

KAUA'I PLANNING COMMISSION  
REGULAR MEETING  
September 8, 2009

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair, James Nishida, at 9:09 a.m. at the Lihu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Mr. Jan Kimura  
Mr. James Nishida  
Mr. Hartwell Blake  
Ms. Camilla Matsumoto  
Mr. Herman Texeira  
Mr. Caven Raco  
Ms. Paula Morikami

Discussion of the meeting, in effect, ensued:

**APPROVAL OF THE AGENDA**

Chair: Can I get a motion to approve?

Mr. Texeira: So moved.

Ms. Matsumoto: Seconded.

Chair: Moved and seconded, all those in favor say aye, opposed, motion carried.

**On motion made by Herman Texeira and seconded by Camilla Matsumoto, to approve the agenda, motion carried unanimously by voice vote.**

Chair: Minutes, executive session, July 28, 2009 and regular meeting of August 11, 2009 and August 25, 2009.

Mr. Texeira: So moved.

Ms. Morikami: Seconded.

Chair: Moved and seconded to approve minutes, all those in favor say aye, opposed, motion carried.

**On motion made by Herman Texeira and seconded by Paula Morikami, to approve executive session minutes of July 28, 2009, regular meeting minutes of August 11, 2009 and August 25, 2009, motion carried unanimously by voice vote.**

**GENERAL BUSINESS MATTERS**

There were no general business matters.

**COMMUNICATION**

Memorandum (9/2/09) from Director Ian K. Costa to James Nishida, Chair, Kauai Planning Commission, recommending the Commission consent to the issuance on Non-Conforming Use Certificates pertaining to Transient Vacation Rentals (see Agenda Attachment "A".)

Deputy Planning Director, Imai read request into the record (on file).

Chair: Questions for Imai? Can we get a motion to receive the report?

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Ms. Morikami: So moved Mr. Chair.

Mr. Raco: Second.

Chair: Moved and seconded, all those in favor say aye, opposed, motion carried.

**On motion made by Paula Morikami and seconded by Caven Raco, to receive report, motion carried unanimously by voice vote.**

Mr. Raco: I have a question for the Deputy. I thought we were not giving any nonconforming use certificates ever since our last batch.

Staff: No.

Mr. Raco: Or do we just keep continuing giving...

Staff: These we don't intend to keep giving them out in mass. We do intend to eventually have people either approved or denied however due process is due process and those people who won, speaking to the larger issue, not necessarily these, but those who are denied do have a right to come back before the Commission to file appeals. And those who were unfinished do have to finish off in some way and those are them. So this is to kind of stop getting those before you all the time, this one is a big step right here, to get these out of the way.

Mr. Raco: So this wouldn't be the last batch?

Staff: No, we can't say that this is the last batch.

Chair: Any other questions for Imai, Barbara.

Ms. Barbara Robeson: Barbara Robeson for the record. I am here again today presenting testimony on behalf of Protect Our Neighborhood Ohana which is comprised of residents and families who live in the Wainiha and Haena areas. First of all we would like to request that all of our testimony, documents and records that have been presented on July 14<sup>th</sup>, July 28<sup>th</sup> and August 11, 2009, be incorporated into the record. The item on the letter, or the testimony that was passed out, it's a little bit incorrect I believe but part of this is because of the information that I just received this morning. Bottom line is the agenda item proposes to give a blanket approval of 32 additional TVR applications bringing the totals since July 14<sup>th</sup>, which was after the March 7<sup>th</sup> deadline, to 65. Again, there is no information that has been made available to the public.

Some of these applications, at least they were listed on the website, were denied, others, I know that the applicants did not receive any kind of notification from the Planning Department. So again we have more questions and comments and again for the record we submit the following: On July 14<sup>th</sup> the Planning Commission gave approval of 16 TVR units and 3 of those had claimed homeowner's permanent home use for the years 2007, 8 and 9. On July 28<sup>th</sup> there were 17 more TVR NUC applications that were approved and 3 of those 17 had also applied and received homeowner's exemptions. Now on this particular agenda item today there are 32 from which you have now removed 2 of them so those numbers are incorrect, but as part of the application process sworn notarized affidavits were required for all TVR applications stating that the applicant had been legally operating a TVR. Today the Commission is considering approval or consent of 32 more TVR's, 5 of the 32 applicants claimed an owner occupied real property home exemption. In other words they were living in the house but yet according to their affidavit the structure had been a vacation rental for some period of time.

So my question, if the applicant was operating a TVR how could they claim a home exemption at the same time? It would seem one way or another that false information was provided to the County. And according to the TVR ordinance, providing false or misleading information on the application or any information relating

thereto at any time during the application process shall be grounds for revocation. Well you have the rest of the testimony in front of you but again we want to bring up from Protect Our Neighborhood Ohana, which of these were in the flood zone and is that jeopardizing the County's flood insurance program, is the flood insurance certification now in jeopardy. Are any of these structures multi-family in violation of the North Shore Plan and we do ask again that you not give your consent to these 32 and hold proper hearings on the matter. However, should you decide to give your consent to approve these 32, now 30, we ask that you cite for the record and give reasons or explanations for your decision, thank you again for your time.

Chair: Caren.

Ms. Caren Diamond: Aloha, Caren Diamond. Again I am speaking for Protect Our Neighborhood Ohana. Many of these applications on this are not on the North Shore and so I am going to address one that is on the North Shore, the Hale Pohaku one. And I want to ask you why these were rejected in the first place and if you could disclose what the difference is now and why they should be approved now when they weren't. You may think about that for all of them but I am asking you to separate out Pohaku from the rest of them and I want to go over some of the papers that I just gave you on it. And so some of this, you have your packets and the first one is the MLS data for when the property was sold and it was sold in January, 2006. And the ad says "upgrades needed, sold as is only, original owner, occupant seller, no vacation rental history." So when it was sold and advertised in 2006 it had not vacation rental history. The next page, I will show you the picture of the house, that second picture shows you the house, how it was open on the downstairs. And if you go to the next page, the public record data, it shows you the size of the house but on that second page it will show you that there was an open basement with no walls. There was a basement with a garage. There was a finished basement but nowhere did it say there was living quarters on the downstairs.

So you have a new owner who comes in and gets a zoning permit. So if you look at that first plan checking status you will see it was just to replace the roof, the siding, windows, cabinets, drywall, and repair electrical. And if you go to the next page you will see how these are deemed unsubstantial improvements, that the structure is pre-flood and these are unsubstantial improvements, therefore no elevation certificate is required. And if you go to that next page, the status detail you will see that the valuation of the permit that he got was for 60,000 dollars. You will see also the house, the size if larger now than the house was as it was sold. And if you go to the next inspection page you will see that the elevation certificate was waived and if you go to the next page you will see that the building final was approved on April 25<sup>th</sup>, 07. So between the time this owner bought it, then he got a building permit for 60,000 dollars, he constructs the house, gets a final after having most of his inspections waived. He finally does get a final and now he is coming to you for a vacation rental.

So the last thing here was an ad as its advertised today and I printed this up this morning and it says "the Pohaku House is a fabulous newly built 4 bedrooms 4 bath home in Haena." It goes on to say this is totally brand new. And then it says the lower level features a suite with 2 twins, separate kitchen and bathroom with Jacuzzi tub and shower combination, a separate bedroom with Queen bed, flat screen TV, etc. So I want to ask you how this was inspected and how it passes the Planning Department's criteria and how it now conforms to the ordinance because you have a house that is now advertising the downstairs. And if you look at this house and go by it toady you will see the entire house, top to bottom is enclosed. It has made a two-story house, the entire downstairs is stone.

We ask you how this is happening and we are asking you to not give your approval and stamp this and if you do we want to know how you are going to say that this is just fine. And I would like you to use this as an example for the rest of them and ask planners to do their homework and see why we have this problem where we have these structures getting built over and over again in Wainiha for these ridiculously low valuations. They are being made flood noncompliant. They are being approved for vacation rental use. I don't understand it and I hope you won't give your consent to approve these, thank you.

Mr. Raco: So in Caren's concern were she provided us on page 4, if I am reading this right, that the Building Department claimed that the dwelling was built before 1981 and that they don't need a flood certificate so that is how they are allowed to have a dwelling underneath.

Staff: Not necessarily. For Building's records, I will have to check as to what was permitted via building. They obviously were permitted some form of improvements downstairs. Now, I mean if we go through the timeline of this the house was existing prior, they could have been vacation renting prior just because the downstairs improvements were completed after the date or final was given (inaudible). It doesn't necessarily preclude any operation prior. As to what was permitted downstairs, that is probably going to have to be checked on the records. What it appears to me is going on here is that there were permitted expansions downstairs, any living was probably not in place when we went out and inspected and saw permitted expansions. If any living has taken place downstairs that may be a question we need to address however it has just come up recently. So this is new information that we have and it does give grounds to, I would say, address this particular TMK because they may have started since we have gone through this process. So basically in this case what we have is kind of a new violation, basically, or a new possible violation, a new complaint to look in to.

Mr. Raco: I guess you are saying that they are allowed, they are not allowed to have living on the bottom.

Staff: That is something we are going to have to investigate as to what the Building Division and they manage the flood ordinance as to what they decided was allowable or not. And whether they had, did they have preexisting, any preexisting rights to build down there. Any grandfathered rights to build dwelling units below or not.

Mr. Raco: And that is why I am saying on page 4, where they say "SLUD Zone dwelling was built before 1981," which clearly to me it allows them to have dwellings under the house.

Staff: Again I can't say. I think that is something that has to be investigated with Building and what they permitted and the call they made being that they administer the flood ordinance.

Mr. Blake: So the way this looks they have a duplex on the property?

Staff: I can't say that it is a duplex.

Mr. Blake: Well that is what they are saying it is, isn't it? Upstairs and two separate kitchens downstairs, bathroom, Jacuzzi, well those are... but the presence of the kitchen would seem to make it...

Staff: The presence of the kitchens would seem to make it a duplex.

Mr. Blake: And those aren't permitted.

Staff: No.

Mr. Raco: So would it be your recommendation to pull this one off of the consent agenda?

Staff: Considering new information today, yes, my recommendation would be to pull this one off and have another inspection on site considering improvements made that may or may not be permitted.

Mr. Teixeira: My question Imai is, are there any other applicants that may have the same or similar situation?

Staff: I honestly cannot without going in the field every day and seeing if somebody has done illegal. We all know people have violations. We all know people have illegal properties on there but to say, this is, when we inspected, it was okay. When we inspected for this particular list we found issues we had to look in to. Sometimes they were lot coverage issues. Sometimes they were permitting issues. Those have since been rectified. I imagine this was one of them. Our guys went out, saw enclosures downstairs going up, found building permits for it and said it was okay. Subsequently, the owners turned that in to living space that is not necessarily okay. That is why I would now recommend for this to be re-inspected. Since our inspection and what people have done on theirs, without going out there we cannot say. We can only say what happened at the time of our inspection and at the time of checking our records.

Mr. Texeira: So were the inspections made on a timely basis? In other words was it done very recently?

Staff: No, we inspected all before March 30<sup>th</sup>. That is how we had to do it. We had to inspect before the March 30<sup>th</sup> deadline.

Mr. Jung: If I could just clarify for the Commissioners. Remember, the authority shifts, so it goes from the Planning Department to you, as the Commissioners, to approve the NCU's after March 30<sup>th</sup>. So now this additional batch is coming out, these aren't subject to appeal but what they are, are after further investigation by the Planning Department, based on what was submitted to the Planning Department, that is why the Planning Department is making these recommendations to you folks. So it's not like any new investigations went on. But you have to remember, once the nonconforming use status is established they are vested. But there needs to be a distinction between whether or not there is nonconforming use, or the use was allowed, or happening prior to this deadline. If anything happens subsequent to then that is a subsequent zoning violation, not subject to the TVR ordinance.

