

KAUA'I PLANNING COMMISSION  
REGULAR MEETING  
July 28, 2009

The regular meeting of the Planning Commission of the County of Kaua'i was called to order by Chair, James Nishida, at 9:10 a.m. at the Lihu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

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

Absent and excused:  
Mr. Herman Texeira

Discussion of the meeting, in effect, ensued:

**APPROVAL OF THE AGENDA**

Chair: Approval of the agenda.

Mr. Raco: So moved.

Ms. Matsumoto: Second.

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

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

Chair: Minutes, regular meeting of June 9, 2009.

Mr. Raco: So moved to approve the minutes.

Ms. Matsumoto: Second.

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

**On motion made by Caven Raco and seconded by Camilla Matsumoto, to approve meeting minutes of the regular Planning Commission meeting of June 9, 2009, motion carried unanimously by voice vote.**

**GENERAL BUSINESS MATTERS**

Memorandum (7/22/09) from Ian K. Costa, Planning Director, to James Nishida, Chair, Kauai Planning Commission, recommending the Commission consent to the issuance of non-conforming use certificates pertaining to Transient Vacation Rentals (See Agenda Attachment "A.")

Staff Ka'aina Hull read memorandum (on file).

Chair: Can I have a motion to receive for the record?

Ms. Morikami: Move to receive.

Ms. Matsumoto: Second.

AUG 25 2009

Chair: All those in favor say aye, opposed, motion carries. Does anybody want to speak on this agenda item, Barbara.

Ms. Barbara Robeson: Thank you Mr. Chair, Barbara Robeson for the record. I am presenting this testimony on behalf of Protect Our Neighborhood Ohana which is presented on behalf of residents and families who live in the Wainiha and Haena area. And I did have a copy. I hope it was passed out to you, of my testimony. I just want to quickly review PONO's past participation on the vacation rental applications. First is during the public comment period between January and March, 09, PONO submitted 6 batches of comments regarding TVR nonconforming use certificates and they were primarily for the Wainiha and Haena area. And our comments consisted of documentation and advertisements from the websites of the applicants that identified possible violations, flood plane violations, North Shore Development Plan Special Planning Area and miscellaneous violations such as building violations, structures newly constructed, etc. which are outlined in my testimony. In addition we specifically included comments on the bigger issue of the Special Management Area and the cumulative impacts and the intensity of use of vacation rental commercial uses in residential areas of the approximately 100 applications for commercial activities in the Wainiha and Haena area. Of course you have in your records the number of those that were approved without SMA permits.

Today you are proposing to give a blanket consent to approve 17 additional applications and the agenda item proposes flipping 33 denials to 33 approvals without any documentation or evidence, at least an evidence or documentation that was made available to the public. At your last meeting on July 14<sup>th</sup> you gave approval to 16 TVR applications, 3 of those 16 had also claimed Real Property Tax exemptions for permanent home use for 2007, 8 and 9 and 4 of the 16 applications had probable violations. And PONO member, Caren Diamond, will elaborate on those items later today. On this agenda, 1 of the 17 applications listed on the agenda claimed a home exemption and 3 of the 17 items had PONO submitted comments and information about the violations that came from the advertisements of those applications. Did you do, or will you do your due diligence prior to making any decisions to consent to these approvals today?

For the record and I am not going to go into all of these, PONO again submits these comments and questions and No. 4, in line with the Commission's decision of July 14<sup>th</sup> with the approval of the 16 TVR applications, are the 17 being considered today going to expire in 2010 when all other TVR applications expire on July 31, 2009? On Monday, July 27, yesterday, we went to the Planning Department counter and again there was an absence of public records and files with respect to the 17 items listed under A.1 and specifics about how and why these items are placed on the agenda. Therefore because of the unavailability of any documentation we offer the following comments which I am not going to go into. They are listed and they came from our previous testimony on July 14<sup>th</sup>. So we ask that you not give your consent to these 17 applications and hold a proper hearing on the matter, thank you again for your time.

Chair: Questions for Barbara, thank you Barbara, anyone else want to speak on this agenda item? Caren, before you start, Barbara made reference that you were going to talk about previously mentioned, the ones that we dealt with last week...

Ms. Diamond: No, I am testifying for this agenda item, Caren Diamond for the record. I am here as well representing Protect Our Neighborhood Ohana from Wainiha, Haena. I again want to ask you, there are 17 items on your list but they are all each individual and they each have individual circumstances yet this agenda item has been bulked together for you to give one blanket approval. And so I am asking how you can evaluate or if you bothered to evaluate each one as you really should evaluate before you give an approval. One of the problems with this approval is there are no rules in effect at all to give approvals for the past 2009 and you are being asked to give approvals for all of these despite the fact that they were denied for some reason. And we have no idea why they were denied before but they are asking you to overturn that denial, make it approved and grant them an extra gift of an extra year. And there are no rules in affect. Your agenda item, at the end of the day, has rules for extending vacation rentals. There are no

rules under which to do this. So I am real confused how you are being asked to approve this to 2010.

We went and looked at what is submitted for these 17 items and it is nothing, nothing. So I am asking you what facts are you basing your decision on and if there are some facts I am asking them to be brought into the public record as what those facts are. Because there is nothing in your record, nothing and in particular we have submitted on your list today 3 of those were in comments PONO had sent, one of them is Keiki Leo which advertises in their own advertisements that you can rent the downstairs. There is an extra unit downstairs and it is rented separately. Maluhia Hanalei has an apartment and a studio, Hale Hanalei Beach House has a studio, you can rent both the house and the studio, they are connected. We are asking have you reviewed these or are you just going to say never mind and say yes. This is our neighborhood. This was our neighborhood and it is part of the Special Management Area. The lack of record, please site what you are basing your decisions on, thank you.

Chair: Questions for Caren?

Mr. Raco: Which ones did you say you think are in violation?

Ms. Diamond: Maluhia Hanalei, Keiki Leo and Hanalei Beach House advertise that they can, the multi and flood renting of their units.

Mr. Raco: But in this memorandum are they in here?

Ms. Diamond: Yes, they are in here, number 1, number 5 and number 15.

Mr. Raco: Number 1, 5...

Ms. Diamond: 15. And that is just an example. I haven't looked at the rest of them so I don't know what circumstances the rest of them and why they were originally denied. And I am further not sure why they are being asked to be approved now despite the fact that they were denied.

Chair: Any further questions, thank you Caren, anyone else want to speak on this?

Mr. Ken Taylor: Chair and members of the Commission, my name is Ken Taylor. I first want to clarify that I don't live down in the Hanalei area but I am very concerned about what is going on and I certainly agree with the previous two speakers, they raised some very good points and I hope you really take into consideration what they have raised. I find it very difficult to understand how in the world that after these properties were denied permits that now all of a sudden and again with no explanation to the public as to why this is going on and without any rules and regulations in place to deal with this kind of activity. I think it is totally wrong and I think that at this point in time you should deny this request until there are rules and regulations in place, until staff notifies the public as to why the denials in the first place and now all of a sudden a waiver of those denials and approval. I think it is wrong. I think it is unfair to the community to move forward with something like this without the rules and regulations in place and without adequate information to the public as to why these things are being considered. We worked too long to get the vacation rental bill in place and now we might as well not even be having it if we are going to every time turn around and just say it's not important, it's not important and we just wave it on. I am sorry, it is important to all of the community on the whole island and I think it behooves you to say no to this proposal at this time, thank you.

Chair: Questions for Ken, thank you Ken. Anyone else want to speak on this agenda item?

Mr. Dick Smith: Good morning my name is Dick Smith. I appeared before you regarding this matter once before. I live in Hanalei Palms and I am the messenger for the people that live in this area that have the same concern that I do. Don Montgomery, Dick

Parks, I believe you got a letter from Richard and Dottie Perry, are not able to be here but I am the one that volunteered to do it. I think you probably all are familiar with Hanalei Palms, there are about 30 homes in Hanalei Palms and of those, 22 are vacation rentals. Many of them we have no problems with, they are owner occupied, they are very close friends of ours, the people that own them live there and they make sure that whoever stays in their facilities are respectful and we retain our tranquil environment. The ones that we are concerned about are the ones that the owners live thousands of miles away and once again I am here before you basically pleading for your help as to some type of mechanism, some kind of system when all heck breaks lose in these places because they are over crowded, there is too many people, they are drunk and they are there to party, that we are being threatened physically, we are being threatened verbally and we have to call the police. How do we get hold of, how to we get somebody who is responsible, the owner, the management company in the middle of the night, thousands of miles away to take responsibility for what is going on in their places, days later getting apologetic letters and emails doesn't really solve the problem. And we think that the Police Department has far more important things to do than to go out and try to settle down a bunch of drunks in our neighborhood and elsewhere on the island where they have the same problem.

So basically, would it be beneficial for us, and believe me we will come in a non-confrontational approach with the staff at the Planning Department, how do we put a system into place where we can deal with this problem? Our moral is totally shot. When we saw that there is a whole new list coming on before you today that will probably be approved it's like we have lost everything. I won't beat it to death but the moral or the feeling in our neighborhood is that all of this effort and work into the ordinance and we have absolutely nothing, we have nothing where, what is it about the windmills, we are just going nowhere fast. In fact we are going backwards and I will wrap it up but I have also written letter from Don Montgomery that I won't read that if I could just give it to the Planning Commission for the Planning Department. But again I am the messenger but I am not voicing a single opinion, there are others, there are a lot of other people that feel the same way and we just, please help us, please help us put some kind of system together where the ones of dealing with this does not fall on our individual shoulders, thank you.

Chair: Questions for Mr. Smith? I have one, have you reviewed the proposed rules for the revocation, what is the wording? Have you read the proposed Chapter rule change, the rules, Chapter 6A, relating to nonconforming use certificate appeals?

Mr. Smith: No sir, we have not. I tried to find it on the website and I wasn't able to do so. It might have been due to my inability to...

Chair: What is the process for them to, you can review it at the counter, what is the process for reviewing the proposed changes? You can get some copies? I don't think it is on the website but we are not going to entertain that, I am answering, it's not on the website. He is going to get some copies for you to review. It is coming up, E.2.h. If you want to go now you can see the one at the counter otherwise Imai is bringing in some copies so you can wait until he comes back.

Mr. Smith: And you are going to discuss it under that agenda item but is it possible for us to come and work with the Planning Department on that?

Chair: I think so. Is it possible? What is the process?

Mr. Smith: Just for us to go in and...

Chair: What they are saying is that the public hearing is today. So for today, you can prepare your statement and then come forward again, review the rules and see if it satisfies what you need.

Mr. Smith: Will the rules be adopted in totality today?

Chair: Yes. We are hoping to. I think the 31<sup>st</sup> is the deadline for the adoption of the rules so this is the last meeting before then. Anyone else want to speak on this agenda item, JoAnne?

Ms. JoAnne Yukimura: Chair Nishida, members of the Planning Commission, good morning, JoAnne Yukimura for the record. I haven't been following this issue closely though as you know I was the author of the vacation rental bill which the Planning Department is seeking to enforce. I just want to make a couple comments, number one, the issue even for Mr. Smith I think is not about revocation of the permit, its about the issuance of the nonconforming use certificate that you are going to finalize today apparently. The law says that the burden of proof is on the applicant to show that they were operating legally at the time that the law was passed. This is a grandfather status of vacation rentals. The law abhors grandfathering, they want to minimize it but you do want to allow those who were legally operating at the time of the law. They are entitled to a grandfather status. But those who were not operating legally are not entitled to it and that is the job of the Planning Department to discern in terms of a burden of proof is on the applicant. It is not on the citizens who are questioning the issuance.

So I think the concern is has there been enough scrutiny? Has there been enough investigation? Once you a nonconforming status, that is a very strong statement and so it should not be done unless there has been good investigation of any claims, there has been a record of legal operation. So whether or not there is technically legal appeal from the citizens is almost irrelevant, it is your job to make sure that this job of the Planning Department was done correctly. And I don't know the details but from what I have heard there hasn't been full investigation of some of the claims, there has been no clarification on the part of the Planning Department how they made their decisions, how they answered these different things. And if there hasn't then the certificates shouldn't be issued, never mind about revoking it later, it shouldn't be issued in the first place. I think the Planning Commission has the power and has the responsibility to scrutinize the process of the Planning Department, the planning staff and make sure that the determination of the issuance of a nonconforming use certificate has been done properly in each case, that's all.

Chair: Questions for JoAnne, thank you JoAnne. Anyone else want to speak on this agenda item?

Mr. Bob Lloyd: Aloha, kakakiaka, my name is Bob Lloyd and I have been here for decades and decades. And since 1943 I have been working in the hospitality industry. In 1956 I got my bachelors degree in hotel and restaurant management and ever since then every year I have worked down in Cape Cod, Massachusetts, worked across North American to Oregon, California, came to Maui in 1963 and I have here since 1965. I have also been a real estate broker here on Kauai for 37 years. I have been a hotel manager, a restaurant operator, won some international awards. Until Hurricane Ewa I was the real estate manager of the largest number of rental units in the Poi'pu Beach area. I had very strong positive feeling reflected by hundreds of persons who performed services and worked with me in the hospitality industry. All of my past experiences with the Planning Department for many, many years have been excellent and rewarding for the island of Kauai for the population here and for the purchases of resort and apartment homes. I have only seen a very few bad actions on the parts of tourists and almost all of those were drug related however drug related problems with tourist are infinitesimal compared to those on Kauai and the other islands.

The main purpose of me testifying at this meeting is to protest the elimination and your poor handling of efforts to end the ownership and in my opinion, legal use, of dwellings which have been used as vacation rentals for decades, grandfather, we just heard about. My added irritation has been with the Planning Department's lack of answering questions by owners related to their needs for application and filing of papers to continue their, profitable to Kauai, rental of their properties. You have also not answered requests by other real estate brokers, representatives of the owners and me. This is not the kind of actions that I have previously experienced with the Planning Department. The County of Kauai is damaging it's self in terms of unnecessary impacting transient accommodation taxes and payments to local residents and businesses

that provide a wide variety of services to the vacationing public. The development of home tourism on Kauai was above all of the other islands for decades. It has brought a wonderful people to Kauai and large amounts of money over the decades.

It is obvious that there are serious flaws in the process of dealing with the TVA violations by this department, namely lack of information, lack of response to valid questions and reasonable time limits to responding to cease and desist orders. Why have you not told them the guidelines for alleged violations and why have you not indicated to them the process for appealing? I don't like the way you are deteriorating this heaven on earth. Thank you for allowing me to talk to you. I would be happy to answer any questions or thoughts you might have.

Chair: Questions for Bob? I have one, how many rentals do you have right now?

Mr. Lloyd: I haven't rented any since Hurricane Iniki and after Ewa, I still have a real estate license but I don't manage properties at all. All but one of them was wiped out in Hurricane Ewa. Well not wiped out, some of them were wiped out, some were washed up inland 100 yards and some were totally destroyed.

Chair: So your observations today are observations of the situation now.

Mr. Lloyd: I am making observations of the comments of people that I have heard over the last 5 months who have been friends of mine for decades, some of them own property, some of them live here, some of them are real estate brokers. And my biggest criticism and I hate to do this because I have always had a wonderful relation with the Planning Department, but the communication from your office over here except for a couple of good guys out at the counter has been hideous. People can't get answers for months, I couldn't either. I found out yesterday I got the wrong answers by the way up until yesterday as to where this meeting was going to be held, what time it was going to be held and I can't read any of the documents that came up on this thing. So I have gone down hill on the Planning Department. I was going to notify Mr. Costa of some of the employees who did a terrible job and then I was going to notify the Mayor but now I am going to investigate to find out if this isn't the plan of your department and the administration. I hate to talk to you this way because I have been a great, great admirer of this department.

