling units on any residential property. That was the main thrust of the bill. That was where much of the discussion focused on the bill throughout the state. Kaua'i didn't really focus too much on that section of the bill because that already occurs on Kaua'i, every residential property qualifies for at least two additional or accessory units, but there was a portion within the bill that also allowed or mandates that residential subdivisions, not within the SMA, not within important agricultural lands, not housing historic or endangered species, and only within the urban district, those subdivisions would be reviewed and acted upon by the Planning Director. So, I think I had discussions with all of you individually, saying that it does remove authority from the Planning Commission to a certain degree for residential subdivisions, if there are any concerns about that, and ultimately, that bill at the State Legislature was passed, and it was signed into law by the Governor. And so, I'll just read to what the law's applicability is. So, notwithstanding any law, county charter, county ordinance, or rule, any administrative authority to accept, reject, and approve or deny any application for subdivision, consolidation, or resubdivision of a parcel of land that has been fully zoned for residential use within the State Urban District, designated pursuant to Section 205-2, shall be vested with the director of the county agency responsible for land use, or a single county officer designated by ordinance, provided that the parcel of land is not, one, important agricultural lands, two, wetlands, as defined by the U.S. Fish and Wildlife Service, three, not a floodplain, four, is not a habitat for endangered or protected species, five, is not within a State Historic Preservation Division, and six, is not within Lava Zone 1 or Lava Zone 2 as designated by the United States Geological Survey, and then also, it shall not be applicable to the Special Management Area. So, it's a very limited area where, essentially, the State Legislature is looking to have the Planning Director or Planning Department, essentially, do ministerial reviews for those residential applications. To be further clear, and I know I discussed this with all of you folks, is that every single island, all subdivision applications, all subdivision applications are ministerial by the Planning Department. The County of Kaua'i is the

only one in which a subdivision application is done through a discretionary process, but as those of you who've sat on the Subdivision Commission know, and that sat, and still on the Planning Commission and reviewed some subdivision applications, is that even though there's an action by the Planning Commission of approval or denial, pursuant to the subdivision code, insofar as they meet every single one of those standards that are required by infrastructure agencies, the Planning Commission is required to approve on the application. There's no discretion of compatibility, say like, with a use permit, and so in having discussions with Representative Evslin and others that were sponsoring the bill, an array of different issues came up. One was that some property owners on Kaua'i were walking away from the subdivision process because of the potential litigation costs associated with residential, with any subdivision. And so, they're walking away from the subdivision process and leaving potential extra density or extra dwelling units on the table to go along the condominium property regime an easier route. Ultimately, Representative Evslin and others felt and ultimately affirmed by the State Legislature that the ministerial process should apply to residential districts, not to agriculture districts, not to the conservation districts, and not even to the rural districts, just to the State Land Use Urban District and those residentially zoned lots. So, what you folks have before you here is, with that act being adopted by the State Legislature, technically the power is vested for ministerial review in the Planning Director's hands, and right now that's in effect. I technically don't have any rails on me for residential review. I could, in theory, just start whipping out a stamp and going to town on residential proposals, so, pursuant to the state law. So, what we've put together is, we took the subdivision ordinance and all its requirements and standards and proposed them as administrative rules with one exception. For the residential development, taking out the reference to the Planning Commission and inserting either Planning Department or Planning Director. Insofar as state law now requires these residential subdivision applications to come to the Planning Director, these rules basically say the Planning Director will be held to the exact same standards that the Planning Commission has held when reviewing subdivision applications with one exception and that it should be a ministerial review as opposed to a discretionary review. And that, again, is pursuant to state law. So, how about I ramble too much and confuse everybody, but that's in a nutshell if you folks have any questions.

Ms. Streufert: Could you discuss the difference between ministerial and discretionary?

Mr. Hull: Ministerial review is essentially, you have, it's a regulation in which insofar as the applicant meets all of those requirements set in the regulations, the approving agency has to approve it. It's a requirement, you have to approve it. A discretionary review is where the reviewing agency, after a public hearing, or the reviewing body, after a public agency, has the discretion within their authority to either deny or approve. The subdivisions sit in this weird ... right now, currently, without state law being adopted, the subdivision ordinance sits in this weird, funky, hybrid situation of it requires a public hearing and it allows for legal interventions to occur, but the standards which are set require the body, the Planning Commission, to approve them no matter what once those standards have been met. So, it is a strange, somewhat nebulous ministerial/discretionary review. I think that gave the legislature and some commenting on it pause to say maybe everything should be ministerial to make it clear, but then the fact that that would pull in a lot of ... it could pull in the potential for resort, Special Management Area, those type of things, even though making it fully clean would perhaps be in order, we don't need to necessarily make it easier to develop in the coastal and resort areas. So, let's at least from the State Legislative standpoint, let's clean up, at least for the residential district.

Chair Apisa: Good question. Any other questions?

Ms. Barzilai: Chair, I have a housekeeping comment. On section 9A-1.4, Administration. So that's page 2 of Article 1. I think we need to remove one word, second line from the bottom, well, third line, it starts with provided that the parcel of land being subdivided is meets the requirement established. So, is, I recommend that is be removed and that requirement be substituted for exceptions established under section 9A-1.2. That would complete that sentence if you want to approve that amendment. Section 9A-1.4, parcel of land being subdivided is meets. So, strike is and change requirement to exceptions.

Mr. Hull: The department doesn't have any objections to that. There's a better of full disclosure. I grabbed everything from the subdivision ordinance to put those rules and requirements on the Planning Director in all of its glory and its misspellings and typographical errors as well. So, there was a question, should we be cleaning up the typographical errors that exist currently in the subdivision ordinance? And my determination is, no, let's get the Planning Commission the words verbatim. If the Planning Commission wants to change it by all means, but all we're proposing is the exact same. So, I have no objections to any typographical amendments being made, but that's kind of why it's there.

Ms. Barzilai: I didn't find anything else, so it looks good. That's it.

Mr. Hull: Yeah, the department will adjust. Without any objections, the department will adjust its recommendation for the rules to be adopted with that small amendment.

Chair Apisa: Seems pretty straightforward. Any other questions? Or we have a motion.

Ms. Streufert: I presume any other typos or in grammar...

Mr. Hull: (Inaudible) were, Kenny (inaudible) is the Subdivision Planner (inaudible) a few more changes that would clean things up for him, and I said we're keeping it verbatim. If we want to come back with things that clean up things just overall for the subdivision process, we would do that at a separate track. So, Kenny's working on that right now.

Ms. Streufert: Because there's section 9A-1.3. These rules impose or the rule imposes.

Mr. Hull: I have no objections to that either.

Ms. Streufert: Section 9A-1.3.

Chair Apisa: What section is that?

Ms. Streufert: Section 9A-1.3.

Mr. Hull: These rules impose.

Chair Apisa: Okay, some minor grammatical modifications. Do we have a motion to approve or a motion?



Ms. Otsuka: Motion to approve with the grammatical errors corrected.

Chair Apisa: As noted.

Ms. Otsuka: As noted.

Chair Apisa: Do we have a second?

Ms. Streufert: Second.

Chair Apisa: We have a motion on the floor. Is there any discussion on it? Roll call vote, please.

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

Mr. Ako: Aye.

Mr. Hull: Commissioner DeGracia?

Mr. DeGracia: 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 Apisa?

Chair Apisa: Aye.

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

### **CONSENT CALENDAR**

Mr. Hull: Next up, the consent calendar was approved by adoption of the agenda.

**Status Reports (None)**

**Director's Report for Projects(s) Scheduled for Agency Hearing (None)**

**Class III Zoning Permits (None)**

## **GENERAL BUSINESS MATTERS**

Mr. Hull: So, moving on to General Business Matters. H.1.

Amendment to Condition 2 of Class IV Zoning Permit Z-IV-2015-16, Use Permit U-2015-15, Variance Permit V-2015-2, and Special Permit SP-2015-04 to allow continuation of operation involving the asphalt batch plant facility on a parcel situated on the mauka side of the Kaumualii Highway, approximately 0.25 mile inland and 0.75 mile west of Waimea Canyon Middle School, Tax Map Key 1-2-006:009 CPR Unit 6 and contain a total area of 2 acres = MAUI ASPHALT X-IV, LLC.

a. Director's Report pertaining to this matter.

Mr. Hull: I don't have anybody sign 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, you may approach the microphone. Seeing none, I'll turn this over to the Staff Planner to go over his report.

Mr. Idica: Good morning, Madam 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: So, any questions in regards to this matter for myself or the applicant?

Chair Apisa: I guess just clarity on they hope to get approval on a new site within a month, but they're asking for two years.

Mr. Idica: Yeah, you know what, that one I would like to defer to the applicant to kind of gauge on how they want to...

Chair Apisa: Applicant, thank you.

Mr. Jung: Good morning again, Chair. Ian Jung on behalf of the applicant, Maui Asphalt, LLC. The owner actually is the County of Kaua'i, so we do have Mr. Wade Lord, who's the CIP Manager in the back there, just in case there's any questions from the ownership standpoint. I don't necessarily have a presentation for this particular project. It's been in place since 2015, and as some of you know, during 2015 there was a big resurgence of trying to do a lot of road repair and new roads that came in, and Maui Asphalt at the time, saw the need for providing such supplies to the DOT, or State Department of Transportation, and County of Kaua'i Roads Division. So, they set up shop in 2015, which was supposed to be a two-year venture, basically for the highway improvements. Realizing that there was a need for this type of material, they ended up staying and have since been trying to locate a new location. I can let you know that we've secured it, and we actually are on the December 10th agenda for the new Ma'alo site, which is off Ma'alo Road up in Grove Farm property, more centralized in Līhu'e. So, the reason for the staggering of the two-year request is we have obligations under our lease, as well as the conditions of approval, that if we relocate within, if the permits get approved on December 10th,

then the relocation procedures can start once the grading permit's approved. Grading permits can be three to six months, depending on the review time by the county. And then once the grading permit is cleared, then we can get clearance on the building permit, which would then allow them to establish the site. It's a fully mobile site, but it does take a variance for the height because it does exceed 50 feet, but once that site is mobilized and reconnected and configured, then they can start operations. So, the additional time on the current site here in Waimea is to clean up that site to restore it under our restoration obligation of the lease, as well as the conditions of approval.

Chair Apisa: So, the two years would not all be operations. It would include cleanup and...

Mr. Jung: Correct. Yeah. So, we sort of created a schedule where, operationally, if it is approved on December 10th, then they can move on within six months, get the final permits that are necessary outside of these land use entitlements, which are more of those zoning kind of permits. So, once those are clear, they can get cleared on grading, building, and then construct within six months thereafter. And then that one-year time, we've agreed with the County of Kaua'i, and the CIP manager to do an 18-month lease extension from this date, which would then allow that additional six months of the remaining two years to be on site and to clean up the site for the project.

Chair Apisa: Thank you.

Mr. Jung: Sure.