Mr. Blake: If it is a subsequent zoning violation that means their TVR certificate gets jerked, doesn't it?

Mr. Jung: That is a grey area that we are trying to flush out right now.

Mr. Blake: I mean gee, how many bites of the apple are they going to get? And this is, if this is true, this is not like a bite of apple, this is like cutting off half the apple. I mean multiple bites and again, if it is true, we can understand why residents get upset because this is just blatant, in your face, poke you in the eye.

Mr. Raco: If the burden is left on the Commission shouldn't these applicants be presenting to us on why they should be getting it or not? I mean really, they should (inaudible) us. I am just afraid that with the information that we got on one, what really is, do I have my authority to base it on, the rest of them, if I don't have that information. Other than entrusting the department which I think the department did a good job but what rights do the neighboring citizens have.

Mr. Jung: And that is why they would have the avenue to appeal if it was based on false information but the Planning Department has to recognize what is in the application as truthful. If they are lying and some presents evidence of that false accusation then they can present that to you, the Commission. But you have to remember they only had 5 months to do inspections for 500. This is what the Council imposed on the Planning Department, to inspect 500 some odd TVR's, nonconforming uses and I think they needed more time to do that. And these are a batch that needed more time and now the department is bringing it to the attention of you folks to give the approval.

Ms. Matsumoto: I have a question. This is, actually I like this packet because it provides a lot of information. Is there a way to impose some kind of requirement on these folks are in question to provide information like that instead of the Planning Department going out and say, for example, assembling these materials. Could the owners do that? Could they provide ongoing records of their property?

Staff: Commissioner Matsumoto, they have to renew every year by July 31<sup>st</sup> so yes, they do have to provide ongoing records. It's not necessarily the MLS sheets they have to provide us but they do have to provide continued evidence of TVR, use as a transient vacation rental, continuing evidence of payment of GE and TAT taxes and continuing evidence of compliance.

Ms. Matsumoto: I am just saying that for organization and just to be able to look at the big picture or a fuller picture I think something like this might be helpful. And I don't want to burden the Planning Department with that because they are doing a lot of work. I just wondered if it is possible to make it a requirement of the owners. They might argue, oh, you have all the records, its all on file, go get it yourself but that is just a question.

Mr. Jung: It is within your prevue to ask the department to provide that for you but you have to remember, as you note in this TVR ordinance, it has placed a huge burden on the Planning Department. Given the legality of the TVR ordinance it's self it is a very complex ordinance and trying to follow through with it, it is very difficult and the Planning Department has attempted to do that and they are doing it. So if you want to impose more requirements on these particular ones you can ask them to do that.

Ms. Matsumoto: And I am not saying, my point is, don't make the Planning Department do that work, make the owner. If they are on the list they should be made accountable and not just wait to see what inspections provide and get the information from the Planning Department but just something like that. Put a little bit more responsibility on the owners.

Staff: Commissioner Matsumoto, for your information, one of the reasons these applications ended up on this list is for exactly that reason. They did not provide us sufficient information to show that they were in compliance. Subsequently we have either found or they have provided that information but that is why they ended up denied the first time because we did indeed put the burden of proof on them and said you can't prove to us sufficiently the first time around, in your application, you are going into the denied status. And indeed they did, as of the deadline.

Mr. Raco: And that is what I am kind of getting to is that how do we know that? Is there a brief description on each application so we have something read other than just giving consent to the agenda?

Staff: We can go deeper into these if need. One of the interests in these is they start off as from March 30<sup>th</sup> they were administrative permits, there is a bulk of them to handle, we look for the most expeditious way to handle them.

Mr. Raco: Because I know the first one that came out on the consent agenda there was some kind brief on each one, on the reasoning and I know that wasn't an official document but (inaudible).

Staff: (Inaudible) FYI document.

Mr. Raco: For the public and help us know what is the reasoning.

Staff: We can do that. That is entirely possible.

Mr. Blake: There is a check sheet that the applicant has to fill out, right?

Staff: There is an application that they have to fill out that has...

Mr. Blake: They make representations as to what they are doing.

Staff: Yes.

Mr. Blake: And so if we go out with the check sheet in one hand and walk the property and it's not accurate, X out, right?

Staff: Yes.

Mr. Blake: Because I agree with Commissioner Matsumoto that the burden should be on the applicant. And I am not anti-TVR but if you are going to be doing something like this then you have to do it the right way or don't do it at all. I mean this, this is like a criminal case, admission against criminal interest, man!

Staff: I understand your frustration with this particular and it's good that it was brought up to us because subsequently after receiving their permits they have apparently, I don't want to, I don't think it's my place to, without proper inspections and checking their permits to say guilt or not, but they have apparently, violations.

Mr. Blake: It doesn't bother me to say they have, they advertised it. So what am I going to do, keep giving them the benefit of the doubt? Come on.

Staff: I understand the frustration Commissioner Blake but without inspecting every property, every day, we cannot verify compliance every day. It's just not humanly possible.

Mr. Blake: I understand that but I think that one of the things that may be helpful is to require the advertising that they, or instead of having them do it we go through the list of all TVR's and get copies of these situations where it's blatant. Not even just blatant but it is just wrong, inaccurate. I mean everybody knows the wheels of government grind exceedingly slowly and that is often times an advantage if you are taking advantage. But I don't have any sympathy for this at all.

Staff: We are not asking you to have any sympathy for this particular application.

Ms. Matsumoto: For example, looking at this Gene Abbott Luxury Vacation Homes page, for accountability for example, I am just thinking this out, couldn't we impose a requirement having them provide us with a hard copy monthly of any ads that go out of their property, for example? I don't know when this was made.

Mr. Jung: That would be an enforcement issue. You have to remember once these people, the thing with the TVR ordinance, the regulation of single family TVR's were not regulated prior to this ordinance. So once they issue of regulation comes into play they become vested. This whole system is set up for people who were operating prior to the ordinance to come and register and get their certificate that they were operating prior to this date. So it would be hard to impose conditions upon that because all they are doing is registering what they allege were their lawfully existing use as a TVR outside the VDA. So we are stuck with that, we can't impose new conditions on grandfathered certificates. It gets very complicated, legally very complicated to try and do that.

Mr. Blake: So if someone has legitimately operating before the ordinance was enacted and subsequently starts to do what they should not be doing what can't we do?

Mr. Jung: It would be an enforcement issue as I just stated and whether or not that could destroy the nonconforming nature of the use. That would be a legal question that I am completely unprepared to answer on the floor. It is an untested area in Hawaii law. There is one case in particular on point which makes a distinction between the nonconforming use of a property and the nonconforming structure but not as to whether or not there is a legal alleged zoning violation. And I am sure the next speaker, Mr. Hempey, will elaborate that is his brief and what is presented to you folks. So along with that, it would be a dangerous are for me to go into the legality of that right now since we are facing multitudes of litigation in all this so I would prefer not to answer on the floor. If you guys have questions we could do it in writing and I could make a formal response to you guys but as of right now I don't want to speak to the issue of whether or not you can address certain conditions on an existing nonconforming use certificate.

Mr. Teixeira: Mr. County Attorney, then how can we make a decision if these issues are not clarified?

Mr. Jung: You can make a decision as to the ordinance as it stands now and I think what Imai is presenting to you is 30, what was 32 and now is 30, nonconforming use certificate requests to these people who have presented information to the department that they were lawfully existing. Whether or not that information was correct or not, that would be up for the department to do further enforcement and up to the public once rule 6A of the Planning Commission Rules and Regulations come into play if they wanted to contest that. As it stands right now if they provided to the department what is satisfactory and based on the investigation, was satisfactory that they were lawfully existing prior to the enactment of the ordinance then they should be getting their nonconforming use certificate.

Mr. Teixeira: So the question is was enforcement adequate. It seems, that seems to be...

Staff: Enforcement, what do you....

Mr. Teixeira: In other words going out to these applicants and finding out if they are actually in compliance.

Staff: We inspected every one that has come before you. Once again to kind of elaborate on this particular case understanding that this particular case if you look at the building timeline, the downstairs units came into being after our inspections.

Mr. Teixeira: So couldn't you require another inspection?

Staff: We can require another inspection, yes. We can go out and inspect it again and in fact that is what I would recommend at this time considering new information that has been brought up.

Chair: Let's go over where we are at right now. You have a request for more information on these applications.

Staff: No. 30 in particular.

Chair: Well I heard more like the rundown on why each of these applications, that they wanted to get that kind of sheet where it says what the department did. So if that is alright with the department, the timeline for this, is there a deadline?

Staff: There is no deadline for this.

Chair: So where we are at right now, if the department is ready to do that then we are not going to take action on this today until we get that information. Is that what I heard so far?

Mr. Raco: Yes. I would be in favor of deferring today on this agenda item.

Chair: And then we will get that sheet that says what was the problem before and the resolution.

Staff: Yes.

Mr. Costa: I guess I would suggest a motion to that affect.

Chair: Why don't we take care of that right now?

Mr. Raco: Motion to defer application B.1, memorandum 9/2/09, from the Director Ian Costa to James Nishida.

Ms. Morikami: I second that.



Chair: Moved and seconded, all those in favor say aye...

Mr. Blake: Let me ask a question, so if we defer action on this then that means they are not supposed to operating now, right, until this gets resolved.

Staff: That is correct.

Ms. Diamond: Chair Nishida, may I address you?

Chair: I wanted to take this vote first so that we get the deferral set.

Ms. Diamond: Okay, thank you.

Chair: All those in favor say aye, opposed, motion carried.

**On motion made by Caven Raco and seconded by Paula Morikami, to defer action on agenda item B.1, motion carried unanimously by voice vote.**

Chair: Caren.

Ms. Diamond: Thank you and thank you Commission for deferring that, obviously I am in favor of that. I did just want to clarify a few things. The comments that, when PONO was submitting their comments on each parcel they submitted comments on Pohaku as well and in those comments that the Planning Department received was this very same advertisement that advertised the downstairs units. The house has not changed since then. The advertisements have not changed since then and I really just want to let you know that we did complain to the Planning Department when the house was being enclosed on the ground floor and we wondered how that was happening. And it shouldn't be new to them that the downstairs got enclosed. And I also want to remind you that the (inaudible) evidence of their advertisements that is in this ordinance that when people advertise, that is really all the County needs to then say no, you don't get your vacation rental permit. I want to bring your attention to two points on this, one, there were some downstairs enclosures in the original house but it was basement, it was never living space. And so even though this is a pre-flood dwelling unit and it was built up high because people had common sense when they built in that area where there are tsunamis, the downstairs area wasn't ever living space.

And so for the Planning Department to now come around and say that this pre-flood structure can legally have living space on the ground floor is very questionable. And the nonconforming uses and the nonconforming structures, I don't know how you can expand a nonconforming use in a nonconforming structure, especially if that structure is then being made to be larger and made to have an increased risk. And so...

Chair: Caren, I think what the department has said is that they will investigate.

Ms. Diamond: Yes, thank you. I just mostly want to let you know that in the packet that PONO submitted was this original advertisement, thank you.

Chair: Anybody else wants to speak on this agenda item, Barbara.

Ms. Robeson: Thank you Mr. Chair, Barbara Robeson for the record. As part of your deferral and your investigation and providing information to the Commission I would also hope that you check on the real property homeowner exemption issues that I brought up. There are 5 of those.

Chair: Imai, that homeowner, are you prepared to address that? I was kind of wondering...

Staff: Homeowner exemption is a Real Property and Finance Department function. We have been sharing responsibility of registration and NCU with Real Property so they have that information and I have talked extensively with them about

what their uses are and what they plan to do with it. Now the final call is not made by us, keep in mind that is Real Property's function on them taking away the homeowner's exemption should they see it appropriate. They have that information.

Chair: What Barbara is saying is that...