Chair: Any other questions for Bob, thank you. Anyone else want to speak on this agenda item, Cheryl, where have you been?

Ms. Cheryl Lovell-Obatake: Thank you Mr. Chairman, for the record my name is Cheryl Lovell-Obatake. I was first of the advisory committee on the vacation rentals. It sounded so chaotic after awhile going to meetings but I would like to support the comments and testimony given by Barbara Robeson, Caren Diamond, Ken Taylor and Mr. Lloyd. I have been watching you guys on TV and other council meetings and gosh it is pretty chaotic of what is going on, you are being overwhelmed I can see since my absence for a year. Carrying capacity, we've been talking about this as the layman's term of carrying capacity on an island and somehow the simplicity of the carrying capacity for this island is diminishing in thought. I am quite concerned about the emergency exists of where vacation rentals are and I mentioned there before and natural disasters which you just heard wiped out Mr. Lloyd's vacation rentals. Federal emergency management agencies are unaware I guess of what is happening in this process and how can you determine an assessment or sort of kind of evaluation when there is a natural disaster. So again, I will support the previous speakers and hope things get better. And you know, I would like to quote something from Lilly Tomlin, the trouble with being in a rat race, when you win, you are still a rat, thank you.

Chair: Anyone else want to speak on this agenda item?

Mr. Chun: Good morning Mr. Chair. Unfortunately I do know who Lilly Tomlin was or is. I just wanted to talk on two items that were mentioned, item number 5 and number 15, they happen to be my clients and I wanted to just highlight or emphasize to the Commission in terms of what those specific issues were. In number 1, sorry, it was

number 1 and 5, number 1 involves Ms. Freeman, we assumed that on her initial denial, the reasons why they were denied are clearly set forth in a letter. In the letter for Ms. Freeman they said that one, she had two kitchens in the house and two, the second thing is that because she had two kitchens she doesn't have an ADU, she needs an ADU permit. When we filed our appeal and that is what we outlined in our petition of appeal, we looked through the records of the Planning Department it's self and also the actual factual situation and what we found and we alleged it inside the petition is one, there were no kitchens because there were no two stoves in the kitchen, there was only one stove so there is only one kitchen.

The second point is you don't have an ADU to allow you two kitchens so even if she had another stove the property and the Planning Department records clearly showed they issued an ADU for that house also. So on those two accounts or two reasons given for Ms. Freeman in number 1, a careful review of the Planning Department's records showed that there was an ADU and there were no two kitchens. And I believe that is the reason why that is before you right now that they have now realized that the facts and records support the issuance of the NCUC.

The next item number 5, Jason Steris, the reason give by the Planning Department on their initial denial of this one was the fact that he did not have permission to enclose the lower floors of the building. A review of the building permit issued and I don't have the exact date but when it was initially built shows clearly that the lower floors were allowed to be constructed, were allowed to be used and enclosed. And that was done by the Planning Department and Public Works express permission. So I gather upon reviewing of our allegations and the petition and our allegations towards the specific dates of the permits and the permits that were issued for that I think the Planning Department realized in fact there was proper permission for enclosing the two rooms on the bottom floor. That was the only two reasons. No there was no issue of kitchens on that one or lock outs. The only question was that he didn't have permission to enclose the two rooms on the bottom. And like I said the permits that we reviewed issued by the Planning Department and the Planning Commission show that they had permission to do that. So I just wanted to clarify that we believe it is proper for the Commission to decide and to re-review and to issue the permits for number 1 and number 5, thank you.

Chair: Questions for Jonathan? Anybody else want to speak on this agenda item, JoAnne.

Ms. Yukimura: I want to speak to what Mr. Chun has just said. It seems clear to me that in the case of the number 1 property the record is clear that there was no illegality but as to number 5 which allowed enclosed lower floor which I think is allowable, it still needs to be breakaway walls I believe under the flood regulations. And I understand no habitation is allowed in the lower level. So did the Planning Commission, and this is just an example, I haven't the docket but I am just sharing with you the questions that come up about thorough investigation. I mean was the violation that they didn't have permits to do the walls or they did have permits to do the walls but is that going to be certified as a vacation rental which will allow habitation which, I may be wrong but I understand is against the flood regulations. So this is the kind of questions that arise in terms of thoroughness of investigation, thank you.

Chair: Questions for JoAnne, thank you, anybody else want to speak on this agenda item?

Mr. Chun: I can respond to that question if you want. Since it involves my client I need to, yes, the permit was issued in 1980, I was looking through it and when you look at the permit there is something in the file that specifically states that the Department of Public Works allows the enclosure of those rooms. And also, according to the Planning Department's files it was used and designated as a bedroom in the original 1980 permit. It was signed off by the Planning Department, signed off by the Department of Public Works, the permit was issued and it was legal at that point in time. And I think that is the reason why the Planning Department after looking at their own files realized that yes, contrary to their initial denial those structures and the bedrooms which is a habitable unit was allowed in 1980. So in answer to that question I believe the Planning Department

did look at the information that we provided them in our petition, did a thorough job investigating it and decided based upon their own records that in fact the denial was wrong and they should be granted.

Chair: Anyone else want to speak on this agenda item?

Mr. Dahilig: Mr. Chair, I would like to request that pursuant to Hawaii Revised Statutes, Sections 92-4 and 92-5(a)(4) to go into executive session to consult with me pertaining to Chapter 8, Article 17 of the Kauai County Code, as amended. This consultation involves consideration of the powers, duties, privileges, immunities, and/or liabilities of the Commission and the County as they relate to this agenda item.

Chair: Can I get a motion?

Ms. Morikami: So moved.

Mr. Blake: Second.

Chair: Moved by Paula, seconded by Hartwell, all those in favor say aye, this is a voice vote? Roll call.

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

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

Commission went into executive session at 9:55 a.m.

Meeting was called back to order at 11:21 a.m.

Chair: A motion and then discussion?

Mr. Blake: A motion has been made already? Mr. Chairman, I think for many of us, well I know for many of us and for some of you that have also served on various Boards or Commissions there is a difference between standing out there and opining and sitting in here and having to do something. And this isn't a lecture by any means it is just how things are. And all of us have said at one time if I was the Governor, if I was the Mayor, if I was the President, bang, bang, bang, I would solve this thing very quickly. And then you get the reality check of being appointed and having the responsibility to act legally. I know what I want to do but having sworn to uphold the law, the County and as it affects the public, I know what I can do or at least I believe I understand what I can do. And violations of the CZO are often difficult to identify and in cases where an ambiguity exists the Planning Department must, and the Commission, must clarify what constitutes a violation and it must be clear.

The approval or the request for us to approve the or confirm the Director's report today, at least for me, satisfies me although it's not with great satisfaction that I say this that the issuance of a certificate is warranted for the one year timeline with the understanding that confirmation of the recommendation isn't to be construed in any manner as evidence of legality in the future. And that enforcement can occur within the period either by the Planning Department or by the public through the rules that we hope to adopt today and that is about all I can say about this, that is the hand we have been dealt so we have to play those cards, that is all I have to say.

Chair: Anybody else?

Ms. Morikami: I believe a motion should be on the floor, move to approve.



Mr. Kimura: Second.

Chair: Moved and seconded to approve memorandum from Ian K. Costa, Planning Director, to James Nishida, Chair, Kauai Planning Commission recommending the Commission consent to the issuance of nonconforming use certificates pertaining to transient vacation rentals, see Agenda Attachment "A", all those in favor say aye, opposed, motion carries.

**On motion made by Paula Morikami and seconded by Jan Kimura, to approve memorandum from Ian K. Costa, Planning Director, to James Nishida, Chair, motion carried unanimously by voice vote.**

Letter (7/20/09) from Barbara Robeson and Caren Diamond for Protect Our Neighborhood Ohana, requesting the Planning Commission reconsider its decision to approve its July 14, 2009 Meeting Agenda Item A.4.a. Memorandum (7/7/09) from Ian K. Costa, Planning Director, to James Nishida, Chair, Kauai Planning Commission, recommending the Commission consent to the issuance of nonconforming use certificates.

Ms. Barbara Robeson: Thank you Mr. Chair. You do have our letter in your packet, Barbara Robeson for the record. You do have our letter in your packet for our request for reconsideration. I just want to summarize a couple of the items here. Item number 1 in our letter, "the decision by the Planning Commission on July 14<sup>th</sup> to consent to the issuance of nonconforming use certificates were based on the facts at hand yet there were no facts at hand," until those facts are publicized or provided to the public I think that you need to reconsider our request here. Number 2, "how could the Commission consent on July 14<sup>th</sup> to the blanket approval of the 16 items when, for example, 3 of the 16 items that were listed on your July 14<sup>th</sup> agenda also claimed real property tax exemptions for permanent home use for 2007, 8 and 9? Did the applicant's provide false or misleading information on their sworn affidavits?" And in Wainiha and Haena, 4 of the 16 applications had probably violations and according to their advertisements one of the structures sleeps 14 and has multiple kitchens.

And our reasoning on that was multi-families are not allow outside the VDA in the North Shore Development Plan and they are also in the SMA. Another one advertises it sleeps 10 and below the home is a sitting area and an additional sleeping room that may be available at no additional cost. Well that violates the National Flood Insurance Program in the Flood Ordinance and it is also in the SMA. And another one adverted for larger groups there is another semi-detached bedroom and bath with its own cozy lanai. Ground floor habitation again is in violation of the Federal Flood Insurance Program and Flood Ordinance and multi-families are not allow in the North Shore Development Plan outside the VDA, another SMA. And finally one does advertise, it says a divided bungalow with a kitchen, it is a wing of the owner's home. That one I think claimed a home exemption.

So no facts were presented on the record for any of these 16 blanket approvals when in reality each one had its individual circumstances which of course were not available to the public. Item No. 3, section 8-17.10(f) of the TVR ordinance cites and annual review and again, and we brought this up before, under what authority were those 16 permits extended until July 31, 2010 when the ordinance 876 has a deadline of July 31, 2009 for the annual renewals. And finally we ask that you reconsider your decision of July 14<sup>th</sup> and that all applications, files, records, documents and evidence be fully disclosed and made available to the public prior to making any further decision concerning these 16 items. Thank you very much Mr. Chair.

Mr. Dahilig: Mr. Chair, I just want to state for the record in regards to the questions of legality that Ms. Robeson is raising with respect to footnote 1 and the lack of public facts at hand with the public record and her reference to Chapter 92, Hawaii Revised Statutes. Pursuant to the Hawaii Supreme Court case Kaapu vs. Aloha Tower Development 74, Hawaii 365 the Sunshine Law does not address the public's interest in disclosure or access to government records. The appropriate law to be citing would be Chapter 92(f) with regards to the Hawaiian Uniform Information Practices Act. So just

for legal reasons I wish to disclose that on the record that I believe that the Commission's action with regards to at least her question of raising the lack of facts in the public record pursuant to Chapter 92, the act was in fact legal based on July 14, 2009.

Chair: Thank you, do we have a signup sheet, anyone in the public want to speak on this agenda item?

Ms. Morikami: Mr. Chair, move to receive for the record item A.2, letter from Barbara Robeson.

Ms. Matsumoto: Second.

Chair: Any discussion, all those in favor say aye, opposed, motion carried.

**On motion made by Paula Morikami and seconded by Camilla Matsumoto, to receive letter dated 7/20/09, from Barbara Robeson and Caren Diamond, motion carried unanimously by voice vote.**

Letter (7/20/09) from Barbara Robeson and Caren Diamond for Protect Our Neighborhood Ohana (PONO), requesting the Planning Commission reconsider its decision to approve its July 14, 2009 Meeting Agenda Item A.4.b. Memorandum (7/7/09) from Ian K. Costa, Planning Director, to James Nishida, Chair, Kauai Planning Commission, recommending the Commission reject PONO's appeal for failure to submit an appeal conforming with the requirements set forth in the County of Kauai Planning Commission's Rules of Practice and Procedure.

Ms. Barbara Robeson: Barbara Robeson for the record. Again you have PONO's, Protect Our Neighborhood Ohana's letter in your packet and I hope you have had an opportunity to look at that. And I will summarize again, PONO contends that we were not afforded due process in the above referenced proceeding that occurred on July 14<sup>th</sup>. We believe the decision of July 14, 2009 circumvented the Planning Commission's Rules of Practice. Our petition to appeal actions of the Planning Director denied under a process not related to our appeal and not in accordance with the Commission Rules. Technically and according to the Commission Rules our petition has not yet been placed on the Agenda, i.e. the agenda item A.4.b.2, on July 14<sup>th</sup> was not applicable to our petition to appeal the actions of the Planning Director which we filed on April 20, 2009.

In addition, the Commission's action to deny our petition was based on the recommendation for the Director whose actions we were appealing. Under what rule or procedure does the Director have the authority to make recommendations for appeals of his own actions? PONO submits this request under the following arguments and I am just going to summarize, failure number 1, "your Planning Commission Rules 1-9.4, Commission Action, a decision must be made within 60 days." And the discussion items on that are "the petition to appeal the actions was filed by Protect Our Neighborhood Ohana on April 20, 2009. No action was taken by the Commission within the 60 days of PONO's filing of the appeal in accordance with 1-9.4 above." Failure number 2, "1-9.3 of the Planning Commission Rules, Hearings and notice", discussion, "no hearing was conducted in conformity with the applicable provisions in Chapter 6 of the Commission Rules, no contested case hearing process was held." And 3, "when appealing the actions of the Director, the Director should not be involved in the decision making, i.e. writing the recommendations for appeal of his own actions." Failure number 3, "the contested case hearing procedures under Chapter 6 of the Planning Commission Rules require 1-6.5, notice of hearing," and the discussion, item 1, "no hearing was set within 60 days of the filing, no notice of hearing was published or provided to the petitioner," meaning Protect Our Neighborhood Ohana, "and no notice of hearing was served upon the petitioner."

So in closing, we believe the July 14<sup>th</sup> decision by the Commission was seriously flawed based on an unlawful procedure in that the Planning Commission Rules and Practice and Procedure were not followed. And, PONO believes that the decision of July 14<sup>th</sup> with respect to the agenda item violates Chapter 91, HRS, was clearly erroneous,

arbitrary and abuse of discretion by the Commission causing harm to the health, safety and welfare to the Wainiha and Haena community, thank you.

Mr. Dahilig: Mr. Chair, just for clarification in the record, the action that was taken by the Planning Commission on July 14<sup>th</sup> was a rejection of the application or rejection of the petition. The merits of the petition that was provided to the Commissioners on the 14<sup>th</sup> were not, in my opinion, there were no merits, the decision to act was not decided on the merits of the petition. And again, just to reiterated, this is a rejection and as I had stated at the last meeting the organization is entitled to resubmit the application or resubmit the petition based on the Planning Director's determination that the petition was not produced in accordance to substance and form as prescribed by the Rules and they did not obtain standing. So it is my opinion that this is a procedural matter and no contested case hearing was scheduled or occurred on the 14<sup>th</sup>.

Chair: Did anyone sign up, Caren.

Ms. Caren Diamond: Aloha Commissioners, Caren Diamond again for Protect Our Neighborhood Ohana. Again we are before you now asking for you to reconsider your decision to toss out the appeals that will grandfather in I believe at last count it was about 233 applications from Hanalei to the end of the road. I am not sure how many complete applications have been grandfathered in. I read on the County website it was somewhere around 300, 233 of those from Hanalei to the end of the road. So I want to think about the impact to the Special Management Area which is our area and your obligations under the law and the permitting scheme in evaluating the impacts to our neighborhood, to what was a residential neighborhood and is now largely a resort due to the Planning Director and your own decisions.

