

## MINUTES

### PLANNING COMMITTEE

June 13, 2007

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember JoAnn A. Yukimura, Chair, at the Historic County Building, Room 201, Lihu'e, Kaua'i, on Wednesday, June 13, 2007, at 9:15 a.m., after which the following members answered the call of the roll:

Honorable Jay Furfaro  
Honorable Shaylene Iseri-Carvalho  
Honorable Ron Kouchi  
Honorable JoAnn A. Yukimura  
Honorable Bill "Kaipo" Asing, Ex-Officio Member  
Honorable Tim Bynum, Ex-Officio Member

EXCUSED: Honorable Mel Rapozo

The Committee proceeded on its agenda items as shown out of order in the following Committee Report which is incorporated herein by reference.

**Bill No. 2204**      A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8 OF THE KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO THE COMPREHENSIVE ZONING ORDINANCE (Transient Vacation Rental and Bed and Breakfast operations)  
[This item was deferred.]

JOANN A. YUKIMURA, PLANNING COMMITTEE CHAIR: I want to thank the Chairs of the other Committees and Councilmembers for allowing Planning to address vacation rentals as the first item of business today. Chair Asing has asked to make a presentation on this issue and as you may know, when Chair Asing asked to make a presentation, it's quite subsistent. We will have it in a minute, but before that, I want to say that I have some amendments that had been prepared and they are being duplicated right now for distribution, so that we can look at it. It is the intention of the Chair to try to move this out of Committee today, but we will see. I don't know what Chair Asing's presentation will be or what the public testimony will be. I would like to, at this time, actually open it up for public testimony. If there is anyone who wishes to testify at this time and then hopefully by then the amendments will be ready and then we'll go into Chair Asing's presentation. So at this time, is there anyone who wishes to testify? Mr. Abrams?

There being no objections, the rules were suspended.

LOUIS ABRAMS: My name is Louis Abrams and I am with the Kaua'i Board of Realtors. I have provided you a copy of our proposed changes to the floor amendment dated May 30 and just thought I wanted to make sure that you had a copy and that as you deliberate, these are available for you. We would suggest that they be incorporated into the bill.

Ms. Yukimura: Thank you. Any questions of Mr. Abrams?

BILL "KAIPO" ASING, EX-OFFICIO MEMBER: Yes, I have. Good morning Louis.

Mr. Abrams: Good morning.

Mr. Asing: I think we'll maybe... the question shouldn't be addressed to you, but because you had given us a proposal...

Mr. Abrams: Yes.

Mr. Asing: Maybe I should ask Councilmember Yukimura first.

Ms. Yukimura: Right.

Mr. Abrams: Okay.

Mr. Asing: Because my question to Councilmember Yukimura is that the amendment that we have that you presented, how does it tie into your proposed amendment which is going to be circulated now?

Ms. Yukimura: Right.

Mr. Asing: Does it have an effect what... do we need to do anything or does the Board need to look at those amendments first and then maybe make some adjustment here?

Ms. Yukimura: Thank you for that question and I will answer that. The Chair actually anticipated what I was going to say. Both amendments have been incorporated into the amendments that I'm passing out right now.

Mr. Asing: Okay.

JAY FURFARO: And that is the...

Ms. Yukimura: Because they were part of the suggestions that... your last time...

Mr. Abrams: Yes, yes.

Ms. Yukimura: And you're commenting on those amendments that were passed out last time.

Mr. Abrams: Right.

Ms. Yukimura: Which didn't have the benefit of your suggestions, but I did incorporate them.

Mr. Asing: Oh, okay.

Mr. Furfaro: And the incorporation that we're referring to Chairwoman, are the documents circulated to the Committee members on June 13?

Ms. Yukimura: Yes.

Mr. Furfaro: Thank you.

Ms. Yukimura: Which has just a few minor changes from the ones that I internally circulated last night to Councilmembers...

Mr. Furfaro: Okay, thank you.

Ms. Yukimura: Via e-mail.

Mr. Asing: Okay, should...

Ms. Yukimura: I did some refinements, but no major changes.

Mr. Asing: Shouldn't we work off your current proposed amendment?

Ms. Yukimura: Right, yes.

Mr. Asing: I think that it will be...

Ms. Yukimura: That is the intention.

Mr. Asing: Best that we discard all the prior amendments altogether.

Ms. Yukimura: Right.

Mr. Asing: And then work on at least start with...

Mr. Abrams: Yes.

Mr. Asing: The proposed amendment as proposed by Councilmember Yukimura.

Mr. Abrams: That would be fine, and we'll take a look at today's amendments and if there's any major changes, then we'll comment on that.

Ms. Yukimura: Yes.

Mr. Abrams: That's alright?

Ms. Yukimura: Yes.

Ms. Iseri-Carvalho: I would note that I do have amendments as well that haven't been circulated and haven't been completed.

Mr. Abrams: Okay, great, thank you.

Ms. Yukimura: Okay, thank you very much Mr. Abrams. Is there anyone else who wishes to speak? Ms. Elmore?

BARBARA ELMORE: Sorry, I didn't realize the agenda was going to be taken out... When the meetings began, about the question on vacation rentals on the table was this question of should we grandfather them? Should we regulate them? Should we possibly ban them altogether? And very early on, the idea of banning them was just taken off the table and I would hope that as long as the bill is being worked on, that would still be one of the possibilities and I know you think of Blaine Kobayashi's opinion letter is a decision or a law. But I think the people that drew up the CZO knew what they were doing and they... they didn't allow them in residential areas or ag or open, so I just I wish that would still be an option. What you're doing when you grandfather all these existing illegal businesses, is to say, okay, we're giving you a lock hold, monopoly on this profitable business forevermore and lucky you, you were and we're disobeying the law all this time, so you get to continue, but new people can't, so that doesn't seem fair to me. You know, to hear them talk now, it sounds as though their... they are really not happy with this bill, but I can guarantee you if you do give them grandfathering, they'll walk out of here and have a big party and slap each other on the back and say we got what we wanted because they are not concerned whether Joe Blow comes in next year or a month after you pass the bill. ...whether he has the right to do it, their only concern with protecting their profits, and by grandfathering them in, you'll be giving them just what they wanted and there's a lot more out there than most people realize. They are permeating this island. So it's sad to me, to see this grandfathering become entrenched as though this is exactly what we're going to do and we won't consider any other option. If you know it's not logical and I know you're logical people, if you close down drug houses as of tomorrow, but you let the ones that were opening, that were operating up until that day, to operate, it doesn't make sense, it doesn't. I don't see this one, two (2) page Kobayashi letter is going to outweigh the common sense that you need to use and planning for the island, thank you.

Ms. Yukimura: Thank you. Any questions of Ms. Elmore? Ms. Elmore, I just want to respond to one of your... or two (2) of your comments. First of all, this is actually a ban, it would, let me finish. That it would prohibit any new vacation rentals outside of a VDA area and one assumes that in a visitor destination area, visitor vacation rentals would be allowed. So it is, in fact, there is a very strong statement of law that you cannot apply it, a law, retroactively. Now, I believe it was not the intention as you say, it wasn't the intention of the drafters of the CZO to allow vacation rentals in outside of VDA areas, but intention alone isn't enough. It actually... there are precepts of law that say you have to explicitly say that and that's our failure. That's our failure that we failed to do that in the past. That is what we're addressing today, so that we don't have more problems in the future. This Council is biting the bullet and saying explicitly that they are not allowed outside of the VDA areas, so...

Ms. Elmore: Except for the ones the hundreds, hundreds of...

Ms. Yukimura: Well, and the law, well you, one can argue the law, but there is reasonable people can say, can speak to both arguments and only the Supreme Court can tell us what actually is the position in our State. What is the law in our State? And people can argue one that you know somehow if the, it's implicit, in our law, that it's not legal. There are others who say you have to make it implicit, explicit and it's because it's not you're legal until then. And so we're the Council... are trying to balance, and whatever, we don't know, I don't know what this body is going to yet decide, but those are the issues to come down on.

Ms. Elmore: Could I respond?

Ms. Yukimura: Sure.

Ms. Elmore: I realize there are different opinions about the law and that's why we have courts and so many attorneys and so forth, but I'm saying, well, let me give you an example. If, today, I went out and bought a vacant lot next to one of these vacation rentals and put in a pig farm, they'd be screaming, but I can say, well, it's not in the CZO that I can't put a pig farm there, and I'm asking...

Ms. Yukimura: I believe it does say that.

Ms. Elmore: It does?

Ms. Yukimura: Yes.

Ms. Elmore: Specifically say...

Ms. Yukimura: Well it does say that what uses need use permits and what's not allowed, I'm pretty sure that is clear.

Ms. Elmore: Well, it doesn't...

Ms. Yukimura: Okay, and I can...

Ms. Elmore: I've read the CZO many times and I haven't seen...

Ms. Yukimura: Okay, well, I will try to...

Ms. Elmore: Vacation rentals listed in residential areas at all.

Ms. Yukimura: Alright, well, I will.

Ms. Elmore: So same thing would apply to pig farms. I would say and what I'm asking you to do is put back on the table your common sense and your logic and if somebody sues, I mean that's too bad you've encountered a lot of lawsuits in the past and to hand to these people on a silver platter what they've been doing all these years and saying you can keep doing it and nobody else can. That is just basically unfair.

Ms. Yukimura: That's what the law does all the time.

Ms. Elmore: Well...

Ms. Yukimura: And you know your common sense may not be someone else's common sense.

Ms. Elmore: I know that JoAnn. I can only speak for myself.

Ms. Yukimura: Yeah.

Ms. Elmore: And I'm sorry you and I don't agree on this, but don't get angry because I have a different opinion and because I get emotional about it. I've seen so many cold-hearted, cold-blooded, unemotional people talk about something that's really wrong and I'm asking you to think about what's right or wrong.

Ms. Yukimura: Thank you.

Ms. Elmore: Thank you.

Ms. Yukimura: Anyone else who wishes to speak? If not...

Mr. Asing: Wow, is that for real?

Ms. Yukimura: I have a feeling that people may want to speak after we go over the amendments and after you make your presentation, so I am planning to allow that. I don't think people are... or people will be abusing their privileges because... and I do believe they may have things to say after they see the amendments and I know they'll have things to say after they see your presentation.

The Committee was called back to order, and proceeded as follows:

Ms. Yukimura: Councilmember Kouchi?

RONALD KOUCHI: I just wanted to offer a comment that I think it was pretty irresponsible to offer the example of a drug house that was operating and then imply that it would be legal. Besides being an inappropriate example to this matter, what is clear by basis of law is that what is illegal before you change the law cannot be made legal again.

Ms. Yukimura: Right.

Mr. Kouchi: And running a drug house is against the law and it is illegal and, so you can't grandfather it in and you can't change the law and I am just very disappointed that, you know, this has denigrated to the point that that would even have been part of the discussion, you know, broadcast on public television and I just felt that we needed to clarify that that could not happen, would not happen, and will not happen. Thank you.

Ms. Yukimura: Thank you. Any other comments? Councilmember Furfaro?

Mr. Furfaro: Yes, Chairwoman, I would appreciate your comments that this Council is attempting to look at a form of grandfathering based on the fact of zoning ordinances most clearly prohibit specific uses, very specifically, precisely, and completely until such time that this legislation that enacts more clarity to that, I concur with Councilman Kouchi's commentary, thank you.