Chair Apisa: Any other questions of the applicant?

Ms. Streufert: I just wanted to thank you for that explanation because I was wondering about how it was going to be cleaned up because that is considered to be a potential site for affordable housing, I think, in the future, and asphalt is not exactly something you want to have in your backyard.

Mr. Jung: Yeah, correct.

Ms. Streufert: That's good to know that you guys are planning on cleaning that up, and that's part of the lease agreement. Thank you.

Mr. Jung: Yeah, it's both part of the lease agreement and the Conditions of Approval, so there's sort of that double-error review there.

Mr. Ako: Madam Chair, if I can ask. Okay, Ian, I going be the bad guy on this over here. I think the last time you came to the Commission was on January 10, 2023 at that time, and I think at that time you were asked that, in a perfect world, what would be your date for an extension, and your response was November 2024, which included not only, it was a two-year extension, and inside that was a buffer in there. I mean, I'm like, what happened? And, I mean, two years from now we're going to come back again, and, you know, not saying you going, but what happened during those two periods because I thought we gave you a buffer to keep everything going.

Mr. Jung: That's correct, Commissioner Ako. One of the issues we ran into was finalizing the lease with the landowner, which is Grove Farm. And then the other two requirements were the Ka Pa'akai Analysis, which is now required by this body, and the archaeological review. So, when they were working through that, it just, unfortunately, these types of studies take some time, and we just didn't anticipate that time for what it took. And so, we have those studies now complete. I was able to complete the written application about three months ago, and then the Planning Department were able to get it on this coming Planning Commission meeting in December 10th.

Mr. Ako: So, if it's approved in December, then you start relocating from Waimea to your new site, and then you start operating there already, and then we cease everything at the Waimea site?

Mr. Jung: It would cease first, because it's the same mobile unit. Yeah, it's the same mobile unit. So, it would cease, get relocated, and assembled there, and then start the operations at the new site. And then transition into the cleaning phase to get the place ready and operational for the County of Kaua'i to take possession.

Mr. Ako: So, do we need a permit on the remediation portion? Or the remediation or the permit is only for the processing of the asphalt?

Mr. Jung: Correct. This particular permit is for the commercial use of the land. So, there's no permit for the remediation. That's just a direct obligation for the applicant.

Mr. Ako: And that should take possibly beyond the two years?

Mr. Jung: No.

Mr. Ako: The complete remediation?

Mr. Jung: Yeah. Our obligation right now is structured on an 18-month timeline, and we have that six-month buffer. So, the hope is to get it approved. If we get it approved in December, then we can get operational within that one year, and then have the remaining six months to clean, and then have that buffer of six months, just in case there's some kind of delay that happens out of the process.

Mr. Ako: So, what we're dealing with right now is you have, what, like 12 workers? Or 12 plus that other company that you have that are employed?

Mr. Jung: Yeah, from my understanding, Stephen Frank's here with me, as well as Ian Uyesono. That's with the greater corporation involved, but there's three on-site employees, and it varies when there's the need because sometimes there's not night work now, but sometimes it'll have to get generated at night to prepare the asphalt for the delivery trucks to deliver it to the county or state job site. And so, it ranges between, one, they're managing the site, and three, when materials are being prepped. And then there's the builders that come in and bring, and I think we had nine noted as nine additional employees there.

Mr. Ako: Okay. Good.

Mr. Ornellas: So, my concern is that this parcel is currently zoned agriculture. Proposed use is for housing. Both of these uses are not compatible with what's happening right now. So, you know, I understand the necessity of having a batch plan. You know, we absolutely need that, but I'm just concerned about the use and I don't know if the county wasn't involved in this that it would even be permitted. But those are just my comments.

Mr. Jung: If I can address that, Commissioner Ornellas. You know, one of the issues we always grapple with when you have a larger industrial use is most of the industrial uses that were set up at the time of, like, rezoning or the general plan, they're all your smaller, like, 20,000 to one acre size. This particular plant needs three to five acres. So, the only resultant opportunity is sort of ag lands that are available through the State Special Permit process. And that's why with this particular permit application back in 2015, there was a State Special Permit from HRS 205, which is the state-level review. And then we had the county CZO Use Permit on county-zoned ag. And then the Class IV Zoning Permit, which brings it to this body for a final review.

Mr. Ornellas: So, the property you're relocating to is going to be leased from Grove Farm. Is that correct?

Mr. Jung: That's correct. We have the lease signed and entered into. Fortunately, it was in a location that was under a previous concrete mixing facility. Those permits have since lapsed since, like, the 1980s, but from a use standpoint, it's consistent with what this proposed use is on that site. So, you're not disturbing any, like, new area. It's going to be reconciled with the prior use that was on that site. And that was the key to try and negotiate with Grove Farm to get it there, where there was a previously existing use. And this is on about 2.5 acres of a 1,000-acre parcel up off the west side of Ma'alo Road as you're headed up to Wailua Falls.

Mr. Ornellas: So, what is the term of the lease?

Mr. Jung: The term of the lease is, I believe it's two years with options to extend.

Mr. Ornellas: My understanding is that Grove Farm has started to liquidate some of their holdings. And I'm concerned about a new owner. How would that work?

Mr. Jung: With a new owner?

Mr. Ornellas: Yeah. Someone, if Grove Farm decided to sell the property, how would that work?

Mr. Jung: Yeah. Then there would be an assignment of the lease with the options to be reserved. So, whoever is the new owner would have to reconcile the lease obligations from a commercial standpoint and carry those over along with the options that are built into that.

Mr. Ornellas: But, that's just a two-year lease.

Mr. Jung: Right. I think it had another two-year option. But I can double-check that. I didn't really prep as much for that one as it's coming up on the Planning Commission agenda.

Chair Apisa: So, the option, is that the tenant's choice.

Mr. Jung: Correct.

Chair Apisa: So, they could have up to four years.

Mr. Ornellas: It's not really very long in the whole scheme of things, but we'll see what happens.

Chair Apisa: For road repair.

Mr. Ornellas: Thank you.

Mr. Jung: Sure.

Chair Apisa: Good questions. Do we have any further questions? No other questions. We'll ask for the County Planner's recommendation.

Mr. Idica: Thank you, Madam Chair. Based on the foregoing evaluation and conclusion, it is hereby recommended that Class IV Zoning Permit Z-IV-2015-16, Use Permit U-2015-15, Variance Permit V-2015-2, and Special Permit SP-2015-4 be approved for the extension of time to allow the operation of the Asphalt Batch Plant facility at its current location.

Chair Apisa: Thank you. Commissioners, any last comments or questions before we go to a vote?

Mr. Ako: Can I comment on this?

Chair Apisa: Please.

Mr. Ako: I think this one, I find myself kind of caught in between places on this. I mean, I guess on the surface for me, it's just another quick extension to have somebody continue operations there because what are you doing, right, I mean, you're paving roads on the county. And I think from doing it that way, bringing in another competitor in there, you bring down the prices. And I'm going to guess that if you ask people in this community what's their biggest complaint, it's going to be about roads and potholes and we need to go ahead and get that done. And at the same time, I think we're also talking about the need of housing. I mean, I don't know whether that's a bigger issue for the county or not. And we're operating right now on county land and we're kind of pushing back the housing projects and then you tie that into, you know, let's assume that we say, no, we're not going to extend it, then we're putting guys out of work also here, which kind of also adds to the economic failure that we're, I shouldn't say failure, to the economic, I guess, stress that we're having. So, I guess I'm looking at this as we're kind of getting caught in between what the priorities of the county might be over there.

Ms. Barzilai: Chair, we have Mr. Wade Lord here from the County, who can maybe speak to those issues. If the Chair would like.

Chair Apisa: Yeah, I see them as two unrelated issues, but if Wade Lord has any input to add about the concern about housing, is that a concern?

Mr. Ako: Well, actually, it's just a comment, I think I have over here...

Chair Apisa: Oh, a comment.

Mr. Ako: It's not so much concern.

Ms. Barzilai: Maybe a brief status then.

Mr. Wade Lord: Good morning, Commissioners. Wade Lord, for the record, Public Works Department. Happy to answer any questions.

Mr. Ako: Okay, I'll...should this commission extend on these for another two, permit for another two years. How does that affect housing? Does the housing project go back two more years or is it a compounding effect?

Mr. Lord: I'm sorry, a specific project? Are you referring to...

Mr. Ako: Like this Waimea (inaudible).

Mr. Lord: Okay. Well, as it relates to our lease, we weren't a party to this request. It's just, like you said, two separate actions. Our lease with (inaudible) they came to us with a request for an extension. So, that they could facilitate a smooth transition from the county property into the new lease Grove Farm property. And so, what we did was we agreed to a schedule of performance measures that our consultant is drafting right now, and we'll have this lease extension executed this coming month, but before the end of the year. And what that extent, what that, what those performance measures do, is they require the tenant to do certain environmental cleanup work while there's still a tenant, and the cleanup, the environmental cleanup survives the termination of the lease. So, even if the lease terminates in 12 months or 18 months, that provision is an obligation of the tenant until they meet all of the environmental requirements of the provision. So, that's really the county's interest in or the (inaudible) interest in this to make sure that the Waimea 400 site when returned is in clean shape and can be used for future purposes here being outlined by the community.

Mr. Ako: And you're pretty confident that the two-year period would be able to remediate everything back to how it was?

Mr. Lord: I am. I am. Yes.

Mr. Jung: Chair, if I can just address that, I think the Housing Project is the Waimea 400 project, which I believe is still in planning stages and working through some initial conceptual designs that community members have kind of met in different charrettes and stuff so, is it final? Do we know?

Mr. Hull: Sorry. I just want to make sure. So, the housing portion of the Waimea 400 is actually only about 30 to 40 acres of the Waimea 400, it's not the full 400 acres, the vast majority of the Waimea 400 is within wetland areas, and is not being looked at for housing purposes, including but not limited to the asphalt site. So, the asphalt site isn't where the housing is being proposed. But then secondly, where it takes the private sector a fairly long time to get projects spun up, it takes them public sector exponentially longer to get projects spun up. There are environmental assessment or an EIS requirements that the private sector is not beholden to, so, my

understanding in speaking with the Housing Director, his hope is to have the environmental's work all done at the sunset of this administration of view, within the next two years, and from there, then they can look at a possible entitlement process. So, it's going to take about two years to get the environment done, and again, it's two separate locations on the parcel. So, long story short, Commissioner Ako, we don't anticipate this lease serving as a blockade to future housing.

Mr. Ako: I think I started already.

Ms. Otsuka: Good point.

Chair Apisa: Thank you for clarifying. Any other questions?

Ms. Barzilai: I think we're ready for a motion. You ready for a motion?

Chair Apisa: We ready for a...anyone ready to make a motion?

Mr. DeGracia: I move to approve Class IV Zoning Permit Z-IV-2015-6...

Ms. Barzilai: Let me, let me interrupt you, I'm so sorry, Commissioner. The application, the petition is, motion to modify Condition 2, petition to modify Condition 2. So,...