I want to give you a couple of examples from those things that we submitted and why you might think about the evaluation the Planning Department did. One of them is a place called Hale Kipuhi which even is misnamed in it's application but it was re-districted in a Land Use Commission re-districting from Conservation. And it was given many conditions, one of which was required to only be a single family residence. The people who were building it and applied were saying that they were living in it as they had for a while but it has a condition to be a single family residence, it has a condition to have access on one side of it, it has a condition to have no lanai's put on and it had a size limitation. Last year the house was improved where decks were put outside every bedroom and the house was expanded and it got grandfathered in as a vacation rental. And we are asking you, if the underlying conditions under a piece of property prevent something how can this Commission or this Planning Department approve making it a resort? So that is just one example.

Another example I want to give is a place called Holumakani and it is in the Wainiha Subdivision. Now I made testimony and you have it in front of you and the Wainiha Subdivision had special, again, as part of the SMA Use Permit in 1984, U-84-2, that was approved, it was for residential use. And the Commission that sat here really had a lot of problems saying that there would a major impact on the area if it was resort use, but they were approving single family residences. And now before you we have the entire Wainiha Subdivision almost made a resort where they sleep 10 and they sleep 12, they sleep 14, they sleep immense amounts of people while they applied for single family residences. The whole Makani Place now advertises downstairs studio is optional with bathroom, kitchenette, TV and cable. This is a dwelling that was built in 2001 or after. I don't understand, did Planning inspect it, did they not inspect it. We are asking, how did these things happen with no transparency, no ability to look at the records, nothing. This is a blanket approval of a resort in what was our residential area.

You as the Planning Commission have the oversight over that. We as people representing our community have asked for you to step in and grant us this appeal to reverse your decision to say the hell with the people, we don't care, it is a resort. It is not a resort. It was a residential community. The families, the local families that have lived there traditionally depend on your ability to oversight what the Planning Department has done and we are asking you to reconsider denying us our appeals, approve us our appeals so that we can go forward with this.

I have one more example. My example is a place called the King Hale which has been permitted as the King Hale, the Princess Hale, it is a place that has been approved for two vacation rentals. It is a place that had 4 units operating, the Planning Department was undergoing many violation inspections previously. They got building permits in 2007. They have been redoing the house ever since. They have redone the downstairs unit so there are two ground floor units. You have just granted two permits, the house is still under construction and we want to know. This is the North Shore area that has no multi-family TVR's allowed. How are we having multi-family TVR's approved? How are we having them approved when they have been under construction for years? How do we have houses that had violations for years and years and years that the Planning Department was aware of that are now just approved? The living on the ground floor, the enclosing of the ground floor spaces may be funny to some of the people in the Planning Department but when it comes down to us having our normal winter waves and the expected hurricanes and tsunamis that come, think about the visitors that are going to be staying in these units and your responsibility to allow development in all the wrong areas, thank you.

I guess if it is okay with you I would like to show this map is really just a partial map because it doesn't have all the ones that had been denied that are going to be approved. So this is what was our community and all the pink is vacation rentals and you can see all along the beach front we have a resort. We are asking you to think about your responsibility in making the North Shore a resort and we are asking you to reconsider your decision, thank you.

Chair: Thank you, questions for Caren?

Mr. Dahilig: Again Mr. Chair, I would just like to clarify for the record that the action taken by the Commission on the 14<sup>th</sup> was a rejection of the appeal, not a denial based on the merits and that PONO, based on the action taken by the Planning Commission on the 14<sup>th</sup> by the rejection, is entitled to re-file their application for a petition in accordance with the rules prescribed by this Commission.

Chair: Anyone in the public want to speak on this agenda item, seeing none...

Ms. Morikami: Mr. Chair, move to receive item A.3, letter from Barbara Robeson and Caren Diamond.

Ms. Matsumoto: Second.

Chair: Any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Paula Morikami and seconded by Camilla Matsumoto, to receive letter dated 7/20/09 from Barbara Robeson and Caren Diamond, motion carried unanimously by voice vote.**

Letter (7/21/09) from Waldeen K. Palmeira, Hui Na Makaiwa O Wailuanuiahoano, with attached testimony, requesting the Planning Commission reconsider its decision to approve its July 14, 2009 Meeting Agenda Item A.5. Memorandum (6/5/09) from County Building Division Chief Doug Haig, requesting modification of Special Management Area Use Permit SMA(U)-2008-1, Shoreline Setback Variance SSV-2008-1 by inclusion of Tax Map Keys 4-3-2:2 and 10, and 4-1-5:6, Wailua, Kauai, Hawaii = *County of Kauai, Department of Public Works, Building Division.*

Chair: Waldeen, can you come up? Before we start though, Mike, can you, the question of who can vote and what we are reconsidering.

Mr. Dahilig: The action that Ms. Palmeria is asking the Commission to take today would be allowed under Roberts Rules of Order however the process would be if a Commissioner chooses to initiate a reconsideration vote it would have to be a reconsideration on the original motion and not on to reconsider that was taken at the July

14<sup>th</sup> meeting. So just for clarification if any Commissioner was intending to make a motion to reconsider it would be on the original motion and not on the failure of the motion made, I think it was made by you Mr. Blake, on July 14<sup>th</sup>.

Chair: So basically the 5 that were here are eligible to make a motion.

Mr. Dahilig: That is correct.

Chair: Waldeen, go ahead.

Ms. Waldeen K. Palmeira: Aloha, my name is Waldeen K. Palmeira of Hui Na Makaiwa O Wailuanuiahoano, Wailua, Kauai. I think first of all I would like to ask for clarification of this request for reconsideration. I think what you just said was that we are not reconsidering the initial inclusion of the testimony of 7/14/09, is that correct?

Mr. Dahilig: What I am clarifying to the Commission is that is someone were to make a reconsideration motion, see what happen at the last meeting they approved the motion and then they voted to reconsider. You are asking for reconsideration again. What I am asking the Commissioners to keep in mind is if they are going to make a motion, if they so choose, that it would be on the original motion and not to reconsider the motion for reconsideration.

Chair: Yes, it was kind of more for the Commission because there are rules saying that you have to vote in the affirmative in order to vote for reconsideration. So what I wanted to clarify at the beginning was who and what motion were we talking about so we could determine who could cast the motion for the reconsideration. It was just a cleanup kind of thing so you can proceed.

Ms. Palmeira: I am still not clear.

Chair: We had to identify who could make the motion for reconsideration. You are asking for reconsideration.

Ms. Palmeira: I am asking for a reconsideration of the original motion.

Chair: And then that is what he clarified.

Mr. Dahilig: That is what I am clarifying is that they in fact would, if someone were to make a motion reconsidering what you are asking for and it would not be the reconsideration vote that was taken at the last meeting.

Ms. Palmeira: Right, thank you for the clarification. I did submit a letter on July 21<sup>st</sup> which was testimony attached to the original July 14<sup>th</sup> testimony, oral testimony and is not attached to today's. And then I also submitted a letter on July 21<sup>st</sup> asking for the reconsideration. So at this time I will be giving oral testimony and again submitting written testimony after. In other words the testimony that is submitted before you is not, it is related, however it was in regards to the previous meeting. I will be resubmitting written testimony.

Again my name is Waldeen Palmeira of Hui Na Makaiwa O Wailuanuiahoano of Wailua, Kauai. Thank you very much for this opportunity to come before you to ask for this reconsideration. I do have a document to read and what I would like to ask you is if it does go over 3 minutes, to give you the option if you would like me to return after other testimony or to finish it now. (read testimony, on file).

Chair: Thank you Waldeen, questions for Waldeen, Nohelani Joslyn.

Ms. Anna Chavez: Hello and good afternoon. I am here to ask you to please the path of greatest benefit...

Chair: State your name.

Ms. Anna Chavez: Anna Chavez. I am here to ask you to take the path of greatest community benefit, the path of enhancing your credibility in good governance, a chance to help perhaps refinish your image with thousands of voters on this island and the path of least resistance. Last Wednesday City Council or County Council members voted unanimously for the consolidation of 3 extra parcels of land into this SMA and they gave us very strong reasons why they were voting unanimously for these land changes at Papaloa Road. They told us about their very significant reasons for voting for it, the significant changes that this reconfiguration of the parcels of land would bring. They believe, some of them, that these are significant positive changes however they are significant changes by any definition of the word, Hawaii Administrative Rules, HAR 11-226 as Waldeen just shared with you again. If there is a change in size, we know it is a change in size because it is additions of 3 parcels, scope, it certainly spans the size and scope, intensity use, they referred to an intense use of traffic, location, well by expanding the footprint it expands the location which may have a significant affect. The original statement that was changed will no longer be valid because an essentially different action would be under consideration and a supplemental statement shall be prepared and reviewed as provided by this chapter.

So the State law basically says if it represents a significant change the addition of parcels into this special amendment, this Special Management Area by amendment, is defined in the State law. So last Wednesday the County Council told us there are significant changes that we need to have happen they argued by consolidation. By very definition of the words of the County Council you have the definition of significant changes and they are relying on reports that were made, findings that were given to you in the Special Management Area Permit.

So there are two big points, County Council is the origin of defining from their perspective significant change. State Law says if you have a significant change, which they all testified to, that we need to have another review and assessment. We don't have an Environmental Assessment for these significant changes that the Council spoke to and we would like you to consider that that is really important especially when it comes to things near and ancillary to the bike path. Also I would like to have you look, I know you probably reviewed it all, the Special Management Area Permit assessment application contains questions to which the applicant responded no but we know the answers are yes. The project site, is it within a designated cultural historic area? Is the project site listed on or nominated to the Hawaii or National Register of Historic Places? We know it is in an area of affect for two of them. Does the project site include lands which have not previously been surveyed by an archeologist? In spite of being in an area of historical affect there has been no archeological inventory survey. Supporters say they would use monitoring but we all know that monitoring means waiting until irrevocable harm has been done and then coming up with a plan to deal with some aspects of the harm.

We ask you to take the path of best service to the community, the path of least resistance and to consider if this Planning Commission and the County of Kauai rely on FONZI's or finding of no significant impacts that were prepared with flawed processes, inadequate foundational materials, no archeological inventory and no environmental assessment for expanding the scope of the amendment before you today, that there are clear flaws that you have the opportunity to correct, thank you.

Chair: Thank you Anna, questions for Anna, Jean Idenberg.

Mr. Jean Idenberg: Mr. Chairman, my name is Jean Idenberg for the record and members of the Commission. I come to this not as an expert on the Planning process or the statutes behind it but I'm hoping to bring just a citizen's view of some common sense that I think can influence for the better. The fact is that these undertakings with regard to Papaloa are related to the bike path, the combined use bike path, something that many, many people on the island are enthusiastic about. In sections that have already been completed are being enjoyed and I come here as a supporter of the concept and the program. But I also come before you recognizing that there have been some flaws in the process and that in order to achieve the result that everybody I think would like to have is

necessary to make decisions in a process that the people who are pro and con at least know that their arguments were heard and that in balance the judgments were made.

For example, I have been told and I can't personally testify to it that in fact on your meeting on the 14<sup>th</sup> that some witnesses were heard by you after you had made your decision already to recommend the changes to the County Council. You will be in a better position to tell me whether that was true or not but beyond that it seems to me that something that has such fundamental support ought to be something that we are all looking to find a way to unite on as opposed to divide on. And there has been some progress made I am told that with respect to the beach it's self and the possibility of an alternative route there are serious discussions underway. I don't know that any new decisions have been made by that there are discussions under way and I would recommend and suggest to the Commission on this matter of reconsideration that the issue of Papaloa be treated in the same common sense way, is there a solution that can be found that can meet local needs, historic and sacred land considerations and still also find a way for the path and it's promise to be fulfilled.

I myself have served in the past on other boards and on Commissions. I have had public responsibilities, not here in Hawaii but in other states and at the national level and so I am sensitive to the pressures that you face every day of the week. But I think there is a route here that can be pursued and it ought to be pursued and the reconsideration is not a negative act, the reconsideration motion, if adopted, opens the door in my opinion to a look once again at fundamental issues around which I think solutions can be found. And I appreciate your time.

Chair: Questions for Jean, thank you, Cheryl.

Ms. Cheryl Lovell-Obatake: Thank you Mr. Chairman, for the record my name is Cheryl Lovell-Obatake. I am compelled to come today with testimony regarding this reconsideration from Waldeen Palmeira. There is a lot of cumulative matters that need to be investigated and examined by the Planning Commission in my opinion. I am now reviewing the draft environmental assessment of Kuhio Highway short term improvements, Kuamoo Road to temporary bypass road. I attended a Department of Transportation meeting and small discussions about what they are doing. When I say cumulative, cumulative in the fact of the Coco Palms which is abutting the Kuamoo Road and Kuhio Highway. For the record I was a Burial Council Chair for two terms, 8 years, and then Ms. Lafrance Kapaka. Also I heard that Mr. Doug Haig had mentioned another entity of the Burial Council is the Hui Malama and Mr. Nihipali. I think that there is a discrepancy and that is incorrect. I have checked with the Kauai representative, there was no sharing of discussion with this bike path and Kuhio Highway and Kuamoo Road bypass, temporary bypass road and improvements.

I think that the Planning Commission should look at all the cumulative developments and as you may know that Coco Palms had come in for a status report, they had not gotten any answers from the Department of Transportation and I think they are waiting for it. There is many historical impacts that may happen. As I said I was the Burial Council member for 8 years and had observed and experienced a lot of historical sites, historical burials and sites and artifacts. And I am compelled today to come here because I met a man who knew me when I was a child and his name is Isac Kaio the 3<sup>rd</sup>, he is related to Isac Kaio, the half brother of Kaumualii, he has given me oral history of the area, even Olahena, even the beach area. In my opinion I don't think a bike path should be on the beach or between Kuamoo. I think I might take it a little step ahead, you know being that this is a tsunami inundation area and the carrying capacity again on this island, I think you should look with your own discretion about the safety for the citizens and guests that arrive here. And in case there is going to be a tsunami one day or another that all those monies for the bypass, bike path, should be given special consideration for emergency exits mauka and take the example of the Big Island, thank you.

Chair: Thank you Cheryl, questions for Cheryl, anyone in the public want to speak on this agenda item?

Mr. James Alalem: Aloha, for the record my name is James Alalem. The most important thing that we have to remember is you know, being a government official you guys are sworn to uphold the law. And in the State laws that we have, in the State constitution that I have in front of me it's stated over here "traditional and customary rights," section 7, "the State shall reaffirms and shall protect all rights, customarily and traditionally, exercise for (inaudible) cultural and religious purposes and (inaudible) who are descendants of native Hawaiians." And on this other hand that I have, in Wailua, the bridge, it is very sacred because we know that the haul cane bridge right next to that, they used some of the Heiau's apuhaku's to build the bridge. I went there yesterday and a few days and still there is resemblance of apuhaku's that are there. In fact there are a couple, a place that looks like a canoe landing that is made out of puhakaus right there, right by the bridge. And so they came up with this FONZI where it says no significant findings but there is, we know that they are there. So reconsider that we need to take a look and stop this project, take a look and do it all over again. It's very important because I have Coco Palms history when they buried the bones. The State legislators over here say that they are clear in the public interest to engage comprehensive programs for historic preservation. The State is not doing anything to protect our State historical heiaus or things that we know are out there by Wailua Bridge.

They also have, that I found, was title 18, Crimes and Criminal Procedures and it talks about damages to religious property, obstruction of persons in the free exercise of their religious beliefs whosoever in any of the circumstances referred in this section intentionally defaces, damages or destroys any religious real property because of religious character of that property (inaudible)...

Chair: Can you wrap up?

Mr. Alalem: "Whosoever intentionally defaces, damages or destroys any religious real property because of the race, color or ethnic characteristics of any individual associated with the religious property or attempts to do so shall be punished by provided in this subsection." Again we are sworn to uphold the law so that is the most important thing so we need to take a look at this whole thing again, thank you.

Chair: Questions, thank you.