Ms. Yukimura: Thank you. I also want to say that in the State ag law, Chapter 205, there is a provision that says any use not explicitly permitted is not permitted, is prohibited, and if we had something like that I think the Blaine Kobayashi decision would've been different as well. But still arguments can be made on both sides. With that, I think I'll take the opportunity to just go over the amendments that have been circulated and then we'll go to Chair Asing's presentation and then we'll have discussion by the Council and further comment from the audience and then we'll see where we are. Okay, does everybody have a copy? It's... I think there... raise your hand if you don't and the date at the top is June 13, 2007. There were a few wording changes made in the findings and purpose, first paragraph, no real change of intention or substance, we did take out... I hope the paragraph on ag, the State of... the law regarding agricultural uses, as recommended by the realtors and we added a few other paragraphs on... at the bottom of page 2, hopefully there, make things more clear, rather than unclear. And then, oh, the definition of transient vacation rentals on page 3, I have chosen and this is just another effort to get some rationality in my opinion to define the use as something that has to be over the course of two (2) or more months now. It was originally and it was presently in the bill which only applies to multi-families

dwelling, is over the course of one year or more, we reduced that to two (2) months and you'll see that there's a correlation with the grandfathering in which requires at least two (2) months operation prior to the effective date because the use is defined as an interval. Okay, and then on page 8 and 9, there were some really inaccurate things that happened, you can't see all of the changes because we took out suggested amendments in the last one and that means that nothing shows, but we basically kept the provisions that are existing in the law about timeshare locations and... we... amendment (inaudible) the reference in the existing bill that says transient vacation rentals now we're calling them multi-family vacation rentals because we're also including now single family vacation rentals, and we have to make the distinction. These are kind of technical things, but on page 9, you'll see that we took the suggestions of Mr. Chun via the realtors association regarding the grandfather clause of the existing law which grandfathered in timeshares and multi-family transient vacation rentals as of 1982. When the law regarding transient, multi-family transient vacation rentals and timeshare was first passed, but the existing provisions in the law say on the effective date of the ordinance and now there are several ordinances that we're dealing with when this passes. There would be another ordinance, so we had to put in the explicit date of September 22, 1982 and that was also basically a technical change. Alright, now on page 10, oh somewhere around here, we took out the standards for transient vacation rentals because we're basically, oh, and maybe we have to put them back in now. I thought because we aren't allowing any in non-VDA areas, we didn't have to do standards, but I'm just recalling we should have standards for those in... in the VDA areas, so we may have to put that back, I apologize.

And then on page 10, registration via permitting of all transient vacation rentals because there were some questions raised about using a Class I zoning permit for registration and then intention there was to try to use an existing process and because we didn't get any input from the Planning Department, so we're not sure how they... what they think about it, but I create a new Class I permit called the Class I TVR permit and I don't know if that's going to satisfy the need. I've also checked, you know, we're going, one thing that the stakeholders group which spent at least six (6) months on these issues agreed on. There was complete consensus... was that we should require registration of all vacation rentals, so we know how many there are on the island. Whether there are in VDA areas or outside of VDA areas, we need to require them to register and this Section 8-17.9 on page 10 is designed to do that. We know that we will have a list of all non-conforming uses because there's a process by which everybody has to go through to establish a non-conforming use, so we'll have that list, but we won't have the list of old or new single family vacation rentals within the VDA area and this Class I TVR zoning permit was designed to do that. I did have staff research whether registration is effectively required anyway already by the TAT process of the State and it maybe not people don't register and then there's no... I don't know how you get them, so any suggestions people have, but the goal is to have an accurate list of all the vacation rentals that are in operation on the island. And that was the purpose... 8-17.9 as respect vacation rentals within VDA areas. Okay, on the paragraph below that on page 10, the last paragraph, Section 8-17.10 in the

purpose of this section that's: (A) to provide a process to identify those single family transient vacation rentals defined as having occurred over a period of sixty (60) days or more as non-conforming uses which have been in lawful use prior to the effective date of this ordinance and to allow them to continue.

So this is the section that governs the establishment of non-conforming uses and you'll see that no non-conforming use certificate shall be issued. This is at the top of page 11, subsection (c), no non-conforming use certificate shall be issued by the Planning Director unless the applicant demonstrates to the satisfaction of the Planning Director: (1) that there has been an excise tax and transient accommodation tax license for a sixty (60) day period prior to the effective date of the ordinance, that there were deposits for at least ten (10) reservations by transient guest for use of vacation rental, that there was at least one transient guest per month that occupied the subject property for any two (2) months prior to the effective date of the ordinance, that there were no outstanding violations of State or County land use or planning laws including the CZO and the shoreline setback law (and now this is the section that has many changes) and that the single family transient vacation rental is not located on land designated as agriculture by State law, that it was built prior to June 4, 1976 which is the grandfather clause of the State law. So anything built prior to the State law is grandfathered in, or that the applicant has a special use permit, which is permitted under that ag law by July 31, 2008, this is prospective, this is a change which specifically permits a vacation rental provided that pursuant to Section 205-6, in issuing such a special use permit, the Planning Commission finds that this allows real farmers to apply one (1) year for a use permit to the Planning Commission. (1) That the applicant resides upon and conducts a farming operation, that the lot is no greater than fifteen (15) acres in size which is a State law requirement, if you're going to the Planning Commission, that more than half of the household income comes from farming operations on the subject property, that the applicant demonstrates that he has a schedule F, when he files his income taxes and that the applicants agricultural products have a regular commercial market that goes substantially beyond providing applicant's family and guest with farm produce or products and that the subject vacation rental unit is no greater than two thousand (2,000) square feet. So I'm sure you, they'll be a lot of comments on this. This is an effort to try to allow a real farming operation to get a use permit for a vacation rental if the permit... the vacation rental has been in existence two (2) months prior because all of this, anybody trying to get a permit here, has to also comply with all of the four (4) previous requirements for non-conforming use. So it's not intended to have any new farming operations start a new vacation rental now, okay, and then the last... I think that was where the last, oh wait, no, and then there were changes made on page 12 to enforcement of illegal single family and multi-family transient vacation rentals and I want to hear and apologize to Councilmember Iseri-Carvalho because I didn't have... this was done late yesterday and I didn't have time to tell her about that, I appreciate she, it's the basic outlines that she developed, the one change is that and I...

Ms. Iseri-Carvalho: (Inaudible).

Ms. Yukimura: Yes, the appeal to the courts. And, also, the appeal and that incorporates Jonathan Chun's suggestion that we allow appeal to the courts. And, also, the appeal to the Planning Commission where you required new evidence, I just took that, and allowed an appeal for any reason, but we can put that back in if as we go over this it... you know, we feel that we should limit Planning Commission review, but otherwise it is, and I did kind of explicitly identify an order to show cause, but I think it's aligned with what you had in mind. So it was an effort to streamline this section and I appreciate any scrutiny that anybody can give to it and make suggested changes or corrections or make it better that, basically, are the changes from the last amended version that was passed out in our last Committee meeting when we considered the issue. Actually, we didn't have a Committee... but so are there any questions from Councilmembers? Councilmember Furfaro?

Mr. Furfaro: Yes, some of these, I just want to read confirmation, so as we look at this particular piece and the changes to page 3, single family over a course of two (2) or more months, this is your attempt to conform to State rules that currently allow fractional interval ownership up to sixty (60) days. Is that what this came from?

Ms. Yukimura: Oh, no.

Mr. Furfaro: Is that?

Ms. Yukimura: It's my attempt. Well, let me start off with... the definition of transient vacation rentals presently in our CZO defines it as, I think a multi-family dwelling unit which is provided over the course of one (1) or more years to transient occupants and I'm not sure the origin, but it suggest that you have to show that you've been doing this over a period of time in order... that's part of the definition of use existing in our CZO. What I've done is, I've included single family because that is what was the problem when the law was passed in '82 that it limited the definition of transient vacation rental to multi-family and didn't explicitly include single family and then I've limited it to a course of two (2) months, so that in grandfathering it, that's the grandfather interval.

Mr. Furfaro: Okay.

Ms. Yukimura: And I'm trying to make it fit that the traditional... some of the traditional requirements of grandfathering, so that we can have a legitimate, you know, strong position if we have to argue this in court.

Mr. Furfaro: Okay, and I guess by chance you're referencing transient vacation rental versus transient vacation use. It is fortunate that the sixty (60) days might actually be the incremental ownership and vacation use by one of those owners and so it is...

Ms. Yukimura: Maybe that was a...

Mr. Furfaro: Maybe that's where it came from.

Ms. Yukimura: A serendipitous.

Mr. Furfaro: Yeah.

Ms. Yukimura: Correlation, but what I want to show is that use is defined not as a one (1) day use, but it's...

Mr. Furfaro: Yes.

Ms. Yukimura: Defined as an interval of time of... and, you know, it makes sense you don't pay... you don't start paying transient accommodation taxes until one (1) month operation, you know, so it's really in the second month that you have to do this, but to really show that it's a use that's not an effort to get under the wire of the law, but it's actual genuine use of somebody who wanted to do a transient vacation rental and they've been doing it... I've put in that two (2) month interval.

Mr. Furfaro: Okay, thank you.

Ms. Yukimura: And I... it may be a feeble attempt, I don't know. I'm opening it up for discussion and input and maybe we can craft together a better solution.

Mr. Furfaro: Well, at this point, I'm okay with it because it confirms with transient vacation use which is allowed under the State fractional ownership so, at this point...

Ms. Yukimura: Okay.

Mr. Furfaro: I'm okay with it. My second question, this is the second of three (3)...

Mr. Asing: Ah, before you...

Mr. Furfaro: Yes.

Mr. Asing: Go with that one. I guess my question is just, you know, where did the two (2) or more months come from? What is the rationale...

Mr. Furfaro: Oh, she, she, she. I was unable to confirm my suspicion that it might have come from the fractional ownership piece, but it sounds like that would be a question for Chairwoman Yukimura.

Ms. Yukimura: Chair.

Mr. Furfaro: I was only trying to confirm my suspicions that it might have come from the current fractional ownership rules.

Mr. Asing: Yeah, well...

Ms. Yukimura: Well?

Mr. Asing: My reason for asking is, I guess I'm a little brainwashed from prior County Attorneys who always tell us that there should be some rationale and not pick figures out of the air, so this two (2) months, you know, like where did it come from? What is the rationale? Why not one (1) month, why not three (3) months, why not four (4) months? So I'm trying to find the rationale behind this.

Ms. Yukimura: And that's a good question Chair. If I might try to answer that, you know, there was a one (1) year provision and that was done by you folks, in '82...

Mr. Asing: And if that's the case...

Ms. Yukimura: I don't know what the...

Mr. Asing: You know, it's something that is set, so there's some rationale.

Ms. Yukimura: Well, a year from now, then two (2) months will be set as the rationale, but let me say that I was thinking what is the minimum amount of time that would really allow for establishment of a vacation rental or a minimum amount of time that would show establishment of a vacation rental. I took into account the fact that you have to at least have one (1) month before you pay taxes, the TAT, that you have to pay TAT in the second month, and so I thought, you know, having two (2) months would be not onerous, but at least a period of time, so that it wasn't just somebody hanging up a shingle the day before the law passes or is approved and saying that somebody slept in this room the day before, you know? Some flimsy, anybody can do that, so, to me, it just required a more... it gave us time to establish a pattern, an intention, all of these things that I think the law looks at.

Mr. Furfaro: Again, I just wanted to point out that under the current State fractional ownership and I use the term not vacation rental, but vacation use. This would be ideally recognized for say my brothers and I am using our family home in Makaha where it has never been used as a rental. It is used for family vacation use, inside the sixty (60) days, but I think there has been a lot of pieces on how we arrived at that and I wanted to move onto my other two (2) questions Councilwoman?

Ms. Yukimura: Yes, that's fine.

Mr. Furfaro: How do you intend to add back the standards for the units for those units that are actually in VDA areas and is that going to come in a...

Mr. Asing: What section are you looking at?

Mr. Furfaro: I'm on page ten (10).

Ms. Yukimura: Well, you know we have...

Mr. Furfaro: It should've been somewhere in there and it's not.