Staff: Is that we take that into account as a violation. It is not in the ordinance so I don't believe we can function off of that. It is not in the ordinance to submit nor is it in the ordinance what they had in the past. So I don't know that we can legally say that that is grounds for denial.

Ms. Robeson: I guess my concern is once you give an approval it is harder to take it away so I am suggesting and hoping that you find out more about this and the legal ramifications and the coordination between, since Mr. Aiu said their was no deadline on taking action, that you solve that problem before you give an approval. Because once you give an approval, as I said, it is harder to take away. Again, back to their affidavit, they swear and it is notarized and they sign it that they have been operating a transient vacation rental on the property since, under the business name of, they fill in the blank. So if it has been a vacation rental how can they live in the house? How can they claim the homeowner's exemption? It affects all of us by the way on the amount of property taxes that are raised for the County so I think it ought to be an important issue.

Mr. Raco: Chair, the Deputy just explained it. It is not our jurisdiction as the Planning Department and the Planning Commission to resolve real property taxes and how they allocate it. That is not in the ordinance.

Mr. Costa: And every registration of each application goes to Real Property. I wouldn't doubt that there are indeed as we see instances where in the past a homeowner exemption might have been claimed and granted by Real Property but given the actual application and documentation that that home may have been occupied for transient purposes. We will certainly work with Real Property but I would imagine there is some house cleaning if you will that needs to occur in Real Property and if indeed they accept the fact that it was used as transient, for transient purposes then perhaps retroactive repayment if you will of whatever that exemption may have been. But that needs to occur by Real Property and we will certainly work with them to share information. But that was one of the reasons why before we even get the application they are registered with Real Property.

Ms. Matsumoto: May I ask you something, Ian, when you do talk to the Real Property Tax office could you get a copy of their homeowner's exemption record for this particular property owner and just staple it to this file? Can we do that just for information?

Mr. Costa: Sure.

Ms. Matsumoto: Even if it is not in the ordinance I really do, because we are doing this now for the County of Kauai, I think we need to get as much information as possible in order to make a good decision and all departments need to work together to help us to make that decision. Because it is coming all, funneling down to us and we are ones who need to do the right thing so any help would be greatly appreciated.

Mr. Costa: Sure.

Mr. Raco: I thought this hearing process was going to be put down to the sub-committee or are we going to be hearing all these nonconforming use certificates from now on? I thought there was going to be a committee.

Mr. Jung: That is subject to the new rules that are pending Mayor's signature right now.

Staff: Also those are for appeals, keep in mind, those are for appeals.

Mr. Raco: They can hear those too, right, that same committee? That would be a good thing.

Mr. Jung: It wouldn't be subject to the appeal through 6A because they actually are the applicant who now under the ordinance the authority shifted from the department to you folks as the Commission to address. It is up to the Commission to address it.

Mr. Raco: But we can set up a sub-committee.

Mr. Jung: You could set up a sub-committee.

Mr. Costa: To at least do the processing but I think ultimately the approval would come from the Commission.

Mr. Raco: Just like the Subdivision, right?

Mr. Costa: Right.

Mr. Raco: So we are having somebody volunteer for that?

Chair: Do you want to deal with that right now?

Mr. Raco: No. I was just asking because I can see this wave coming already. What I thought, as I said in the beginning, that...

Mr. Jung: We can look into how we can set that up and propose it to the Commission.

Mr. Costa: And it will be an occurrence yearly and strategically the numbers involved would be less and less as the years go by.

Chair: Anyone else want to speak on this agenda item? Seeing none, so we moved to defer so that's it.

Memorandum (9/2/09) from Director Ian K. Costa to James Nishida, Chair, Kauai Planning Commission, recommending the Commission reject appeal by Hempey & Meyers LLC for TVNC – 1286, TMK 4-9-013:023 pursuant to Chapter 9 of the Rules and Practice of the Planning Commission that the appeal was not filed in a timely manner.

Deputy Director Imai Aiu read request into the record (on file).

Chair: I have a process question Imai, Dan and Tom are here, what you are saying is that the timeline didn't apply?

Staff: Yes.

Chair: But the application that we got from them was regarding the TVR and...

Staff: The appeal that you got, you are speaking of?

Chair: Yes. So what are we discussing today?

Staff: I would say we are discussing strictly the timeline and I would let the Attorney opine on this further but the appeal is not up for discussion today. We are not entertaining the appeal or the merits of the appeal we are addressing strictly whether they filed in time or not.

Chair: And should we endorse your recommendation what happens?

Mr. Aiu: I believe so, yes.

Chair: What happens to that?

Staff: If you reject it?

Chair: No, if we accept this what happens to the application?

Staff: To the appeal, it's done, it cannot be filed. They would then be remanded to any other higher power if I am correct, right, beyond this Commission. They have exhausted the options of this Commission.

Chair: Any other questions for Imai, Dan.

Mr. Dan Hempey: My name is Dan Hempey. I represent Tom Somers and the Somers Trust did apply. And just basically we are simply asking the Commission to let him go forward with his administrative appeal, that's all, we are not asking for any particular result in that appeal here today we are just asking that he can have his appeal because he filed a letter on time after he got the notice of the denial. Later I ran into Tom and we were talking about it and we filed a supplement to that appeal. But in any event the background information is as follows; the Somers own a property down near Moloaa, a 10,000 square foot property but it is zoned Ag., 2,000 of the feet are pretty much under water in brackish water. He applied for a nonconforming use permit pursuant to ordinance 864. The March 30<sup>th</sup> deadline set forth in that ordinance came and went without a decision on his application. Then on May 13<sup>th</sup> he got a certified letter from Planning and that letter says "we have reviewed your application for a nonconforming use certificate to continue transient vacation rental operations and have found the following on your property", and it says "a" and it cites the law, it cites a part of 864. And then it talks about Ag. lands and permits not being issued on certain Ag. lands.

Then it says "pursuant to section 8-17.10 your application has been denied and you are directed to comply with the following requirements immediately, a) cease and desist transient vacation rental operations immediately, b) remove any un-permitted structures on your property." So when Tom got the letter he, within 4 or 5 days wrote back and he followed the instructions and he said I don't have any un-permitted structures or improvements on the property. The property was inspected by yourself and no structures were there, I have a certificate of occupancy, everything is permitted and legal. We respectfully suggest that the letter that Mr. Somers received was a little bit confusing and he did file something right after, he responded to the letter directly as mentioned in the letter. The letter doesn't say anything about you may appeal pursuant to Chapter 9, the letter doesn't give any instructions for the appeal. The letter just simply says cease and desist and remove un-permitted structures and he immediately responded to that. Later he hired us and as I am sure you know we beefed up his appeal and added legal arguments and whatnot. We are simply asking that Mr. Somers be allowed to present his appeal like everybody else who sent a letter to Planning after requesting, looking at this issue after they got their denial letter. He responded within 15 days, the letter doesn't say anything about responding within 30 days pursuant to Chapter 9, he responded within 15 days.

We are just asking the Commission to give him the benefit of the doubt, allow him to go forward with the appeal. He is absolutely willing to waive the 60 day requirement for decision on that appeal. I am aware and I do want to say for the record that other appeals were accepted for consideration that did not strictly follow Chapter 9 and they were accepted and some of them were supplemented later. But some were, I guess in those letters where other people wrote, apparently the magic word is appeal. And in some of these other cases people said I hereby appeal to your sensibilities to reconsider this or things like that but apparently if people sent a letter on time, even if that letter did not comply with Chapter 9 and have all the specific requirements set forth in that Chapter, apparently if people knew to use the magic word appeal, theirs were considered. But Tom, I guess didn't use that particular word and again we are not asking for a permit here today, we are simply asking that he be given the benefit of the doubt. I think he will be happy to tell you that he didn't understand the letter when he got it and what he was supposed to do, and have his appeal considered on the merits.

And actually that is really what it is all about, we are talking about, ultimately we are talking about a pretty significant property right and we can all debate whether there was a property right to run TVR on Ag. later but that is what we are talking about, a pretty important property right. And to simply have it summarily taken away because the letter that my client and not an attorney sent in didn't use the magic word appeal seems rather harsh we would respectfully submit. And again he is willing to stipulate on the 60 rule, we are just asking that his appeal be given consideration, that's all.

Chair: Questions?

Mr. Blake: I have a question, it says the letter of May 13<sup>th</sup> to which Mr. Hempey referred, says "we have reviewed your application for a nonconforming use certificate to continue transient vacation rental operations and have found the following on your property; it was built prior to 1976, the application has a Special Permit which specifically permits vacation rentals (inaudible) the permit was secured prior to the enactment of this ordinance". And then it says "our records show the subject farm dwelling was permitted on July 19, 1990 and no record of Special Permit has been provided". What does that mean?

Mr. Jung: Council, in drafting the ordinance 864 and 876, specifically prohibited TRV's on Ag. land and Mr. Somers's TVR is on Ag. land so pursuant to the ordinance, technically if an appeal came your way you would be bound by law to not grant the appeal because it is on Ag. land.

Mr. Blake: So it's open and shut.

Mr. Jung: Pursuant to the ordinance.

Mr. Raco: And that is why he got denied.

Mr. Jung: No, that's not why he got denied. He got denied because he didn't come within the window to appeal the Planning Director's decision within the 21 days after the issuance of this letter.

Staff: Commissioner Raco you are asking for the reason of the original denial of the NCU?

Mr. Raco: The original denial.

Staff: It is because of exactly that he did not build, he did not meet one of these two exception criteria on an Ag. land.

Mr. Blake: And the specific exception criteria is D.2?

Staff: It is either D.1 or D.2, if you have one of those then you meet the exception criteria. In this case he did not meet either.

Mr. Blake: So then we move to the next paragraph and it says you have been denied and you are directed to cease and desist TVR operations and remove any un-permitted structures. And base on the record Mr. Somers responded saying there were no un-permitted structures on the property but he didn't say whether he was going to cease and desist TVR rental operations.

Staff: It does not say that, no.

Mr. Hempey: And we followed it up then with a supplement with the various legal arguments related to the ordinance.

Mr. Blake: Right, that was your memorandum. So the issue before us is whether Mr. Somers is taking issue with item B.

Staff: And whether that constitutes an appeal, right.

Mr. Blake: Constitutes an appeal of the paragraph in the directive that said to cease operations immediately.

Staff: Whether it constitutes even an appeal of the denial. Our contention in the department is that it does not because basically he is responding to one of the conditions of the compliance letter, not taking issue with it, not asking for an overturn of the denial or that the operation be permitted.

Mr. Hempey: And again we are just asking for a shot at the appeal. We are aware that other people sent in letters that did not specifically say this is an appeal pursuant to Chapter 9, those were considered as appeals. Apparently you just had to use that magic word appeal. I don't think there is any harm or prejudice to the department by just allowing him to go forward and have his appeal heard. That is all we are asking is that he has the right, that he can have his appeal heard, that's all. I'm sure Mr. Somers would answer any questions if there are any for him.

Chair: Seeing no questions, thank you, anyone in the public want to speak on this agenda item? Seeing none...

Mr. Raco: (Inaudible).

Mr. Jung: First you have to receive and then you can take action on whether or not you want to comply with the Director's decision in his memorandum to reject the appeal.

Mr. Raco: Motion to receive memorandum dated 9/2/09.

Mr. Teixeira: Second.

Chair: Moved and seconded to receive, all those in favor say aye, opposed, motion carried.

**On motion made by Caven Raco and seconded by Herman Teixeira, to receive memorandum dated 9/2/09 from Director Ian K. Costa to Chair, James Nishida, motion carried unanimously by voice vote.**

Staff: Chair, if I could just respond to one of the arguments Mr. Hempey posed, is the use of the magic word appeal and in that I would argue that the department cannot have the burden of without you saying directly in your letter I wish to appeal or I wish you to overturn the decision. The department cannot have the burden of intuiting what an appellant's or applicant's intent is in their letter and without them saying it we cannot be judge to say that they mean it. I believe they have to make their meaning clear.