Mr. DeGracia: Okay, motion to...

Ms. Barzilai: ...that's what the approval would concern.

Ms. Otsuka: Excuse me?

Mr. DeGracia: Okay, I move to accept the amendment to Condition 2, Class IV Zoning Permit, Use Permit, Variance Permit, and Special Permit till all construct of operation involving the asphalt batch plant facility. Permits No.'s are Class Zoning Permit Z-IV-2015-6, Use Permit U-2015-15, Variance Permit V-2015-2, and Special Permit Sp-2015-4.

Chair Apisa: Thank you. Second?

Ms. Streufert: I'll second.

Mr. Ako: Second.

Ms. Otsuka: But, regarding the Recommendation No. 8?

Chair Apisa: This is H.1., Agenda Item, Amendment to Condition 2 of Class IV Zoning Permit. That's where we are.

Mr. Hull: Oh, no, I think...

Ms. Barzilai: Of all subject permits.

Mr. Hull: ...Commissioner Otsuka is bringing up concern with Condition No.8.



Ms. Otsuka: I wanted to do a housekeeping Condition No. 8.

Chair Apisa: We have a motion on the floor, so this would be our discussion.

Mr. Hull: No, I think if there's a, any anticipation for a motion to amend...

Chair Apisa: Oh.

Mr. Hull: ...it would have to occur during discussion.

Chair Apisa: Okay.

Mr. Hull: I think what Commissioner Otsuka is getting at, she has a housecleaning measure she'd like to propose, introduce...

Chair Apisa: Oh, okay. Thank you.

Ms. Otsuka: Yeah.

Mr. Hull: ...on Condition No. 8.

Chair Apisa: please, go ahead.

Ms. Otsuka: Recommendation No. 8, if the words, the applicant is advised that, can be removed. And it should start with, should any archaeological or historical resources be discovered.

Mr. Hull: Yeah, so these are an older archaeological condition that was pretty standard in previous permits since then the commission has utilized a bit more stronger language. This is just, like I said, an older condition so I think the department is open to, and of Romio putting on the stronger language, which would read, Romio could you read that for the commission?

Chair Apisa: So, this would be Condition No. 8?

Mr. Hull: Yeah.

Chair Apisa: Thank you.

Mr. Idica: Okay, so Condition No. 8 has been amended to read, should any archaeology, archaeological or historical resources be discovered during ground disturbing construction work, all work in the area of the archaeological historical findings shall be immediately, shall be immediately ceased and the applicant shall contact the State Department of Land and Natural Resources, Historic Preservation Division at the phone number, and the Planning Department at the Planning Department's phone number.

Mr. Hull: Yeah.

Chair Apisa: Thank you.

Ms. Otsuka: If you don't mind, can you remove the word be?

Mr. Idica: Excuse me?

Ms. Otsuka: On the third line, historical findings shall immediately cease, remove the word be.

Mr. Idica: Okay, will do. Thank you very much.

Ms. Otsuka: Thank you.

Ms. Barzilai: So, I think you have to withdraw your motion and then move again as amended.

Mr. DeGracia: Okay, well, could I ask to amend my previous motion to include amendments to Condition No. 8?

Ms. Barzilai: It requires two votes, but yeah, you can do that.

Mr. DeGracia: Okay. So, if it's easier, then I'd like to withdraw my motion.

Chair Apisa: Since the second...

Ms. Streufert: (Inaudible) of withdrawal.

Ms. Barzilai: And then just move again as amended.

Mr. DeGracia: Okay, I'd like to move my previous motion as amended.

Mr. Ornellas: Second.

Chair Apisa: Okay, we have a second. Now we have a motion on the floor, good comments there, Commissioner Otsuka. Thank you. And do we have any discussion on this? I will take a roll call vote, please.

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

Mr. Ako: Aye.

Mr. Hull: Commissioner DeGracia?

Mr. DeGracia: 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 Apisa?

Chair Apisa: Aye.

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

Mr. Jung: Thank you, Commissioners.

Ms. Otsuka: Thank you.

Mr. Hull: Next, we have H.2.

Amendment to the Updated Master Plan indicating the designated areas for farm dwelling units with the Moloaa Hui Project Area - Class IV Zoning Permit Z-IV-1997-29 and Variance V- 1997-6 to allow the transfer of density from CPR Unit 26 to Unit 24 related to property located in Moloaa and Papaa, Makai of Kuhio Highway and Koolau Road, immediately across the former Meadow Gold Dairy site, Tax Map Key(s) 4-9-009:009, Units 5 & 7 = **HALEWOOD GARDENS LLC. (RHEA M. KOWARDY, TRUSTEE thru MOLOAA HUL LANDS, INC.)**

a. Director's Report pertaining to this matter.

Mr. Hull: We don't have anyone sign up for testimony. But would anybody in the audience like to testify on this agenda item? Seeing none, I'll turn it over to Dale for the report pertaining to this matter.

Mr. Cua: Thank you, Madam Chair, and members of the Commission.

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. Hull: Dale?

Mr. Cua: Yes.

Mr. Hull: Sorry. If the commission would beg my indulgence. You folks have had this report for some time, it's a very simple switch of one farm dwelling unit from one CPR unit to another farm dwelling unit, or to another CPR unit. I think just summarizing that, unless you guys like further analysis provided.

Ms. Barzilai: I'm sorry, Ka'aina, did we call for testimony?

Mr. Hull: Yeah.

Ms. Barzilai: We did? Sorry.

Mr. Cua: Yeah.

Mr. Hull: So, in summary, it is literally taking the ability to use half a farm dwelling on CPR Unit 26 and moving it to CPR Unit 24.

Mr. Cua: Correct.

Mr. Hull: I know there's a lot of people in the audience that have been sitting for a while for a separate agenda item, so that why I just...unless the commission would like Dale to read the whole report.

Chair Apisa: I think we're good, Dale. We have the report, we read it. But, did we get public testimony on this? I don't recall that.

Mr. Hull: We can call for the Moloa'a farm dwelling proposal is there any...we don't have anybody signed up. Is there anybody that would like to testify on this agenda item? I'm seeing none.

Chair Apisa: Okay, thank you.

Mr. Hull: Do you guys have any questions for staff or the land owner?

Chair Apisa: If there are no questions, does anyone have a motion? To move the residential unit from one CPR unit to another.

Mr. Ornellas: Move to amend updated master plan indicated the designated areas, performed dwelling units with the Moloa'a Hui Project Area, Class IV Zoning Permit Z-IV-1997-29 and Variance V-1997-6 to allow transfer of density from CPR Unit 26 to Unit 24.

Chair Apisa: We have a motion on the floor. Do we have a second?

Ms. Otsuka: Second.

Chair Apisa: Is there any discussion? Roll call vote, please.

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

Mr. Ako: Aye.

Mr. Hull: Commissioner DeGracia?

Mr. DeGracia: 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 Apisa?

Chair Apisa: Aye.

Mr. Hull: Motion's approved, Madam Chair. 6:0. Next up, I'm going to relinquish the seat to the County Attorney's Office, we have both and Director's decision and a, (inaudible) that we're a party to, so I'll hand it over to Laura.

Ms. Barzilai: Thank you, Ka'aina. So, I'm going to read the notice.

In the Matter of a Notice of Violation and Order to Pay Fines, for 1) illegal commercial events within the Agricultural District (weddings, retreats, spiritual events and private ceremonies) and the failure to cease and desist and secure the required permits, and 2) the construction of seven (7) yurts without the required permits, related to the property located at Hui Road, Anahola, Kauai, TMK 49003001, **KALALEA TRUST**, applicant, as Appeal File CC-2025-1.

a. Petition to Appeal Notice of Violation & Order to Pay Fines, received by the Planning Department on October 9, 2024.

b. Clerk of the Commission's Recommendation to Refer an Appeal(s) of the Planning Director's Decision to issue a Notice of Violation and Order to Pay Fines, for 1) illegal commercial events within the Agricultural District (weddings, retreats, spiritual events and private ceremonies) and the failure to cease and desist and secure the required permits, and 2) the construction of seven (7) yurts without the required permits, related to the property located at Hui Road, Anahola, Kauai, TMK 49003001, **KALALEA TRUST**, applicant, as Appeal File CC-2025-1.

Ms. Barzilai: I believe also in the record are the appeal documents submitted by Mr. Langschmidt. Chair, would you like to speak at this time?

Chair Apisa: Yes, but just to remind the commissioners at this time, the only decision before the commission is whether to accept the form of the appeal and refer to a hearings officer for a contested case. Today, we will not take any substantive discussion or evidence on the matter.

Ms. Barzilai: We do have, believe Mr. Langschmidt from Kalalea Trust and we have Deputy County Attorney Chris Donahoe. They each want to get up and say something very brief before any motion will be made.

Mr. Carl Langschmidt: Hi. Good morning, everyone.

Chair Apisa: Your name for the record, please.

Mr. Langschmidt: My name is Carl. I'm a trustee for the...

Chair Apisa: Last name, just for the record.

Mr. Langschmidt: Family name is Langschmidt, yeah. I am the trustee for the Kalalea Trust and a member of Garden of the Eden Church.

Chair Apisa: Thank you.

Mr. Langschmidt: So, I just wanted to really, I mean, this whole situation is a real frustration because it's a waste of a lot of resources and people's time. I understand that this whole situation arose from a neighbor complaining, I have one very difficult neighbor on Hui Road, and this has recently arisen. a few months ago after a dispute with this gentleman. This gentleman, I've got photos on my...

Ms. Barzilai: So, Mr. Langschmidt...

Mr. Langschmidt: Yeah.

Ms. Barzilai: ...today you are being offered an evidentiary hearing, that is the decision that is pending before the commission is whether to refer this as a contested case to a hearing officer, which will entitle you to an evidentiary hearing. The commission is not taking evidence today, and I think Mr. Donahoe wants to speak that fact.

Mr. Langschmidt: Can it not be dismissed? Because, I mean, I'm just saying, like, the commercial events, like Donna is my neighbor, and my wife and I run a private ministry. We don't run commercial events. I mean...and on top of that, the inspectors trespassed on our property, if you trespass on my home, I'm sure you'll at times see my wife naked and then you can charge me for operating a strip club or something. It's ridiculous. They trespass and then they come up with some you know, make up some stuff like I'm operating commercial events. I'm not operating commercial events.

Ms. Barzilai: Mr. Langschmidt, if I may, Chair, I think it might be appropriate to hear from the department's attorney at this time.

Chair Apisa: Yes, and actually, though, I would like to point out, Mr. Langschmidt brought up a good point. We are actually neighbors in the same CPR unit on opposite ends of a five-unit CPR, but I have no financial gain or anything. We were simply neighbors. This matter before us is, we live in Kilauea and this matter before us is a Moloa'a property, it's an entirely separate property, so I don't feel like I have any conflict, but I do want to make that disclosure that we are neighbors, but there's no, I have no financial gain or conflict of interest.