Ms. Sandra Herdon: Sandra Herndon for the record. My purpose here is to support those individuals who have already gotten up to speak, speak the truth, speak the legalities of this, to underscore the fact that not only is there a legal issue involved here but the whole idea that the cultural impact is a negative one, is so far from the truth. And I myself have been watching what happens in the government here and I sometimes feel like the consideration that is due to the Kanakamaoli is not really felt and honored. And in as much as this area which all of you know, all of us know, everybody that comes to this island knows that the Wailua area is singular most sacred area on this island. That cannot be ignored. I was not raised in the Hawaiian religion. I have come to learn it, to understand it and to honor it and it doesn't matter if that is not my religion, I was born in a country that was founded on freedom of religion and I think that we need to extend that very, very basic right to the Kanakamaoli, thank you.

Chair: Thank you, anyone else wants to speak on this agenda item, seeing none, Commission?

Mr. Raco: Motion to receive the letter from Waldeen Palmeira regarding the County of Kauai, Department of Public Works, Building Division.

Ms. Morikami: Second.

Chair: Moved and seconded, any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Caven Raco and seconded by Paula Morikami, to receive letter dated 7/21/09 from Waldeen K. Palmeira, motion unanimously by voice vote.**



## COMMUNICATION

Letter (7/10/09) from Planning Director Ian K. Costa to James Nishida, Chair, Kauai Planning Commission, requesting on behalf of Mayor Bernard P. Carvalho, Jr., that the Planning Commission initiate proceedings for the following and inform the Commission that the legal requirements for Condominium Property Regime approval and related issues for proposed County regulatory authority is still being reviewed by and analyzed by the Planning Department and the Office of the County Attorney.

- a. A bill to amend Chapter 8 of the Kauai County Code 1987, as amended, relating to the Comprehensive Zoning Ordinance to amend the allowable Residential density and number of subdivided lots allowed within the State Land Use Agricultural District specifically within the County's Open Zoning District by amending Sections 1.4 and 8.5 and that a Public Hearing be set for September 8, 2009 pursuant to Hawaii Revised Statutes 91-3.
- b. Establishing a "Public Comment" item within the Subdivision Committee's Agenda to facilitate public participation prior to the Subdivision Committee's Action on subdivision applications.

Chair: Move to receive.

Ms. Morikami: Move to receive communication B.1.a and b.

Ms. Matsumoto: Second.

Chair: Moved and seconded, any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Paula Morikami and seconded by Camilla Matsumoto, to receive B.1. a and b, motion carried unanimously by voice vote.**

Chair: You know, under this public comment item, I am entertaining a motion to include the public item comment on the Subdivisions Committee's agenda for all subsequent meetings. We are going to start with (a) first, the Director reminded me about we needed a motion to...go ahead.

Ms. Morikami: Mr. Chair, on item B.1.a, I would like to move that we initiate proceedings for the item, (a), a bill to amend Chapter 8 of the County Code, 1987.

Chair: Any second?

Mr. Raco: Second.

Chair: Moved and seconded, any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Paula Morikami and seconded by Caven Raco, to initiate proceedings for item B.1.a, motion carried unanimously by voice vote.**

Ms. Morikami: Mr. Chair, on item B.1.b, I would like to also entertain a motion that we initiate proceedings on establishing a public comment section item within the Subdivision Committee agenda to facilitate public participation prior to the Subdivision Committee's action on subdivision applications.

Chair: Any second, Mike?

Mr. Dahilig: Mr. Chair, I would suggest that possibly under B.1.b, there is no specific code or rule that is being presented for adoption by the Commission, rather is a practice that the Mayor is asking the Commission to institute just as a practice. So therefore I would recommend...

Ms. Morikami: Move to approve.

Mr. Dahilig: Move to approve, just accept it. We wouldn't be initiating any proceedings though. There is no public hearing that is required for B.1.b.

Chair: What was your motion again?

Mr. Costa: Perhaps a motion to request the Subdivision Committee to implement recommendations.

Ms. Morikami: May I withdraw the previous motion and restate, on item B.1.b, move to incorporate this public comment in the Subdivision Committee report.

Chair: Any second?

Mr. Blake: Second.

Chair: Any discussion?

Mr. Raco: What are we moving into Subdivision?

Chair: We are moving an official public comment section. Even though you ask for public comment along the way, we are going to have an official public comment section within the Subdivision Agenda.

Mr. Blake: So where do the public comments go now?

Chair: Now it's kind of unofficial for anybody who wants to talk about the...

Mr. Dahilig: Under 92 anyone in the public already entitled to speak before the Planning Commission's subcommittee on subdivision. So that is already an entitlement that is already given. What is being requested by the Mayor is just to clarify that there are distinct public comment periods before action by the Subdivision Committee on a particular item. It is just opening up formality's sake that on the agenda it will be listed an item that says public comment first and then the item. That is a practice that the Planning Commission can institute or the Planning Commission Subdivision Committee can institute but it is not something that needs to be done either through the rules or through ordinance.

Mr. Blake: Clarification, if we implement this request by the Mayor, public comment is formally requested in the Planning Commission's Subdivision Committee and there are no public comments and it comes up to the Planning Commission for approval and somebody wants to comment on the Subdivision, is that an untimely request?

Chair: No, they can speak on it.

Mr. Dahilig: That's correct. You are allowing in this case potentially two bites of the apple. That is how I can characterize it, once at the Subdivision Committee level and then when you accept it under sub (c) as part of your regular agenda later on in the morning they can provide testimony again on it. So it is two bites of the apple.

Mr. Blake: Or the Chair could say no, you had your chance.

Chair: No, I think anybody can speak on any agenda item.

Mr. Dahilig: Well because they are two separate proceedings and they are noticed as two separate meetings I would say that the Chair would have to allow it under 92, to allow them to testify twice if they wanted. Part of it is because also the Subdivision subcommittee is not made up of the full Commission and therefore I would have to view it as two different meetings.

Mr. Blake: So how does this facilitate the process?

Mr. Dahilig: I think that the Mayor's original concern based off of what I understand his representations from his office as well as the Planning Director was concerns about agricultural subdivisions and the ability for the public to be involved in it's inception.

Mr. Costa: Formally providing on the agenda a period to request facilitating public comment and that doesn't preclude public comment on any agenda item as it exists currently.

Mr. Raco: And it's got to go to Subdivision. I mean it just cannot come to the full Commission and public hearing because if we go into Subdivision and then there is public hearing and public testimony, people that are in the Subdivision Committee will hear it twice.

Mr. Dahilig: Again this is public comment, it is not a hearing so...

Mr. Raco: Yes, we will hear public comment twice.

Mr. Dahilig: For those of you that are on the Subdivision sub-committee you will hear public comment twice if you adopt the recommendation from the Mayor.

Mr. Raco: So could we just adopt the recommendation to just have it on the full Commission and hear it once?

Mr. Dahilig: The Subdivision Committee is a creature of this body and so you delegate authority from this body to have the Subdivision Committee do this type of work. If you feel in certain cases that the Subdivision should not be handling a matter and the full matter should be brought up to the Commission for full deliberation and testimony then that is within the providence of your authority collectively. But as it exists right now, because the authority has been delegated to the sub-committee, those of you that would be on the committee and then are on the Commission would hear the testimony twice. It is within your providence to say certain applications for subdivision, we want it at the Commission and it does not go down to the Subdivision Committee. That is within your discretion.

Chair: I think what Ian talked about I think this particular thing is coming up because of some of the things that happened on the large Ag. subdivisions that occurred and the public wanted input in this. Many of us, I think Council people and others have been urging and Mayor Baptiste started, I think, talking about it to reduce the amount of allowable units on these lands which is part of this letter they are going to be working on and introducing. I think once that happens, the impacts on the Ag. subdivisions is going to be greatly reduced. And then the way they have to do it is the normal way, come in with a General Plan amendment which has public notification and everything whereas on the Subdivision end, to me, it is an entitlement, it is part of the CZO. You already have the discussion based on the General Plan amendment, you are entitled to these units in the CZO ordinance and that is why they have set apart the Subdivision Committee as a separate, in my mind it is a separate committee because it is related to the entitlements of the CZO and the General Plan. And we open it up to public comment but it is really, to me it's almost like a building permit where there are standards for the construction, density, all those kinds of things which gets presented in Subdivision and then gets approved in, recommended for approval, it comes here for the public comment. It's more like, it's related to entitlements and there are rules and regulations, it's all really, it's not really discretionary. It is in a sense but not really so public comment has always come into play but the hard part was when these 100 or more unit Ag. subdivisions come before the committee, before the Commission.

Mr. Costa: Let me just expand a little bit, it was initiated by Mayor Baptiste but along with an overall approach towards Ag. subdivisions which results in the bill we have before you and this directive I guess, if you will. We looked at several alternatives, one,

the least of which was to possibly require a Class IV for an Ag. subdivision however that had some concerns in and of it's self, not to mention the 60 day time frame that the Class IV brings in. And you probably would not have too many instances where one could meet that 60 day time frame because it does involve bonding, construction of improvements. But the overall point was to basically facilitate public input and after much review at least for now the decision was to formally place within the Subdivision agenda a portion set aside for the public to testify. And also what the Class IV would have done was what is now an administrative type permit similar to a driver's license, you pass these steps and you get it, into a discretionary permit.

Chair: And partly, you brought to mind things that I had to go through, but partly, before expending the money for the design for the interior roadways, the drainage study and all that kind of thing you need to get approval that the zoning and the density is approved. And that is the preliminary subdivision process. Once that happens then you have to go talk to your engineer and they have to fit in the design for the drainage study and all that other stuff based on the CZO which may take in some cases years. So the 60 day, Use Permit thing is not appropriate to a subdivision because they need to get, in order to expend, some of that money is like huge money. Even for mine its big bucks just to do a small thing so you want to get some assurances that at least the number of units allowable, that it complies with the CZO and the zoning and all that before you start expending design money and make the improvements and all that. And that is why you have preliminary subdivision approval and then you work on that and then you come in for final whereas the Use Permit process would be unworkable.

Mr. Blake: And so what does the public...

Chair: The public comment only allows, it is something that we have always done but it formalizes that process that the public can comment on these.

Mr. Blake: Has it been a problem?

Chair: It was a problem. It became a problem in those big Ag. subdivisions, people felt they were locked out of the process.

Mr. Costa: And there was request to look at furthering public input and that is why we looked at Class IV and whatnot but this is a compromise. But I think more importantly in terms of an approach of Ag. subdivisions is the bill that we are proposing which affects the density within Open lands within the Ag. District, if you will. So these are combined to I guess address...

Mr. Blake: Correct me if I am wrong, if I come in for an Ag. subdivision and I stay within the four corners of what the law allows for Ag. subdivisions you have to give me my permit.

Mr. Costa: That's correct.

Mr. Blake: Once I want some extra consideration from you by way of roads or parking or whatever, once I want to deviate from the rules, then anybody can comment.

Chair: They can comment either way. I think they can comment either way, they have the opportunity to comment either way.

Mr. Blake: Right, but it becomes less of an administrative exercise then (inaudible).

Chair: Actually the way the subdivision, I don't know how it works for some of the, like when you ask for variance or whatever but the way subdivision, in experience, Dale Cua is immobile, there is no deviation from the CZO. And if there is a deviation it is going to have a variance permit application and variance is different, right?

Mr. Costa: Yes. And you have touched on something, I think really Use Permit, Variance are truly discretionary. To some degree a Class IV is administrative as well

because as long as you follow the standards of that district whether it is for hotel, you don't exceed the number of units, you don't exceed lot coverage, you can have your setbacks, how do you arbitrarily deny that?

Chair: Exactly, right Caven?

Mr. Raco: Yes.

Mr. Costa: Much like the analogy of the driver's license.

Mr. Blake: But again, using your Class IV example, if you can't deny it there is still discretionary or room to maneuver in there.

Mr. Costa: In terms of the conditions you place on the approval.

Chair: I think what somebody told me was that that brings in the art of negotiation which I saw a wonderful example of it in the Sheraton case with Caven Raco and Sandi Kato-Klutke when they vastly improved, I think improved the look of the hotel both for the guests and the public. They were worried about massing and they were worried about the view to the ocean from that inland road. And even though it was a Class IV permit sometimes they can improve the permit as part of the art of negotiation.

Mr. Costa: I think you are kind of touching on an SMA permit which is very discretionary.

Chair: That is discretionary, it's all mixed in.

Mr. Costa: (Inaudible) leeway in terms of view corridors, impacts, visual impacts.

Chair: Where are we at? The public comment item so anymore discussion on the public comment, all those in favor say aye, opposed, motion carries.

**On motion made by Paula Morikami and seconded by Hartwell Blake, to incorporate this public comment in the Subdivision Committee report, motion carried unanimously by voice vote.**

## **SUBDIVISION**

Mr. Raco: Subdivision Committee Report No. 2, General Business Matters, Communications, Unfinished Business, there was none. Under D.1, application 2009-25, application 2009-26, application 2009-27, application 2009-28, all approved. Final Subdivision Action, item D.2.a, application S-2006-38, approved, and item No. D.3, Tentative Extension Request for application's 2006-44 and 2007-18, all approved. And Committee members present were Caven Raco and Camilla Matsumoto.

Chair: Motion to approve.

Ms. Morikami: So moved.

Ms. Matsumoto: Seconded.

Chair: Moved and seconded, any discussion, before we vote, anybody in the public like to speak on this agenda item, seeing none, all those in favor say aye, opposed, motion carries.

**On motion made by Paula Morikami and seconded by Camilla Matsumoto, to approve Subdivision Committee Report No. 2, motion carried unanimously by voice vote.**

## **UNFINISHED BUSINESS**

Letter (3/2/09) from Tracy Nagata, D.R. Horton, submitting Annual Status Report 2009 and requesting to amend Condition 10 of Project Development Use Permit P.D. U-2006-19, Variance Permit V-2006008 and Class IV Zoning Permit Z-IV-2006-24, Tax Map Key 3-7-03:20, Hanamaulu = *Kohea Loa*. [Deferred by applicant's request 7/14/09.]

- a. Letter (7/22/09) from Tracy Nagata, requesting this agenda matter be deferred to the August 11, 2009 Planning Commission meeting.

Chair: Can I get a motion to accept?

Mr. Raco: Motion to accept.

Ms. Morikami: Second.

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

**On motion made by Caven Raco and seconded by Paula Morikami, to receive letter dated (3/2/09) from Tracy Nagata, motion carried unanimously by voice vote.**

Commission recessed for lunch at 12:50 p.m.

Meeting was called back to order at 1:50 p.m.

#### **CONTINUED PUBLIC HEARING**

There were no continued public hearings.

#### **NEW PUBLIC HEARING**

Variance Permit V-2010-1 from CZO Section 8-8.5(a)(2) relating to lot coverage requirements within the Open District (O), Class IV Zoning Permit Z-IV-2010-1 and Special Management Area Use Permit SMA(U)-2010-2 to allow the construction of an Additional Dwelling Unit on property situated within Niumalu along the south side of Hulemalu Road, approx. 1,000 ft. southwest of its intersection with Niumalu Road, further identified as Tax Map Key 3-2-02:32 and containing a total area of 43,575 sq. ft. = *Robin & Lisa Murayama*. [Director's Report received 7/14/09.]