Ms. Yukimura: Yeah, we'll just add that back in. They are actually the same standards for non-conforming use on page... let me... so we would just put the words back in another place, but let me... Oh, okay, so it would be on page 10, the upper half, paragraph subsection (B) development standards for holders for non-conforming use certificates, and they require, you know, that...

Mr. Furfaro: I see.

Ms. Yukimura: The name, yes the 24/7 contact number only one sign, no direct illumination of the sign, and a list of requirements and information entitled for the safety and comfort of you and your neighbors that would provide essential information to the visitors.

Mr. Furfaro: Thank you.

Ms. Yukimura: So these things would also... then be required of...

Mr. Furfaro: Use in...

Ms. Yukimura: Single family vacation rentals in...

Mr. Furfaro: VDA?

Ms. Yukimura: VDA area.

Mr. Furfaro: Approved areas, okay, and then my last question for this particular piece as we are talking about agriculture activities.

Ms. Yukimura: Yes.

Mr. Furfaro: By State law, the State House and Senate passed last year enacted legislation that does allow for some equal tourism within the Agricultural District. It is referenced in this bill of which I only have the one copy, but agricultural tourism and I'm reading from it. Conducting on a working farm or a farming operation is defined in Section 165-2 for the enjoyment education of

visitors provided that the agricultural tourism activity is an accessory use and secondary to the principle agricultural use and does not interfere with the surrounding farm operations and provided further that this paragraph should be applied only to the county, which, to a county which has adopted an ordinance regulating agricultural tourism. Now, I just want to visit that and we can go and look at 165-2, you know, it talks about tree farms, and all of those particular things. But this specifically does not reference a percentage of revenue, but your bill does make reference to, you know, kind of on the basis that the equal tourism revenue is equal in fifty percent (50%) portions to the farming activity, but yet, the State, the State rules doesn't put a percentage expectation on that. It says that each County shall adopt the ordinance setting forth procedures and requirements including provisions for enforcements, penalties, administrative oversight and for the review and permitting of an agricultural tourism use and activities as accessory use on working farms or farming operations. I want to emphasize on working farms because, obviously, the onus is on the agricultural land owner to make sure he has a working farm which is later defined, but it doesn't reference a percentage of revenue.

Ms. Yukimura: And...

Mr. Furfaro: That's my only point.

Ms. Yukimura: That's correct, it doesn't and the reason why I'm proposing that we do it here is that we make sure that we are implementing the intention of State law which is... be accessory to an actual farming operation and if and I'm suggesting that is one of the criterias for determining whether something is bona-fide farming operation or a working farm would be that the income comes at more than half of the income comes from the farming operations.

Mr. Furfaro: Yes, and I think...

Ms. Yukimura: Now...

Mr. Furfaro: I can appreciate.

Ms. Yukimura: Yes.

Mr. Furfaro: I can appreciate, you know, you're using that as a method to implement the fact that it's a serious farm, but, you know, like all other State control land issues here whether it be vacation rentals on conservation land in Hā'ena or you know verifying that there's a bona-fide farm and you know all of the burden falls on the County, not on the State inspectors, so I just want to point out that if we are now going to look at rectifying and reconciling receipts for ag products and vacation rental and so forth. It does put an extra burden on us and, therefore, we should consider the fact that, you know, the financial burden should be offset by some type of fee to record such activities.

Ms. Yukimura: Actually, we, as a County, have a great interest in being able to determine what real farming is and this is...

Mr. Furfaro: No, I don't disagree with you Councilwoman, I'm just saying that the burden now is on us to record and document these revenues.

Ms. Yukimura: Okay, and I... if this was a law that was just passed, I will have to see how it works with the existing revised statutes because the revised statutes does talk about an ag tourism ordinance. We have not passed an ag tourism ordinance.

Mr. Furfaro: Yes.

Ms. Yukimura: So it wouldn't affect the grandfathering in, but the ag tourism wording that I see in the law has said that overnight accommodations shall not be permitted and, so unless that was taken out by the Legislature in this past year.

Mr. Furfaro: No, I left a copy for the Chair...

Ms. Yukimura: Okay.

Mr. Furfaro: It was just passed last year...

Ms. Yukimura: We'll take a look at that.

Mr. Furfaro: And, again, my point is that the controls and the recording of those revenues due, posed some type of burden on the County.

Ms. Yukimura: I believe it's embodied in 2055.

Mr. Furfaro: (Inaudible)

Ms. Yukimura: I'm sorry?

Mr. Furfaro: 2052.

Ms. Yukimura: Oh, okay. Okay, so we'll have to look at that maybe at a recess and see how that all reconciles. Other questions?

Mr. Furfaro: Thank you for my three (3) questions.

Ms. Yukimura: Thank you for your questions. Chair, did you have some questions?

Mr. Asing: Ah, no.

Ms. Yukimura: Or any other Councilmembers?

Mr. Asing: No, not right now.

Ms. Yukimura: Are you ready to do your presentation?

Mr. Asing: Hang on, wait a little while, let me go check.

Ms. Yukimura: Let's see, okay.

Mr. Furfaro: You want to take a quick recess?

Mr. Asing: Yes, why don't we take a short recess, and I'll go find out...

Ms. Yukimura: Okay.

Mr. Asing: And then we may have to take a little longer recess if...

Ms. Yukimura: Okay, or we can do some other business maybe.

Mr. Asing: Okay.

Ms. Yukimura: Okay, so, yes, we'll take a... actually, shall we take ten (10) minutes and do a... it's early, but we'll do a caption break?

Mr. Asing: Okay.

Ms. Yukimura: Alright, let's do a ten (10) minute caption break.

There being no objections, the Committee recessed at 9:58 a.m.

The meeting was called back to order at 10:21 a.m., and proceeded as follows:

Ms. Yukimura: Chair Asing has a presentation to make, so I'll suspend the rules and, oh, I don't have to because you're an ex-officio member. So Chair Asing you have the floor.

There being no objections, the rules were suspended.

Mr. Asing: Okay, thank you. Am I on? Hello, hello, hello, am I? Okay, thank you. What I'd like to do is make... I was going to say short presentation, but it's going to be a little longer than short and I have to apologize that I am not as prepared as I want to be, but the show must go on. So I'm going to do my best to try to put some points across and some things of concern that I think everyone should share. With that, my intent in the presentation is to do a number of things. One is and I don't know whether I should go that way, or that way, or

face... It doesn't matter? Well, I'll just stay here and if you catch just half of me, that's enough.

Mr. Asing: Okay, anyway, the intent of the presentation is, excuse me. First, to show the impact of vacation rentals and then after the impact, what I want to do is show from the impact some of the concerns and possible... I guess not solutions, but we need to look at the legal issues that surround it, so with that, why don't we just start and whatever happens, happens. Could we have the first slide please, Harry?

Mr. Furfaro: Lights Ernie.

Mr. Asing: This is the Hanalei area, and... and if you noticed in the Hanalei area, this is Hanalei pier and here from the pier this is Weke Road coming along this area here. That area there is the Ching Young Village, Aku Road is just to that point going along here, and then getting to Weke Road, so I want to show you the location on this particular end here. We are covering from the pier all the way across to Waioli Bridge which is right there, then you cross the bridge there, so we are really taking the entire Hanalei area. Next slide please, Harry. This is the lots that are presently in the Hanalei area. With that, can we have the next slide please? What did we intend to show here? Okay, in this particular slide, the intent of this slide is to show the lots that have buildings on and for your information, this is from the Real Property Tax Division and from the IT files, so this is actual on what we have there now. So all of the vacant lots, that's one (1) vacant lot, there's another vacant lot, there's another vacant lot there, vacant, vacant, vacant, vacant, and the rest, of course, in blue, are all lots that have buildings on them. Next slide Harry.

I was attempting to show the zoning in this area, so you would have an idea as to what kind of zoning we would be dealing with. If you noticed, the light green is open zoning, so along the entire oceanfront area is open zoned extending back this way toward the river. This is the river here, in this area. There's an R-1 piece there, close to the pier, and primarily the rest of it is our R-4, so these are the R-4 lots here. Okay, next slide please, Harry. Okay, this is just the lots again that are there and with the zoning, of course, the green is the open and the blue is the R-4. Next slide please.

Ms. Yukimura: Chair Asing? Question?

Mr. Asing: Yes.

Ms. Yukimura: Do those show condominium lots too?

Mr. Asing: No I... no. The answer is no.

Ms. Yukimura: Okay.

Mr. Asing: The answer is "no," and I am not sure whether we have condominium lots there or not...

Ms. Yukimura: Okay.

Mr. Asing: We may have, but I don't know.

Ms. Yukimura: Okay.

Mr. Asing: This map will not reflect that.

Ms. Yukimura: Okay.

Mr. Asing: Next slide Harry? Okay, we had this slide Harry, okay, this slide here and you want to put up there... represents vacation rentals in the area now, must qualify that. When I say I must qualify that, this information that you see here that is colored in pink, represents the number of vacation rentals if you look on the left screen. The information that we got to place these numbers of vacation rentals in the Hanalei area is from Vacation Rental Kaua'i which is the study by Ken Stokes. Okay, you want to show that slide? If you will notice, this is the Ken Stokes study and you want to pull Hanalei and, here, from the study, Hanalei vacation rentals is 112 other accommodations. Bed and breakfast is 12, so the total number of vacation units that I'm making reference to is 124. Now, the 124 figure, yes, is what we used to place on these lots here. So the 124 that you see here, is reflected here, so there not... I'm not saying now please qualify that. I'm not saying, as an example, if you go to that lot, there is a vacation rental. All I'm saying is that the 124 was placed throughout this area, so that we'll have an idea as to what it looks like.

Ms. Yukimura: So Chair, there's no one to one correlation?

Mr. Asing: No.

Ms. Yukimura: You're just kind of scattering the 124?

Mr. Asing: Yes, the 124, is the total number of lots and I will give you that information now. So Steph, you want to put that information up? Okay, in the Hanalei area, there are 331 parcels that represent 331 parcels. Out of the 331 parcels... Next slide. You have 267 parcels with buildings, you remember, I showed you some vacant lots, vacant, vacant, vacant and, so forth. So total parcels with buildings is 267. Next slide, and you have this, of course, is the vacant parcels if you add the 64 to the 267 and you have your total, total parcels. Now, the 124 total vacation rentals which are being reflected on this map represents forty-six percent (46%) of the total parcels with buildings. Forty-six percent (46%) represents the total of that 267, so what we're, in essence, saying, is that forty-six percent (46%) of all of the lots that have buildings are vacation rentals, okay? Move on to the next one.

Ms. Yukimura: Chair, while we're going there, when you say buildings, you mean dwelling units?

Mr. Asing: Well, no. No, I don't.

Ms. Yukimura: Oh.

Mr. Asing: Just buildings. Anything...

Ms. Yukimura: So it could be a shed or a canoe club?

Mr. Asing: Ah, not really, well possibly.

Ms. Yukimura: Possibly.

Mr. Asing: We got the information on looking at the... the TMK's and if we show a building there, you know, and, yes, that's the answer. Now we go to the Kilauea area and my reason for going into the Kilauea area is to just show that because the vacation rentals are also on ag lands. I wanted to give you an idea as to what Kilauea looks like, so we have Kilauea here, and we have all the way from Waipake area here and this is kind of the boundary. I worked with Planning Department, they gave me the figures of the ag subdivisions within the area of between the Waipake area and the Kalihiwai ridge area here, so we are looking at Kilauea almost in its entirety. Yes, using the Kalihiwai river coming down here, emptying into Kalihiwai Bay. So Harry, next slide please. Okay, these are the lots in Kilauea and now you will notice that these are the ag lots, and so you noticed I did not take the town core because the intent of this is to show the ag piece and these are the areas that are zoned ag or open. Next slide please. Ah, you know, this slide isn't a very good slide and we intended to show the open and ag and you going to have a hard time seeing the... see the "A" over there, is the ag, and you see the "O" for open, so Harry go onto the next one. And you notice that there's a town core there, yeah? And these are the ag lots, next slide please Harry. Okay, what did we intend to show here now? Building? This is the vacant... Harry, we're trying to show the buildings on all of these lots, yeah, so all of the blue and if you notice, there are lots that are empty here. Those are empty lots, empty, empty, empty, empty here, empty, here, here, and here, okay, next slide. Now, again, from the Ken Stokes report, we pull up these figures, so this represents, again, we've taken the figures and we have put them in different areas. So it's not specific by saying that that particular lot has a vacation rental. In Kilauea, we have approximately 943 parcels, so all of this represents the 943 parcels, now, approximately 69 parcels is in Kilauea town...