Ms. Barzilai: In other words, Chair, you are not a neighbor to the subject property.

Chair Apisa: I am not a neighbor to the subject property, and I was not aware of it until I got it in my hearing packet, my commission meeting packet.

Ms. Otsuka: Thank you.

Deputy County Attorney Chris Donahoe: Good morning, Chair and Commissioners. Deputy County Attorney Chris Donahoe. I have no objection for the matter being referred to a contested case, for a contested case hearing. It'll give Mr. Langschmidt and the county to present their arguments and their case and their evidence at that time.

Chair Apisa: So, what I'm hearing is that it would go to a hearings officer and that's where your presentation would be made.

Mr. Donahoe: That's correct.

Mr. Langschmidt: I obviously just would like the whole thing dismissed sooner rather than later, but it's a waste of everybody's time.

Chair Apisa: I understand, but I believe that is a process that we need to go through.

Mr. Langschmidt: Okay.

Mr. Ako: Madam Chair, I'll make a motion.

Chair Apisa: You'll make...okay, we have a motion.

Mr. Ako: So, I move to accept the appeal filed as CC-2025-1, and to refer this to Boards and Commissions to conduct a required analysis in a contested case hearing.

Ms. Barzilai: I need a second, please.

Chair Apisa: Do we have a second?

Ms. Otsuka: Second.

Chair Apisa: So, we have a motion on the floor to refer it to a hearings officer. Is there any discussion?

Mr. Langschmidt: Can you make a motion to dismiss it?

Chair Apisa: I don't think that's an option.

Ms. Barzilai: It's an option within the commission to hear the evidence today and to make a decision on the record, but I believe there's a motion pending on the floor.

Chair Apisa: There's a motion on the floor and that's customary that we don't hold the hearings ourselves is referred to a hearings officer. That's pretty customary.

Ms. Barzilai: I'll take a roll call vote, Madam Chair.

Chair Apisa: Yes, please.

Ms. Barzilai: Motion to accept appeal and refer to a hearing officer. Commissioner DeGracia?

Mr. DeGracia: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Vice Chair Ako?

Mr. Ako: Aye.

Ms. Barzilai: Chair Apisa?

Chair Apisa: I think the decision has been made, so, aye.

Ms. Barzilai: Thank you. Motion carried. 6:0. Mr. Langschmidt, you will be notified of the date of the hearing. Thank you for coming.

Chair Apisa: Thank you.

Mr. Donahoe: Thank you.

### **COMMUNICATION (None)**

### **COMMITTEE REPORTS (None)**

Ms. Barzilai: Item is concluded. So, if we are continuing on right now, I'll go ahead and take care of the agenda. We don't have Communications. We do not have Subdivision Committee Reports, and at this time, We're on K. Unfinished Business for Action.

### **UNFINISHED BUSINESS (For Action)**

Ms. Barzilai: This is a long one guys, be patient.

Special Management Area Use Permit SMA(U)-2022-1, Class IV Zoning Permit Z-IV-2022-1 and Use Permit U-2022-1 for the Construction of a Farm Dwelling Unit, Guest House, Garage and Associated Site Improvements, within Lot 11-A of the Seacliff Plantation Subdivision in Kilauea, involving a parcel situated approximately 1,000 feet West of the Pali Moana Place/Makana'ano Place Intersection, further identified as Tax Map Key: (4) 5-2-004: 084 (Unit 1)



affecting a Larger Parcel approximately 12.305 acres in size, NĀ KIA'I O NIHOKŪ, Petitioner-Intervenor, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUAI, Respondent, and PHILIP J. GREEN and LINDA M. GREEN, Trustees of the Philip J. Green, Jr., Trust, dated December 4, 2018, and the Linda M. Green Trust, dated December 4, 2018, Applicants. [Deferred, September 10, 2024.]

- a. Decision and Order of The Kaua'i County Planning Commission, Dated September 11, 2024; Certificate of Service.
- b. Hearing Officer's Amended Report and Recommendation of Contested Case; Certificate of Service. Hearing (Held): Dates: November 14, 15, and 17, 2022, December 12, 13, and 15, 2023, and January 9, 10, and 12, 2023.
- c. Respondent Planning Department of The County of Kaua'i's Exception to Hearing Officer's Amended Report and Recommendation of Contested Case; Memorandum in Support of Exception; Certificate of Service.
- d. Intervenor's Exception to Hearing Officer's Amended Report and Recommendation of Contested Case; Memorandum in Support of Exception; Certificate of Service.
- e. Applicants Philip J. Green and Linda M. Green's Answer to Intervenor's Exception to Hearing Officer's Amended Report and Recommendation of Contested Case, Dated October 11, 2024; Certificate of Service.

Ms. Barzilai: At this time, Chair, I would recommend calling council to council table to receive, so that you can receive argument. I would like to state for the record that I spoke with Mr. Irons, Mr. Green's attorney. I offered to suspend this meeting until after lunch today so that he could take a flight from O'ahu and appear, he declined to do so. Mr. Irons expected separate notice approving of his request for 10 minutes oral argument. Oh, Thank you. There is no requirement to provide notice to council of approval of oral arguments. Council is supposed to check the agenda to see what their item is going to come on. Mr. Irons did not indicate if we deferred today if he would choose to appear in the future. I would like to take testimony from those who are present now, starting with I'm sorry, Chair, we'll take testimony first. Starting with Kau'i Fu. Please state your name for the record, you have three minutes to speak.

Ms. Kau'i Fu: Thank you. Ke aloha nui a kākou. I am Kau'i Fu, Jessica Fu and I'm a resident of Kīlauea. This is Makua Ornellas, my son, and I have two other children, ages 12 and 5. And today I want to say thank you, mahalo, (speaking Hawaiian) from myself, my family, and my children who can't be here today for your time for this commission's time on this particular issue and to our Planning Department as well as our county, I come with much gratitude for each and every one of you here today, and I would like to show my aloha for you all, and for this place that hopefully we can, hopefully the recommendations on behalf of the hearing officer are heard today, and that you all are empowered to protect our community, space of Nihokū is such a special place and our community was stood up to stand for this place over and over again. So,

this is Oli aloha for Kīlauea and Nihokū. (Speaking Hawaiian). Aloha. Thank you for your time today.

Ms. Barzilai: Thank you, Kau'i. Next on the list to testify is Piko Vaughan.

Mr. Piko Vaughn: Aloha Planning Commission. My name is Pikomanawakupono Ka'ōpuaolanākahili Blaich Vaughn. I am from the ahupua'a of Namahana in the moku of Ko'olau on the beautiful North Shore of Kaua'i. Ever since I was a toddler, I wandered the slopes of Nihokū scouting for the tails of tropic birds, searched for nesting shearwaters and frigates, and weeded and cleaned the slope that looks down upon the community where I'm from. Four years ago, I testified in the first case at the age of 12 and now I was like, grown to a young man, I realized the time and dedication our community has put into preserving our sacred mountain for generations to come. I sit before you here today as the next generation. Now, I'd like to thank you for helping to protect Nihokū and approving the hearing officers' recommendations.

Ms. Barzilai: Pe'ena'e? Did I say that right? Sorry. Vaughn.

Ms. Pi'ina'e Vaughn: Aloha mai kakou. Hi, my name is Pi'ina'emalina Vaughan, and I live in Kīlauea, Kaua'i. I go up to Nihokū a lot to kilo and observe the land of birds and rain at different times of the year, such as piko o wākea and the spring equinox. Me and my siblings grew up rolling down the huge grassy hill up at Nihokū. I go there a lot and gather lauhala with my grandmother. When we started this case, I was in fourth grade. This is what my testimony said in fourth grade, Nihokū means a lot to me, like family. It is a place to get away from people and a place to connect with the 'aina. It is also a home away from home. Today, I'm in eighth grade and I feel the same exact way. I feel like Nihokū is such a sacred and special place which holds lots of Hawaiian traditions. Thank you for not allowing such a gigantic house so high on the mountain because the place would never be the same. Mahalo for your time.

Ms. Barzilai: Thank you. Next, Anaualeikūpuna Vaughn.

Ms. Anaualeikūpuna Vaughn: Aloha mai kākou. 'O wau o Anaualeikūpuna (speaking Hawaiian) Vaughn. I have been a part of this case from the beginning. Almost five years ago now. What I love about most about Nihokū is that it is not developed. It gives you a sense of the past because it is not as changed as everywhere else you see. From Nihokū, we can see Namahana Mountain Range, Wai'ale'ale on a clear day. The beaches of Kalihiwai and Kīlauea, and the layout of our town. We go with our 'ohana and on class field trips, learn and help to revive the mo'olelo of our 'aina by retelling them. We honor our ancestors by giving life in oli, chant and hana, work. To preserve the place in the community, it is important to not build houses too high up on the mountain because that would make it harder to connect to and learn from the past. Thank you for working to preserve the sacredness of this undeveloped place. Please approve the hearing officer's recommendations. Mahalo.

Ms. Barzilai: Thank you. Kealohilaniokamaile Eu-Parziale.

Ms. Kealohilaniokamaile Eu-Parziale: Aloha mai kākou. My name is Kealohilaniokamaile Eu-Parziale. I was born and raised on the north shore of Kaua'i and throughout my life I have taken care of Nihokū, Kahili, and Kīlauea in many different ways. I do beach cleanups, weeding,

maintenance, and volunteer work days, but most importantly I've helped to educate the next generation about our 'aina. As I get older and I'm faced with more responsibilities and leadership roles, I find myself understanding the importance of working to protect Kauai's beautiful environment and what that means for me and my community. I want my children's children to have the same privileges that I have had being able to preserve and enjoy our ahupua'a. So, on behalf of those who have come before us, the generations on their way, and us, the people who are alive and standing in front of you now, thank you for helping us to protect our sacred spaces, our endangered wildlife, and our native plants. Your decisions ensure the safety and well-being of our community. Mahalo nui loa.

Ms. Barzilai: Thank you. Ka'ōnohiokalā Sproat Armitage. Please state your name for the record.

Mr. Ka'ōnohiokalā Sproat Armitage: Aloha. My name is Ka'ōnohiokalā (inaudible) Sproat Armitage. I am from Kalihiwai, Kaua'i. My great-grandfather and great-great-grandfather who were the konohiki of Kalihiwai, used Nihokū as a place to kilo for fish. My grandparents, David and Linda Sproat were both interveners in the first contested case 40 years ago to protect Nihokū. I have visited with my 'ohana and with my Kīlauea achool class since I was in first grade. My friends and I did a lot of weeding to help make a habitat for the birds. I love the view from Nihokū. I also look at the views of Nihokū everyday from my home. It would not be the same with this huge house up high. Thank you for supporting the work of my 'ohana and our community across generations to protect Nihokū. Mahalo nui loa.

Ms. Barzilai: Thank you, Gary Smith.