1. Agency Comment (7/17/09) from County of Kauai, Department of Water.

Staff Bryan Mamacalay: Thank you Chairperson Nishida. Staff would like to ask the Commission to bring your attention to the tack board so I give you an orientation of the property. This is the 400 scale zoning map of Niumalu, Nawiliwili, this is Nawiliwili Bay, this is the Bay area, this is the Kauai Marriott, Nawiliwili Harbor, this is where Young Brothers and the shipping yard is located in this particular area. Niumalu Road or Wapa Road comes in this particular direction here. A familiar landmark is the Kauai Inn in this particular area. This is again Niumalu road, at this particular point, this is where Niumalu Road, let me take that back, Hulimalu Road climbs up to the lookout overlooking Menehune Fish Pond. The subject property is right at the bottom of the hill here in red. As you can see this area is zoned Open, adjacent to the property are lands that are zoned R-4 so we have a mix of residential, Open zone, as well as industrial zoning in this little compact community of Niumalu. This is an enlargement of the subject property, again this is Hulimalu Road and this is where Hulimalu begins the climb up to the Menehune Fish Pond lookout. Access to the property is provided by this easement, road drive easement that provides access to other properties to the rear, here and this is the main entrance to the property, this is the existing dwelling in yellow. This section here is an existing paved driveway, this is the air quality monitoring station that I talk about in additional findings and this is the subject of the variance since it will be generating more lot coverage on the property.

Staff Planner Bryan Mamacalay read staff report (on file).

Chair: Questions for Bryan, evaluation.

Staff Planner Bryan Mamaclay read conclusion and department recommendation (on file).

Chair: Move to receive.

Mr. Raco: Motion to receive.

Ms. Morikami: Second.

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

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

Chair: Avery, do you want to come up?

Mr. Avery Youn: Good afternoon Commissioners, my name is Avery Youn, I am the authorized agent for the applicant. My presentation is very short, I just wanted to say that the Niumalu area is primarily a residential area already as it exists today and that the zoning of the Open District for this lot was probably because of the flood zone. And probably because between this area and the river there are larger sized lots and it was probably zoned because it was one of the larger lots in this area. Also, because it is no longer in the flood zone there is just a little corner in the lower right side over there, that is what is called zone X. The Open District is not really a critical issue anymore because it is no longer in the flood zone and also because it is in the Urban District which does allow residential development.

Furthermore, this slot does qualify for an additional dwelling unit but the dilemma it's facing is because it is a bigger lot the 10% lot coverage becomes a problem. For example the lot immediately next door which is zoned R-4 is only 11,000 square feet and it's allowed at least a 5,500 lot coverage which is more than this lot which is one acre. So that lot which is only one fourth the size is allowed a greater lot coverage by about 1,500 square feet as compared to this lot. And even with this lot being that it is one acre in size, if we increase the lot coverage to approximately 18%, that still leaves over 80% of the lot in Open so it doesn't deviate from any of the original Open Zone designations, it is still 80% Open. Other than that, are there any questions?

Chair: Thank you Avery, Bryan...

Mr. Youn: The applicant's are here in case you have any questions of them too, Robin and Lisa Murayama.

Chair: Robin, do you guys want to say something?

Mr. Robin Murayama: Good afternoon Commissioners, my name is Robin Murayama. I just want to say that I am a fourth generation Niumalu resident, my son and daughter are fifth generation and the reason for the ADU is for them, that is all I have to say.

Chair: Thank you Robin, questions for Robin? Bryan, do we have all the agency comments?

Staff: No we have not at this point in time.

Chair: What are you expecting?

Staff: I don't expect any significant comments from the other agencies.

Mr. Raco: So we can rock and roll today or what?

Staff: I believe the Commission can. If there are any conditions imposed it would fall under the catchall condition that there would be more conditions imposed by other agencies.

Chair: Anybody in the public want to speak on this agenda item? Did you get the catchall condition?

Staff: That would be the standard, "The applicant is advised that additional government agency conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agency or agencies."

Mr. Raco: So I would just motion to close the public hearing on Variance Permit V-2010-1, Class IV Z-IV-2010-1 and SMA(U)2010-2.

Ms. Matsumoto: Second.

Chair: Moved and seconded to close the public hearing, any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Caven Raco and seconded by Camilla Matsumoto, to close the public hearing, motion carried unanimously voice vote.**

Mr. Costa: So Bryan, just to clarify, you will be adding that condition?

Staff: Yes.

Mr. Raco: So I would like to motion to approve as amended by the planner, V-2010-1, Class IV Zoning Permit Z-IV-2010-1 and SMA(U)-2010-2.

Ms. Matsumoto: Second.

Chair: Moved and seconded, any discussion, all those in favor say aye, do we have to roll call this, roll call.

**On motion made by Caven Raco and seconded by Camilla Matsumoto, to approve staff report as amended, motion carried by the following roll call vote:**

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

Special Management Area Use Permit SMA(U)-2010-1 to permit the construction of two dwelling units on property located along the southeast side of Ananalua Road, located in Wainiha, Kauai, approx. 330 ft. south of the intersection of Kaumualii Highway, further identified as Tax Map Key 5-8-006:065, and containing a total area of 1.156 acres. *Jonathan & Bernadette Wichman.*

**Hearing was continued.**

Amendment to Class IV Zoning Permit Z-IV-2002-9 and Use Permit U-2002-24 to replace equipment and extend an existing thirty (30) ft. monopole to a height of forty (40) ft. at a telecommunication facility located on the eastern side of Ola Road, approx. 870 ft. north of its intersection with Kaumualii Highway, Waimea, Kauai, further identified as Tax Map Key 1-6-010:002, and affecting a 750 sq. ft. area of a 1.62 acre property = *Verizon Wireless*. [Director's Report received 7/14/09.]

Staff Ka'aina Hull read Director's report (on file).



Chair: We will take public testimony. Is the applicant here?

Ms. Danette Mettler: Danette Mettler on behalf of Verizon Wireless.

Chair: Any additions to the report?

Ms. Mettler: Yes. I have prepared photo simulation of the proposed design. We are not proposing a tree pole at this time. We talked with the owner and the Kauai Historic Society and both said they preferred a sleeker design. The pole design that we have, we are flesh mounting the antennas and painting them brown so you will see in the picture the antennas look like they are a slightly lighter color. This is just for demonstration purposes so that you can see the antennas however they would be painted brown, all the same color and would match the existing overhead utility lines nearby.

Another reason for leaving this pole as is and just mounting the antennas, flesh mounted and not changing out to a tree pole, this site, right next to the site is the Transit of Venus and the previous conditions required that we protect that and that we erect a wrought iron fence which we did. If we had to change this out to a tree pole we would have to remove the pole and there would be ground disturbance, we would like to avoid that, in order to save the archeological sites, to protect them.

Mr. Raco: So your reasoning is not to disturb the soil or the erosion of the...

Ms. Mettler: Right.

Mr. Raco: Let me ask you this then, how old is the pole that is there now, when was that installed?

Ms. Mettler: I believe it was 2002, yes, July, 2002.

Mr. Raco: So what would change from 2002 to 2009 under construction if we had to change the pole?

Ms. Mettler: We would have to remove the pole where before we installed a new pole. This way the footings and the, you know you have to go quite deep in order to erect these poles so we would be actually removing the pole and the foundation and the footing where before we didn't have to do a demolition.

Mr. Raco: But both had to require some kind of land construction or erosion...

Ms. Mettler: There is drilling for the pole, yes.

Mr. Raco: And the first pole was used for, how was that installed?

Ms. Mettler: How was it installed? They drill a hole and they use concrete and foundation. I'm not sure.

Mr. Raco: So what is the difference between now and then?

Ms. Mettler: Demolition, trying to actually take this pole out.

Mr. Raco: You would still have to...

Staff: Just for clarity sake, I think what you are saying is if, as proposed, the regular monopole with the extended height, would it require ground breaking disturbance. But with the tree pole you are saying ground breaking disturbance would be required.

Ms. Mettler: That's right.

Chair: Any other questions, thank you.

Ms. Mettler: One more thing, if you were leaning towards requiring a tree pole I would have to ask before you vote on it I would like to go back to the owner if that was the case. Like I said, the Kauai Historic Society and the owner both preferred not to have a tree pole but if for some reason it was required we would have to go back and talk with the owner about it and I would like to ask for a continuance.

Chair: Anybody in the public want to speak on this agenda item, seeing none, Ka'aina, you can finish with your report.

Staff Planner Ka'aina Hull read department recommendation (on file).

Staff: And just to reiterate, in the Director' Report the evaluation does bring up the possibility that a stealthing or a tree pole may be appropriate as this Commission has imposed it on other applications however the department didn't go as far as to put that in the recommendation for conditions of approval just because primarily it is a preliminary report in which we wanted to see where the public and the Commission stood as far as stealthing requirements go.

Chair: Motion to receive staff report.

Mr. Raco: So moved.

Ms. Matsumoto: Second.

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

**On motion made by Caven Raco and seconded by Camilla Matsumoto, to receive staff report, motion carried unanimously by voice vote.**

Chair: Any discussion, questions for...

Mr. Raco: So you had a condition in there?

Staff: The consideration of the tree pole and whether or not it was appropriate was brought up in the evaluation however there is no condition as the report stands now for a condition of approval.

Mr. Raco: And you have the recommendation from the Historic Society that (inaudible).

Staff: Yes. The Historic Society basically states that "this is to inform you that the Kauai Historic Preservation Review Commission met on July 7, 2009, to review your request", this is the letter to the applicant, "to replace 3 omni antennas with 6 panel antennas on the grounds of the Waimea Parson's Building. The location and design of the initial antennas support facility reviewed by KHPRC and SHPD and have been in existence for many years. Based on the above information presented that KHPRC concurs with the SHPD no affect recommendation dated 5/25/09."

Chair: Did we get all the responses back from the different departments?

Staff: We do.

Chair: Do you have any comment on the proposed conditions, okay.

Mr. Raco: Motion to approve Use Permit U-2002-24 and amendment to Class IV Zoning Permit Z-IV-2002-29.

Ms. Matsumoto: Second.

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

**On motion made by Caven Raco and seconded by Camilla Matsumoto, to approve U-2002-24 and Z-IV-2002-29, motion carried unanimously by voice vote.**

State Land Use District Boundary Amendment A-2010-1, General Plan Amendment GPA-2010-1 and Zoning Amendment ZA-2010-1 pertaining to Tax Map Key 5-2-017:028:

A-2010-1

Request: Amend State Land Use District Boundary Amendment from Urban District to Agricultural District.

GPA-2010-1

Request: Amend County General Plan Amendment from Residential Community to Agricultural and Open.

ZA-2010-1

Request: Amend County Zoning Amendment from Limited Industrial (I-L) to Agriculture (A).

Location:

Kilauea, Kauai. On the mauka side Kuhio Highway, approx. 1,500 ft. northwest from its intersection with Kolo Road containing a land area of 6.55 acres.

Tax Map Key:

5-2-017:028. *County of Kauai.*

Chair: I forgot to close the Verizon Wireless public hearing so we are going back to that.

Mr. Raco: So close the public hearing U-2002-24, and Zoning Permit Z-IV-2002-29.

Ms. Matsumoto: Second.

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

**On motion made by Caven Raco and seconded by Camilla Matsumoto, to close public hearing for U-2002-24 and Z-IV-2002-29, motion carried unanimously by voice vote.**

Staff Planner Ka'aina Hull read staff report (on file).

Chair: All the comments from the departments are in?

Staff: Yes.

Chair: Before I open it up why don't you just finish so we can talk about the whole thing.

Staff Planner Ka'aina Hull read department recommendation (on file).

Chair: Any questions for Ka'aina? Is the landowner or the...do you want to come up and speak?

Mr. Michael Kaplan: Thank you Commissioners, my name is Michael Kaplan. I am the Project Manager for Anaina Ho and I just wanted to say that we are in favor of the action that the Planning Department is taking. Our ultimate goal for this area of the property is to build an outdoor amphitheater with an indoor auditorium and certified kitchen. We do hope that when we do come back for a Use permit, hopefully within the next couple months for this project that the Commission takes into account that we are willing to down zone this property back to Ag. with the wishes of the community and the County, thank you, any questions?

Chair: Any questions, thank you, anyone in the public want to speak on this agenda item, seeing none...

Mr. Raco: Motion to receive.

Ms. Matsumoto: Second.

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

**On motion made by Caven Raco and seconded by Camilla Matsumoto, to review staff report, motion carried unanimously by voice vote.**

Mr. Raco: Motion to close A-2010-1 and GPA-2010-1 and Zoning Amendment ZA-2010-1.

Mr. Blake: Second.

Chair: Moved and seconded by Hartwell, moved by Caven, any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Caven Raco and Hartwell Blake, to close the public hearing, motion carried unanimously by voice vote.**

Mr. Raco: Motion to approve.

Chair: Any second?

Mr. Blake: Second.

Chair: Any discussion, seeing none, all those in favor...roll call.

**On motion made by Caven Raco and seconded by Hartwell Blake, to approve A2010-1, GPA-2010-1 and ZA-2010-1, motion carried unanimously by the following roll call vote:**

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

Variance Permit V-2009-3 to allow a deviation from CZO Section 8-3.6(a) relating to the minimum lot width requirement for residential zoned properties, and a Class IV Zoning Permit Z-IV-2009-19 for a proposed two-lot subdivision of property located along the mauka side of Fujii Street in Lihue, situated approx. 75.ft. from its intersection with Poinciana Street, further identified as Tax Map Key 3-8-014:020, and affecting a total area of 12,328 sq. ft. = *Jonathan Fabian*. [Director's Report received 7/14/09.] **POSTPONED.**

State Land Use District Boundary Adjustment A-2009-1, General Plan Amendment GPA-2009-1, and Zoning Amendment and County Visitor Destination Area Amendment ZA-2009-10 pertaining to Tax Map Key 3-5-01: por. 27, 102, and por. 168 = *MOIR Golf (Kauai) LLC.*

A-2009-1

Request: Amend approx. 14.6 acres from Agricultural District to Urban District.

GPA-2009-10

Request: Amend approx. 19.1 acres from "Open" to "Resort."

ZA-2009-10

Request: Amend approx. 21.6 acres from Open District (O) to Residential District (R-2), and

Request: Expansion of the existing Kauai Lagoons Resort Visitor Destination Area boundaries to recognize additional land Area that will be occupied by resort-residential development and associated improvements, affecting approx. 9.2 acres.

Location: Kalapaki, Lihue. Within the Kauai Lagoons Resort's 27-hole golf course complex, in the nearby vicinity north-northeast of the existing Kauai Marriott Resort and Beach Club facilities and south and west of the Lihue Airport facility.

Land Area: Approx. 34.0 acres.

Tax Map Key: 3-5-01: por. 27, 102, and por. 168.

**Hearing was continued to 8/25/09.**

Special Management Area Use Permit SMA(U)-2009-5, Use Permit U-2009-19 and Class IV Zoning Permit Z-IV-2009-20. The Special Management Area Use Permit will allow for the subdivision and development of seven (7) single-family residential lots within an approx. 7.06-acre site within the SMA boundary. The Use Permit will allow for the development of an underground sewer pump station with appurtenant facilities. The Class IV Zoning Permit will allow for the development of 22 single-family residential subdivisions, including the private underground sewer pump station with appurtenant facilities. These improvements are located within the Kauai Lagoons Resort's 27-hole golf course complex located in Kalapaki, Lihue, in the nearby vicinity north-northeast of the existing Kauai Marriott Resort and Beach Club facilities and south and west of the Lihue Airport facility, further identified as Tax Map Keys 3-5-01: por. 27 and por. 168, and d containing a project area of approx. 22 acres = **MORI Golf (Kauai), LLC.** [Director's Report received 7/14/09.]

**Hearing continued to 11/24/09.**

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

1. Adoption of a proposed Chapter 6A relating to non-conforming use Certificate appeals, including standards relating to loss of quite Enjoyment, transgressions and con-compliance;
2. Amendment of Chapter 1 pertaining to the definition of "proceeding," and
3. Amendment of Chapter 9 relating to appeals from the planning director. **County of Kauai Planning Commission.**

Deputy Planning Director, Imai Aiu, read staff report (on file).