Ms. Yukimura: 639?

Mr. Asing: I mean 639. So the 639 parcels in Kilauea town is right there, so Kilauea town... I am not... shown that and made that large, but this is the

639, okay, so what I am saying is that 304 parcels are in agricultural, the rest is in agriculture. Okay, next slide. All the 304 parcels in agriculture, you want to take yeah, 214 parcels of the 304 have buildings on and, again, buildings, I cannot qualify that and say exactly what kind of building except that the information we picked up from Real Property is there. There is a building on that lot and of the 304 parcels, I worked with the County Clerk who is a former Planning Director and Peter tells me that of these 304 parcels, each parcel could be subdi... I'm sorry CPR by three (3), so we're making it the number. The total number of units that you could place in this area would be 912, okay. Now, I'm not going to go through this and explain all of this, but let me just tell you this. Again, this makes reference to the Ken Stokes study. Ken Stokes study said that there are 61 total vacation rental and bed and breakfast. Okay, now I'm using 55 of these are in the Agricultural District which is all of these... this area here and six (6) of those are in the town core, yeah? So with those figures, what we're doing is, we're doing the calculation here, and saying what that represents, yeah? Is the ratio to show that if we put eighteen (18) on here, this is what it'll look like? But you can imagine that because we cannot cut up these parcels here. You have to imagine that the 912, possibly, yeah, was taken out, so this is the correct figure that we're using. So we're only using eighteen (18), so we're not putting the 61 over here because that would not be correct, okay.

Next slide. Again, let me just emphasize. Just taking the study by Ken Stokes, okay, next slide. Next slide. This is the Conservation District here and this is the pavilion area here and the YMCA would be in that area here. I believe that the, not I believe, I know that the conservation line is approximately this way and we'll show it right now. Go ahead, the next slide. Okay, this is just intended to show that all of this blue here is conservation and the entire Hā'ena area and you will notice that right there, see that line there, that's the demarcation point between coming to Hā'ena to have that conservation there it is, yeah? This is all conservation here, but when you go towards Līhu'e, this area of the highway, it is not Conservation District, okay, next slide Harry. These are the lots that are in the Hā'ena area, and if you notice, again, here is the line. This is the pavilion area here, and from this point on here, you getting into the so called State Park so this is really from that point going this way is all State park, so there are no lots there except owned by the State. Next slide Harry. Okay, this is the number of... showing the lot configuration for each lot. Next slide Harry. Wait a minute, now, before we... yes, go ahead, go take the next slide. Wait Harry, take the next slide, okay, what was this now? Buildings, okay. This slide represents buildings that are on these lots. Let me point out... if you look to the left screen, there is a total of 130 parcels. Oh, pressing, oh, I'm screwing you up, oh, I'm sorry. I'm the guy that's making everything go haywire. Okay, there are 130 parcels in this entire area of the 130 parcels, 62 parcels have buildings in here, okay? Now, Harry, take the next slide please. Okay, this slide is intended to show vacation rentals and if you notice, there are five (5) vacation rentals and to the left screen, you know, there's five (5) Kaua'i residents owners, so these vacation rentals are owned by someone on Kaua'i, What else was I going to explain? Oh, okay, and then we'll take the non-Kaua'i residents and put that on. And this is the rest here remember the dark outline red

is the Kaua'i residents and the rest of them are owned by off-island, their addresses are not addresses locally and the information is on the left screen. Five (5) Kaua'i resident owners of vacation rentals, and sixteen (16) are non-Kaua'i resident owners. For your information, this particular map is actual. In other words, if I point... as an example to that area right there, you noticed that it is not surrounded by the dark red, so that means there is a vacation rental there, and that vacation rental is owned by an off-island person. Ernie, where are you Ernie? Can you bring the book with all the tabs and if you can place it on the table. Maybe Ernie, you can just kind of hold that up for the camera and the reason I'm showing that is that represents actual information that we have and we can tell you, as an example, almost everything about that piece of property and when I say almost everything, I can tell you what, how much they're paying taxes... I can tell you valuation of the property, I can tell you the vacation rental terms, and that information is what we have included with that is the... the information that we picked up from the Internet and there, in that packet there. So I'm going to use, as an example, why don't we just do this, then I will point to that area there and let me pick up the vacation rental information on that particular property. The quarter-back is not calling the signals correctly, so, anyway here's the information. Harry, you're going to do that, okay, here you go, that's the house right there. This particular house here is, oh, I'm pressing the button again? Oh, sorry. High-tech, okay. Here's the information that we pick up. In this particular place, there's the house and this is what is advertised. The price is from \$5,500 to \$7,500 per week. There are five (5) beds and five (5) baths in this particular unit here, and here's what they advertise. Delightful, bright, and cheerful new building beachfront villa located right on Tunnels Beach in Hā'ena. Come and enjoy, relax, your vacation at a five (5) bedroom, five (5) bath hideaway... this villa offers a full gourmet kitchen and gorgeous ocean view that will make cooking seem like a dream family room office... is a full size, pool table and a game table to delight the family after a long day. Enjoy the massaging Jacuzzi on the decks, sleeps ten (10). Okay, and, again, let me just emphasize that everything that is on the map is actual, so on this particular case in the Hā'ena area, these are all actual... we got the information not only from the Internet, but we also worked with DLNR and picked up information from DLNR also.

Ms. Yukimura: Question Chair Asing?

Mr. Asing: Yes.

Ms. Yukimura: So the blues that are the non-vacation rentals and we can assume that there...

Mr. Asing: And with buildings on.

Ms. Yukimura: With buildings on, so we're assuming that if the buildings are dwelling units, they are either owner occupants or they're people... they may be off-island owned, but they are not...

Mr. Asing:           There could be.

Ms. Yukimura:       Vacation rentals?

Mr. Asing:           Yes, that's all I can tell you at this point.

Ms. Yukimura:       Okay.

Mr. Asing:           Thank you.   Okay next.   Okay, and in this particular slide, we are in the Hā'ena area. We are outside of the Conservation District and the Conservation District is to the left. This lot here is Camp Naue, the YMCA Camp here, this is the road that goes back Alealea, I believe, going back here to this back portion and coming back on the highway again. Okay, so it extends from the Conservation District which is to the left and it goes all the way to this point. On this end is the Wainiha Bay area, so you get from Wainiha and you get to this point and you make the turn and you are now getting to what is commonly called, Hā'ena area so to speak, so that's the area that we're looking at. Okay, next slide Harry. These are the lots that are there, we have total lots in this particular area of 226 TMK's. Next slide Harry. This represents all of the parcels with buildings, so we have... if you look at the left slide, 165 total parcels with buildings and those buildings are colored in blue, so all of the blue lots have buildings. All of the ones that are blank like this, here blank, blank, etc., are right there, 61, okay. Now, next slide please Harry. I just wanted to give you an idea of zoning, what do we look like in this area here, this is the Conservation District line here going left is conservation. There are some R-2 in this area, open, but primarily all of these, like I said primarily are R-4. And if you noticed, we have Charo's right in that area here that was grandfathered in many, many, many years ago. With that, next slide please. These are the number of lots and what we were going to show here. Okay, okay, and we wanted to show the parcels with the zoning and, again, the R-4 and the R-2, etc. This represents, again, on this particular map, this is actual, this is not something that we pull out of the air. What you see here is actual that are vacation rentals, that are Kaua'i owners. We don't have that up there, yeah? Okay, now put the next slide on Harry.

And there, you have the rest, again, of the vacation rentals, so you have a total of... look at the left screen, 60 total transient vacation rentals in this particular area here, that 60 represents thirty-six percent (36%) of the total buildings, in this area here. Okay, now I just wanted to do sort of a comparison of... with all of the vacation rentals in this area here, I said to myself, what would that equate to if you had a hotel, as an example, how many rooms would you need to replace this, so we looked at the records and we find that the record show that the room range available in the vacation rental runs anywhere from two (2) to seven (7) rooms. And so we used an average of three (3) rooms per vacation rental and the three (3) rooms, of course, 180 rooms, so what you're... What I'm saying is it's equivalent to a 180 room hotel is what you have in this area right here, so that's all I'm doing. Again, I want to stress that these are actual, so that if you go to, as an example, that lot there and that happens to be owned by someone on Kaua'i. And

here we have it, this particular rental here is gorgeous, seven (7) bedroom, oceanfront estate, sleeps fourteen (14), the location in Hā'ena and that's the location that I pointed out there. I'm going to keep on going, here's their ad... by the way, I believe we ended up calling what was that Ernie, in the mainland? Okay, yeah you want to show the rationale? Okay, no, this is the wrong one. That's the wrong one. No we got to go back, yeah, wait, okay, there's a rate for not this one, try go back. Yes, well, I wanted the rate on this one here, oh. No, that's not the one. This is a different one, see. This one here, the seven (7) room one, we get one rate on this, right? Okay, we have a difficulty... Ernie, you want to pull that file and just... Seven (7) bedrooms, here it is. Okay, my apologies, here it is, the rates is \$5,995 a week. Note, until confirmed, rates are subject to change without notice. So the rate is \$5,995 a week in that particular unit and that unit is right there. Okay, next. Now I'm going to show you that lot right there. So pull that out and let me have that information on that particular unit and here you go, that unit there has...

Mr. Asing: Hello, hello can you hear me now? Okay, here's the unit that we're making reference to, so we talking about this lot. Notice, again, that the red around... maybe someone owned on Kaua'i and here is the ad, yeah, three (3) bedrooms, king, queen, king. I guess the three (3) bedrooms, one has king and the second one has a king, and the third one has the queen I guess bed. Anyway, master bedroom has Jacuzzi bath, washer/dryer, DVD, and CD sound system, 42 inch TV, living room, Sony TV, wireless Internet, there's a pool also and heating optional at additional charge, hot springs, spa, and hot tub, let's look at the rate. Here's what they charge here. Three (3) and four (4) bedrooms, it sleeps between four (4) and six (6) and the rates are from \$10,500 to \$14,000 per week.

Ms. Yukimura: Chair, could I?

Mr. Asing: Okay.

Ms. Yukimura: Make an observation before we close that...

Mr. Asing: Okay.

Ms. Yukimura: Photo, you know, if you just look at it, it surely looks like that whole peninsula is a dune and, so did it seem like...

Mr. Asing: Yes, oh, you talking about this area here?

Ms. Yukimura: The picture before you, yes, the aerial shot.

Mr. Asing: Yes. The answer is yes to that. I am very familiar with the area, yeah, you talking about all of this, yeah?

Ms. Yukimura: And even in your previous one, we don't have to go back...

Mr. Asing: Okay.

Ms. Yukimura: It was so close to the ocean.

Mr. Asing: Okay, I believe, yes, okay. With that, Harry I guess... shall we take a short recess please?

Ms. Yukimura: Okay, how many minutes? Ten (10) minutes?

Mr. Asing: Maybe five (5), ten (10) minutes.

Ms. Yukimura: Okay.

Mr. Asing: How about we take a caption break then and then I'm just going to finish up.

Ms. Yukimura: Okay, thank you.

Mr. Asing: Thank you.

Ms. Yukimura: Ten (10) minute caption break.