Mr. Gary Smith: I thought it was age before beauty, but...beautiful. Good afternoon, Commissioners. My name is Gary Smith. As you can see from the youth behind me, I represent the old (inaudible) of Kīlauea, the people who were originally set that 1982 setback line where no houses to be built above a certain point, and that is because the people of old Kīlauea did not want to see houses on Crater Hill as they called it back in the day. Today we know Crater Hill by its proper name, Nihokū, which means a protruding tooth. Now, I would humbly ask that the commission accept and approve the findings of the master whereby the line that has been defended from 1982 until today, and I'm sure many of the old (inaudible) time residents who have passed would never in their wildest imagination. think that we would not defend this line until four generations later that comes today to carry on, carry out the banner, carry the torch. So, I humbly ask that you approve that and that uphold that line and give that line its credibility and veracity from one end of Nihokū all the way down to Mokulea Point and here and after steadfastly hold on to that wishes of the Kīlauea community. Mahalo.

Ms. Barzilai: Thank you, Beryl.

Ms. Beryl Blaich: Aloha, Commissioners. I'm Beryl Blaich. I reside in Kīlauea, and I have been following this issue since its beginning. The land in question is located within a development, Sea Cliff Plantation. A condition of this development was the establishment of a setback line above which no building could occur. This long investigation has established that that setback line from 1982 has never been altered despite the project developer's efforts. Though it sits within a development, the parcel in question. is not developed. Therefore, this undeveloped parcel, not yet built upon, may be developed and built upon only above its setback line. And I'm

so grateful for your work and I am so amazed to recognize that, you know we talk about working in the hope that our children's children will benefit. And I have today, seen my children and my children's children advocate for the preservation of the existing line. Thank you so much.

Ms. Barzilai: Thank you. Mehana Vaughn.

Ms. Mehana Vaughn: Aloha mai kākou.

Ms. Barzilai: You may begin.

Ms. Vaughn: Aloha mai kākou. Well, in the public testimony, we sent some photos taken yesterday morning about 7.45 a.m. and I, they hadn't gotten to you, we just brought a few to pass around, but I just wanted to tell you, first of all, what an honor it is to be here with you all today again. but also, to have our children and have our kūpuna and to have the very youngest keiki of our community, and so many community members here today, so many people here, their families have been in this for generations and it's just really an honor to be here for our mauna. The reason we sent the pictures and brought the pictures is because of this question of undeveloped. So, I wanted you to see, and I see there in your packet in color what it looked like yesterday morning. on this parcel. You can see there continue to be no buildings or structures of any kind. There are no improvements, infrastructure or dwellings. The only residences are the nesting sites of nene, pueo, ua'u kani (wedge tail shearwaters), and likely soon the moli will be coming to have their chicks. The parcel and surrounding areas and we also have a photo in there of the adjoining fish and wildlife parcel. It looks more developed because it has a predator proof fence and hala trees. The whole area remains undeveloped and certainly less than fully so. So, we just ask that you approve the hearing officer's recommendations with this very one small change in wording to accurately reflect current conditions on the 'aina, as the kids say, they've rolled down the hill and it's unchanged from four years ago, this is how they experience it. After three years, four public hearings, over 200 written testimonies in support of the community, more than 50 Zoom and in-person testimonies, nine days of this current contested case hearing, 20 expert witnesses and hundreds of pages of transcription, on top of two other contested case hearings, three sets of concurring hearing officer recommendations over more than 40 years, all in support of protecting the cultural practices, original setback line, sacredness, vistas, and sanctity of Nihokū. All that is left to you is one word, not, to just add the word not, not fully developed as the land and the entire parcel remains today. One word and one vote, yes, to all of the hearing officers, 17 vital, appreciated, thoughtful recommendations and to putting this contested case for rest, to rest. We pray for our generation, the kūpuna we follow, and for our keiki and theirs this one last time. Thank you so much for your time and authority to do the right thing for Nihokū and our community. Ke aloha nui no. Mahalo.

Ms. Barzilai: Thank you. Hoku Cody.

Ms. Hoku Cody: Aloha mai kākou. I'm Hoku Cody. I am one of the co-founders of Nā Kia'i o Nihokū and when this process started, I was living on O'ahu and flying to Kaua'i and I recently moved to Kaua'i a few years ago, full-time just to be closer to this effort. My testimony really here is just to thank you guys for the process and for really not this process, giving us the opportunity to not be dismissed in what we, I feel like when we started this effort, you know, in about 2015, Uncle Gary really just had a place name and a story that was collected amongst the

kūpunas that shared with him and over the years, and through this process, we've dug up and reconnected so much, and in that way challenged us in a good way. So, in that way the decision is up to you, but the process itself, we really just are thankful for. We learn so much about Nihokū. And as someone who's not from Kīlauea I see the changing landscape in the North Shore and its attempts to really dismiss any life ways of native Hawaiians and a Hawaiian like myself who comes from an urban place but looking for areas that allow us to malama, really special areas like Nihokū. We see...there's many hurdles for us to even get to the hill, not just with through Fish and Wildlife, but also through the gates that are meant to keep us out. And we do all kinds of things just to make sure that we can continue to go and reconstruct our remembering in that space. So, we really just mahalo you guys for hearing us out. We now know, and over the years and throughout this process, we now know more than ever before that Nihokū really does provide an unconventional scenario of a fluid system that really, really is hard to protect and maintain not just Nihokū, but our life ways. It's hard to protect without community and without the setback line, and that setback line was really, we feel a long-winded discussion of compromise between what we felt is a really special place that deserves to be undeveloped with the community that would really like and the agreements that were set out with the Sea Cliff Gate community. And in the 80s, when they put the setback line down, there weren't many options of how to protect the place, you know I think in the 80's, Kaho'olawe, was still being bombed. They had not yet consent decree to allow access for traditional ceremonies was still being developed. So, a setback line was one of the few along with the refuge, one of the few options available at the time, and so, we're just trying to work within what we have to continue remembering. And over the years, we've gotten...

Ms. Barzilai: Three minutes, Madam Chair.

Ms. Cody: ...we've gotten different options now, so I guess if, if it was the 80's now we might be proposing a different way to protect that place but here we are just trying to work with what we have and we really mahalo what you guys have done for this process and hearing us out. Mahalo.

Chair Apisa: Thank you.

Ms. Otsuka: Thank you.

Ms. Barzilai: Kyle Peru.

Mr. Kyle Peru: 'O Kyle Leslie (speaking Hawaiian) Peru. No Kīlauea mai au. My family's been from Kaua'i for a very long time, on my dad's side for about five generations and from my mom's side for a lot longer. Mahalo for your time and for your consideration and hearing our testimonies. This is a personal opinion, I am strongly against erecting another edifice of excess, as there are many that dot our moku. It was only going to be sold and resold over and over, and that doesn't benefit the rural community. So, how much is enough? The current climate suggests that max it out is the way, but it doesn't have to be, and it is not our way. Less is more and to us less on Nihokū is better. Thank you all for hearing us, for not striking us off, and for letting us be a part of this process. Aloha.

Ms. Barzilai: Thank you. Nanea Sproat Armitage.

Ms. Nanea Sproat Armitage: Aloha, my name is Nanea Sproat Armitage and this for me, or I'll start off by saying, I have...my family has resided in Kalihiwai for seven generations. This for me is like crazy because I can remember being a small child here with my parents as they were testifying and I remember being like, this is so boring, oh my gosh, what am I doing here? And now here I am as an adult. And when I walked up, my son was like, mom, this is so boring, I can't believe I'm here. So, we've come full circle. But I would like to just say, my grandfather and great-grandfather used Nihokū, which was Crater Hill at the time as a place to look for fish, and to gather and do cultural things. Both my parents, David and Linda Sproat were interveners in the first contested case 40 years ago to protect Nihokū and here I am 30 plus years later following my parents footsteps to help uphold what they set forth. And I just ask as you make your decision today that you consider, sorry, what benefit this development has for our community. We're slowly losing our special and sacred places, and I can only hope that one day, my children's children will still have places that they can gather. You know, my question is like if we keep bending and changing, it's only a matter of time before somebody is going to break the wall and get through. So, you know, there's a reason why they created those setbacks and regulations back in 1982, and I feel like it's important to uphold that. So, I would appreciate and ask if you folks can honor the hearing officer's recommendations for the 1982 setback regulations. And thank you for supporting the work of my family and other community members across many generations to protect Nihokū. Mahalo.

Ms. Barzilai: Malia Frye.

Ms. Malia Frye: Aloha, my name is Malia Frye. I'm born and raised in Kalihiwai, and I've been part of the community there my whole life. I've never left. I've been blessed to be here this entire time. Some of my earliest memories are going out to Nihokū with my dad as a really small child and looking at the ocean, walking around out there, and it was always such a special place and somewhere that was kind of one of our special holoholos with my dad, so, he's passed away now, and I remember that very fondly. I'm now raising my own children here and preserving these special places is so important as a parent. I want my children to have some of the experiences that I had and enjoy, even if it's just looking at these places because we can't access them as easily, but having some sort of access to them in their memories of this place and in their life growing up here. It's very sad to see access being limited throughout the island and to see developments scarring the landscape of beautiful places such as Nihokū that you can see from almost any point in Kīlauea Town. And I ask that you please uphold the recommendations of the hearing officers from 1982 and preserve this place for all of us. It's a very important place to the community, as you can see, people are coming forward and sharing some of their beautiful memories and we really hope that this is something that you're going to support as well. Thank you.

Ms. Barzilai: Thank you. There's no one else signed up to testify. Would anyone else like to testify on this matter before the parties come forward? Seeing none, Chair if you're ready.

Chair Apisa: Yes, at this time we would like to hear oral argument from the parties in the order of the case caption. Starting with the intervener, followed by the department, and finally Mr. Green's attorney who I understand is not here. Each party will have 10 minutes to present and then three minutes on rebuttal.

Ms. Barzilai: Starting with intervener, and as I stated earlier, I described my conversation with Mr. Irons on behalf of Mr. Green. Please state your name. You have 10 minutes.

Ms. Kirsha Durante: Aloha nui kākou. My name is Kirsha Durante and I'm the litigation director for the Native Hawaiian Legal Corporation. As a point of clarification, is the request for a deferment from the applicant before this commission? If so, I would like to address that before proceeding with my presentation.

Ms. Barzilai: Actually, he did not make a request to defer.