Mr. Tom Somers: May I speak to this issue? My name is Tom Somers for the record. When I received this letter I immediately called them up and within 4 days I sent my response letter to them and I was under the impression that my letter was an appeal because when I read it said cease and desist transient vacation operations immediately and says number (b) "remove or permit any un-permitted structures or improvements to the property". When I appealed with my letter I was just saying that I don't have any un-permitted stuff on my property. Everything I have is legal. I have a certificate of occupancy and therefore in my opinion I thought I was appealing their denial because I thought it was based on the fact that they are saying that I have removed or permit any un-permitted structures. So I responded and said I don't have any un-permitted structures on the property and you guys were out there to inspect and I do have a certificate of occupancy. So I considered this my response to them within 4 days after I got this letter, I considered it my appeal even though I didn't write the word appeal in there.

In the letter from the Planning Department it doesn't say anything about appeals at all. It doesn't even use the word appeal in the letter to me so to me, my letter was saying I don't have any nonconforming uses on the property, I didn't know why they wrote that. That is why my letter states that, to me I was appealing their decision because

I thought their decision was based on the fact that I had some nonconforming permits or structures on the property. I even applied for it even though I knew that they weren't passing any vacation rentals on Ag. zoned land. I knew the rule but I wanted to apply just to follow through and do everything right and according to (inaudible) just in case something came up I would have an opportunity. So that is why I did file the application even though I knew they were denying anything on Ag. zoned properties and one of my reasons was because my lot is only 9,750 square feet and shouldn't be zoned Ag. in the first place. The County doesn't make any Ag. lots of 9,7509 square feet. And of that land, this was an old Kuleana lot, and of that land 2,000 square feet of it is in the lagoon in the brackish water where the salt and the fresh water mix. So I am on the little lagoon down there with a lot under 10,000 square feet and I don't think that the County allows lots to be zoned Ag. if they are less than 10,000 square feet so that was another reason that I was writing to letter, just in case in the future things changed. I was just trying to go by the rules. But this is my letter of appeal even though it doesn't say appeal in it.

Chair: Thank you Tom. Go over again what happens in the appeal.

Staff: What do you mean what happens in the appeal?

Chair: How are we handling the appeal?

Staff: How are we handling appeals? Appeals right now will be handled pursuant to Chapter 9 of the Rules of Practice of the Planning Commission and if appealed by the applicant under that directive which basically leads you to a contested case hearing. What we have proposed and is awaiting signature by the Mayor and basically to take affect is the proposed Chapter 6A which proposes a short form for contested case hearings which included the hearings officer, sub-committee that Commissioner Raco referred to earlier.

Chair: And if we accept an appeal what does that mean?

Staff: If you accept this as a valid appeal we at some point have to hear it or make a decision on it.

Chair: And what kind of timeline is that?

Staff: Well the applicant has consented to waive the 60 day timeline and waiving of the 60 day timeline is contingent upon the outcome of legislation before the Council so that would be our first mark, whenever Council makes a decision on the bill relating, 2298, relating to TVR's on Ag. land. At that point we would have to at some point begin dealing with these issues. There is nothing in the consent letters on each side that says within a certain number of days after enactment of the ordinance that it will happen but we will have to begin dealing with it sometime after enactment of that ordinance in one form or another depending on the outcome of the ordinance or the bill before Council.

Mr. Texeira: I have a question Mr. Chair. If we reject the request to appeal how will that impact other possible applicants?

Staff: It would be, in our view it would be, things would be going to same as they always have been because this is consistent with our practice and the Rules of Practice of the Planning Commission. If you are outside of 21 days you have forfeited your right to file an appeal.

Mr. Jung: If I could just supplement to that. Think of it as a statute of limitations where you have to do a prescribed action within a certain period of time and if it is not done then technically you waive your right to appeal. So in this case under rule or Chapter 9, 1-9-2, "The Submission of an Appeal, the appeal shall be submitted to the Planning Commission, County of Kauai, Lihue, Hawaii, and shall be filed within 21 days for appeals that is provided in the Comprehensive Zoning Ordinance." So technically he should have appealed within the 21 days. Now whether or not his letter that he submitted constitutes his idea of an appeal versus what the Planning Department did, that is an issue you guys would have to resolve.



Mr. Teixeira: And that is my point. By doing this are we not opening Pandora's box by what you just mentioned?

Staff: That actually, Commissioner Teixeira, would be my argument that if you accept a letter of this form as an appeal an applicant can say almost anything is an appeal and it then becomes on the department and you guys to guess the applicant's intent in their letters without them stating so and I do not believe that is a good practice for the Commission.

Mr. Jung: It would be precedent setting so you would be opening the door and not strictly following the rules as prescribed.

Mr. Hempey: May I speak to that point? I just want to say I don't think you are opening any Pandora's box if you just let his appeal go forward because the box closed after 21 days, after the denial. So it's not that you would be getting a flood of new appeals filed 4 months after, 5 months after the denials. The box closed 21 days later. Tom sent a letter so if there is tons of people out there that sent letters that got denied because they didn't say the magic word appeal, that could affect them but I don't think that is the case. I think the real case is that a lot of people sent letters and they were all considered to be appeals and if people missed the 21 day deadline, they missed it. There is no Pandora's box, the box shut after 21 days. So the only people that would be affected would be Tom Somers and maybe if there is one other person but I can't think of one who sent in a letter and got it denied because it didn't use the magic word appeal. And again we are just asking that he be treated like everyone else, lots of people are having their appeals considered even though they didn't technically mirror the exact requirements of Chapter 9. Nobody told Tom, oh, you have to use the word appeal. We are taking things that don't comply with Chapter 9, everybody else can file things that don't comply with Chapter 9, we are taking them but we have this secret requirement that you use the word appeal. No one told him that so again, I don't think there is any Pandora's box. We are not asking for a Use Permit today. We are just simply asking that his letter, that he get the benefit of the doubt with that particular letter, this is one person, and that he can simply get his case decided on the merits instead of losing such an important property right on a fairly unclear procedural issue.

Chair: Thank you Dan, questions?

Mr. Teixeira: My question was not related to the appeal but to the 21 day ruling.

Mr. Jung: If you look at Chapter 9, 1-9.2, it says "the petition" which is the petition to appeal the decision of the Director, "shall contain the following; the name, address and telephone number of the appellant, the identification of the property and appellants interest therein, particular provision of the zoning ordinance or subdivision ordinance or regulation in question, all pertinent facts, the action of the Director and the reasons for the appeal including a statement as to why the appellant believes the Director's action was based on an erroneous finding, material, fact or the Director had acted in an arbitrary or capricious manner or had manifestly abused his discretion." So therein lies the standard when you appeal the decision of the Director. Whether or not and no disrespect to Mr. Somers but if you are going to appeal the decision of the Planning Director you have to consult with the Planning Commission Rules. Whether or not he knew to do that, I don't know but now apparently he did through Mr. Hempey's support.

Mr. Costa: I guess beyond the approval or denial of the appeal, even if the appeal were granted the Commission nor the department could approve the application as it is a unit that was constructed after 1976 and cannot be approved based on the law today.

Mr. Blake: Say that again please.

Mr. Costa: It's on Ag. land and until the law is amended it cannot be approved.



Mr. Blake: That was my question. Before we get to the, I think, to me, the use of the magic word appeal is a non-issue. There are all kinds of ways to say I appeal. If you say appeal it makes it clear and whether or not you say appeal or not you have to follow the format that is set out in the rule and so whether or not you use the word appeal to me is the neither here nor there. But it says “pursuant to Chapter 205, no nonconforming use permits shall be issued for vacation rentals on Ag. land unless it was built prior to June 4, 1976.” Does that apply here?

Staff: No. This was built in 1990.

Mr. Blake: The application has a Special Permit under HRS 205-6 which specifically permits a vacation rental and the permit was secured prior to the enactment of this ordinance. Does that apply here?

Staff: No. There is no record of the Special Permit.

Mr. Blake: So, in order for this to be approved, the nonconforming use certificate to be approved, what has to happen?

Staff: He either had to have one of those two, the house had to be constructed prior to 1976 or prior to that July 1976 date, or he had to have on record prior to the enactment of the ordinance a Special Permit allowing TVR use, one or the other.

Mr. Blake: So does this even qualify in any respect as a TVR?

Staff: No.

Mr. Raco: Even the applicant, he admittedly said that he put it in to see if there was or in the future if there was going to be an ordinance passed then he was prepared for it.

Mr. Blake: Then is there anything to appeal?

Mr. Jung: Well he is entitled to the appeal because he is a property owner and how you dispose of that appeal would be pursuant to the ordinance, therefore if it is restrictive in what you can do on Ag. lands...

Mr. Blake: Is this a legitimate TVR?

Mr. Jung: As it stands right, no.

Mr. Blake: Before March 30<sup>th</sup>, was it?

Mr. Jung: From what it appears from the application, no, and pursuant to the ordinance.

Staff: Exactly, pursuant to the ordinance this is not a legitimate TVR operation.

Mr. Blake: Pardon me?

Staff: Pursuant to the ordinance this is not a legitimate TVR operation.

Mr. Blake: Without the ordinance was it?

Staff: Without the ordinance there was no governing mechanism so any TVR at that point was a legitimate TVR operation, practically without going too far in to a legal reading of what the rules or absence of rules there was, I would have to say it was as legitimate as any other out there without any governing ordinance to it.

Mr. Jung: And to just track where the Deputy Director is going, there is threats of litigation that they will pursue either a declaratory relief in the Circuit Court or an Agency Appeal that came from this forum to test whether or not prior TVR's on Ag.

were legitimate and lawful prior to the enactment of the ordinance. So that is subject to debate. As I mentioned to you folks when we were going over the current pending bill before Council that will allow a non-enforcement agreement for those who are on Ag-lands to allow and operate, that is an issue that still needs to be thoroughly resolved and I am sure Council when they take up the bill will look into that.

Chair: So what happens if we take no action on this?

Mr. Jung: I guess in affect the appeal would go and if Mr. Hempey and his client Mr. Somers agreed to the stay then the appeal would still be ripe.

Chair: So no action is like approving the appeal?

Mr. Jung: I think there would have to be action on it either way because it has been a request by the applicant. I just wanted to clarify this isn't for the actual appeal. This is the action to reject.

Mr. Blake: So correct me if I am wrong, there were TVR's on Ag. land, there are TVR's on Ag. land now.

Staff: Roughly 4 have met the criteria I believe.

Mr. Blake: Prior to that there were...

Staff: Many.

Mr. Blake: Of which this was one, correct?

Staff: Yes.

Mr. Blake: And so the legitimacy of those Ag. TVR's is in question pending this legislation that the Council is considering. So even if we accept the appeal it might still be muted by Council's action.

Mr. Jung: That is correct.

Mr. Costa: And by the way the law is written now.

Mr. Jung: Well there would have to be a decision based on how the law is written now.

Mr. Blake: You know I feel for Mr. Somers. I know him to be an honorable person but the law is the law and I don't see that much wiggle room in the manner in which an appeal has to be presented. And it is unfortunate that he didn't, Mr. and Mrs. Somers didn't appreciate this at the time that he responded to the letter but the TVR is a creature of statute and as such you have to follow the statutes.

Mr. Raco: So is there a motion?

Chair: Is there a motion?

Mr. Raco: I will make a motion to...