There being no objections, the Committee recessed at 11:03 a.m.

The meeting was called back to order at 11:16 a.m., and proceeded as follows:

Ms. Yukimura: Will members please take their seats. Okay, before the Chair continues his presentation, the plan is to hopefully finish the presentation in about twenty (20) minutes to have Councilmember Iseri-Carvalho describe the amendment she wants to propose, to take public testimony on anything that has proceeded and then to break for lunch, so we can prepare some other amendments or whatever and then come back after lunch to maybe take action, we'll see. Oh, and I don't know if the Council... the Committee might want to confer with the County Attorney, so that's also something, we'll see.

Mr. Asing: Thank you.

Ms. Yukimura: Alright, go ahead, Mr. Chair, you have the floor.

Mr. Asing: Thank you.

Ms. Yukimura: Lights please.

Mr. Asing: Thank you. With that, let me continue, but before we do that, Ernie turn the light on. I want to explain something by pointing to the map that is on that extreme right and there's the red dot. I'm going to be talking about this particular piece of property, this particular piece of property which represents about six (6) acres was going to be developed by Dr. Ferreira back in 1978

thereabouts and he was going to do condo multi-family and four (4) single family units on this particular property. The Planning Commission gave the approval for the development of those approximately twenty-seven (27) units on this particular property here. A group, excuse me, called North Shore 'Ohana and we had one person in the audience Barbara Robeson who was on that group together with myself, filed an appeal to the Fifth Circuit Court, we lost there and didn't get to first base I guess, and the Judge threw it out. We appealed it to the Hawai'i Supreme Court and we won, so with that first slide please. Ernie, lights?

And I guess this is very old. I don't know if you can see it here. I think it's 1978 and this happens to be, oh, there's me I guess. I think Barbara is some place over here and, so this is the no more than 100 people in the North Shore... decided that we're going to contest the decision by the Planning Commission. These are the trouble makers, I guess that's me there, that particular individual is Barnes Riznik, formally with the Historic Association here, next slide please. This happens to be the notice of appeal to the Fifth Circuit Court, you can do the next slide, we got thrown out and then now since we got thrown out, excuse me, we filed it, and it's filed under Mahuiki versus Planning Commission (this is 1982). This is the Supreme Court filing here and you'll notice my name and my wife's name together with others who filed. Now, I'm going to be reading excerpts from the Supreme Court decision. Remember, I said that we appealed the case to the Fifth Circuit, lost and this is the Supreme Court decision that I'm going to be reading from, so next slide. Here's some excerpts from the decision where a commission that had been delegated authority to pass an application for Special Management Area Use Permits under the Coastal Management Zone Act, exercised such authority inconsistently with the guidelines and restrains the grant of the permit could not stand. Okay, next. Here's another excerpt. The real property involved in this controversy consist of approximately 5.277 acres of undeveloped land subject to use regulations under the CZMA, is situated in Hā'ena, Kaua'i for which Hā'ena limited a California limited partnership sought permission from the Planning Commission to develop as a combined condominium apartment and single family resident project consisting of seventeen (17) condominium units and four (4) single family dwellings. The evaluation in (inaudible)... the proposed development consist of some alterations of existing land from... in vegetation and, in our opinion, due to the density of use, will cause some impact to the scenic and environmental character of the... consideration must be given to height and bulk of buildings proximity to the shoreline. In this case, all proposed structures are to be one story with gable style roof and in itself, this development with certain modifications may not create substantial adverse and environmental impact to the character of Hā'ena. The cumulative impact of such individual development could, however, be substantial enough to adversely affect the environmental character of Hā'ena. This cumulative impact could be lessened if: (1) the property owners on their own initiative do not build to the maximum density allowed and utilize the dwelling units primarily as permanent residence or beach type homes that are not commercial or resort type in nature. Please hold on...

Remember this, remember the commercial resort type in nature... resort type in nature, again, I will point out that this is a Supreme Court decision as it relates to the SMA. Remember, this substantial enough to adversely affect the environmental character of Hā'ena, next. Here's another excerpt from that decision based on the (inaudible)... and evaluation, it is concluded that for the SMA Use Permit in itself the subject project with certain modifications, could meet the criteria for granting the Special Management Area Use Permit. It is also concluded that the cumulative impact, again, remember this one, that the cumulative impact of such individual developments could, however, be substantial enough to adversely affect the environmental character of Hā'ena. The density of the development and the nature of use, again, please take into consideration, again use, density of development and nature of use, visitor oriented resort, residential function are the main factors that are judged to cause the more significant effects to the environment of Hā'ena. The Planning Commission, however, made no finding that the development would not have any substantial adverse environmental or ecological effect or the adverse effect was clearly outweighed by the public health and safety prior to the approval, next slide. When Dr. Ferreira's application for Special Management Area Use Permit was approved, the Planning Commission as the authority charged with the responsibility of enforcing the policy of CZMA on Kaua'i, was subject to the strictures of H.R.S. 205-A-26 which is... which in relevant part provided that no development shall be approved unless the authority has first found: (A) that the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is clearly outweighed by public health and safety, (B) That the development is consistent with the findings and policies set forth in this part. We have combed in the record in vain for findings by the commission that the develop...

...commission that the development proposed by Dr. Ferreira would have no substantial adverse and, oh, yeah, okay, and the development was consistent with the findings and policies set forth in H.R.S. Chapter 205A. We discover instead serious misgivings on the part of commission members about the proposed, proposal's compatibility with a policy to preserve and protect the environment and resources of the coastal zone. Furthermore, there are misapprehension regarding the relationship of the County zoning ordinances and CZM packet. The statement of commission member and I'm not going to put the names of the commission member. I took it out and this is the statement by one of the Commissioners upon approval. Unfortunately, this is one of those decisions where there's really no solutions to the problems. We have had many comments, pros and cons on this application. I hate to see an area as beautiful as Hā'ena being slowly eroded and destroyed. The statement of... and that was one statement the commission member and I'm not putting the commission member. Again, this is another commission member and this is his statement. Unfortunately, this is the saddest part. Our ordinance permits the use of catering to short term visitors, again, you know, I take this and here's a commissioner that is saying that our ordinance permits the use of catering to short term visitors in residential districts. Please remember, this is our ordinance permits, okay, in the sensitive environmental of Hā'ena. This function, which is more resort type, is highly out of character and I pretend that in the long

run (inaudible)... I'm sure that the past decision makers in their deliberation and subsequent decision to up zone the land did not intend that it eventually be used as a resort destination area. Now, we come to a footnote and that footnote 14 there, and let me read this one here. The last statement I read was from one of the Commissioners that voted for the project, this footnote here is from the Supreme Court ruling and let me read this footnote. The author's observation in this regard is as follows: permit required under this act supercedes all others including any permits required from State agencies such as Land Use Commission in Conservation and Agricultural Districts along the coast, so the 1995 shoreline protection legislation for the first time supercedes State control and an important area of environmental concern. Ah, and then we have, at the very end, this is the final order on the end of the Supreme Court. Supreme Court's ruling, the order of the dismissal and the summary judgment entered by the Circuit Court vacated and the case is (inaudible) for proceedings consistent with this opinion, so it's now sent back to the Commission and I want to do one more thing, go back one more slide back, go back, okay. In this particular footnote, you may notice the name (inaudible) Mandelker and we now go to show that, okay, this one here you can't read this. Well, but Professor Mandelker is one of the county's scholars and teachers in Land Use Law. He's co-author of the popular law school case book, "Planning and Controls of Land Development," which is now in its 4<sup>th</sup> edition. The author of land use law... comprehensive (inaudible) this field, anyway, I won't go through all of this, all I'm trying to say is the Supreme Court used this and cited this. So the credibility issue is not at stake because of the this particular individual, so we have... Okay, now that was the Supreme Court ruling and I will now take you to Act 186. Act 186 was passed in 1980 and Act 186 is the Act which mandated the counties to do the timeshare and vacation rentals into definite areas, so this is the items that prompted bill 811 for the County to move. The State is saying, County, we have some problems in timesharing vacation rentals and we want you to identify areas of concerns and place these vacation rentals in this area. We're not going to tell you where to place them, we're going to leave that up to you, but the mandate is for you to do it, and that's what this Act says here. So the county authority, the several counties shall by amendment of their zoning ordinance limit the location of timeshare units, timeshare plans and other transient vacation rentals within such areas as deemed appropriate. They are not telling us where, they're saying, but do it, again, timeshare. They are also saying geographic limitation except provided in this section, timeshare units, timeshare plans, and transient vacation rentals are prohibited and I don't need to go through the rest over here. And this is the last portion authority of the Director. The Director and the several counties may adopt rules and forms pursuant to Chapter 91 to effectuate the purpose. The purpose of this Chapter is to implant its provisions, next. This is the bill that we have now on the floor. It was 811 that was the bill and, of course, once the bill passes, it changes into an ordinance and that's the ordinance that we're working on which 436 and this is the ordinance.

Here's the findings and purpose. Findings and purpose pursuant to the authority of Act 186, special laws of Hawai'i 1980. The County Council enacts this ordinance for the purpose of designating locations referred and (inaudible)

destination areas in which transient vacation rentals, timeshare units and timeshare plans are to be allowed. These visitor destination areas include lands in Po'ipū, Līhu'e, Wailua, Kapa'a, Princeville and delineated on the visitor destination area maps incorporated as part of this ordinance. I don't think I need to read this one, you can skip that. I think you can skip all of this here and then I want to do this. This particular bill here which was introduced in 1982, I believe it was introduced in February 1982. It took us all the way to September 1982 to finally pass this bill. It was introduced by myself as the Chair of the Planning Committee at that particular time and it went from the Planning Committee and referred to... and you look at this and you will see the Committee Report on Policy. At that time, we felt that there was some policy involved, so the Policy Committee needed to get involved and that's the reason you see this here. Okay, let me do this. You will notice that the major changes in draft 2 went from the original to draft 1 to draft 2. And of course, this is the final bill that we have before us now which is 436 and let me read it. First, destination maps are modified to do more precisely defined visitor destination areas where timeshare and transient vacation rentals will be permitted. Additional areas are included in the Po'ipū, Wailua, Kapa'a, and new Līhu'e map has been... also been added. Please note this also that a single family residential area in the Wailua, Kapa'a area was deleted.

Okay, next. This is the map, this is the Princeville map, am I right? Yes, so this is the area here that was delineated as vacation rentals boundaries with timeshare. This one here happens to be... this is the harbor, so this the Marriott Hotel area here. Today, (inaudible) go get me some amendments in this area, but when we passed the bill, this is what it looked like. We also have a portion here that was added on at that particular time. Ah, this one here is in the Po'ipū area. That's the crater there and this is Po'ipū Beach area here, so all of these areas here, that's the hotel back there or timeshare and this is the one that I wanted to point out if you look at the Policy Committee Report, you will note that the Policy Committee Report took out and I'm going to make that statement again. ...took out the single family residential here was taken out, it used to be timeshare was allowed here, this is Pono Kai, so Pono Kai... this is the stream right here and then in this area here, that's Coco Palms, that's the Wailua River, that's Kaua'i Resort area, so all this area is timeshare area.

Next, okay. Now I have gone through Act 186 and I went through bill 811. I'm going to now take you to the conference committee report number 37A, Senate Bill 1516. The purpose of this bill is to regulate timesharing in the State of Hawai'i. I don't need to read that. Okay, County authority... this mandate will be particularly helpful in the efforts to clarify hotels/resort, and transient vacation rental areas. The counties do not presently zone for the (inaudible) forms of transient vacation accommodation and should address this in the near future. Now, I am going to tell you that this conference committee report is what generated 186. In other words, what you have is you have both House and the Senate pass the bill, they went through the conference committee and this is that conference committee report generating 186. It is the clear intention of (inaudible)... that timesharing and transient vacation rental use are identical uses of land. Remember that

identical uses of land without regard to ownership and that both uses of land should be addressed in a co-equal manner by the County. Your conferees further note that county land use decision are not based on ownership, but on the use of the land in question as such as timesharing and transient vacation rental should either be, should be, should be either permitted or prohibited on an equal basis within an area deemed appropriate by the County, permitted or prohibited. Okay, next.