Ms. Durante: Thank you. Then I'll just briefly state for the record that we were here in September, as many of you commissioners who were here may recall. At that time, this commission prudently directed that the hearing officer provide clarification on one Conclusion of Law, which was Conclusion of Law 42. This commission set an expedited deadline for that request from the hearing officer of 30 days, which the hearing officer timely complied with when he submitted his amended recommendations on October 2, thereafter, the party's timely complied with the process set forth by this commission in its rules to provide exceptions as was permitted by the decision and order that this commission filed. All of that activity was completed on December, October, excuse me, 18, three and a half weeks ago. So, with more than enough time to know that this would be scheduled before the commission for today's proceeding. And that request, again, was expedited at the request of the applicant who, as those of you who are present may recall, started his presentation with justice delayed is justice denied. Emphasizing the delays that as he characterized it in resolving this case. So, it is appropriate to move forward with the proceedings today to hear oral argument for those who have availed themselves of the due process right, that is extended. You don't have to avail yourselves, but if you choose to and you are here and you avail yourselves, it would be appropriate for this commission to move forward and render a decision or take action on this contested case hearing matter. Now moving to the merits of this case briefly, you know, I had written something that I was going to present to the commission today, but I think the testimony that you just heard from many of the committee, community members address the two critical issues that arose during this contested case hearing, which was the setback line and the impact to Native Hawaiian practices. And there's really nothing more that I can say other than what you've heard from those who testified and all of that is confirmed by the record from the nine-day contested case hearing that was held and focused specifically on these issues. All of those recommendations that support the request that the interveners made at the onset, which was to apply the original 1982 setback line to the property and to impose mitigating conditions on the request for a permit in order to mitigate the impact to native Hawaiian practices. All of that is what the hearing officer recommended to this commission, and that we are asking that this commission adopt. The only modification to the hearing officer's amended recommendations that we are requesting has to do with Conclusion of Law No. 42. So, I want to briefly make three points about that. First, the applicant did submit exceptions to the amended or excuse me, an answer to our exceptions to the hearing officer's amended recommendations. And I just want to point out that the analysis and the arguments raised by the applicant are misguided and fatally flawed. And this is probably best illustrated through the argument that the applicant makes with respect to relevant area. When we're talking about relevant area for purposes of determining whether or not the subject parcel is developed, the applicant asks you to look at the entire subdivision in order to evaluate that there is infrastructure within the subdivision. There are roads within the subdivision, notwithstanding the

fact that the subject parcel itself has no development whatsoever. You saw photos from Ms. Vaughn who testified earlier. There are photos that were emitted during the contested case hearing and they're in black and white, but it doesn't change the fact that there's nothing there. There is no development on that property, yet the applicant asks you to look to the relevant area of the subdivision to determine that this is developed, but then when we talk about Native Hawaiian practices and this commission's obligation to affirmatively protect those practices, by doing a Ka Pa'akai Analysis, the applicant then says, no, no, no, it's not the whole area that the Planning Department within its discretion correctly identified as this parcel, the entire parcel and the neighboring refuge. The applicant says, no, no, no, it's not that relevant area that the Planning Department correctly or appropriately identified, it's just this one parcel that you look at whether or not Native Hawaiian practices are happening there. And the bottom line is you can have it both ways. You can't have a selective application of what is the relevant area and only use it when it benefits your interests. And so that's the first point I want to make about why the arguments made by the applicant are misguided. Second, when we think about development, this issue of development, and I know there's been lots of pleadings back and forth and there's lots of legalese and reference to case law, but if we just step back with a bird's eye view, the development and whether or not a parcel is developed, it's important and within our case law because the law says if it's developed, if there are things there, if there are structures, it is always inconsistent to allow practices to happen where things are developed, but that is why that definition which comes from State versus Hanapi, which the county correctly pointed out is a criminal law case. It's not a case that has to do with permits, but it really is the only case that gives us any guidance from the courts about what it means to have developed property. And it has a very clear definition of what it is. Develop, fully developed property has structures, has improvement, has infrastructure. This property has none of those things. And it's not only these pictures, it's undisputed. It was undisputed during the case and there was numerous pieces of evidence to support that. But when we think about that it makes sense because when property is not developed, what that means is that it triggers the Ka Pa'akai Analysis since 2000 when that case came out. And then the commission does its analysis. Are there practices? Are they being impacted? And what, if any, feasible action can be taken to mitigate that. Part of that feasibility analysis is, is it feasible to have practices happening where an area where a structure is built? And if it isn't feasible, given the circumstances of the case this commission is empowered to adjust the conditions in light of that. So, this idea of developed versus not developed, it is legalese, but it doesn't, the request that we are making to the commission to modify that language to say that this parcel is not fully develop does not deprive this commission from still determining whether or not there are mitigating conditions that need to be imposed in order to protect practices while also looking at what is feasible within the proposed subject parcel. And the final thing that I just want to note is that these exceptions that the intervenor raised don't change the outcome. As I said earlier, the outcome that Mr. Kimura recommended in his first recommendations were the things that we asked for and were the things that we presented evidence on to support. And he reached the correct decision. His amended recommendations also don't change the ultimate conclusion, which is the 1982 setback line applies, and conditions are appropriate to mitigate the impact to Native Hawaiian practices. So, I asked the commission to consider this, what's the benefit of the intervenors raising this exception, other than to advise and bring to this commission's consideration, what is potentially something that is problematic within the legal jurisprudence that exists and applies, but also practical implications. I touched on some of that earlier about what power the commission has to then, operate within its analysis and



determine what's feasible. But I also noted in my exceptions to the amended recommendations that it creates a problematic framework that is unworkable. Which is likely why our legal jurisprudence doesn't go that far saying a parcel can be bifurcated into developed and undeveloped portions.

Ms. Barzilai: Ms. Durante, I'm sorry to interrupt you. You've reached 10 minutes, but you will be given three additional minutes.

Ms. Durante: Thank you. I'll wrap up.

Ms. Barzilai: It's up to the Chair. It's up to Chair if she would like you to continue.

Chair Apisa: Yeah, I mean, like 30 seconds or just...

Ms. Durante: That's fine. It's appropriate that this is coming up during November, which is Makahiki season, which is so focused on the practice of kilo, which was really at the heart of this case.

Chair Apisa: Thank you.

Ms. Durante: So, we ask that the commission adopt the recommendations with the amendment I proposed. Mahalo.

Chair Apisa: Thank you.

Ms. Barzilai: Mr. Donahoe?

Mr. Donahoe: Good morning or good afternoon, Chair and the rest of the commission. Deputy County Attorney, Chris Donahoe, on behalf of the department. In addition to the county exceptions that were pretty detailed that I submitted and go into distinguishing of Hanapi, as well as some of the evidence that sets forth why the county department believes that lot 11-A should be considered in its entirety along with the refuge area. I just want to touch upon some a few additional points. One, and if it wasn't clear, it seems that a lot of the amended report focuses on undeveloped and less than fully developed as interchangeable terms, and those aren't interchangeable terms. And the Kalipi case, which stated, it's, you can have recognized Native Hawaiian traditional and customary rights on undeveloped land, but then the Pash case came along and stated, we'll extend that to include less than fully developed and that's the standard that Hanapi uses. It's either A, undeveloped or less than fully developed. And so, we've looked at a subdivision like Sea Cliff, you can make the point that there are 25 out of 48 residences, but that doesn't necessarily mean it's not fully developed if you just look at the relevant area, which the department determined was (inaudible) Unit 1 and Unit 2 of Lot 11-A, and the refuge and the refuge hearing officer correctly points out that deference should be given to the administrative agency who is tasked with coming up with what the relative area it is, and that was under the Mauna Kea 2 case. So, with that clarification, there's also additional evidence that focuses on why the entirety of Lot 11-A, and I agree with the interveners argument, there's nothing in the case law or statutes that allows a portion of a parcel to be partitioned off because it does make the situation unwieldy because in the same subdivision, you have the setback line, which is going to be different for each lot, and so if you look at just using, focusing on below the setback line,

then how do you characterize the rest of the parcel as less than fully developed? And so, some of the evidence that the applicant set forth in this case, at the contested case, acknowledges that Lot 11-A consists of both Unit 1 and Unit 2 in the application, describes the property, as the applicant is proposing to construct a single-family dwelling unit on Lot 11-A. In the land coverage, which is important, page 12, and this is also quoted in the Director's Report, they cite the total square footage for both Units 1 and 2 amounts to 536,006 square feet, which yields 53,600 square feet of allowable land coverage. That's what the applicant used to determine whether this proposed residence, which was 30,170 square feet was below that. And if, and I couldn't do the math, so I googled it. How much is 536,006 square feet? How many acres is that? Well, that's 12.305 acres. That's the entirety of lot 11-A, both Units 1 and 2. And so, the applicant's own application utilizes that as the subject property, the entirety of the lot. Also, the application mentions Native Hawaiian rights, impact on traditional and cultural practices, and also that they're asking this commission to find that they satisfy the requirements of Ka Pa'akai. Why would the applicant put those statements in their application, if they are now saying that it's fully developed and we don't need a Ka Pa'akai Analysis. It doesn't make any logical sense. And those arguments weren't made until these exceptions were submitted. There was a Ka Pa'akai Analysis submitted by the applicant for Lot 15, which is 1,900 feet away from Lot 11-A. Again, why would the applicant enter this exhibit, which is in a Ka Pa'akai Analysis, if now the argument is the entire subdivision is fully developed, you wouldn't need the Ka Pa'akai Analysis. Why would the Planning Commission have required a Ka Pa'akai Analysis to approve the Lot 15 permits, which they were approved and not require it of Lot 11-A. If they're both vacant lots, they're in the same subdivision. They don't have any houses on them. There's no infrastructure. And so, to not require in this case for the entire Lot 11-A, it goes against what this commission had previously ruled for other lots. The same thing goes for Lot 12. And again, this is another exhibit by the applicant. The Director's Report states that the property is vacant land, and its existing use is vacant. Lot 13, the same thing, it's vacant land. So...Now it seems that what the applicant is arguing is a portion, just a little portion of one of the lots where no other lots were considered to be less than fully developed, is now being considered to be less than fully developed. And that doesn't go along with the analysis other than Conclusion of Law of 42, it doesn't go along with the hearing officer's analysis at all, because the hearing officer does recognize the Native Hawaiian traditional and customary practices, discusses and, discusses the evidence that supported the Hanapi, that the Hanapi test was met. It includes those in the recommendations. So that's why, in and of itself, Conclusion of Law 42 is not correct. One quick point on the difference between the applicant did submit an exploration associate's archaeological field study. The field inspection was for the entire 12.305 acres. So again, it's looking at the entire lot as a whole, not just the 1982 setback or any other portion, it's the entire portion. What makes that different than a Ka Pa'akai is, the archaeological field analysis looks for historical properties, that's it. It doesn't analyze and it doesn't balance the Native Hawaiian traditional and customary practices and rights that are practiced in the relevant area. So, that is different than a Ka Pa'akai Analysis. And so...All the evidence that came into this case supports that it's the subject property and the relevant area has always been Lot 11-A, Units 1 and 2, and the surrounding refuge area. And that's what the Ka Pa'akai Analysis that the Planning Department submitted in its Supplement 6. And it's the recommendation of the commission that the commission strikes the language of Conclusion of Law 42 or adds the words, not fully developed instead of less than fully developed, or as were less than fully developed, does not include, because the evidence is clear that it's not fully developed. And that the Ka Pa'akai Analysis in its entirety was required

and was proper and that the recommendations that were made should be approved by this commission to approve the permit with the conditions that take into account a balance between the Native Hawaiian traditional and customary practice as it relates to the entire relevant area. Thank you. And if the commission has any questions.