Mr. Somers: May I say one more thing, for the record, Tom Somers. In the record that was sent to me by the Planning Department it doesn't state anything about an appeal at all. There is nothing about an appeal in this letter that came from the Planning Department. I says that I have 15 days to respond and so I responded in the 15 days and to me, because it doesn't say anything about you have to use the word appeal, by me responding to this letter within 4 days of when I got it, it says you have to respond in 15 days is what the Planning Department says. I responded in 4 days after I got the letter with a response directed to what I felt was, they were saying you are being denied. I knew I was being denied because it is zoned Ag. that is not the point. I submitted this as

an appeal so down the line in the future I may have a chance of keeping or using it as a vacation rental. And the fact that it said remove or permit any un-permitted structures or improvements to the property, that is why I responded saying there was no un-permitted things on the land and I have a certificate. And to me that was the way I was appealing the letter that was directed to me.

It didn't say anything in the letter from the Planning Department about an appeal, it just said respond to the letter within 15 days so that is what I did. And I said what is going to happen now and they said they would get back to me and nobody ever got back to me. No one ever sent me a letter. Once I submitted my letter saying that I didn't have anything nonconforming and the people at the Planning said someone will be contacting you, I never got another letter from anybody. No one ever sent me anything about an appeal. No one even sent me a letter about this meeting here today. If my attorney hadn't have just stumbled upon it I wouldn't have even have known that there was a meeting going on today regarding my appeal. And all I am doing is appealing to get on the list of other people who did file appeals and the fact that my letter doesn't say the word appeal, in my honest opinion this was my appeal based on the letter that the Planning Department sent me which didn't say in their letter that you have 15 days to appeal. It just says you have 15 days to contact us and that is what I did.

I don't know if you guys have the second page of the appeal letter but it says "failure to contact the Planning Department in writing within 15 calendar days upon receipt of this letter to provide an acceptable plan for compliance provides us with no other alternative but to issue a notice of violation and pursue litigation. Please call the Planning Department," which I did within 4 days after I received the letter. So I never saw anything that said appeal that had to be in writing so I did contact the Planning Department with my letter which to me is the appeal on the letter that they sent me saying hey, I don't have any illegal issues over here regarding the structures, that was my appeal.

Chair: So Tom, you said that you understand that the law said that you cannot have that TVR on Ag. land.

Mr. Somers: Yes sir.

Chair: So your appeal to us would be that you should have that TVR...

Mr. Somers: No. My appeal is to the fact that they said you had 21 days to...

Chair: No, I get that part. So say you get that, say you get that.

Mr. Somers: Say you approve, you acknowledge my letter as an appeal?

Chair: You have acknowledged that the thing has to wait until the thing has to...

Mr. Somers: Sure, definitely. I realize that it may go nowhere. I realize that I maybe have a 50/50 chance of the legislation being changed, they could allow it or I could go back to the Planning Department and try to get my property rezoned from Ag. to Rural or Residential or something.

Chair: So why did you bring this up for us to deal with today when there is this pending legislation and is Dan coming up, I think you have to say something first about the notification, just to clarify. Well actually you did get notified. Tom said that you...

Mr. Hempey: Yes we did. I think that was a mistake. We got notified. We had no issue with it being on today. But the letter denying it put it on today so that is why when you just asked him why we put it on today, we didn't. The communication, I think, put it on today.

Chair: Well that is what I was asking, why don't we just not take action on it until we get something from the, clarifying the issue at the County Council.

Mr. Hempey: We are just trying to preserve our place in line while hopefully the Council does something.

Chair: But if not taking action today ensures that place then we have to take action I think.

Mr. Hempey: That's fine, if not taking action allows the appeal to go forward, that's fine.

Chair: No, what I am saying is that why even address the issue or what you are asking us today is to say yes or no to that letter so if we take no action on that letter and take it at some future time because it may be mute. The Council may say no TVR's on Ag. land and your appeal would be mute.

Mr. Hempey: Well my concern is that the Council might say we are going to allow limited grandfathering for people who have active applications pending and if ours is denied summarily based on procedure we wouldn't be in that group. So I really am just trying to protect this one possibility.

Chair: So if we deny this today you are saying that is not going to provide that possibility.

Mr. Hempey: I think if you deem that he didn't file on time, he out the door, we don't have that possibility anymore. If you say lots of other people wrote letters that weren't perfect but we considered them appeals, we are going to give him the benefit of the doubt. Our letter talked about permitting violations and he responded to that, lets give him the benefit of the doubt. All that does is keeps him in line and if the Commission, Council, sorry, does something that allows people with permits pending to go forward then he would not be deprived of that. But we understand on the merits when there is an appeal, we understand the law right now says you can't get TVR on Ag. land. We understand that, we just wanted to loose on the merits and not procedurally.

Chair: How many appeals are there on Ag. land?

Staff: We received roughly 41 applications. If I had to guess, we have somewhere in the neighborhood of 15. I was going to say 16 appeals on Ag. lands.

Chair: And all those 16 appeals had the word appeal in the letters?

Staff: Yes. In fact many of them were filed timely by Hempey, the actual appeals.

Chair: Any questions for Dan and Tom, thank you.

Mr. Blake: So in 25 words or less what does a deferral do?

Mr. Jung: Again, it would be dangerous precedence to defer an action pending legislation from Council because we wouldn't know exactly what would happen with Council. So if you defer the action, it is entirely up to you if you would like to defer this action. The affect and outcome of how that deferral would play out would be probably cause for litigation depending on the outcome of the legislation. If the bill is prepared that active applications are grandfathered, which I don't think it necessarily would because grandfathering would be looking at who applied, so not necessarily who has an active application. To address Mr. Hempey's concern, I couldn't imagine the bill doing that if I were the County Attorney, Deputy County Attorney addressing that legality. I would not advise Council to do that. None the less if you take no action in the deferral it would be a grey area untested that we would have to resort to pending what Council does with this bill. So in other words there is no clear answer.

Ms. Matsumoto: Is it possible to go into executive session on this matter?

Mr. Jung: You would have to direct a question as to why you would like to go into executive session and if I could answer it on the floor I would.

Ms. Morikami: Maybe she is thinking along the same lines, I am not sure. Based on the letter coming from the applicant, May 21, 2009, isn't it really a subjective review of whether or not this is an appeal or not an appeal? Isn't it pretty much subjective to the Planning Department's interpretation of whether this was considered an appeal even if the word appeal was not granted?

Mr. Jung: It would and again as I mentioned earlier, it's your prevue whether or not the appeal was subject to 1-9.2.

Ms. Morikami: And our action today has absolutely nothing to do with TVRs on Ag. land, this is just an appeal to say that he met the deadline?

Mr. Jung: Correct and again what Mr. Hempey said is that he is just trying to perfect his avenues to contest the law in general, be it an administrative appeal to the Circuit Court as an agency appeal, Chapter 91 appeal, or a deck action. So he is just trying to keep all his ducks in a row. And this is one avenue to protect that and that is why he arguing in favor of whether or not this letter constitutes an appeal.

Chair: Cammie was that your question or do you have another one?

Ms. Matsumoto: I would like to make a motion to go into executive session on the agenda item for one of the permitted purposes listed in section 92-5(a), Hawaii Revised Statutes, HRS, without noticing the executive session on the agenda or the executive session was not anticipated in advance, HRS section 92-7(a). This executive session may only be held however upon an affirmative vote of two thirds of the members present which must also be the majority of the members to which the board is entitled, HRS section 92-4. The reason for holding the executive session shall be publicly announced.

Chair: Any second?

Mr. Blake: And what was the reason that you wanted to hold the executive session?

Ms. Matsumoto: I think my understanding is that I can make a motion to discuss the liabilities involved in this matter.

Mr. Blake: In deferring the decision today on whether to accept this appeal or not?

Ms. Matsumoto: Yes.

Mr. Blake: Second the motion.

Chair: Any discussion, roll call.

**On motion made by Camilla Matsumoto and seconded by Hartwell Blake, to go into executive session, motion carried by the following roll call vote:**

Ayes:	Kimura, Blake, Morikami, Matsumoto, Texeira	-5
Noes:	Raco, Nishida	-2
Absent:	None	-0
Not Voting:	None	-0

Commission went into executive session at 10:55 a.m.

Meeting was called back to order at 11:06 a.m.

Chair: Paula, do you have another question?

Ms. Morikami: No thank you.

Chair: Any other questions? What does the Commission want to do?

Mr. Raco: I will make a motion to reject the appeal for TVNC-1286 on TMK 4-9-013:023.

Chair: Any second?

Mr. Texeira: Second.

Chair: Any questions? Is this going to be a voice vote? Roll call, so an aye vote would be to reject the application.

Staff: Reject the appeal.

Mr. Raco: And to accept the Planning Department's recommendations.

Mr. Jung: Maybe to clarify withdraw your original motion and second and then to clarify exactly what the motion is.

Mr. Raco: So then I would remove my motion and he would have to remove his motion too.

Mr. Texeira: I remove my second.

Mr. Raco: So then I would motion to approve staff report or Planning Department's recommendation to reject the appeal of application TVNC-1286 on TMK 4-9-013:023.

Mr. Texeira: Seconded.

Chair: Moved and seconded, any discussion, roll call.

**On motion made by Caven Raco and seconded by Herman Texeira, to approve Planning Department's recommendation, motion carried by the following roll call vote:**

Ayes:	Kimura, Blake, Morikami, Raco, Matsumoto Texeira, Nishida	-7
Noes:	None	-0
Absent:	None	-0
Not Voting:	None	-0

## **SUBDIVISION**

There was no Subdivision Committee meeting held.

## **UNFINISHED BUSINESS**

Informational update on Planning Department long range projects and activities.  
[Deferred 8/25/09.]

Chair: Ian with the staff is going to be giving the informational update on the Planning Department's long range projects and activities, Ian.

Mr. Costa: Good morning Commissioners. We are providing this presentation to give the Commission an update on our long range projects as well as the development of our long range planning section. And assisting me in the presentation will be members of our Long Range Planning Division which is headed by Myles Hironaka who could not be here today due to being in attendance with a family illness. But I do have Ms. Lea

Kaiaokamalie who is a planner in our Long Range Division as well as Marie Williams. We are lucky to have these two women who have joined our Long Range Planning Division and I believe have been there close to a year, about a year now. I thank Lea for coming back, she was a member of our Planning Department for some time and then went over to the Information Technologies Department, assisted them for a while and we were able to recruit her back.

We are temporarily waiting for our file to come up on our laptop and we appreciate your patience. Again, we are lucky to have Lea and Marie. Up until their coming and joining us, our Long Range Division consisted of one person and that is Myles so they have been instrumental in helping us manage our long range projects as well as get some of them moving along quicker. Part of the reason for this presentation was not only to update the Commission on our efforts but to also update the public but we this will be aired on Hoike.

So this is the intro of our long range planning projects provide by the Planning Department and being present to the Planning Commission today. Part I, just to recap our funded projects, shown first is the County Zoning Ordinance or Comprehensive Zoning Ordinance, the CZO, which is the second phase of our CZO update. We did, just to give you some history on that, back in 2003 I believe we received an initial funding to update the CZO at the urging of the County Council. That money was used to produce a TVR report which was completed several years ago and was the seed if you will for then moving to yet proposed regulation of transient vacation rentals and has culminated in the adoption of an ordinance which the Planning Commission has been well involved in.

Number 2, Zoning Digitization or Geographic Information Systems project, No. 3, Coastal Erosion Study, No. 4 the Kapa a'Wailua Development Plan Update, No. 5, The Lihue Town Core Urban Design Plan, No. 6, Lihue Development Plan Update, No. 7, Koloa/Poi'pu/Kalaheo Development Plan Update and No. 8, Important Ag. Land Study. Part II, on going initiatives of the Long Range Division include efforts in data gathering, management and analysis in order to build the division and departmental capacity to research and conduct land use analysis. Also participation in partner planning initiatives and thirdly, quote, "with an eye on the future" long range project scheduling.