Again, your committee further notes several areas of non-enforcement of their own zoning ordinances by some of the County and disregard it... is not the present character of the neighborhood, but, again, remember its intended use by the County. That is also important, intended use, the Legislature intends by this Act that the counties be guided by the notion that timesharing and transient vacation rental should not be permitted where the life styles of the permanent residents will be disrupted in an unreasonable manner. Any zoning code is only as good as its enforcement. In its reviewing of timesharing and transient vacation rental... concluded that several of the counties have not used their zoning authority on these less formal and traditional types of transient vacation base accommodation. The problems caused by these short term... in the County zoning ordinances are clearly demonstrated in the case of the County versus Miranda (inaudible). Your counties elected not to prejudge where an appropriate area of timesharing and transient vacation rental should be allowed or prohibited, but to leave that decision to each County as a logical part of its zoning or designation functions. Your committee expects that the counties will act auspiciously to clarify the (inaudible)... of these uses under the zoning ordinances, so that's it for the conference report.

The conference report is what generated 186. I'm going to take you now to this. I believe this is the last slide and this is something quite interesting here. This one here happens to be on the present Commission agenda, Planning Commission agenda. It happens to be Wainiha subdivision. There's a lot here and this one here happens to be one of the pieces and I'm going to point it out right in that area here. That's the lot here that I'm showing and, so the lot is vacant. It is being built on and here's one of the conditions as stated by the Planning Department. Let me read it to you and, again, this is with the Commission today. It's on their agenda and I guess at the next meeting, it should be made clear that the area is situated outside, outside the timeshare boundaries of the North Shore, and, therefore, a transient vacation rental would not be permissible without use permit. As such, the proposed resident shall not be used for vacation rental or bed and breakfast uses and this provision shall be incorporated into the deed description of the lot and filed it with the Bureau of Conveyances. Now this is a little bit strange to me, but good. It's a good... because Planning Department for some reason or another has decided why this statement if I read it correctly and I'm not an attorney, so I may have misread, but this statement says, you cannot vacation rent single family resident here. So it appears to me that they are interpreting the law. Now to say you cannot in single family residential, so that's very good, Planning Commission. Furthermore, here's an interesting note from the report from the Planning Commission or not a report, condition. Furthermore, the approval of this project shall run with the applicant. Furthermore, the approval of this project shall run with the applicant and not with

the land, and not with the land. Should the property be sold, the design review of the Planning Commission shall be rendered null and void. That also is an interesting finding and condition with that, I believe, recommendation. The proposed residence shall not be used for vacation rental, that recommendation, based on the (inaudible) ...is recommendation by the Planning Department, that the applicant plans can be accepted provided that the following conditions are addressed. The proposed residence shall not be used for vacation rental or bed and breakfast uses and this provision shall be incorporated in deed description of the lot and recorded with the Bureau of Conveyances prior to building.

Ms. Yukimura: What date is that?

Mr. Asing: That, I think it's going to be probably on the next meeting, I... Barbara? Oh, yesterday?

Ms. Robeson: Yeah.

Ms. Yukimura: No, but these words are coming from which? When were they written, when was this?

Mr. Asing: Very recent and I have the information here.

Ms. Yukimura: Okay, well, I had asked the Planning Department to be here, but they keep leaving.

Mr. Asing: Ah.

Ms. Yukimura: So now how are we going to get their response?

Mr. Asing: May 2, 2007, turn the light on please.

Ms. Yukimura: And Judge Pyun, you have somebody who's been following the... (inaudible) the Planning Department? Okay, so it's a very recent document?

Mr. Asing: Very recent.

Ms. Yukimura: Thank you.

Mr. Asing: Well, it was passed yesterday, yeah.

Ms. Yukimura: Okay, did they pass it with that wording?

Mr. Asing: Let me just finish up by doing this. What I want to do is do an illustration and what I just went through with you, I described Act 186, its intent, what it was intended to do, I described to you, I described to you Act 186 (change tape)... affect 186 and then I also described to you the bottom here, the Supreme Court ruling and some of the things that they take into consideration.

Now, what I'm going to do is reference the Supreme Court ruling and say, as an example, the Supreme Court ruling in the case of this is the Ferreira project. We had multi-family units, we had single family units, they were building there and the court said, no. Okay, now if the court said, no, what did the court use? They used the SMA rules to say no to that. Now, if you read this and I explained to you about use. Remember use, visitor type accommodations, yeah? That's what they talk about here. Alright, so would you think that if this development occurs, again, that this also means "no?" I would say so and that is my interpretation. I would also say this because it was generated from this... also is going to say "no" to that and it's just my interpretation. I am not an attorney, but I can read too, you know, so I... I'm not that way off I don't think so. Now that being said, my opinion is that if... as an example, you have a single family residential area and you had a vacation rental, another vacation rental, a regular rental, and a regular rental, and another vacation rental and another vacation rental, do you think that this, all of this would apply? Remember now, use impact, you know, all the things that I described to you. I'm sure that this is going to apply here too, or no? That's my opinion, and if this was in the SMA only, if it was in the SMA, as an example, if it was there, I want to tell you... right next to Peter, if it was there, that whole area is SMA, the entire area, the zone, the SMA line is starting from that point. It goes there and it comes back here, that's the line, SMA line, so all of that is SMA. When you get into the Hanalei Bay there, all that is SMA and everyone in there is SMA. The SMA line and you can correct me if I'm wrong, Director Ian, the SMA line goes up the river and as it goes up the river, it even extends and correct me if I'm wrong again into the base of the mountain that's the SMA line, so you can see (inaudible)... are also in the SMA, that's how far the SMA extends in the Hanalei area, so what I'm saying is that all of that, I would say Supreme Court say "no" to that, you can't do that, I would say SMA rules would also say no. So I would take this and say I do not believe if this was an SMA that you can do it because what the rules are as interpreted by the Supreme Court, I would also say using the same logic that this would apply there too, it's a no. I would say this also applies there, so it's a "no," so you cannot do it. So tied to that is the fact that when this bill was passed, there is also (inaudible)... there is a map attached to this, and the map is specific here. It is here, it is in this area here, there is some gray and the one gray is that the vacation rental, transient vacation rentals are... is defined as multi-units, but I think you'll need to go behind that and look at intent and use. That's my interpretation because if you look at all of the rulings that were made by the Supreme Court on this one here, you're going to find that, you're going to find the same here, you're going to find the same here, what is the intent of the (inaudible)... I read that to you, yeah, impact, use, neighborhoods, you know, it's all there. So, anyway, this is just my interpretation and my feel is that I do not believe that those... any vacation rental that was done after this bill was passed which is September 1982, September 22, 1982, every vacation rental that was passed after that time is not in conformance with the law.

Ms. Yukimura: Thank you Mr. Chair, I'd like to ah...

Mr. Asing: With that, that's all I have and maybe we should break for lunch and....

Ms. Yukimura: I would like to at least have questions and maybe some testimony. I planned to go at 12:30, so first of all, thank you very much for a really thorough historical tour of this issue and are there any questions by Councilmembers of the Chair? Okay, I have a question. If it was the intention of the Council in following and enabling legislation of the Legislature.

Mr. Asing: I'm sorry JoAnn.

Ms. Yukimura: That's okay, so if it was the intention of the Council following the enabling legislation of the Legislature to have single family vacation rentals be illegal, why was transient vacation rentals defined as multi-family?

Mr. Asing: I... you know, my (inaudible)... oh, I'm sorry. My answer to that is that the so called single family residential, yeah, was something that somebody manufactured on single family residential, so I can do it and my interpretation was "no" you cannot.

Ms. Yukimura: No, but why didn't the Council then say single family...

Mr. Asing: Because it was clear enough at that time. I will agree with you now, and I will be making a proposal that we clarify that by putting the single family residential, but I think it's merely a clarification more than something that is legally defiant.

Ms. Yukimura: Well...

Mr. Asing: It's my interpretation.

Ms. Yukimura: Well, if Blaine Kobayashi's opinion raised the question of clarity, why haven't the Council cleared it up before then?

Mr. Asing: I can't answer that except that... or I can tell you is my analysis of the entire history on what took place that's what I feel. And what I feel is, you know, if the Leg felt and this conference report that everything is going to be handled by this one here.

Ms. Yukimura: If...

Mr. Asing: But the County (inaudible), but since, you know, since it was passed by the County and, again, you know, these maps are part of the bill, that's my...

Ms. Yukimura: Well, the Legislature didn't say single family and multi-family rentals are illegal in certain areas. They just say, counties, you say that, and

so the County when it passed ordinance 811 said it, but they defined transient vacation rental only as multi-family.

Mr. Asing: I think Councilmember Yukimura...

Ms. Yukimura: Can you put your mike on?

Mr. Asing: Oh, I think you need to look further into it. You know, I'm not an attorney, so I think it would be best that, you know, we go into Executive Session and talk to the County Attorney and make some decisions, but, you know, that's where I'm coming from, that's my research, that's what I find, that's what I believe in, and I... you know, you are going to have a tough time convincing me otherwise because I know what happened here. I know what happened here and I got the proof. I showed you the Supreme Court ruling and I know what happened.

Ms. Yukimura: And so, okay, so as long as we're upheld in court.

Mr. Asing: So what I'm saying is, because of that, I'm using all of this information that I feel is relevant to, you know, bring up the issue on what I feel is the correct interpretation of, you know (inaudible).

Ms. Yukimura: Thank you. Councilmember Kouchi?

Mr. Kouchi: I don't see that they are in conflict. I mean the proposed amendments that Councilmember Yukimura has offered say whatever is legal TVR in a residential area needs to come in with these things to become eventually a non-conforming use going forward. And if you're illegal based on all the other opinions, then you can't advertise out your use. And if Mr. Asing's presentation holds to be true, anyone falling in that SMA category as he describes, would not be considered legal use and, therefore, would not be eligible to be continued on in this bill as adopted. But, obviously, that would be left to the Attorneys and/or court to determine what that is. That's not something that we as a Council can ever make a definite ruling on. I think that the bill is crafted in a way that acknowledges that this is correct, then they would not be qualified and they would not be legal. So I see Mr. Asing trying to help identify what may not, you know, be able to become continued use should we adopt this. But I don't see it as being opposed in any way to what you're proposing.

Ms. Yukimura: Okay, then I will ask the Planning Director to come forward. The Chair will suspend the rules.

There being no objections, the rules were suspended.

IAN COSTA, PLANNING DIRECTOR: Good afternoon Councilmembers, Ian Costa, Planning Director.

Ms. Yukimura: Thank you Mr. Costa. So based on the presentation of Mr. Asing, when an application... assuming this bill that we're looking at passes, when the application come before you for non-conforming use certificate, will it be the position of the Planning Department that any vacation rental use in the SMA, within the SMA area, does not qualify to be a non-conforming use.

Mr. Costa: Except those prior to 1982? Is that what you're asking?

Ms. Yukimura: That's correct.

Mr. Costa: I think we need an opinion from the County Attorney because I think we have a conflicting opinion which we've been moving forward based on... and it's the Blaine Kobayashi's opinion is certainly in conflict with Kaipo's conclusion.

Ms. Yukimura: Okay, that's going to be very, very important to clear up because once you are... once the law passes, you will be getting applications for it. So are there questions of Mr. Costa? Councilmember Iseri-Carvalho?

Ms. Iseri-Carvalho: Maybe not. Mr. Costa, at this point, but it is the Chair's intention for us to discuss these issues in Executive Session?