Mr. Dahilig: Upon further review of the provision with regards to cost and fees, after some further research by our office I am of the impression that when the Commission sits in it's capacity in a contested case hearing capacity it is not sitting as a court of equity and usually when you want to award cost and fees at a court level the court is applying its equitable authority. But in the case of a contested case hearing I would have some concern about having that provision in there because of the authority that I am not clear whether or not the Commission actually does have. So I would recommend with regards to the proposed addition of a provision providing the opportunity for the Commission to award costs and fees for frivolous claims that that not be included as part of the rules.

Mr. Aiu continued reading staff report department recommendation (on file).

Chair: Imai, where in this is that one about the fees, do you want that motion now to approve that whole thing and then work on the amendments?

Mr. Dahilig: We could entertain a motion to approve the rules as proposed by the Planning Director in its entirety and then open the public hearing and then after the public hearing we can take up the issue of the fees and through the Commissions discussion after the public hearing.

Chair: You want this motion?

Mr. Dahilig: Yes.

Chair: I was asked to ask if there was a motion to adopt Chapter 6A and amendments to Chapter 1 and 9 of the Rules and Procedures of the Planning Commission with proposed changes made by the Planning Director as read by Imai to the version released on June 25, 2009 for public review.

Ms. Morikami: Mr. Chair, so moved.

Chair: Any second?

Mr. Kimura: Second.

Chair: All those in favor say aye, opposed, wait, no vote yet, we have to go to public. So now you want me to table?

Mr. Dahilig: Just go to public hearing.

Chair: Who wants to speak, we are opening the public hearing. Don't start the timer yet, do you have questions regarding the changes, where to find the changes and all that, what are the proposed changes?

Ms. Barbara Robeson: No, I understand that the proposed changes that were handed out are in bold as was pointed out.

Chair: Are you ready for your testimony?

Ms Robeson: Sure, (testimony read, on file).

Mr. Dahilig: Maybe just for some background I can address some of your concerns from a legal perspective. The reason why we are, the word "contest" is when we are reviewing the rules with the Planning Department. The potential for the denial of a re-issuance was that it would force us into a contested case hearing and so because in essence what is happening is because a permit has been issued already, if we were to not have re-issued it would be a taking essentially, a taking of a right or a privilege. And so that is why immediately we have to model the rules, when we started off on this process internally, we have to model the rules to a contested case hearing process. When we also read the rules, the point that you brought out in regards to this has happened before of does it have to happen afterwards, in my opinion in terms of what were advising the Planning Department was that the statute doesn't make clear in terms of it's tenses whether or not it is meant to be before or after re-issuance. So when it says "the re-issuance" in the paragraph, it says "the re-issuance," it could mean that the permit was already issued and you are contesting the re-issuance of the permit.

So there is an ambiguity there, I am going to point that out but the recommendation that we have had in terms of why we are going down this route is because first off we are operating under the assumption that this is a contested case hearing, it is a right or a privilege that may be taken away by this process and that the quote/un-quote, re-issuance, does not define whether or not it is before or after. And because the nature of a contested case hearing, where you are pulling away a right or a privilege, we have recommended that it be done afterwards. So just as some background, why it is modeled in this fashion. Imai, do you want to...?

Mr. Aiu: Yes, furthermore, to add just to what does contesting a re-issuance look like, what form is that supposed to take that somebody is actually supposed to bring

forward their evidence and make a determination. Is it just dropping off testimony at the counter while we do the re-issuance and then how are we supposed to judge that versus what the applicant has given us when they differ. That is not something that should be administratively decided when there are already rules and processes in place like this, or the precedent for those types of rules and processes already places that kind of judgment when you get two different types of evidence before you, before the Commission. Even to follow that to its logical conclusion it would have to come up here to be decided, there is no other venue for that so that is why they end up here, it ends up as this contested case hearing as an appeal form.

Ms. Robeson: Could I respond? Having been involved in the vacation rental issues for about 9 or 10 years now and following closely the development of the ordinance over months and months and the amendments and the public hearings and so forth, and then reading the committee report from the County Council on January 14, 2009, which on page 3 states that there were 3 floor amendments and one of the amendments requires that the Planning Commission create administrative rules prior to July 31, 2009 regarding the annual renewing of nonconforming use certificates. These rules will allow for public input as to the re-issuance of the certificates.” So that is in part besides the other information that I have given is the basis for my testimony.

Chair: Questions for Barbara, anyone else, Caren.

Ms. Caren Diamond: Good afternoon Commissioners, Caren Diamond. Again I am here for Protect Our Neighborhood Ohana. Are these the rules that you were talking about before, you were saying this is what we should look forward to? I am kind of confused because we have been before you in the last couple weeks and basically what I heard was the new rules are coming out and you will be able to contest these. But now I see this contesting has only 50 yards, you have to be right there which means you basically be the immediate neighbor and that is in conflict with the CZO where 300 yards is our current law. So I want to know why you want to make it so much smaller for this. I actually just really want to protest these rules in many ways. I think they are really bunk and I think that the reason is many, one, we were given these rules, the amended rules right here today. On Friday I came to the Planning Department desk and I got a copy of rules but it wasn't these rules, it didn't have the bold, it didn't have the changes. So because this is a public hearing I am asking when this got published, when it was available to the public and why you are being asked to vote on it today and I am asking if that is correct. Because if it is a public hearing things are supposed to come in due time for people to be able to review them and comment on them.

I want to take exception to page 10, number 5 and I take note that the County Attorney told you that that probably wasn't appropriate but that sentence kind of sets the tone for the type of amendments that are in this where it says “the Commission panel or hearings officer may choose to award costs to the prevailing party or parties in the event of an appeal brought under arbitrary or capricious or frivolous claims.” Well what if this claim was brought under correct claims and the party won? So all you are doing is saying, you are only allowing for just this one instance and so yes, I would ask you and hope that you would strike this from your discussion and from your amendments in here when you make them.

I want to take about the SMA because there is nothing in here that asks you to evaluate the Special Management Area and you have 233 applications in Hanalei to Haena. I don't see anything in here. So they make noise, they don't make noise, what about your responsibility to uphold the regulatory scheme and the laws of the Special Management Area? What about that? And if I don't live within 50 yards, that's it? I think these are, these amendments don't do what you were asked to do as Ms. Robeson had stated and I would ask you to please read the testimony that we submitted and I would ask you not to pass these today. I think you were put under a lot of pressure because these rules are supposed to be done by the end of this month which gives you 3 days to do it. I don't know why your Planning Department waited until the very end to bring them before you. But pretty much that makes it so that what, you have to say yes? Is that the intention? Was it, the initial ordinance was implemented so well by the Planning Department that this is all we have now? We are saying that your Planning

Department did a lousy, lousy job, where they did not review many, a lot of things and our neighborhood has turned into a resort. And now you say we can do nothing about it, thanks a lot.

Chair: Anyone else want to speak on this agenda item?

Ms. JoAnne Yukimura: Chair and members of the Planning Commission, JoAnne Yukimura for the record. I just wanted to raise one procedural issue that is the changing of the proposed rules between public hearing and, between publication and announcement of the rules and public hearing strikes me as very odd and possibly a violation of the HRS Chapter 91 because the public is having to speak to a moving target and that seems wrong. I also want to say that I think Barbara Robeson has some very legitimate concerns and at the same time I hear your Council's point partly because I have a legal background about the right and privilege that may be taken away. But to me what that does is highlights more than ever the importance of whether to give or issue the nonconforming use certificate in the very first instance because it is harder to take it away once it is issued. And what the public is clamoring for is some real clarity and very clear regulatory process that shows that the certificates are issued on clear and proper evidence. And to me if you do that at the outset the issues later are not as great but once you issue them it is a big problem. And so I just want to take this opportunity to again re-emphasize and request your scrutiny over that process. I think that's it.

Mr. Dahilig: Ms. Yukimura, maybe I can respond to why there is a difference in what was published, when the publication came out on June 25<sup>th</sup> in the Garden Island and we made the draft rules available, pursuant to HRS 201N, we also have to take these rules through small business (inaudible). So we have had to go to the State and we have also had to go to create and have a small business committee a pendent to the Planning Commission review these rules and they provided comments on the draft that was out for review. What the Planning Director's report has or suggested amendments to the rules that were published on June 25<sup>th</sup> and we, as a courtesy, tried to list out these recommendations ahead of time rather than bringing them on the floor when the Commission begins deliberations. And so it was all fairness trying to at least provide the public more notice as to codifying what these two small business committees have recommended as changes and in at least a written form have that available for the public to know 6 days in advance. So this was as part of the agenda packet that was out, these bolded changes that were recommended by these two bodies, were I guess made available at the counter.

Addressing Ms. Diamond's concern that maybe she got the wrong copy of the rules, I don't know what happened there but really what was available when the agenda was posted was these rules that had these proposed changes by these small business committees. So it was never meant as a way to try to create a moving target, rather to provide advance notice rather than bringing the amendments once the Commission began deliberations which they are entitled to make changes to once they...

Ms. Yukimura: They are.

Mr. Dahilig: Yes.

Ms. Yukimura: Okay, thank you for that explanation. I do understand it better after the explanation, thank you very much.

Chair: Anyone else want to speak on this agenda item?

Ms. Jane Obramo: My name is Jane Obramo. I had a whole set of testimony here based on what I thought were the rules and they have changed so my testimony has changed a little bit. I have one real basic concern about all of this and I am just wondering if you guys have really considered that you are creating a separate code of conduct for the visitors compared to the long term residents of the island. I think there is a lot of issues here that the visitors have to adhere to but my particular neighbors don't have to adhere to and I object to that. I don't think that that is fair. I have been a long time resident here and I understand the need to create an appeals process but I am not



comfortable with the idea that the rules create a different set of guidelines for the visitors. I don't think that is fair. I am not sure it is legal. I am not sure that you can uphold that in the landlord/tenant code. I am not sure fair housing would agree with that.

By creating these rules you are creating a mechanism where a resident can create a penalty against a neighbor for noise or gatherings or parking or whatever these rules are but as a resident I can't create that same kind of penalty against a fellow neighbor who's got a barking dog or any of that stuff. That just doesn't seem fair to me. I don't like the idea looking through these revised conditions, I don't like the idea that when this, if there is an objection that it is going to take 120 days, you have as much as 120 days to review and respond to that. I think that is an undue burden on a homeowner. I don't think that is fair. And I like the idea that they took out the large gathering, I couldn't figure out what a large gathering really was. I would like to see the, I would like the County Attorney to consider a way to establish a set of fees for frivolous complaints. I think that you are opening yourselves up to a fair number of frivolous complaints. One of the issues in here is if there is a lot of police reports, well you know I can call the police anytime I want but that doesn't mean I am going to get any response from them or any action.

In closing, I would just ask also if that small business advisory committee reviewed the corrections that you made. And I would also ask that you guys just kind of think about this a little longer. I think you are really setting a precedence of creating a discriminated class of residents and visitors are residents, you know they get here, they are here. They are tax payers just like us. They are living here just like us. Just because I have been here for a couple of years doesn't make it any different than if I arrived here yesterday. We are all still citizens, thank you.

Chair: Questions?

Mr. Dahilig: Just for some background information because you have touched on issues related to possible discrimination which could carry some legal consequences for these rules. If you look at the organic document, the ordinance that was passed by the Council in January they use the phrase "loss of quiet enjoyment and transgressions." And trying to define what "loss of quiet enjoyment and transgressions" are is part of the requirements in passing these rules. So, simply what the Commission is doing is the Commission is implementing standards as they are required to do under the ordinance that was passed by the County Council and this is the shot that they are trying to, I guess that the department is trying to put a peg on this in terms of what is loss of quiet enjoyment and transgressions. That is why you see the standards in there. So it's not to qualify it but to provide an explanation why they are in the rules themselves.

Ms. Obramo: I understand that but you required us to put a document for the comfort and safety of you and your neighbors into these vacation rentals. Certainly those are our guidelines and I don't think that punitive damages beyond that are necessary.

Mr. Dahilig: And again, just to clarify, this body does not make policy but in this particular case it was charged with the responsibility to define further what is "loss of quiet enjoyment and transgressions," it is based on, I don't want to use the word edict, but it was based on what the law requires the Commission to do.

Ms. Obramo: Who is going to define what the morals of the neighborhood are and whether they are correct?

Mr. Aiu: That is up to this body to judge, that is why it goes before a public process and that is why you are here giving testimony here, to put out those standards.

Mr. Dahilig: Again, as I stated, the Commission does have the option to not even define what is "loss of quiet enjoyment or transgressions" but the Planning Department, for transparency sake, is trying to set some clear guidelines ahead of time for a hearings officer, them, or a panel to review anything that comes up. So the Commission does have the authority to say well, we don't want clear standards set forth, we just want everything judged based on the phrase "loss of quiet enjoyment and transgressions." That is the

reason why the rules are in there with that amount of specificity is because we are trying to be a little more transparent as to what is “loss of quiet enjoyment and transgressions.”

Ms. Obramo: So as a resident what kind of protections do I get against other residents?

Mr. Dahilig: I can't answer that.

Ms. Obramo: I don't think that is fair.

Mr. Costa: I know Caren and Barbara were instrumental in getting these terms put in, maybe they can help us. I see Caren laughing back there. This is an unusual law.

Ms. Obramo: I am just concerned. I get it, I know the vacation rentals are proliferating, I get all that part. But it just, you know you talk about being fair in this document and I don't think it is fair to treat the visitors differently.

Mr. Aiu: If I could respond to that, if not, that is okay, I don't need to.

Mr. Dahilig: I would just say again, this was a policy call made by the County Council as to the standard of “loss of quiet enjoyment and transgressions” so by law this is the stand that they want transient vacation rentals held to. If there is an issue with regards to the standard that the County Council set forth you can approach your, any County Council member if you would like them to change the phrase. But this is the standard that the Planning Commission is required to hold these TVR's to if there is an appeal.

Ms. Obramo: This is getting pretty specific and I hope you guys are careful about it.

Chair: Anyone else in the public, JoAnne.

Ms. Yukimura: JoAnne Yukimura for the record. I guess because your Counsel has been so gracious in explaining things which does help the public understand I would like to know what the rationale was in directing all the appeals from Chapter 9 to Chapter 6A, that is the appeals that would be from a Director's decision. Because to me, actually if you set up some guidelines on that it is easier for the public to go through that than to have to hire attorneys and everything. So perhaps if you are willing, Chair, to have that explanation given I would appreciate it.

Mr. Dahilig: The reason why we shifted it from a Director's, under Chapter 9, Director's, I guess a Decision of the Director is because based on the reading of the ordinance, both ordinances, it is my impression that all authority for issuance of any type of NCU has been transferred after March 30<sup>th</sup> to the Planning Commission from the Planning Director. So my instinct is that even renewals now, everything has to be approved by the Planning Commission based on the way that the rules are written. So that is why in essence we have made a determination that it has to go from 9 to 6A because it is no longer a Planning Director decision.

Ms. Yukimura: So I am not familiar with that transfer, when was that made?

Mr. Dahilig: When we read ordinance 864...

Mr. Aiu: It is 8-17.10, I believe.

Mr. Dahilig: I am looking at 8-17.10, sub (F), and what is unclear to me is whether or not the rules have been, sorry, the ordinance has transferred all authority or not, it does not clearly define whether all authority as been transferred. But what I can read in the ordinance is that already, after March 30<sup>th</sup>, the Council in its wisdom has said you have to go up to the Planning Commission. So it doesn't address renewals as being within the providence of the Planning Director, unless I am reading it wrong but that is why we recommended the change from 9 to 6A.

Ms. Yukimura: Well I can tell you as the drafter of the ordinance that the decision was seen primarily as the decision of the Planning Director because it says “no nonconforming use certificate shall be issued by the Planning Director and demonstrates to the satisfaction of the Planning Director.” All the core decisions making is referring to the Planning Director. So I was just very surprised to hear that this was a Planning Commission decision.