Chair Apisa: Thank you for that explanation.

Ms. Barzilai: Chair, you can (inaudible) to allow the parties three additional minutes, if they'd like to take those three minutes. Sorry. Chair, if you'd like to allow an additional three minutes per party.

Chair Apisa: Certainly.

Ms. Barzilai: If there are any further comments for rebuttal.

Chair Apisa: Do you have any...first it would be...

Ms. Barzilai: It would be Ms. Durante.

Chair Apisa: Yes. You have three additional minutes.

Ms. Durante: I'll be brief. I really just want to thank this commission for first of all, allowing the contested case hearing. I mean, I think as I shared the last time, the amount of resources that were put into this hearing, the amount of days that this hearing officer took, the 82-page decision that or recommendation that he made to this commission, it was extremely thorough. And I think what the county's attorney and myself are saying, is that work, that very thorough, comprehensive work that Mr. Kimura did, I know for the intervener, we do not want to see that undermined because there is one Conclusion of Law in there that is somehow inconsistent with legal jurisprudence. Because that undermines all of the effort of all of the witnesses, all of the effort of Mr. Kimura and it would undermine the validity potentially of that decision if it was subject to challenge. I will say that I don't think legally we'll survive the challenge where that decision will be defeated, but it will nonetheless prolong this process, and it will prolong the appeal process, and it could potentially lead to problematic outcomes, which is why I focus on the practical impacts of adopting what's being proposed when you can still reach the same outcome with something that is backed up by law. Thank you.

Chair Apisa: Thank you.

Mr. Donahoe: Deputy County Attorney, Chris Donahoe. I know based on that, there's no rebuttal from the County. I would mirror much of what Ms. Durante said.

Chair Apisa: Thank you.

Ms. Barzilai: So, I would just like to make one statement, please. We have a party that isn't here right now because he stated that he couldn't be guaranteed more than three minutes to speak and that's concerning. No additional notice was required to Mr. Irons for him to appear today, although he did not ask the commission to defer this meeting or to defer this item, please note that it is within your purview to do so if you did deem that that was appropriate. He did speak to

Mr. Donahoe, and I think to preserve the record, I would ask that Mr. Donahoe describe his conversation, please, with Mr. Irons.

Mr. Donahoe: Deputy County Attorney, Chris Donahoe, again. Yes, I spoke, I contacted Mr. Irons prior to the matter being called to see if he would be appearing, and he did mention the notice that he wasn't providing specialized notice. I said it was properly noticed under, on November 6<sup>th</sup>, and stated that we would be given an opportunity to present argument. He said he was not going to, did not intend to fly over, but was requesting a Zoom access. And then I relayed that information to Ms. Barzilai.

Ms. Barzilai: At which time it was explained that this meeting was not noticed with interactive conference technology. This is an in-person meeting and parties are obligated to watch the agenda so that they know when their item is on. With that said. Chair, if you want to ask questions of the parties.

Chair Apisa: I don't have any questions directly at this time. Do the other commissioners have questions? I guess the thoughts going through my head would be to defer, not to defer, but we'll see if that becomes more clear.

Mr. Ako: Well, I'll give you my two-cents. Well, first of all, I just want to say thank you for the testimony that you have brought forth to this body today. I don't think we've always seen eye to eye or, I shouldn't say we, you know, I don't think you folks have always agreed with what I had to say and neither did I agree with everything that you had to say, but I think what I really appreciate is the fact that the demeanor that you bring forth, in bringing your testimony to us. I think that is something that for me, I think I really appreciate in the manner that you're doing that.

Chair Apisa: Mutual respect.

Mr. Ako: Yeah, which we don't always have the, I guess the luxury of having that in every case there. But I guess for me, I do have some questions. If I can ask? You know, I think we sent it back to the hearings officer to get clarification, and what we got back, I think, was, again, something that we didn't expect to come back. But in my mind, you know, there's got to be some kind of logic in terms of what he had decided. I think when you look back in the past decision that he has made it's been very solid decisions, very clear, very understandable, and this is one, I think, that comes with a (inaudible) what has come out. Is there a way in your mind that you can kind of possibly conceive what this man was thinking? I mean, not to go into his brain, but he must have had some kind of logic. I'm trying to figure out what that was.

Ms. Durante: If I may, Commissioner Ako.

Mr. Ako: Yes, please.

Ms. Durante: You know, I will say this, you know, his first recommendation said the property is fully developed, and then the amended recommendation said it is fully developed in this certain portion, which ultimately, when you look at the footnote, he's really saying it's actually not fully developed, it's less than fully developed. That's really what he's saying. And I think the concerns, I can't speak for the county attorney, but I can speak for the intervener, that the concern with that,

even if that is the interpretation that a court will, I guess impute to Mr. Kimura's Conclusion of Law No. 42, is that whether or not land that is fully developed triggers that analysis is actually something that has not been resolved by the higher courts. So, this issue of the developed, less than fully developed or not developed, it's black and white where the law stands with respect to fully developed and not fully developed, is not as clear as with respect to less than fully developed. So, that's where the concern that I share has to do with that because then it will prompt the court to have to try and infer what did Mr. Kimura mean? And if you step back and look at that, the totality of the recommendations, it cannot get to that conclusion without the property being not fully developed because that's what triggers the analysis he undertook. The question will then be, will the court have to somehow establish some type of legal framework for less than fully developed and how that looks and how that can be applied to all parcels, because it won't just be residential parcels, this could be other developments, this could be subdivisions, you know, there's all types of different panning actions that happen. And so, I think that that's part of, I think, what the gray area is, there's also just notice issues like when State versus Hanapi, which is the case that Mr. Donahoe touched on, which was a criminal case, which is the case that we all talked about as providing guidance on what fully developed means. Part of the reason why that is part of a criminal case is because if practitioners go to lands and they engage in practices, one of the things that they have to show as a defense to a crime they're charged with, is that the property is not fully developed, it's undeveloped. So, if we employ a strategy or a framework where land that looks like the photo I held up earlier is now developed or less than fully developed for legal purposes, how is a person, a practitioner, to know that that's considered legally developed or less than fully developed. I mean, any person, there is a common sense element to law and I think that's because judges are people too. You know, how is an individual going to know that that property is fully developed or less than fully developed because it's zoned for a residential purpose. And I think that's the concern and that's the gray area that we are raising in our exception, and I agree with you, you know, 82 pages, I think it was over 100 findings of fact, you know, 60 Conclusions of Law, I mean, and the only one we're saying there's this issue is this one. And if I were to infer, I actually think Mr. Kimura, upon reflection saw that there was problems with it because he didn't say it is fully developed. He didn't maintain that. He retracted it. So, even he knew that fully developed doesn't reconcile with the rest of his decision, which he chose to not change because he could have, but he chose to not. So, all we are asking is that with respect to this, as I said, it doesn't deprive the Planning Commission from still setting feasible, addressing the feasibility of the mitigating conditions and impulses. And the Planning Commission is within its powers to consider those things, which I think makes sense, it's a balancing. It's not that landowners are Native Hawaiian cultural practitioner rights prevail, it's a balancing, and that is a balancing. And I'm sorry, I don't know if that addresses your question.

Mr. Ako: No, yeah, no. That was helpful. I know we've done it in the past where we've done a Ka Pa'akai Analysis for an entire development, yeah, as a whole and not necessarily individual lots around there. And knowing that the Ka Pa'akai decision came out in 2019, was there a Ka Pa'akai Analysis? Do you know? For this development.

Ms. Durante: So, I think that that's actually an excellent, excellent observation that you're making, Commissioner Ako. The subdivision underwent a major subdivision request in the early 80s, right? So, at that time, there was no Ka Pa'akai versus Land Use Commission, that case and decision didn't come out until the 2000s, which when you think back on history, it actually makes sense because the 1978 Constitutional Convention, which is what created Article 12, Section 7,

which says the state has to protect Native Hawaiian traditions and practices, which then evolved into, well, how do we do that in the planning context. And then Ka Pa'akai o Ka'aina versus Land Use Commission emerges from that in 2000. So, there wasn't, there wasn't a Ka Pa'akai framework that was employed. And I think that, you know, when Uncle Gary was speaking, I actually thought of what he was sharing that, you know, we're doing what we can now, and I think it's that, at that time in the 80s, there weren't these words or phrases or terminology that we use now to articulate why things were significant, but people just knew it was. And that was why they advocated for a community plan that protected view plain and the original setback line, which Mr. Kimura is recommending to uphold. So, there wasn't a Ka Pa'akai Analysis done per se, but there was community input about the significance of that. And I think the underpinnings is it's culturally significant and in the contested case hearing there was actually testimony from individuals who weren't members of the intervener party, who came and talked about how for generations they were able to access Nihokū with their family because there was a particular type of kauna'oa that grew up there and nowhere else. So, the idea of, you know, Nihokū like now just being a new place for practices it just isn't true it's verified through historical documentation, it's verified through paperwork, and it's consistent with Hawaiian concepts of what sacred places mean. For Hawaiian secret places or places where you don't build things, where you don't access, or you do it through limited and specific purposes because they are sacred. So, you know, it's... There wasn't an analysis done under what we think about it, but the concepts were there.

Mr. Ako: And we don't know what that was, or do we?

Ms. Durante: The concepts? There was actually because there was a contested case hearing in 1984, they actually talked about that, and those findings of fact, and Conclusions of Law, which are also admitted into the contested case hearing for this matter, actually outlines really clearly what the community thought about, what they advocated for. There was documentation as well from the subdivisions attorney that was submitted and then corresponding responses that talked about what the community was advocating for and really you know those from Kīlauea probably know it, it's just a signature landmark of that area, but what they all really talked about was protecting that area. They didn't say, because I go there to gather, but that was what was testified to was that was the practice of many 'ohana in that community.

Ms. Barzilai: Any other questions, Chair?

Ms. Streufert: I do have a couple questions. There's a lot of things that we... I'm not sure how large this area is that we're trying to protect because it seems to include the bay, and it also, because of the fishing rights that you're talking about, which is on the other side of Crater Hill, and so is it the entire area that you're looking at or is it just on one side or the other? How are you identifying the piko, as everyone's talking about because it's just piko is usually a central point as opposed to a whole area. So, how does this... how are you defining where this area is that you're really concerned about?