Ms. Yukimura: Yes, it is.

Ms. Iseri-Carvalho: Given the information that we received?

Ms. Yukimura: Yes.

Ms. Iseri-Carvalho: Alright, then I will hold my questions for that period, thank you.

Ms. Yukimura: Okay, thank you. Any other question of Mr. Costa? Councilmember Furfaro?

Mr. Furfaro: Not of Mr. Costa. I, too, will hold my comments to Executive Session as I'm very interested in this interpretation as it relates to Mr. Kobayashi in condominium multi-family units and getting the definition of what the intent was there since it's prior to my time.

Ms. Yukimura: Okay, thank you. Anymore... any questions of Mr. Costa, if not, thank you very much. The Chair is going to keep the rules suspended and ask if there's any public testimony, then I will ask the Council, let's see?

Mr. Asing: JoAnn?

Ms. Yukimura: Yes.

Mr. Asing:           Somebody in the back.

Ms. Yukimura:       Yes, so we'll have um... well, okay, there are people to testify now and the rules are still suspended. Who wishes... is there anyone who wishes to testify? Ms. Nishimitsu?

LORNA NISHIMITSU:       Thank you Councilmembers. I'm here on behalf of the Kaua'i Board of Realtors.

Ms. Yukimura:       Oh, thank you.

Ms. Nishimitsu:       And I'm just going to restrict my comments to the latest draft of amendments that has been circulated today. Requiring that a use must have been in existence for a minimal period of time before the adoption called the ordinance that you're looking at adopting is inconsistent with the language of your own Section 8-23.2A of the Kaua'i County Code and it is also inconsistent with Section 205-8, Hawai'i Revised Statutes, both of which are non-conforming provisions which define a non-conforming use as one that existed at the time of enactment of the legislation in question and I wanted to point that out. We also have a concern with the non-conforming use certificate process because it sets up all of these elements that essentially remove the non-conforming status that is already vested in a piece of property which has been lawfully in existence in transient vacation use because there has been no prohibition against the same. Under the law as it now exist for State (inaudible) lands, so long as a single family dwelling is being used as a farm dwelling, there's no prohibition that the dwelling cannot be used for transient vacation rental purposes. Under the law as it now exists for State C, D, E and U lands, single family dwelling is an outright permitted use and there's no prohibition that now exist that prevents the use of that dwelling for transient vacation rental purposes under the law as it now exist for County agricultural and open lands. Single family dwellings are generally permitted and there is no prohibition against using the dwellings for transient vacation rentals purposes under both State and County laws as they now exist, there's no requirement that a dwelling on agricultural class land has to be used exclusively in connection with the farm or that their... the family derives one hundred percent (100%) of any agricultural income just from that activity. And you're setting up standards of how much income, how much use, must occur before it can be a non-conforming use under your yet to be adopted ordinance.

Before 1978, when the State adopted the definition of a farm dwelling, any single family built on lands in the State Agricultural District was lawful, therefore, even if such a dwelling were on A or B lands, there was no prohibition then, or a requirement then that the house had to be as a farm dwelling, so there's several layers of complexity that are kind of hovering over this whole issue of transient vacation rentals. Basically, the law says that a valid non-conforming use is lawful, so requiring the owners who had these valid non-conforming uses to register for the non-conforming use certificate is, may not be equitable and it may not be defensible. This County has never required the owners of lands on which any other kind of non-

conforming use exist to register with the Planning Department to validate that non-conforming use. The big question is whether a failure to register and receive an NUC can render a pre-existing lawful use, unlawful and I think the answer to that may well be known, and quite probably will be known. And for those reasons, we're asking that you revisit the issue of setting up all of these elements before someone can even get a non-conforming use certificate. One really problematic one is you say that the single family transient vacation rental is not located on land that is designated agriculture by State law, but in some cases, that transient vacation rental use is now lawful and when the applicant goes to Ian Costa and says, can I get a non-conforming use certificate and Ian sees that the property is within the State class ag lands, he's going to say, "no" you can't have it and you ended up removing the protection of your existing non-conforming on provisions both under State law and under County law, that's all I have to say.

Ms. Yukimura: Thank you, any questions of Ms. Nishimitsu? Councilmember Furfaro?

Mr. Furfaro: So thank you for the testimony Lorna, but I guess in my view, I want to make sure that if we establish something that says on the day that this, the intent of this ordinance passes, you need to prove that you paid all of your transient accommodation taxes. I don't think that's an unfair expectation that had existed nor do I think that if we pass this ordinance on the date, it does pass, you have to prove that you at least had a general excise tax license. I know... I think that's an expectation or even for that matter, you know, things that deal with at least proving that you had prior occupancy or even that you had a reservation system. I guess I would expect that to verify that you actually had a business.

Ms. Nishimitsu: I'm not saying that every single element of proof that you burden the applicant with establishing to the satisfaction of the Planning Director is unreasonable, but some of them set owners up for failure because they are validly in existence under current law.

Mr. Furfaro: So noted your comments and it's based on us revisiting some of that criteria, thank you.

Ms. Yukimura: Other questions, Councilmember Bynum?

Mr. Bynum: Just that at the end of your statement you talked about cases where TVR's of ag land are currently lawful?

Ms. Nishimitsu: Because they are not specifically prohibited under current law. So which means...

Mr. Bynum: In your interpretation, is vacation rentals under current State law are not prohibited on ag lands?

Ms. Nishimitsu: There is no prohibition that we could locate in Chapter 205 or under the State regulations.

Mr. Bynum: There seems to be disagreement on that issue so...

Ms. Yukimura: Even with your colleague Jonathan Chun who said that on Class A land and B lands, there would... required to be farm dwelling.

Ms. Nishimitsu: Oh, no, and the... having a farm dwelling is not inconsistent with having a transient vacation rental because there's no requirement that the owner occupy the home one hundred percent (100%) of the time, so if on occasion the unit would be rented out on a transient basis, and that has been the practice, I don't see a requirement.

Ms. Yukimura: There's still a requirement of it being a farm operation.

Ms. Nishimitsu: Yeah, I'm not saying there is none.

Ms. Yukimura: So that is, that is included, you'll see it's an... or where in item number 5 on page 11, the single family transient vacation rental is not located on land designated ag or that it was built prior to '74 or the applicant has a Special Use Permit.

Ms. Nishimitsu: But after 1976, if I built a farm dwelling and I occupied it part-time, and rented it out on a transient basis part-time and I did have agricultural activity occurring on the property, you're telling me I cannot... I cannot get the non-conforming use certificate.

Ms. Yukimura: We're saying that you have not shown that it is a legal use on ag land as a farm dwelling.

Ms. Nishimitsu: Because I haven't occupied it one hundred percent (100%) of the time.

Ms. Yukimura: No. We have no hundred percent (100%) occupancy requirement.

Ms. Nishimitsu: And I guess that's where the disagreement arises because why does it not constitute a farm dwelling?

Ms. Yukimura: Because it's not, it's being used as a vacation rental, that's why.

Ms. Nishimitsu: There's a prohibition against my using it as a...

Ms. Yukimura: Well, we would argue that there is, that it's not a farm dwelling if it's a vacation rental. And so we can hammer that out in court. My

reading of the statute does not indicate that a farm dwelling includes the definition of vacation rentals, and so the only way you would be able to have a vacation rental is through a Special Use Permit.

Ms. Nishimitsu: And the farm dwelling requirements is under that Section 205-4.5 that talks about Class A and B lands.

Ms. Yukimura: Right, but there's... throughout the statute, a real emphasis that there being farm operations, farm operations... there's always that intention or language everywhere and even in ag tourism ordinance it says, overnight accommodations shall not be a permitted use.

Ms. Nishimitsu: Although if you look at 205-5, which says, on all ag land.

Ms. Yukimura: That's why the Special Use Permit is allowed and we are allowing that.

Ms. Nishimitsu: On all ag lands, you can have those uses that are described in 205-2 and 205-4.5 and such other uses as a County may allow and what the County allowed in the CZO was single family dwelling without a prohibition on renting it out for short term purposes.

Ms. Yukimura: I think our department has required farm dwelling units on all ag lands.

Ms. Nishimitsu: You talking about the farm dwelling agreement?

Ms. Yukimura: Uh huh.

Ms. Nishimitsu: Okay, the farm dwelling agreement is a way for the County to implement 205 and I don't believe that 205 requires a farm dwelling for anything other than dwellings on Class A or B lands, so there's been just a matter of practice that the farm dwelling agreement, they are getting it from everybody that is building on any ag lands. But as a matter of law, the farm dwelling requirement is limited to A and B lands.

Ms. Yukimura: But the County may request or require or decide in it, as long as it's not contrary to the State statute that it requires farm dwellings in all lands.

Ms. Nishimitsu: Except that the counties or allowance on your... the ag and open provisions about generally permitted uses say you can have a single family dwelling, there's nothing that says you must also engage in farming activity.

Ms. Yukimura: Because the State law supercedes the county's law.

Ms. Nishimitsu: And this is the argument, I guess, perpetually have, but

the State law says that agricultural activities... in order for you to live on your property or build a home on your A and B lands, you must have a farm dwelling. There is no such requirement under State law for the C or lesser lands and then the County law says, for any ag or open lands, you can build a single family dwelling and there's nothing in the CZO that says that those dwellings have to be used in connection with the farm.

Ms. Yukimura: But is not the County bound by State law?

Ms. Nishimitsu: As to A and B lands, yeah.

Ms. Yukimura: Okay, alright. Um, and then with respect to your grandfather clause issues, do you not believe that the County could define use as a use that has to be over a certain period of time?

Ms. Nishimitsu: You can change the law now, but the law on non-conforming as it now exist and it existed for people who have been engaging in that use is that... at the time of the adoption of the ordinance, so you cannot retroactively make a use unlawful just because it may be politically prudent to do so, or the law is, unfortunately, I guess in the your cases, as it is that whatever exist lawfully at the time of the adoption of a new law that makes that use unlawful is a lawful use.

Ms. Yukimura: But does the County not have the right to define the criteria by which it will use to establish a use? To say that a use was actually in effect because a use is several things. If you're going to show intention to use, it's a commercial use vacation rental. Vacation rental is a use for pay, so don't you have to have the elements of showing that it was payment, that there was intention of commercial use by having TAT license. Aren't those not a correct criteria or justifiable criteria to determine a use?

Ms. Nishimitsu: As so long... so you're trying to tie it to the fact that you couldn't have paid taxes if you commence the use on the date...

Ms. Yukimura: No, I... we don't have any payment of taxes as a requirement, we have the obtaining of a license as showing intention to use for commercial use.

Ms. Nishimitsu: And I think that's why I responded to Councilmember Furfaro by saying that some of your conditions don't appear to take or erode away the lawfulness of the use that existed at the time of the adoption of ordinance, but some of the conditions appear to attempt to do that, but we give you grandfathering on one hand and with the other hand we're going to take it away while... when we catch you, as you come in to apply for your non-conforming use certificate.

Ms. Yukimura: Okay, so that's the issue of whether we can require them to renew or to establish by a certain time, but if we stay first on the criteria by

which to measure, to determine actual use, you say that it's logical... I mean, you have to have some basis to decide whether the use was in place.

Ms. Nishimitsu: Yeah, and...

Ms. Yukimura: And so would you agree that the obtaining of a license is a justifiable criteria?

Ms. Nishimitsu: I'm not agreeing that, oh, okay, as far as having a license.

Ms. Yukimura: That's all I'm asking, right.

Ms. Nishimitsu: What I'm taking... issue with is the fact that for me to convince you that I have a non-conforming use, I have to get a certificate and if the Planning Director decides he's not going to issue that certificate, I have to then appeal that decision to the Planning Commission and...

Ms. Yukimura: At some point, a determination has to be made of whether there's a non-conforming use or not and that's all we're talking about. The point of determining whether a non-conforming use is in existence or not.