Mr. Dahilig: And that is the problem that we are running into with subsection sub (F), is that the way we are reading it is failure to obtain it by March 30<sup>th</sup>, 09, then you have to go to the Planning Commission. Is a renewal another obtaining? So sub (C), as you are referring to does authorize the Planning Director to issue but only up until March 30, 2009. After March 30, 2009 it is unclear whether or not an issuance would also pertain to a re-issuance and therefore would fall into the providence of the Planning Commission.

Mr. Costa: And that was part of the original bill that you did author.

Ms. Yukimura: I do see a distinction between the subsequent issuances although I don't think it's clear here that it is the Planning Commission, it is not clear. But in terms of the original nonconforming issuance, that is clearly a Planning Director's decision and this change, appeals concerning nonconforming use certificates applies to both the original and the non.

Mr. Dahilig: Because it is past March 30, 2009.

Ms. Yukimura: I don't think that should matter.

Mr. Dahilig: Out of abundance of caution we don't want the Commission to, we don't want the Planning Director issuing things that he is not authorized to issue and so based on the way that the statute is written, after March 30, 2009 the Planning Director has lost all of his authority to issue. Whether or not to deny, that is another question but to issue, everything has been transferred over. If you have not obtained it my March 30, 2009 it has to come up to the Planning Commission. Is a renewal an obtaining and I think that is the big question and my impression is that it could be interpreted as a renewal could be an obtaining so that is why that transfer from 9 to 6A as made.

Ms. Yukimura: Well I appreciate the explanation, thank you.

Chair: Anybody else in the public, Caren.

Ms. Diamond: Thank you. I will be short, Caren Diamond. I have one request and that is to ask you to please not pass these rules today with all these problems. I would as you to go back to the County Council and ask them for a time extension instead of rushing through some poorly thought out rules that obviously have a lot of problems with them, thank you.

Mr. Costa: In all honesty that should have been done in the amendments which didn't give us any extension to approving by March 30<sup>th</sup> which we had to do and the appeals date of July was also, in other words you lit the fuse from both ends and we have to live with it.

Chair: Anybody in the public wants to speak, seeing none.

Mr. Raco: Motion to receive first.

Ms. Matsumoto: Caren had mentioned several things in her original testimony but she is referring to on page 10, item 5, that she wanted to strike that.

Mr. Dahilig: It is my recommendation that the Planning Commission, should they want to entertain the amendments as proposed by the Planning Director, not adopt that particular provision on page 10 for, again for reasons where I do not believe that the

Commission can sit as judges of equity and therefore parse out fees, like attorney's fees or whatever. So that is why my recommendation is not to have that in there because I don't want to have the Commission over extending its authority.

Mr. Raco: So 5, as read, I mean as written is okay?

Mr. Dahilig: Well, no, I would say 5, as written, I would remove. The old 5.

Mr. Blake: So how would we (inaudible) against frivolous...?

Mr. Aiu: That would have to come through our screening process basically that we would screen before hand, the grounds.

Mr. Dahilig: I think this is a discussion that would be better done as deliberations on the motion.

Chair: I have to say this, I am totally confused. I was so caught up in what was happening in the approval for the, I missed the last meeting and I had to catch up on that and I am just not prepared for this at all so I am hoping that there are 6 people, that you guys are able to wager this. But to tell you the truth, I mean I looked at some of this stuff in here and I went why are they putting this in? The idea that this thing was supposed to give a way for people to come in and it's like everything was against the guys coming in and the 50 yards and all that, I don't know, the fines. As soon as I read that I don't know, I couldn't deal with it. Anyway, how do you guys want to deal with this?

Ms. Morikami: Mr. Chair, can we at least close the public hearing? Move to close the public hearing.

Chair: Any second?

Mr. Raco: Second.

Chair: Moved and seconded to close the public hearing, any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Paula Morikami and seconded by Caven Raco, to close the public hearing, motion carried unanimously by voice vote.**

Chair: What do you guys want to do?

Ms. Matsumoto: I agree with the Chairman...

Mr. Raco: There is a motion on the floor.

Chair: There is a motion on the floor to approve as amended, any discussion?

Ms. Matsumoto: I am a little uncomfortable today because it is quite overwhelming, all of these points here, and if we are to make a decision I would like us to make a good decision on a document that we feel is comfortable or is complete or...I don't know, I am just not comfortable today.

Chair: Any other discussions?

Mr. Dahilig: Would you like to go into executive session as to what your rights, privileges and duties are as pertaining to this ordinance?

Mr. Raco: So we would table the motion on the floor and...

Mr. Dahilig: I would ask that the Commission consider going into executive session to consult with the County Attorney as it pertains to the Commission's rights, privileges and duties under ordinance 876 as approved by the County Council on January

14, 2009. Specifically with regards to section 8-17.10, sub (f), with regards to the promulgation of rules by July 31, 2009.

Mr. Blake: So moved.

Ms. Matsumoto: Second.

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

**On motion made by Hartwell Blake and seconded by Camilla Matsumoto, to go into executive session, motion carried unanimously by voice vote.**

Commission went into executive session at 4:54 p.m.

Meeting was called back to order at 5:22 p.m.

Chair: We are in deliberation; we are going over starting on page 5, the changes as proposed.

Mr. Aiu: Chair, the first changes to 1-6A-2, sub (A), sub (2), where we add in the language, I should read the whole 2, "Any residence within 50 yards of the transient vacation rental TVR's property line," that is the addition, "or in the case of a TVR operation within a condominium (inaudible) regime, the actual physical unit, who can show that the TVR operation has been contrary to the peace, safety, comfort, morals and welfare of the neighborhood as further defined in section 1-25 below."

Chair: Actually I have a question on the first one, sorry, if somebody that lives outside of the 50 yards, under section 1, I asked earlier, if a member of the public has compelling evidence that an NCU was granted based on false or misleading evidence, you are saying that if the application, you can talk about what you told me?

Mr. Aiu: Yes, false or misleading evidence. I believe what you asked me is if somebody who basically has a house in the flood plane that they didn't show any improvements below the flood line and they did have improvements below the flood line but that was not represented in the application that would be false information.

Chair: So the application has to reflect exactly what is there.

Mr. Aiu: The application has to reflect exactly what is there. In fact they have to submit stamped plans that say so.

Chair: And if there is a violation or anything like that a member of the public can bring that forward?

Mr. Aiu: Yes.

Chair: As well as they department?

Mr. Aiu: As well as the department.

Mr. Costa: Without having to meet the distance criteria.

Chair: Okay, now we are on the distance criteria. Anybody wants to...

Mr. Kimura: Yes. I would like to make a motion to change the 50 yards to 300 feet.

Chair: Any second?

Mr. Raco: Second for discussion, 300 feet or 300 yards?

Mr. Kimura: Feet, it is pretty much standard what the County...

Mr. Costa: Which happens to be the notification requirements for use permits and other matters.

Mr. Raco: Call for the vote.

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

**On motion made by Jan Kimura and seconded by Caven Raco, to amend 1-6A-2, subsection (A), subsection (2), motion carried unanimously by voice vote.**

Mr. Aiu: The next item is the addition of 1-6A-2, sub (A), sub (3), which adds in "a denied NCU applicant to the parties entitled for a vacation rental."

Mr. Aiu: The next item is item (C) which adds " to presiding Chair or Hearings Officer as the Planning Department and any intervenors admitted with the permission of the Chair, Presiding Officer or Hearings Officer shall considered parties to the petition."

Chair: Just for clarification, you are saying whoever, these three people, but whoever is in charge.

Mr. Aiu: Yes, exactly.

Chair: Next item, questions?

Ms. Matsumoto: Would it be worth stating it that way to say "or whoever is in charge"?

Mr. Dahilig: I believe it addresses the head of the 3 options that in these rules you can dispose of appeal. Either the Commission as a whole so it would be the Chair, the head of the panel which is the Presiding Officer or the Hearings Officer which is an individual and it is just him or her.

Ms. Matsumoto: So the way it is stated is sufficient?

Mr. Dahilig: Yes.

Mr. Aiu: Continuing, next is 1-6A-3, Disposition of Business, "Appeals shall be disposed by the Commission, a TVR hearing panel of three Commissioners duly appointed by the Commission, or a Hearings Officer. In the case of a Panel the Commission or Chair shall appoint a member of the Panel to serve as its Presiding Officer. Responsibilities of the Presiding Officer shall be vested with the same rights and responsibilities enumerated under Chapter 6 of these rules. The Commission, Panel, or Hearings Officer shall convene as necessary provided notice is given pursuant to HRS Chapter 91," remove "and 92". "The Commission reserves the authority to create more than one panel to dispose of petitions."

Chair: Continue.

Mr. Aiu: We are eliminating 1-6A-4, (A), "At least 30 days before the anticipated appeal hearing, the Panel shall hold a pre-hearing where", and replacing that with a new (A), "At least fifteen (15) days before the anticipated hearing, the Commission panel or Hearings Officer shall hold a pre-hearing where (1), review the petition for completeness in accordance with these rules, (2), "Entertain any request for intervention and determine standing, and (3), "Receive the appeal dossier, including evidence from all parties. The evidence shall include a list of witnesses and the purpose for which that witness will testify. Upon review, the Commission, Panel, or Hearings Officer may reject any evidence that does not conform to these rules including striking any witnesses deemed as cumulative." Next page...

Ms. Morikami: Excuse me, going back to that (A), shouldn't the word "where" be replaced by "to"?

Mr. Aiu: Where are we looking at?

Ms. Morikami: "At least 15 days before the anticipated hearing, the Commission, Panel or Hearings Officer shall hold a pre-hearing to review," "to entertain," "to receive," "to approve."

Mr. Aiu: Sure, I am okay with (inaudible).

Mr. Dahilig: You would need a motion to amend that.

Ms. Morikami: I move that we change the word "where" to the word "to."

Ms. Matsumoto: Second.

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

**On motion made by Paula Morikami and seconded by Camilla Matsumoto, to amend 1-6A-4, subsection (A), motion carried unanimously by voice vote.**

Mr. Aiu: 1-6A-5, page 7, we are on "Filing of Documents, completed petitions shall be filed with the Planning Department. Upon filing, the Planning Department will assign a hearings date to convene within at least 120 days from the hearing date, or shall, within 120 days, request to the Planning Commission that the matter be postponed when the amount of pending Commission business precludes due consideration of the matter." I would like to make a correction here because it says "120 days of the hearing date" which is redundant. It should be 120 days from "filing" date.

Mr. Raco: So moved and amended.

Chair: Any second?

Mr. Kimura: Second.

Chair: All those in favor say aye, opposed.

**On motion made by Caven Raco and seconded by Jan Kimura, to amend 1-6A-5, motion carried unanimously by voice vote.**

Mr. Aiu: Now on to 1-6A-6, sub (D), "The Director may reject any petition which is incomplete, inaccurate or fails to comply with the rules of the Commission. The rejected petition shall be returned to the petitioner."

Ms. Matsumoto: Do you mind if we do through each one instead of skipping down?

Mr. Aiu: To the changes, okay.

Ms. Matsumoto: Just go through all of it and then not skip down to only the changes.

Mr. Aiu: 1-6A-6, "For revocation of granted NCU on basis the NCU should have been denied, completed petitions shall include the following: (1), A sworn affidavit under penalty of perjury by petitioner attesting to the reasons why a NCU application should have been denied (e.g. including but not limited to zoning violations on the property, no history of TVR use prior to March 7, 2008, or false or misleading information provided by application", and proof of reason for denial including photographs, advertisements, building permit records. For revocation of a granted NCU on basis of disturbance to peace, safety, comfort, morals and welfare of the neighborhood, petitions shall include: A sworn affidavit under penalty of perjury by the petitioner attesting to: a regular pattern of

deviation from the standards enumerated under Section 1-6A-7, below; and specificity as to the observed instances when deviations from Section 1-6A-7 occurred. Any written audio, video, or photographic evidence including relevant police reports. And (D), the Director may reject any petition which is incomplete, inaccurate or fails to comply with the rules of the Commission. The rejected petition shall be returned to the petitioner.”

Ms. Matsumoto: I have a question about documents and advertisements. Would that include the on-line advertising as well?

Mr. Aiu: Yes.

Mr. Dahilig: You could require it if you choose to put it into the rules.

Mr. Kimura: Advertisement is advertisement.

Mr. Dahilig: That’s right.

Mr. Kimura: So it is automatically in.

Ms. Matsumoto: Okay.

Chair: What about that point we were talking about outside, Ian, you said that an advertisement is intent to rent and not renting or advertising is not proof of an action.

Mr. Costa: I think we are addressing that in the rules.

Chair: In where?

Mr. Costa: By putting that in as a clear violation.

Chair: So in this case the advertisement it’s self.

Mr. Blake: What are you referring to?

Mr. Costa: I was saying I think Jimmy is just referring to a past discussion where I told him historically advertisement in and of it’s self is not evidence to prove that somebody has been staying there or been charging or actually accommodating people for less than 30 days, the fact that you are advertising for it.

Mr. Blake: How do we regard...

Mr. Costa: We are putting it in the rules that that is a violation.

Ms. Matsumoto: So what would you say?

Chair: Well it says “proof or reason of denial including photographs”, they are saying that advertisements are proof that...

Mr. Kimura: There is a violation.

Ms. Matsumoto: I understand that. I would like to suggest that we put “information,” another word. It could be “photographs, information, advertisements.” Because sometimes when you go on-line we can say it’s an ad, we can call it an ad but sometimes a lot of people would just say we just put it out there, it is out on the web and we are not soliciting, it is information only. But yet it can have all this information about something so I would just say “information” which is broad, just as broad as advertisements is.

Mr. Dahilig: You can make a motion.

Ms. Matsumoto: Move to include in 1-6A-6, (2), the word “information.”



Mr. Raco: I will second that for discussion. How would you in a court of law uphold that, information, because it (inaudible)?

Mr. Dahilig: Again, I am not then one that is making the rules here so it is hard for me as an attorney to interject intent in terms of what the Commission would want. So I would defer making an interpretation as to what the word “information” would mean. Ultimately it is up to the Commission to decide if meets their satisfaction.

Chair: What I do is if one of the Commissioners wants to acknowledge they can.

Ms. Robeson: As to your discussion on the ordinance 876, section 8-17.11, (b), it talks about advertising of any sort which, I mean that might be your definition that you want to use to make it consistent.

Chair: Thank you Barbara, do you want to withdraw and try and, I have a problem with “information” too. Do you want to withdraw?

Ms. Matsumoto: I withdraw my motion.

Chair: That’s okay, Caven?

Mr. Raco: Yes.

Mr. Blake: Why are you withdrawing “information”?

Ms. Matsumoto: The feeling is the word “information” is too broad and not clear enough and I am searching for clearer language that would include the type of information that we see on-line quote/unquote, information sometimes is not necessarily an ad, somebody might say it’s not an ad but...

Mr. Blake: Can you give me an example of what you are talking about?

Ms. Matsumoto: Okay, I go on-line, I am thinking about renting a hotel room or something and sure it’s an ad but it is filled with information about amenities and the whole property and all of that. And that you could say is an ad but also somebody might say, I am just letting you know what my property is about.

Mr. Blake: If it is meant to entice you into renting on a vacation rental basis what is wrong with that? I mean what is wrong if it is broad?

Chair: Barbara, what was that you said again, advertisement, that is what the law says, right?

Ms. Robeson: I will just read what it says, (inaudible), and there is a Latin term I am not going to say right, “advertising of any sort which offers a property as a transient vacation rental shall constitute a (inaudible) evidence of the operation of a transient vacation rental on said property and the burden of proof shall be on the owner, operator, or lessee to establish that the property is not being used...”