The department is currently working on 8 long range projects. These are first of all the CZO Update. The start of our contract was in February, 07. The target completion is November of this year. We are currently awaiting the final draft to be delivered next month at which point we will then draft implementing ordinance and then bring it to the Planning Commission likely in November and hold a public hearing on that matter. The CZO as some of you know, this update is an attempt to update the current CZO which was adopted in 1972 and has not been completely updated or revamped since that time. As the Commission is aware there have been a number of amendments to the CZO so the purpose of this update was not only to fully incorporate those amendments that have occurred since 1972 but also to do a cover to cover revamp of the entire CZO and make it more user friendly as well as to update some definitions that have since come about and come into being for uses or activities that were not in existence back then. As well as update other provisions that have been outdated.

Just a slight, short description, the new zoning, Phase I commenced in 1996, there was a contract earlier back in the 1990's whereby that contract produced a draft CZO update. Immediately after that draft was completed the General Plan Update was started and the CZO implementation of that draft was put on hold until the General Plan could be updated. And part of this exercise in the new update was to go through that draft and make sure it was consistent with the 2000 General Plan update. The project was put on hold in order for the department to update the 2000 General plan as stated, Phase II began in 2007. The first draft for review was completed and delivered to us in November, 2008. I believe we distributed that to the Commission in about December, 2008. As of about a month ago or two months ago the staff met over a series of about 3 or 4 months to go through cover to cover and provide final comments or amendments if you will to that draft. And the consultant is currently incorporating those amendments and working towards producing the final draft next month.

No. 2, Zoning Digitization GIS project started in December of 08. Target completion is next month. The purpose is to digitize our zoning maps for lands designated Agricultural and Open District and update original zoning map layer developed in 2000. New zoning data will be parcel specific and include density information in acres and feet per zone on parcels. Staff is working with consultants to design a new data base, interpret boundaries, flag areas that need further discussion and resolution, document project methodology and create (inaudible). The project is in its final stages. Staff has completed reviewing the shape file or map layer. The final shape files and project documentation will be transmitted to the department once revisions are made. This is another project that is right at the cusp of being completed. Lea will give you some additional background on this.

Ms. Lea Kaiaokamalie: Thank you Commission for hearing us today. I just wanted to go into a little detail on what the final attribute table or the data base is going to look like for this new shape file. The original zoning shape file was these large chunks of zoned lands so it was not parcel specific. And as you know one of the things that the staff gets asked on a daily basis is what is the density per zone on my parcel and our plan techs and planners have to use the old planimeter basically to try to determine what that is and that gets cumbersome. So we have asked the consultant to make zoning our primary, basically our primary field in this one and that way we can list the parcels twice and know therefore if it is a parcel with split zoning. The new attribute table also gives us the acreage and square footage of that zoned area and also helps us to flag.

And now this is an extreme example, I just put this up here basically I guess to see if people are awake or not, of course you cannot have Ag. lands with RR-20 zoning there but if for example, through this project we have been able to look very specifically at lands especially lands out in the Ag. District that before we only had these large 400 scale, 1,000 scale maps and really look specifically at these areas to see where the boundaries are. And in this case basically we can then flag and systematically look to resolving issues. And again this is not a real example. This is an example of what the map project that you would see with the new zoning GIS layer and here we are showing the core town area. The layer gives you such things as major landowners, TMK and again how many zoning splits there are on the parcel, what the zoning is and what the area density is for that area along with other information that you can put on the GIS which is you TMK, your roads and other layers.

Mr. Texeira: Mr. Director, can we ask questions as we go or do you want us to wait to the end?

Mr. Costa: I guess I would ask that you save your questions for later. No. 3, Coastal Erosion Study, the purpose is to provide necessary scientific data to support new and revised setback rules regulating construction and setback boundaries adjacent to Kauai's shoreline which would be then based on scientific data and coastal specific erosion rates. Project description and status, the project is in its final stages and I was just informed that we have received the final product and will begin drafting of an ordinance to implement if you will that data that we have just received. Part of what we have received is erosion maps and a completed report as to the basis of that data. This shows you some of the graphic information that is part of that report that will be then interpreted to, or utilized to determine specific erosion rates for any point along the coast of Kauai. This involved about a year, year and a half actually almost two years, this was a three year project but it involved two years or aerial photography island wide.

The Kapa'a/Wailua Development Plan started in May of 06. Target completion is June of 2010. Wilson Okamoto is the consultant. The purpose was to guide development of the east Kauai district to ensure that current and future growth is consistent with the General Plan, protects and where feasible enhances the rural character, cultural and historic assets of the area and integrates recommendations for policy and design requirements provided by community and government agencies. Project description and status, the department is currently reviewing the draft plan and actually I believe the consultant is at the stage where he has prepared alternative growth scenarios which have yet to be presented to the Community Advisory Committee. This here is just a map showing the area involved.



The Lihue Town Core Urban Design Plan started in May of 05, target completion is this month and we do have the public hearing for that scheduled at the next Commission meeting on the 22<sup>nd</sup> I believe. The purpose here was guide the renewal of the Lihue Town Core area through urban design themes involving buildings, street scapes as well as circulation for vehicular, bicycle and pedestrian traffic. The plan details a mixed use design and zoning recommendations for the following neighborhoods, Rice Street, Kuhio Highway, one district being Rice Street, the next Kuhio Highway District, Akahi, Elua Street and Umi Street District, the Lihue Civic Center and Community Facilities District as well as the Lihue Mill site. Just to sort of summarize, Kauai does not have any mixed use zoning, in fact the closest that comes to it is the Kapa'a/Wailua Development Plan in the town core which is the area between the two canals, one being where the boat ramp is, the other being where the library is.

If you look at any of the zoning maps there is no zoning for that area but what the plan does is list a series of uses that are permitted which are mixed in nature and includes uses such, anywhere from commercial to residential to industrial. So it is the closest that the County currently has in terms of mixed zoning or mixed use zoning. So the town core, the recommendations that we will be bringing forth does similarly provide a mixed use zoning type recommendation for these areas as I described earlier which is really the Lihue Town Core area. What we are doing is trying to promote a greater mix of uses in an attempt not only to give the landowners some flexibility in the types of uses that they can propose but also to promote and enhance a more walkable town core area.

The Lihue Development Plan update started in, actually will be commenced in June of next year. The purpose of the plan update is to guide the development of the Lihue District to ensure that future growth is consistent with the General Plan and integrates recommendations for policy and design detail in the Lihue Town Core Design Plan, Lihue/Hanamaulu Urban Design Plan, Lihue Civic Center Master Plan and the Sustainable Design Assessment Team Report or SDAT as well as other applicable public facilities and transportation plans for the area. Project description and status, the Planning Department is in the process of developing the scope of work and selecting a consultant for this project.

The Koloa/Poi'pu/Kalaheo Development Plan update, start date is July of this year and the purpose is to implement the General Plan's goals and visions for the Koloa/Poi'pu/Kalaheo Planning District. The project will provide guidance for future population growth and economic development in coordination with other public infrastructure and facilities plans for the district in a manner compatible with the protection and enhancement of community assets. The project description and status, the department has received a project work plan the consultant that includes a plan for public involvement in this process. The Citizens Advisory Committee will be selected this fall with meetings commencing subsequent to the selection process. Just a side note, we have suspended this contract as the consultant has requested some additional funding so we are working with the administration and will be approaching Council for potential additional funding before we kick that off.

The Important Ag. Lands Study, we just executed a contract I believe at the beginning of this year. This follows up on legislation that was adopted by the legislature I believe 3 years ago and we are glad to announce that we will be kicking this project off with a public meeting at the end of this month, I believe July 30<sup>th</sup>. I am sorry, September 30<sup>th</sup>. Project purpose, to identify important agricultural lands pursuant to Act 183 of the Hawaii State Legislature which includes lands compatible or capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and contribute the State's economic base and produce agricultural commodities for export or local consumption and are need to promote the expansion of agricultural activities and income for the future even if currently not in production. Through this project the department will also examine the diversity of agricultural use, activities in the County through discussion with various stake holders, partner agencies and members of the public. The consultant for this the University of Hawaii, their proposal or contract is for a two year time period to produce a series of maps identifying the important agricultural lands as well as providing recommendations for any amendments to either the CZO or other regulations that are appropriate.

Again, we are holding a kick off public hearing or public meeting on September 30, 2009 at the Kauai War Memorial Convention Hall. The consultants and department staff will have a booth, just had a booth at the recent Farm Fair held August 27<sup>th</sup> thru the 29<sup>th</sup> to distribute information about the project and announce the kick off meeting as well as to engage community members in mapping exercises related to identifying important agricultural lands as well as to distribute applications for potential membership in the stake holders or technical advisory committee. Now we will move into some other initiatives of the Long Range Division that are not necessarily funded projects and Lea will elaborate on these.

Ms. Kaiakamalie: Thank you. In addition to the projects that Ian discussed the Long Range Division is also engaged in research, data collection and data management, statistical analysis and systems development to improve upon the department's ability to update and implement plans and codes and other long range functions. And also to be able to do research and reporting better on a daily basis. So the update of the Kauai General Plan is right around the corner and with this in mind it is important to position our Long Range Division with additional resources, knowledge and tools in preparation to take on existing projects and also these future plans and special studies. Very important to this is our system, developing systems for implementation, monitoring and feedback into the future to have a more comprehensive look at the impact of our more visionary plans and our development plans on other plans, beyond just what the Planning Department is responsible for and making sure to engage the right agencies and of course the community in these discussion.

The Division is currently engaged and gathering and evaluating land use planning related data including data basis, maps, models, statistical information to build our capacity in the area of planning theories and methodology. So we do this a lot. We are constantly trying to look at other methodologies to use by the other Counties, other States, but also most importantly I think for us is islands just like ours in the Pacific and the territories as well to see what everybody is doing, what is successful, what is not successful to gather demographic information about Kauai, Hawaii, areas just like us, and to be apprised of the newest types of information, tools and techniques out there for planners to be able to access.

The department has also developed a beta data base using Microsoft Access. Access is kind of limited but we did start the leg work on trying to do data input to computerize all of our historic permit logs and data. And our division has also acquired a large format scanner/plotter in order to begin scanning and archiving its repository of maps. Also when that zoning shape file is delivered to us and we do a little bit of in-house updates on that we will be able to print out as we need, new zoning maps as needed, do analysis and be able to really take our reporting into the 21<sup>st</sup> century I guess. In addition, the division along with the plan techs, the regulatory planners, we have basically mapped our work flow procedures, what we do on a daily basis, what information we bring into the department, what information is required from us, from other agencies and how we give that out in anticipation of developing planning and permitting work flow module. Now for this to really work we will need to work hand in hand with the Real Property, the folks in the Real Property Division, the Building Division and also the Engineering Division to be able to look at our projects in a timely basis and be able to exchange information and project status as well.

Mr. Costa: Lea, I would just like to draw a parallel. Previously we had a discussion on some of the efforts involved in verifying applications for TVRs for instance. Currently we go through the care file and look through three different storage rooms and about 100 different file boxes to find this permit history data much of which you will be able to pull up simply by typing in the property's TMK in the near future.

Ms. Kaiakamalie: So until that funding is available for us it doesn't mean that we can't know what we are doing, ultimately how the system is going to work for us, what information we need, what information we give out and really try to plan a good system that involves our archived information and maps as well. And this graphic that I have over here on the left hand side shows kind of a visual of what we are trying to build,

is that geographic information stays where it does on the land all the time, it doesn't move so even, for example, if you start subdividing a parcel or merging a parcel, it stays geographically in the same location.

Mindful of that if we build our system to kind of mirror this a little bit then maybe, well one of the problems of course is always there for any kind of land use office is basically how to do parcel genealogy where you could go back to the mother, the parent parcel even if that parcel might have a slightly different TMK number. Sometimes it's not in the same plot, sometimes it's not in the same zone and then it gets difficult as it starts to make children or subdivisions of parcels for us sometimes to be able to physically organize that. But in the virtual world what is kind of nice is you can lay these out more like maps to also assist us that when we go out and look for those files even if they are in boxes and such to know where they are and kind of have those things just mirror each other. So it is a work in progress and it's not something, it is something that we have been doing slowly and carefully over the last few years and especially since Marie and I joined the Long Range Division.