Ms. Durante: You know, as I will say, I think that the testimony about what is considered in the Nihokū and the center of Nihokū, you know, people provided their own personal interpretations of what that is, but I think for the purposes of this case, which again, the recommendation by Mr. Kimura is to approve the permit. It is to allow development to occur, but to have it occur below that setback line, and then to have it occur with certain reductions in size, lighting, et cetera,

some of which I understand are standard conditions that are imposed, but some of them also impose to mitigate the impact to Hawaiian practices. So, for the purposes of this case, our clients have worked with the US Fish and Wildlife Service to secure a permit to be able to access that area, which is where they've engaged their practices because it is private property, and they are not trespassing on private property. So, they engage in these practices right on the other side of that fence in that photo that Mehana showed, a lot of their practice, well, I should say some of their practices, because it actually their practices happen within the entire range of the US Fish and Wildlife Area, which most of that is considered Nihokū because Nihokū is the backside of a collapsed crater where the three sisters are on the other side, that's a collapsed crater, so Nihokū, is that. So, for the purposes of this case, though, it was what Mr. Kimura correctly found was that where their practices of are occurring right on the other side of that fence, which one of the major practices that I guess became the focus of the hearing was the practice of kilo or studied observation from a specific panana or platform or based for an extended period of time to gauge weather patterns, calendaring, when to plan other conditions which are really unique at Nihokū, that that practice happening right there on the other side of the fence would be impacted by the proposed location and size and lighting from this development. So, I guess I know that's not a direct answer to your question about what is Nihokū because I think Nihokū is what was testified generally was that it is the backside of that collapsed crater, which is the whole thing, but it does encompass that area right on this other side of the fence, which is US Fish and Wildlife property, which is where Nā Kia'i o Nihokū has work to get permit access since 2015.

Ms. Streufert: So, if you were to have access to that area, not necessarily on Lots 11-A and...that would also fulfill your needs?

Ms. Durante: So, they actually do have access. And I think one thing I'll just clarify for the commission is that it was the applicant who raised the idea of an area on their property to be set aside potentially as an easement for cultural practitioners to access. Ultimately, and what we ask the hearing officer, we didn't ask for that. We asked that the house be conditioned so that where it's positioned doesn't impact their ability to engage in practices on US Fish and Wildlife side. So, there wasn't a request to access their property, which is why, part of the reason why is that some of the applicant's arguments is misguided because there isn't that request, to have that and I don't believe that's part of Mr. Kimura's recommendations, and we didn't take any exceptions to that because that isn't the request of the intervener. So, you know, again, I think it's a fair balancing of, you know, those things.

Chair Apisa: Does the commissioners want an executive session?

Ms. Streufert: Before that, could I just say...One of the things that I do remember, and I do remember that 2019, presentation, there was an archaeological survey that was done and was presented, and I believe that also included a bit of what we would now consider to be Ka Pa'akai, although I don't know, I can't remember how detailed that was but they're just (inaudible) to the record that there was something in 2019, so it isn't from 2000. It is up from 1980 something, but...

Ms. Durante: Oh, sorry. If I can clarify, I thought the request was about the subdivision and the creation of the subdivision. There was a 2019 archaeological surface survey, which is actually not a Ka Pa'akai Analysis. That survey it consists of walking the property and doing a visual look

at the property to see if there are historic sites that can be visually observed. There's no excavation that's done, there's no analysis of any type of cultural practices that don't leave traces of activity that are happening in that property so, what actually came out during the contested case hearing, and Nancy McMahon, who is the archaeologist who did that survey, she was the one who pointed out that it was not a Ka Pa'akai Analysis because it didn't take into account the oral history and testimony of cultural practitioners in that area. It basically just said we don't have any, we don't visually see any historic sites and then from there, the assumption was that there was no practices occurring there, but what was introduced through expert testimony is that there are many practices such as hula, oli, kilo that don't involve any type of structure necessarily being there or any type of plant being there or any type of marker. There are things, practices that happen without a tangible sight that indicate it's happening there. And as I said, cultural practice for Hawaiians is that sacred places are undisturbed. So, that actually would be inconsistent with cultural practices, but mahalo for the opportunity to clarify that.

Chair Apisa: Yeah, so, is that helpful? Can we go into executive session?

Ms. Streufert: (Inaudible), that's fine.

Ms. Barzilai: I need a motion on that, Chair.

Chair Apisa: Yeah. If that would be the pleasure of the commissioners, we'd need a motion to go into executive session.

Ms. Otsuka: Motion to go into executive session.

Chair Apisa: Do we have a second?

Mr. DeGracia: Second.

Chair Apisa: Just a voice call vote.

Ms. Barzilai: I'll take a roll call vote, Madam Chair.

Chair Apisa: Oh okay.

Ms. Barzilai: Commissioner DeGracia?

Mr. DeGracia: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Streufert?



Ms. Streufert: Aye.

Ms. Barzilai: Vice Chair Ako?

Mr. Ako: Aye.

Ms. Barzilai: Chair Apisa?

Chair Apisa: Aye.

Ms. Barzilai: We will now enter executive session. I'm sorry, but those who are not on the commission will leave the room. We expect about 45 minutes to an hour. Thank you. Motion carried 6:0.

### **EXECUTIVE SESSION**

The Commission went into Executive Session at 1:03 p.m.  
The Commission reconvened from Executive Session at 2:40 p.m.

Ms. Barzilai: I have a statement to read. This is a mandatory statement under Sunshine Law pursuant to Act 19, relating to public agency meetings. A board is required to report a summary of its discussion or any final action taken during an executive session, after reconvening to the public portion of the meeting. The Commission has concluded its executive session on item K.1. This item involved a discussion for the purpose stated on the agenda. Disclosure of the discussion would defeat the purpose of convening the executive session, which was held pursuant to HRS Section 92-5(a)(4), the Commission's right to consult with its attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. No final action was taken in executive session. And the final discussion will now commence. Thank you.

Chair Apisa: I would just like to add to that and to thank you all for your patience. I know it was a very long session, but it is not an easy decision, it has been tough and we had lots of discussion. So, thank you for your patience.

Ms. Barzilai: You can open the floor to the commissioners for discussion, Chair.

Chair Apisa: Open the floor. Commissioners, any discussion now on open floor.

Mr. DeGracia: Just a little bit of sharing. So, I woke up this morning thinking one direction and after the testimony today, it became a lot clearer to me and I've changed my position. So, I'd like to thank everyone who testified, and then all the representatives are coming out and sharing their information, which really is helping me craft and create my position on this issue.

Chair Apisa: Anyone else have any comments or thoughts on it to share? I can just repeat, it is a tough decision.

Ms. Streufert: Yeah, this...if I could. I think that the amount of time that we took in the executive session is indicative of how seriously we take these issues and also that there are many ways to

consider the issues that are involved here. We had some, I think, pretty robust discussions and it's always difficult when there are so many different sides that you can see in an issue like this, but appreciate everybody coming in, appreciate our attorneys input in terms of what are possibilities and consequences of actions. Thank you.

Chair Apisa: Anyone else have any comments or else I will entertain a motion? I'll entertain a motion.

Mr. Ako: Okay, I'll make a motion.

Chair Apisa: Alright. Thank you.

Mr. Ako: Let's see. Regarding Special Management Area Use Permit, SMA(U)-2022-1, Class IV Zoning Permit Z-IV-2022-1 and Use Permit U-2022-1 for the Construction of a Farm Dwelling Unit, Guest House, Garage and Associated Site Improvements, I moved to modify the amended Hearings Officers report Conclusion of Law No. 42, to reflect that the subject property is undeveloped.

Mr. DeGracia: Second.

Ms. Barzilai: There's a motion on the floor to modify the hearing officers amended report and Conclusion of Law No. 42, to reflect that the subject property is undeveloped. Would you like a roll call

Chair Apisa: Is there any other discussion on it? Before we take a roll call vote. Vote, please.

Ms. Barzilai: Commissioner DeGracia?

Mr. DeGracia: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Vice Chair Ako?

Mr. Ako: Aye.

Ms. Barzilai: Chair Apisa?

Chair Apisa: Aye.

Ms. Barzilai: Are there additional motions of the commission with regard to the report?

Mr. Ako: Again, regarding to that...the same permits, I move to adopt amended Hearings Officers report recommendation as amended to affirm the decision of the Director to approve applicants, SMA applications subject to the recommended 17 Conditions of Approval as set forth in the amended Hearings Officer's report and recommendation.

Mr. DeGracia: Second.

Chair Apisa: Is there going to be another motion?

Mr. Ako: No.

Ms. Barzilai: That is the motion, Chair.

Chair Apisa: Okay, I'm sorry. Yeah, we modified the No. 42, yeah.

Ms. Barzilai: The motion is motion to adopt hearing officers amended report as amended. Is there any discussion?

Chair Apisa: Roll call vote, please.

Ms. Barzilai: Roll call. Commissioner DeGracia?

Mr. DeGracia: Aye.

Ms. Barzilai: Commissioner Ornellas?

Mr. Ornellas: Aye.

Ms. Barzilai: Commissioner Otsuka?

Ms. Otsuka: Aye.

Ms. Barzilai: Commissioner Streufert?

Ms. Streufert: Aye.

Ms. Barzilai: Vice Chair Ako?

Mr. Ako: Aye.

Ms. Barzilai: Chair Apisa?

Chair Apisa: Aye.

Ms. Barzilai: Motion carries, the item is concluded. 6:0. Thank you very much for your time.

(Chanting in Hawaiian)

Chair Apisa: Mahalo.

Mr. Hull: Commissioners, we go on to...we have no Subdivision Committee Report (inaudible). We have finished Unfinished Business Matters.

**NEW BUSINESS (For Action) (None)**

Mr. Hull: No New Business matters. You folks did use one executive session.

**ANNOUNCEMENTS**

Mr. Hull: We're on to Announcements. The good news is we're wrapping up the calendar year here. The unfortunate news I have for you is...today was not the largest agenda you will experience in 2024. December 10th, 2024, whether it was procrastination or serendipitous reasons, the department was flooded with inundated with a series of applications that pursuant to submittals and deadlines necessitated putting them on the December 10th agenda. We did get some to get some consent to being moved to January, but it still will require a fairly robust agenda December 10th and then we also have two agenda items deferred today, they'll move to December 10<sup>th</sup>. I can say there's nothing particularly robust controversy. There are no Coco Palms or Kau'inoa applications on December 10<sup>th</sup>, there's just a fair amount of applications. So, I apologize for that in advance. We can look at providing both breakfast and lunch. And that's all we got. So, the next meeting is December 10th, 2024. If there are any additional agenda items you folks want on that meeting or say in the January or February meetings, briefings or whatnot, please let myself or the Chair know. Other than that, have a wonderful Thanksgiving all.

Multiple Commissioners: Thank you.

Ms. Otsuka: So, motion to adjourn?

Mr. DeGracia: Second.

Chair Apisa: We have a motion to adjourn. All in favor say aye. Aye (unanimous voice vote). Meeting is adjourned. 6:0.

Chair Apisa adjourned the meeting at 2:49 p.m.

Respectfully submitted by:

*Lisa Oyama*

Lisa Oyama,  
Commission Support Clerk

(X) Approved as circulated (December 10, 2024 meeting).

( ) Approved as amended. See minutes of \_\_\_\_\_ meeting.