Chair: That is in the law already.

Ms. Robeson: That is in the ordinance, yes, so I was just saying to be consistent with your language.

Ms. Matsumoto: So we are okay then, as is.

Mr. Costa: So whatever we put there, I mean even by saying photographs, photographs of what? But the basis is that somehow what they submitted as evidence in their application is false so whether it is information, photographs, that application was falsified, needs to be included in there, right? Proof of reason of denial including photographs, advertisements, building permit records, it could be a whole host of other

things that we are not listing. But the purpose for which is to document that records were falsified.

Ms. Matsumoto: Could you put in for example “advertisements of any sort,” could you put something like that?

Mr. Dahilig: You can always make a motion as...

Ms. Matsumoto: Mimic the law like (inaudible). Is that going too far?

Chair: It has to be related to the vacation rental but I think what Mike, I asked Mike and I think what is in the law is clear.

Ms. Matsumoto: Clear enough?

Mr. Dahilig: Ultimately even though these rules may further define something, the ordinance already requires you to hold the dossier to this standard because this is a more superior regulation than the rules.

Ms. Matsumoto: So you are saying what is written in number 2 is okay?

Mr. Costa: Maybe if you wanted to just put in “shall include but is not limited to.” In other words the proof.

Ms. Matsumoto: “Proof of reason of denial shall include but not be limited to”, that’s good.

Mr. Costa: “Photographs, advertisements...”

Ms. Matsumoto: That’s good, “including but not limited to denial shall.”

Mr. Costa: “Shall include but are not limited to”, if you want to include that in a motion.

Mr. Blake: Do you want to say “shall” or do you want to say “may”?

Mr. Raco: “Shall”, not “may” because it may give them reason, he may or he may not, “shall” is...

Mr. Costa: We are not limiting it, as long as it is proof.

Mr. Raco: Gives us the (inaudible), we shall, they shall.

Ms. Matsumoto: So what is a better word?

Mr. Raco: “May”.

Ms. Matsumoto: So I would like to make a motion to change the language in item 1-6A-6 (2) to read as “proof of reason of denial may include but are not limited to photographs, advertisements, building permit records.”

Chair: Any second?

Ms. Morikami: Second.

Chair: Moved and seconded, any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Camilla Matsumoto and seconded by Paula Morikami, to amend 1-6A-6 subsection (2), motion carried unanimously by voice vote.**

Mr. Raco: You want to read each one?

Mr. Aiu: That was the request.

Ms. Matsumoto: We are getting there.

Mr. Aiu: 1-6A-7, "Loss of Quiet Enjoyment, Transgressions, Non-compliance, pursuant to section 8-17.10(f) of the Kauai County Code, the Planning Commission considers the following evidence of "loss of quiet enjoyment or transgressions" regarding TVRs operating under a NCU: noise, noise exceeding the standards prescribed under Chapter 22, Article 14 of the Kauai County Code or activities producing excessive noise between the hours of 9:00 pm and 8:00 am and excessive noise may be discounted by the Commission for instances occurring on state holidays and weekends." We have struck "large gatherings" and (CB), safety. "Absence of conspicuously posted sign alerting occupants to pertinent natural hazards to the area including but no limited to tsunami, floods, and high winds, evacuation routes and location of the nearest shelter; and emergency contact and civil defense broadcast information." 2, "Repeated police calls, 3, activities at TVR tending to place in jeopardy the health and safety of neighborhood residents; or, any other unlawful activities. (C), "Parking, guest cars occupying street parking, (D), Intensification of Use, unpermitted expansion of the TVR dwelling and/or related structures; or unpermitted intensification of use or additional uses. (E), "Other Disturbances, any other activity by the TVR tending to significantly disturb or negatively alter the character of the surrounding neighborhood.

1-6A-9, "Order of Hearing, at the commencement of the hearing, the Presiding Officer may state time limits, if any. Time limits may be imposed to encourage conciseness and efficiency. At any portion of the hearing, a Commissioner, Panel member or the Hearings Officer may pose questions to the presenter. All those testifying, shall undertake an oath attesting to the truthfulness of their testimony. If witnesses are presented, cross-examination shall be allowed. Petitions brought before the Commission, Panel, or Hearings Officer shall be heard in the following order: (A), Public testimony by non-parties shall be received. (B), The Department or Director shall present a report giving the background of the property including physical and operational descriptions, applicable ordinances, and permitting history and be subject to questions by the Commission, Panel, or Hearings Officer. (C), "All parties shall give opening statements. The petition shall present evidence. Presentations by the petitioner shall concern only the property at subject in the petition. The Department shall present evidence. Any admitted intervenors shall present their evidence. The Presiding Officer shall entertain any requests for rebuttal. Repetition of previously stated evidence shall not be allowed. All parties shall give closing statements, with the petitioner giving its statement last."

"The Presiding Officer shall provide all parties with the opportunity to submit to the Planning Department proposed written findings, conclusions, decision and order within fourteen (14) days of the hearing. If a party requests to submit proposed written findings, the Chair or Presiding Officer shall announce a future date when those proposals shall be received, the agency hearing will be closed, and the Commission or Panel will undertake deliberation and decision making. If no party requests to submit proposed written findings and conclusions, the agency hearing shall be closed and move directly to deliberation and decision making. The Commission, Panel, or Hearings Officer shall decide either to uphold the Director's decision granting or denying the NCU permit, amend a NCU permit with conditions, issue a NCU permit with or without conditions or revoke an NCU." 5 is what we have proposed to delete which is "The Commission, Panel, or Hearings Officer may choose to award costs to the prevailing party or parties in the event of an appeal brought under arbitrary, capricious or frivolous claims." And (L), The Commission, Panel, or Hearings Officer shall file with the Planning Department its written findings and conclusions decision and order within thirty (30) days of its oral decision. So first, I guess if I could ask for a motion to delete 5.

Ms. Matsumoto: So moved.

Chair: Any second, no second, who seconded?

Ms. Matsumoto: I moved it.

Ms. Morikami: Second.

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

**On motion made by Camilla Matsumoto and seconded by Paula Morikami, to delete 1-6A-9, subsection 5, motion carried unanimously by voice vote.**

Ms. Morikami: Mr. Chair, I just need language clarification on (D) that was just read. "The petitioner shall present evidence. Presentations by the petitioner shall concern only the property at subject in the petition." I don't understand what that means.

Mr. Aiu: Basically we are saying that you can only talk, if you decide to petition to revoke an NCU permit you can only talk about that property. You cannot say that the neighborhood it's self is going away. You have to say this property has these violations.

Ms. Morikami: I understand that, I just thought that was a grammatical error.

Ms. Matsumoto: How about saying "only the subject property in the petition."

Mr. Aiu: Okay.

Ms. Matsumoto: Move to change (D), 1-6A-9, (D) to read "The petitioner shall present evidence. Presentations by the petitioner shall concern on the subject property in the petition."

Ms. Morikami: Second.

Chair: Any discussion, all those in favor say aye, opposed, motion carries.

**On motion made by Camilla Matsumoto and seconded by Paula Morikami, to amend 1-6A-9, subsection (D), motion carried unanimously by voice vote.**

Mr. Aiu: And lastly, Chapter 9, "Appeals From Actions of the Planning Director. Section 1-9," sorry, should have had more in there, "relating to applicability is hereby amended as follows (deletion stricken and bracketed, additions bolded and underlined.) A person may appeal an action of the Planning Director in the administration of the zoning and subdivision ordinances as provided for in Chapter 8, Articles 17, 18 and 19 and Chapter 9, Articles 3 and 5 or the Revised Codes of Ordinances, as amended. Any appeals concerning nonconforming use certificates must be brought under Chapter 6A and not this Chapter."

Mr. Blake: Is that a typo after 18 and 19?

Mr. Aiu: I believe it is. If I go back and look at my original rules. Actually that had the same typo in there but I believe it should say "and".

Ms. Matsumoto: Where is that, how should it read?

Mr. Aiu: It is right after "Article 17, 18 and 19.

Ms. Matsumoto: So move to delete "can" and insert "and".

Ms. Morikami: Moved and seconded, all those in favor say aye, opposed, motion carries.

**On motion made by Camilla Matsumoto and seconded by Paula Morikami, to delete "can" and insert "and" to Chapter 9, motion carried unanimously by voice vote.**

Mr. Blake: I have a question. What does the last sentence mean?

Mr. Aiu: The last bolded sentence?

Mr. Blake: “Furthermore”.

Mr. Aiu: That is not part of the amended rules. That is just the conclusion of my report.

Chair: That is the one when we listen to Barbara (inaudible).

Mr. Aiu: It is not part of an amendment to Chapter 9. It is just the conclusion of the report.

Ms. Morikami: Did we do Chapter 1?

Mr. Aiu: “Chapter 1, Section 1-1-2 relating to definitions is hereby amended as follows (deletion stricken and bracketed, additions bolded and underlined). Proceeding means any matter that is brought before the Commission, Subcommittee, Panel, Department or Hearings Officer within its jurisdiction for decision making as defined by statute, charter provision, ordinance or rule.”

Chair: Because we are going to get ready to vote is there anybody in the public that wanted to speak on this again, as amended?

Mr. Aiu: One last thing, Chair, on Chapter 9, it says Section 1-9, Mike do you have the rules there with you of what section that should be?

Mr. Dahilig: That should be Section...

Mr. Kimura: What page?

Mr. Aiu: Page 10 of my report.

Mr. Dahilig: It should be Section 1-9-1.

Ms. Matsumoto: I also, before we go on, on page, well it’s called, after Chapter 1, “the following Chapter 1 is”, I think it should be “added to the rules”, small typo and then I do have a question. This section will also change to reflect the changes that were made previously, right?

Mr. Aiu: Yes.

Chair: Barbara, go ahead.

Ms. Robeson: Barbara Robeson for the record. I thought Mike said that the ordinance takes precedence over the rules, that it has a higher level of regulation. I thought you said more superior regulation than the rules. If that is the case then on page 10, Chapter 9, that is in conflict with the ordinance on Section 8-17.11, “Enforcement against illegal transient vacation rentals,” (A), which says “In addition to the other penalties provided by law including but not limited to section,” so and so, “the Planning Commission Rules, as amended, the Planning Director or any member of the public may initiate proceedings to revoke a nonconforming use certificate or stop an unpermitted use pursuant to Chapter 12 of the Rules of Practice and Procedure of the Planning Commission, as amended.” And then “violations of the conditions of approval are providing false information.” So I don’t know how your proposed rules can supersede the ordinance if what I heard Mike say was what I thought I heard him say.

Mr. Dahilig: Barbara, what section are you looking at?

Ms. Robeson: In the ordinance.

Mr. Dahilig: Which section of the ordinance?

Ms. Robeson: 8-17.11, "Enforcement".

Mr. Dahilig: And what I would clarify is that you can go through two routes. We are not amending Chapter 12, so if you want you can always go and revoke pursuant to 12. So there are two processes, essentially. If you do want to go 12 you can go 12 but based on, in the new ordinance, 876 this is another process for, it is a different type of revocation because it is based on loss of quiet enjoyment and transgressions.

Ms. Robeson: So there is actually two processes then that the public can go through, they can either go through 6A that you are bringing forth today or Chapter 12 of the Planning Commission Rules.

Mr. Dahilig: Both are contested case hearing processes.

Ms. Robeson: Right, thank you.

Chair: Anybody else?

Mr. Raco: Call for the question.

Chair: Seeing none, we have a motion on the, do we have to change the motion to as amended?

Mr. Aiu: The amendments are on record.

Chair: Roll call.

**On motion made by Paula Morikami and seconded by Jan Kimura, to adopt Chapter 6A and amendments to Chapter 1 and 9 of the Rules and Procedures of the Planning Commission with proposed changes made by the Planning Director, motion carried by the following roll call vote:**

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

**For Acceptance into Record – Director’s Reports for Projects Scheduled for Public Hearing for 8/11/09 Public Hearing: NONE.**

**For Acceptance and Finalization – Director’s Report for Shoreline Determination.**

Planning Director’s Report pertaining to a shoreline setback determination (SSCR-2009-1) for the proposed site location of a single family residence within Lot 12 in Wainiha Subdivision-II, Wainiha, Kauai, Tax Map Key 5-8-009: 047, for acceptance by the Commission = **Craig Dobbin.**

Staff Planner Lisa Ellen Smith: Thank you Chair Nishida. My applicant is not here at this time, he sent a letter that was in your packet this morning, she was going to be here around 6:00 but is not here, just so you know.

Staff Planner Lisa Ellen Smith read staff report and department recommendation (on file).

Chair: Questions for Lisa Ellen?

Mr. Raco: Prior to that parcel that was adjacent to his or down the road from his, the applicant provided us some kind of site plan and a building footprint and a foundation plan and some kind of layout. Do we have that?

Staff: No, they have no submitted for design review at this time.

Mr. Raco: Okay, well same with the other application, they were not designing for design review but they had some kind of plan, floor plan and foundation plan at least.

Staff: This is merely for the setback.

Mr. Costa: This is step one, I guess, to be able to generate a site plan.

Mr. Raco: But the last one, they did that and they had the drawings, Gary told me they had the drawings of the footprint.

Chair: That was different, Gan Eden. The one Gary gave the floor plan, no, the last one, what was that one, Lisa Ellen do you remember?

Staff: It was Gan Eden, LLC, and I did the determination and Mr. Cua did the design review for the subdivision.

Chair: And you did it on the same, when this was submitted, the setback determination was submitted...

Staff: No, we did not. We did not do it at the same time.

Chair: So the original setback determination had a site plan attached to it?

Staff: Not on the Gan Eden property, yes.

Chair: Sorry, you are right, so is that, we cannot get, in this case...

Staff: They don't have site plans yet.

Chair: They don't have a site plan yet.

Staff: They haven't submitted for design review at this time.

Mr. Costa: But by establishing the setback, now they can design the site plan.

Chair: Any other questions for Lisa Ellen, do you want to speak on this?

Ms. Caren Diamond: Good evening Commissioners. As part of the Wainiha Subdivision a design review, sorry, Caren Diamond. As part of the Wainiha Subdivision a design review is required. And we are wondering about the segmentation of doing the setback determination first as apposed to doing a complete review of the entire project, but I will put that aside for a moment. I just want to let you know that the shoreline determination, the certified shoreline for this is on appeal and has gone to the circuit court. This again is another lot that had it's beach front planted and has a long history which I wont' go into now but I just want to let you know that is how the Brescia case and all the trouble that started with that happened where Planning gave approval before things had gotten finalized. So I just ask you to please review this as a whole project and not just segment pieces and pieces. And you may decide on approving the setback but it may change based on where the certified shoreline, whether it does get moved eventually or not.

Chair: Thank you Caren, anyone else want to speak on this agenda item? What does the Commission, oh, we have to receive the report.

Ms. Matsumoto: Move to receive the report.

Chair: Any second?

Ms. Morikami: Second.

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

**On motion made by Camilla Matsumoto and seconded by Paula Morikami, to receive staff report, motion carried unanimously by voice vote.**

Ms. Matsumoto: Move to accept the report.

Ms. Morikami: Second.

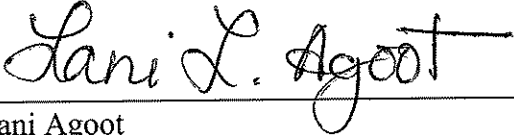
Chair: Moved and seconded, all those in favor say aye, opposed, motion carries.

**On motion made by Camilla Matsumoto and seconded by Paula Morikami, to accept staff report, motion carried unanimously by voice vote.**

#### ADJOURNMENT

Commission adjourned the meeting at 6:14 p.m.

Respectfully Submitted.

  
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Lani Agoot  
Commission Support Clerk