In addition to creating this planning and permitting data base, basically in the beta version in Access, we are also scanning correspondence, the department actually as a whole is scanning correspondences, maps and other pertinent documents. And actually right now we hold that on Laser Fiche so we can go back and look at for example old correspondences and letters that are (inaudible) by parcel number and this makes it a lot easier therefore to know, to follow up on the status of permits and projects. And these elements will ultimately be tied together in that larger work flow system which will also have that mapping or that GIS component as part of it. Within the last 5 years actually the department and the Information Technologies Division have been working together to actually look at the different kinds of models there are out there for work flow systems.

The division also uses GIS to develop new geographic data sets which means that we take existing data and we update it and we do other types of analysis with it and create new data from it. We also provide maps and conduct land use analysis for plan processes as well as to provide data and mapping analysis to department staff and other County agencies and even nonprofit partners that we have. Actually just recently we got an Enterprise license for the County, it is a 3 year license that the company that produces our GIS which is ESRI allows for rural Counties of populations less than 100,000 people. Basically you can have a County wide license for 3 years for 50,000 dollars a year and that really is going to help us because right now all of our staff members will have access to GIS and our Long Range Division will provide on going training to the staff to help them to use the software to query zoning data, create maps, do some analysis, hopefully track their projects and basically create that system, that larger system we need to be a little more comprehensive and allow us to do research and reporting easier.

Mr. Costa: Lea, you might report that those are currently being installed on the computers.

Ms. Kaiakamalie: Yes, last we had two of our first waves of installation and that is done by the Information Technologies Division, specifically Garrett Johnson has been really super in coming and helping us to do the installs and he is also going to be helping with the training as well. And now I am going to turn it over to my partner Marie and she will go over some of our partner initiatives that we are involved in.

Ms. Marie Williams: Thank you Lea and thank you Commission. Another important function of the Long Range Division is that we work with other County and State agencies to ensure that the vision and goals and objectives of the General Plan and other plans are being met in all the different planning processes. No plan happens in a vacuum, it affects other plans and is impacted by other plans and because of that we have a coordinator role and we want to make sure that the County is moving on the right track in all its planning efforts. And this means that we serve as a partner in many various planning efforts and projects, some examples are the Public Facility Plans of other agencies. There is the State Department of Transportation, Statewide Transportation Advisory Committee, the upcoming Land Transportation Plan Update, the Host Benefits

Fund Program and the Built Environment Task Force of Get Fit Kauai which seeks to implement Hawaii's first nutrition and physical activity plan.

And in preparation for the 2010 census which will be April 1<sup>st</sup> of next year we are working with the U.S. Census Bureau to review the boundaries of the County's census tracts, (inaudible) groups and designated places which actually have not been updated in several decades. We received training from the Census Bureau on the Tiger Mapping System to assist us in this and the recommended changes were submitted to the Census Bureau earlier this year. And the purpose of this project really is to ensure that each geographic entity complies with the U.S. Census Bureau's statistical requirements and as a result hopefully we will have much more accurate data on the next census data. Results are released December, 2010.

An activity that is very exciting for us, myself and Lea enjoy this, is to participate in public outreach and education concerning planning issues. And these are slides that were prepared by Lea and presented to students and teachers at various meetings with High Schools and teachers and we were also at the Sustainability Fair at KCC earlier this year. This poster is another example of educational material designed to help students and the public really think about planning issues. We want to get people that might now usually be involved in planning to get involved and realize the importance planning might have on their lives and how they can improve our planning process. And our division, with the guidance of our Planning Director has its eye on the future, we are looking at future planning projects and other studies so our department can be prepared with the data and tools that we need to develop a system to complete all these future projects on a regular schedule.

And on the horizon is the General Plan update, the Impact Fee Study, the Waimea/Kekaha Development Plan Update and the Hanapepe Development Plan Update. And we also want to ensure that the necessary changes to the CZO that result from these plans are made on a timely basis. That concludes our presentation. I will quickly go over who is responsible for long range planning and that is our Planning Director and our Deputy Director, they direct and guide us, Myles Hironaka is the Long Range Division's manager and myself and Lea are planners within the division, thank you.

Mr. Costa: Thank you Commission. I guess if you have any questions we will try and answer those at this time.

Mr. Texeira: Mr. Chair, could I make one request? Could this be larger? I am like squinting over here. Can you give so I can actually take a closer look?

Mr. Costa: I will make sure that we distribute or follow up with a distribution on a larger scale.

Mr. Kimura: Is any of this on the internet, on the government website?

Ms. Kajaokamalie: Not at this point. It is up to the Director whether or not we want to make it available.

Mr. Costa: It is not currently. I don't see any reason why we wouldn't put it on at this point.

Mr. Kimura: I couldn't read it. If I wanted to go back and look at it is the only reason I am asking.

Mr. Costa: I think that is a great idea, no problem and we would periodically update it. Lea, try and work with IT and I think it is a good idea to put it on the County's website.

Mr. Kimura: Or you can just make a copy, I am fine with that.

Mr. Costa: I am going to do that because of Herman's request.

Ms. Matsumoto: I also think it is, I am just very impressed with this report and I think it would be good for Kauai to know what is being done, some of what is being done at the Planning Department and how inclusive it is as it considers many aspects of Kauai.

Mr. Costa: I believe we are doing a presentation on the Mayor's show which will air on Hoike I believe next week and we will be using the same presentation with some updates should things, for the things that occur in the next couple of weeks.

Mr. Blake: Instead of doing one big presentation why not break it up so that you have every two weeks or something like that so that the public or so that we all can follow pieces of it rather than try to absorb the whole thing at one time. I always wonder where Kauai is going, like in 25 years are we going to look like Oahu or are we still be primarily, well not primarily but will agriculture still be a big component. How much population are we going to have to put up with, traffic and so forth and so forth. The catch phrase was always that we don't want to get to be like Maui. I think we like Maui and so I think it would be valuable to the citizens to know where we are headed, how fast we are headed and whether there is anything that the citizens can do to affect our own future. So I prefer breaking this down and having the newspaper carry successive reports so people have a chance to digest it and ask questions.

Mr. Costa: I am assuming that would be at least every other week that we are not having a Commission meeting which is the week we prep for the Commission.

Mr. Blake: However it is easiest so that it works.

Mr. Costa: Just to follow up on your comment about the population, I don't believe there is...arguably we are the most attractive place on earth. We have people moving here every day with no mechanism to address that.

Mr. Blake: And that, it's nice to know that we are, well I guess most of us...

Mr. Costa: And that is part of the beauty of being America.

Mr. Blake: (Inaudible) feel that way already but it also has the affect of housing being in short supply, transportation becoming a bigger and bigger component in your every day life because of the delays in getting from point A to point B. Whether we are going to become a service economy, the people that have been here for a long time will just have no choices but to service the people that are coming in who can afford to come in and what is going to happen to the people that work for a living. We are going to be relegated to barrios just to service these bigger more expensive developments and so forth. When I think of Koloa, we have about 1,900 people by census and just the South Shore of Koloa, from Kukui'ula Boat Harbor to Mahalepu is slated for 4,000 units. I don't know if that figure is still current but that is at least 10,000 people, new people, so already the face of Koloa is changing. It is nice that we have these historical districts and so forth but you have a different kind of population component now and how is that going to affect those who have been there since birth versus those that come in well into their adulthood.

You hear these rumors about closing Koloa School and so forth and so you have your rumor of the week that is going on and it's just based on rumor. We don't have anything hard to talk about or to think about. And so I believe that the more information that the public has, both the kamaaina and the malahini, the better we will be able to have some say in the direction that we take as a community.

Mr. Costa: I just want to touch on that note that much of our resort zoning aside from Kukui'ula which was relatively recently rezoned, much of our resort zoning that was placed since 1972 has not been built out however I believe the zoning has not accounted the roughly 30 to 40 thousand people that have moved here since that 72 that are not subject to the impact fee like developments are. But that is something that we have to reckon with.

Ms. Matsumoto: I would also like to recommend that you share this report with the Chair of the, excuse me the Council member who is the Chair of the Planning.

Mr. Costa: Thank you, actually this report was specifically put together based on a request from the Committee Chair that we present it as a follow up to our budget request so we gave this presentation. I believe it was in March and as a result of that being aired I believe on Hoike the Planning Commission Chair requested that we provide the similar presentation so some of the work was obviously updated since then. We use this tool constantly as a base and constantly update it for any future presentations as well.

Ms. Morikami: Mr. Chair, I have several questions for the Director. On the upcoming Koloa/Poi'pu Development Plan, the update, once funding is secure what is the process for selecting members of the advisory committee? I am just curious as to how they are selected, who selects them, how many people. I am just curious as to who makes up this advisory committee.

Mr. Costa: Typically we provide recommendations of people who have been either active of the community or that represent certain interest groups or community groups. We usually provide a list to the Mayor but ultimately the Mayor selects these members. Often times as a matter of courtesy those names are also forwarded to the County Council.

Ms. Morikami: My next question is on the important Ag. land study, IAL, coming up in the presentation on September 30<sup>th</sup> at the Kauai War Memorial, what is the format going to be like? Who is presenting? What is being presented? How are you going to get people there to observe and ask questions?

Mr. Costa: Lea is the project manager for that and has been working closely with Dr. Carl Kim with the University of Hawaii Planning Department and she can elaborate.

Ms. Kaiakamalie: The meeting that is coming up at the War Memorial, I guess the agenda for that meeting is to go over Act 183 a little bit, the history of IALs back when it was approved during the Constitutional Convention in 78. And then also to give a background of the pilot study in which the Land Use Commission contracted the same folks, the UH Department of Urban and Regional Planning to do, Koloa/Poi'pu was the focus of that pilot project in which Dr. Kim and his crew developed methodologies...it was a technical review so they used a lot of stats on the agricultural information, the old ALLSH, Agriculture Lands of Importance to the State of Hawaii or ALISH, (inaudible) data, Land Study Bureau Data, major land resources, Ahupua'a, water and such and came up with this grid, kind of a grid map. Each pix or each cell in there representing approximately 64 acres in which they could code the importance or the presence of important agriculture and their infrastructure, water resources, even roads to transport agriculture. And they are taking this methodology basically and coming to the public and coming to the department and all the agencies and saying hey, how do we refine this a little more and look at the entire island. To also map where farming is done now, I myself have been doing research and there is no one place where you can get information on all the active farming in here. To gather information relating to agriculture, to keep our focus on what Act 183 requires us to do but also to really take a look at our own rules and say maybe we want to change a little bit as far as how we are treating agriculture, how we are defining agriculture or what even agriculture is.

This is all something that is going to happen through the public process. Basically the kickoff meeting is going to be there for people who are interested, farmers, the community and such and to find those folks that may be interested in sitting on that stake holder or technical advisory committee which we do have statements of interest out right now. You can go to the IAL website, we can provide that information for you, you can go on the website and download that statement of interest form or pass it around to those that you feel would be good representatives of agriculture. Not just the large landowners, not just the farmers but those that might be a cross between these, those that might represent larger groups, those that have various backgrounds relating to Ag. that would be great to come to this working group. And I say working group because it is a technical study to help us to refine the methodologies so that when you go out to the



public, I think we have 3 public meetings, 3 or 4 public meetings that we want to do we go back to the community and then present that and say hey, what do you think of this? Is this where your lands are? Is this methodology applicable? How can we refine and make that grid a little more organic I think and be able to capture that information that we really need.

Ms. Morikami: What time is that taking place?

Ms. Kaiakamalie: 5:30 to 7:30pm.

Ms. Morikami: And how are you informing the public about this meeting?

Ms. Kaiakamalie: We do have a press release that is ready. We have also been sending information about the website application, there is a brochure and the questionnaire also for folks that might be interested in doing an IAL designation at this point. We have sent it through the virtual coconut wireless at this point letting people know and we will do a press release like I said.

Ms. Matsumoto: And the date of that again?

Ms. Kaiakamalie: September 30<sup>th</sup>, 5:30 to 7:30pm at the Kauai Memorial.

Mr. Costa: Just a little bit of additional information, about 5 years ago myself and other representatives of Kauai participated in workshops that served as the input if you will to the legislature for its enactment or adoption of this law. In those discussions all the Counties participated and in those workshops at some point the question was asked of the Counties what kind of funding would each County need with respect to doing these studies. I know that for the County of Kauai at that time we stated a preliminary figure of a half million dollars and I believe other Counties did so accordingly. When they adopted the law the legislature provided 75 thousand dollars to be split amongst 5 Counties. Obviously at that point none of the other Counties were willing to accept the money clearly because that wasn't adequate so the Land Use Commission came to us and asked us if we wanted the 75 thousand. Well along with that acceptance of the 75 thousand was also a commitment to complete the study within 5 years. We suggested to the Land Use Commission that they contract directly with some entity, consultant, to produce a pilot study that would serve as the basis for the Counties to then follow. Well luckily they contracted with the University of Hawaii and the pilot project was the Koloa/Poi'pu area and I just wanted to bring that up because I will make copies of those and get those to the Commission right away. That was completed about a year ago.

Ms. Morikami: I just have one more question and that is I noticed on one of you future projects you were mentioning the Impact Fee Study. What does that entail or what is that?

Mr. Costa: That is to update on when we approve new units either through zoning amendment or Class IV Permits there is what is called an environmental impact assessment fee that is charged. The basis for that is to provide some infrastructure funding project by project if you will that is outdated. So that project is to specifically update that impact fee to account for emergency services, police, fire, providing for parks, roads, solid waste, those are just a sampling of the elements that that fee should account for per unit. And so that is what...

Ms. Morikami: An update.

Mr. Costa: We did put out the RFQ for that, I believe it was in June. Every June the County puts out an RFQ for upcoming projects, we did put that out so we will be, and I will be reporting that a little bit later put we are soon to go through those respondents, rank those and then move towards negotiation of a contract and get that particular project underway.

Ms. Morikami: Thank you Mr. Chair.

Mr. Texeira: I would like to make a comment if I could. I really believe that, number one, the Long Term Division, Planning Division, is the primary research arm for planning, for the Planning Department, am I correct?

Mr. Costa: Research as well as data management.

Mr. Texeira: So as such, for me data gathering is important but the data gathering, it seems to be overlapping between the needs to what we need right now as for the future. So I am just stating that the data gathering should not only be for the future but for current and mid-term...

Mr. Costa: As well as historical.

Mr. Texeira: Yes because it is such an important component of planning and the information is so relevant.

Mr. Costa: Sure. And much of what Lea and Marie tried to show you is, and to tell you quite honestly for the last 3 or 4 years I believe in our budget proposals we have been pushing the GIS software. Not only GIS software for purchase but also to contract to turn all our decades of permit information to electronic form, every year we fall back several hundreds behind. So we have been making that push, the efforts you see that were demonstrated on this have been largely due to in house efforts.

Mr. Texeira: So with that in mind could I for example make the recommendation in terms of the type of data I think is, I would need to help me in making planning decisions? Could I recommend to the department what types of data gathering, what types of data I would like to see?

Mr. Costa: Sure. We are always open to any recommendations.

Ms. Kaiakamalie: It would help us if you would provide or tell us specifically where to gather data because we look at things comprehensively so everything is past, present and future in the system that we are looking at. And of course like I tried to give the example of parcel history, just doing parcel genealogy work by its self becomes very cumbersome and time consuming so if you can, I mean there is the general types of data of course we want to collect. I personally, my thesis was on Ahupua'a planning so Hawaii land use history is an interest of mine and I collect information on that and how lands traditionally and historically have broken down where the ownership information is because it helps us to know where that land came from, what the use of it was and etc. It would really help us if anybody, really, could specifically tell us where or even gather and provide that information for us. It is just one thought because we open to whatever you have to give.

Chair: Anybody else?

Mr. Blake: I think this is great. To me if you can look into the future then you are planning versus reacting and I think much of what we do is reaction. The public plans and we react to their planning. We have development plans for each region of Kauai that seek to direct activity and by having our long range planners come before us often I think they can help keep us on track by their observations that say if you permit housing in this area then be aware that this is prime agricultural land. And I know that is addressed by the planner's reports, specific reports on the projects but this would kind of give you an overview so that you are thinking about this all the time. And that is where I feel I am at a loss because like I said I feel like I am reacting versus being proactive and I would like to be more proactive, head things off at the pass, guide things where such action is possible or advisable so that the Planning Commission plans.

Mr. Costa: I think you just, yes, it is important to keep in mind that we are tasked with not only planning but permitting. We don't control who can and cannot apply for a permit and government has created laws whereby we have to process and act on those plans within a certain time frame, otherwise they are automatically approved. So we have to do both.



Mr. Blake: I understand that and to me if I come in and ask for a permit and my permit falls squarely within the requirements for that type of permit, it's almost like you have to issue the permit. But the minute that I diverge outside because I want less parking or more parking or I don't want to plant certain kinds of required landscaping or anything like that then to me the immediate question when we are being asked to exercise discretion, how does the public benefit from this. It is not just a matter of the applicant benefiting, how does the public benefit because we have the guideline and we say if you do this, fine, you get your permit but as soon as you decide that you want to move outside the box so to speak, that to me, I think it really falls upon the applicant to tell us why we should do it. Not just be good guys, help me make more jobs...How is the public going to benefit from us exercising discretion and I think that is the (inaudible) that we should follow, in my opinion. So that is what I look at and if you want SMA consideration, why, not just because it is easier for your project or it will make parking more convenient or some such project related consideration. How does the public benefit from it? Because once it is in, once it is (inaudible) and concreted, that's it. I know that the planners opine in that regard whenever they are presenting their reports. I just would like to have that emphasis recognized, myself.

Mr. Costa: I just want to say that it is our duty to facilitate the Commission. If there is any additional information, facts that you need to make your decision. That is what we are for.

Chair: Anybody else, thank you everybody.

Pursuant to Hawaii Revised Statutes Sections 92-4 and 92-5(a)(4), the purpose of this executive session is to consult with the County's legal counsel on questions, issues, status and procedural matters pertaining to:

- a. Civil No. 09-1-0069, Fifth Judicial Circuit (Declaratory and Injunctive Action), Theodore K. Blake v. County of Kauai Planning Commission; County of Kauai Planning Department; Ian Costa, in his official capacity as Planning Director, Department of Land and Natural Resources; Laura Thielen, in her capacity as Chair of the Department of Land and Natural Resources; and Eric A. Knudsen Trust. (Subdivision No. S-2003-48)
- b. Civil No. 09-1-0214, Fifth Judicial Circuit (Agency Appeal), Barbara Robeson and Caren Diamond, Members of Protect Our Neighborhood Ohana v. Planning Commission and Planning Department, County of Kauai; and County of Kauai.

This consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Commission and the County as they relate to these agenda items. [Deferred 8/25/09.]

Chair: We will do that executive session things and then I was talking to Ian and he said the reports might be fairly fast so I thought if we could go into executive session before we go to lunch, then you can get that out of the way before the public hearing if that would be okay with you folks. So would somebody like to read or move to go into executive session?

Mr. Teixeira: Pursuant to Hawaii Revised Statutes Sections 92-4 and 92-5(a)(2&4), the purpose of this executive session is discuss matters pertaining to the Planning Director and, if necessary, to consult with the County's legal counsel. This session pertains to the evaluation of the Planning Director where consideration of matters affecting privacy will be involved, and if necessary, to consult with legal counsel regarding the powers, duties, privileges, immunities, and/or liabilities of the Planning Commission as it relates to this agenda item.

Chair: We have to do (a) and (b) too? Herman, can read (a) and (b), D.a and b, too?

Mr. Teixeira: Where is that, I don't see it. Item (a), Civil No. 09-1-0069, Fifth Judicial Circuit (Declaratory and Injunctive Action), Theodore K. Blake v. County of Kauai Planning Commission; County of Kauai Planning Department; Ian Costa, in his official capacity as Planning Director; Department of Land and Natural Resources; Laura Thielen, in her capacity as Chair of the Department of Land and Natural Resources; and Eric A. Knudsen Trust. (Subdivision No. S-2003-48). (b), Civil No. 09-1-0214, Fifth Judicial Circuit (Agency Appeal), Barbara Robeson and Caren Diamond, Members of Protect Our Neighborhood Ohana v. Planning Commission and Planning Department, County of Kauai; and County of Kauai.

Mr. Jung: And Commissioner Teixeira, if you could just read into the record item D.2 for executive session, pursuant to Hawaii Revised Statutes.

Mr. Teixeira: Pursuant to Hawaii Revised Statutes sections 92-4 and 92-5(a)(4), the purpose of this executive session is to consult with the County's legal counsel on questions, issues, status and procedural matters pertaining to.

Ms. Matsumoto: Second.

Chair: So moved to go into executive session, seconded, roll call.

**On motion made by Herman Teixeira and seconded by Camilla Matsumoto, to go into executive session, motion carried unanimously by the following roll call vote:**

Ayes:	Kimura, Morikami, Raco, Matsumoto, Teixeira	-6
	Nishida	
Noes:	None	-0
Absent:	None	-0
Not Voting:	Blake	-1

Commission went into executive session at 12:26 p.m.

Meeting was called back to order at 1:18 p.m.

## CONTINUE PUBLIC HEARING

There were no continued public hearings.

## NEW PUBLIC HEARING

The adoption and amendment of administrative rules pertaining to the Rules of Practice and Procedure of the Kauai County Planning Commission. The proposed adoption and amendments include the following:

- Amendments to Chapter 6 pertaining to various deadlines during contested case proceedings;
- Amendments to Chapter 9 pertaining to Commission action on an appeal;  
and
- Amendments to Chapter 12 relating to Applicability, Revocation of Permits and Hearings on Orders to Show Cause.

### County of Kauai Planning Commission

**The hearing was closed.**

Zoning Amendment AZ-2010-3: A proposed bill for an ordinance amending Sections 8-1.4 and 8-8.5 of the Kauai County Code, respectively,

- by requiring that parcels with multiple zoning designations be considered individually in applying development standards with the exception that parcels containing 50 acres or more situated within the State Agricultural Land Use District and zoned Open District (O) be considered cumulatively with the

remaining portion of the parcel zoned Agriculture District (A) for the purpose of subdivision; and

- by imposing standards for density, subdivision of land, and limitations on subdivisions currently applied on land zoned Agriculture District (A) to lands zoned Open District (O) also situated within the State Agricultural Land Use District.

County of Kauai Planning Commission

1. Staff Findings pertaining to this agenda item.

The hearing was continued to 9/22/09.

For Acceptance into Record-Director's Reports for Projects Scheduled for Public Hearing for 9/22/09.

There were no Director's Reports.

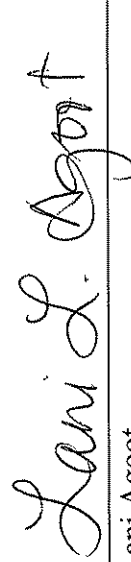
For Acceptance and Finalization-Director's Report for Shoreline Determination.

There were no Director's Reports.

**ADJOURNMENT**

The Commission adjourned the meeting at 4:52 p.m.

Respectfully Submitted.

  
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Lani Agoot

Commission Support Clerk