Ms. Nishimitsu: And in all other cases, the question of whether there's a valid non-conforming use or not which have been unwarrantly expanded or increased comes by a case by case basis. You don't tell people, whoever has a non-conforming use out there, you going have to come in and register.

Ms. Yukimura: But you don't think that there's criteria that has to be used by the Planning Director to determine on a case by case basis, whether the right exist?

Ms. Nishimitsu: And it's made like I said on a case by case basis on a notice of violation.

Ms. Yukimura: So these are... these are criteria for determining on a case by case basis whether the use exist or not.

Ms. Nishimitsu: Except that you are making a certain group of people...

Mr. Asing: Councilmember Yukimura? Maybe we should break for lunch.

Ms. Yukimura: Yes, will be in a minute.

Mr. Asing: Okay.

Ms. Nishimitsu: Well, you're forcing one class of people who have non-conforming uses to come in and register while there are other classes of people with

non-conforming uses who have never had to register and will probably never be asked to register.

Ms. Yukimura: Well, if the question becomes whether we have the right to require registration of all the uses, and I think we do, so under that determination, that's why we're requiring them to register. Okay, so any other...

Mr. Asing: Councilmember Yukimura?

Ms. Yukimura: Questions?

Mr. Asing: If I may? I just want to make a statement, but not with...

Ms. Yukimura: Well, let's finish up with Ms. Nishimitsu first.

Mr. Asing: Yes.

Ms. Yukimura: Is there anymore questions? If not, thank you very much.

Ms. Nishimitsu: Thank you.

Ms. Yukimura: We have come to the deadline for lunch and, so I'm going to have more discussion and then we will... and I also want us to go into Executive Session with the cameras here, so that after lunch we can go straight into Executive Session.

Mr. Asing: Okay, can I make... I just want to take this opportunity to thank... there are many people that help me put this presentation together and I want to thank Barbara Robeson, Caren Diamond, Leah Sausen, Louise Sausen, Beau Blair, and especially Harry of the IT Department who did all of this computer work regarding the presentation that you see on the wall, and kind of a special mahalo to Stephanie, our staff, who worked late many nights, including last night and Stephanie and Ernie Pasion, so thank you everyone for their help in making the presentation. Thank you.

Ms. Yukimura: Thank you Chair. And thank you to you also. You put many hours into... and took us to historical...drop for this. Okay, so I'm trying to see, do we have to go into the Committee of the Whole or? Okay, so what I'm going to do is I'm going to recess the Planning Committee and ask the Chair of the Committee of the Whole to convene, so that we can do the proper process to go into Executive Session and then we will recess the Committee of the Whole, so that when we come back at whenever we come back we will go into Executive Session and then immediately so... Yes, Councilmember Bynum?

Mr. Bynum: Just one question because we started public testimony and not everyone had a chance to...

Ms. Yukimura: Right.

Mr. Bynum: Will we come back to that?

Ms. Yukimura: Yes, we will. So Councilmember Bynum has asked about procedure and what's going to happen is, we'll break for lunch after we established the procedure to go into Executive Session, we will come back into Executive Session and when we come out we'll have more testimony, and then we'll consider amendments. Okay, so any other discussion? If not, the Chair recesses the Planning Committee. Councilmember Kouchi?

There being no objections, the Committee recessed at 12:32 p.m.

The meeting was called back to order at 2:51 p.m., and proceeded as follows:

Ms. Yukimura: When we left off, we had some public testimony and we're open for further public testimony and then we'll have discussion by Councilmembers and based on the Executive Session which had some open questions that still have to be answered by the County Attorney, it looks like we'll be deferring for one more time. Mr. Mickens, then Ms. Punohu.

GLENN MICKENS: For the record, Glenn Mickens. Thank you JoAnn. I appreciate all the dialog that's gone on for a couple hours about this bill of yours JoAnn... has a lot of excellent points. I'm not sure that the people watching it are going to be able to understand. It's a little on the confusing side, but I've... you've done your homework. I just have a short testimony. Kaipō has well highlighted the problem with the proliferation of TVR's on Kaua'i. I am completely supportive of what Kaipō and others are pointing out, we do not need the spread of these commercial operations on Kaua'i. However, as Jay so well pointed out, there are no State inspectors on Kaua'i to enforce violations on their State land. They leave the enforcement to the County especially in the Conservation District and I think you know why should the County of Kaua'i have to pay for this, it doesn't make sense. And the County doesn't have enough enforcement people now to take care of all our other violation problems, so it seems to me unless we first put teeth in any of our ordinances, hire more people, we're simply spinning our wheels. I compliment JoAnn and this Council for proposing legislation to address this TVR problem, but as JoAnn said, whatever ordinance is passed, it will ideally be challenged in court. Thus, I believe it will be a long time before we get resolution to this serious problem and, again, I don't know what the answer is to it. I mean you obviously... you're doing something, you're not just sitting still trying to address the problem, but you know as you pointed out, JoAnn, it's going to be into the courts and somebody's going to make the decision and all your work of your amendments and everything, I think they are going to be altered into something anyway, thank you.

Ms. Yukimura: We'll see, thank you. Any questions of Mr. Mickens?

Mr. Furfaro: Oh, are you okay?

Mr. Mickens: Yes, no, I just kicked the cord.

Ms. Yukimura: Ms. Punohu. Please state your name.

ANNE PUNOHU: Aloha my name is Ann Punohu. Thanks for the couple hours to calm down, so I can write my testimony, am I too loud again? Oh, I did it again. Okay, they say I'm too loud every time, I can't hear anymore, I'm getting old that's why. The Supreme Court decision really gives this body the right to regulate the (inaudible) industry, in Council Chambers today are a lot of heavy hitters from both sides of the island from Barbara Robeson (former Planning Commissioner) to Peter (former Planning Director) to Councilmember Yukimura (former Mayor) to lots of attorneys, to Uncle Kaipo and Councilmember Ron Kouchi together have about sixty (60) years of combined experience in this Council. ...to the current Planning Director to Caren Diamond and friends who prove that one person can make a difference to the Board of Realtors at all. Never one time at one place had so many, so much knowledge and experience been in this room to where I can ask a couple of simple questions, why? Why did people have to go homeless on the beach, so much so that people can have vacation rentals that charge \$1,400 a week rent which in my opinion is outrageous gouging, why did the Planning Commission allow people to move onto ag land, that wasn't bonafide farmers. When we went to the meetings, we were really happy because we thought rich people could not take the land anymore because they would have to be farmers, then we found out that we couldn't afford the land when we found out that all the rich people would buy the land. They would have to have... they would've had to farm, they would have to come to people who knew how to farm. Everyone was really excited and I couldn't figure out how I was going to take care of my crop without being able to live on the land, but I just figure I would teach the owners how to take care of it. If I wasn't there, I found out that to lease the land from them was off the charts. You had to pay for everything and the landowners were asking for fifty percent (50%) of the profits then it got even worse. Landowners were just using the local farmers to establish agriculture activities and terminating leases, that happened recently by the way. The... bonafide farming and then let it go claiming hardship. They were saying we tried farming and can't farm, so we need to subsidize with vacation rentals then came the emphasis occasion where an ag subdivision out... lot agriculture in the subdivision. Today, I was so excited when I heard that landlords were going to have to be farmers and farm, I was thinking now is my chance, they need me. Then I heard ag tourism, but the ag use was first, hurry I thought, I'm going to be able to do this, I'm going to go out and find a landowner and live happily ever after, then it got kind of ugly. I heard that all those houses that so many local people got evicted from to make way for vacation rentals where charging \$14,000 a week to let people stay there. I can remember we used to take in tourist for free in Hanalei and I think the people from the North Shore would know that we did do that especially when the bridge shut down, we all had to take care of everybody because they had nowhere to stay in Hanalei. We took care of them. I'm almost pau. I can't imagine charging \$14,000 for anything in the world, I didn't know this was happening. I also thought as vacation rentals as small, homey, little cottages,

where you can stay with a family who lives here, and get close and personal with the people and culture. I didn't think that it would really be the main cause of a lack of housing. I thought they were inexpensive maybe \$200 to \$300 or so. And then I didn't know nobody wants to come here and farm, a long time ago I've told the Planning Commission that the council should adopt an ordinance that will require perspective farm dwelling owners to qualify for farm as an addition of purpose running with the deed. That's because if any real farmer knows you have to prove that you have farmed before and raise a crop for profit that is compatible use with where you want to farm before you get a loan. I remember one landowner saying he couldn't farm because his orange trees couldn't grow by the ocean, so he needed a vacation rental. Ag tourism is a great idea and I did it at Waipa. It's still working down there, it's a real farm with local people that live here in real farm dwellings and farm. Then the visitors get to help to make poi. It's fantastic. I'm all for that, it's very sad to think a lot of things that had to go through is a direct result of what's happening here. I'm almost pau, but I still have hope one day for a piece of land and a farm dwelling. I hope it won't just be a dream. I also hope to have people come to live here not build houses and charge people \$14,000 a week to stay here, that's wrong, shame, and greedy. SMA and CZO supercedes, get regulated, go farm something and charge a fair weekly rate, mahalo.

Ms. Yukimura: Thank you. Any questions of Ms. Punohu? Thank you. Is there anyone else who wishes to testify? Ms. Elmore?

BARBARA ELMORE: Thank you. I misunderstood this morning or I didn't hear you. I thought that was our only chance this morning, so thank you for letting me come back, but I think what the vacation rental industry has wanted all along is grandfathering of all existing vacation rentals whether or not they were legal in the first place. They say they are in favor of regulations, but what they really mean by regulations is legalization. They want a blanket granting of nonconforming uses, they want the County to wipe the slate clean of all their illegal activity with no punishment whatsoever and then give them the opportunity to keep operating only this time it would be officially legal and I was at a meeting in 2004 in Hanalei about this subject and the people there admitted, at that time, there were over 500 vacation rental managers and I'm sure each manager had more than one (1) operation that they were managing. The letter that the Board of Realtors wrote to you on May 30, signed by Louis Abrams says that they wanted only, to only address the issue of a person's prior right to continue a nonconforming use and he was specifically asked not to address the policy decision and mechanism used to regulate future vacation rentals... they are only interested in grandfathering themselves, there's around 12 million current illegal aliens now on the mainland and they came into the U.S. by ignoring and breaking the law, they might be good law obeying people now and their intentions may have been good, but that does not change the fact that they broke the law in the past and they did not follow proper procedures to immigrate. And on the local front, Kaua'i has been permeated with commercial vacation rental businesses many of which ignored the law to set up their commercial businesses. And they have been asking for (inaudible) and the letter I just quoted, they want grandfathering, nonconforming

use, the dictionary defines MSD as a general pardon for offenses, so there was some offense committed to even ask for pardon or MSD. The accommodations, the number of people each vacation rental can sleep range from two (2) people up to twenty (20) people or more at each unit, and I'm sure all those people would fit into our existing legal hotels, and resorts if only our leaders would follow all of the law and use your common sense to refuse the grandfathering and nonconforming status. I've seen them on their internet site and other places, I've heard them talk about how being spied upon, but if you go to the Internet, that's public information, it's not spying on them. See what they are putting on the Internet and I'm... I hope I have the right copy, but my copy of the CZO, Chapter 8, Article 23, well it's 8-23.2 nonconforming uses says, a nonconforming use may continue to the extent that the... that the use existed on the effective date of this Chapter and in parentheses, it has September 1, 1972.

Mr. Nakamura: Three (3) minutes Madam Chair.

Ms. Yukimura: So your three (3) minutes are up and can you... are you soon done?

Ms. Elmore: Yes, but I'm still confused about this date of September 1, 1972.

Ms. Yukimura: That refers to the time that the CZO was first adopted and to uses that were in existence at that time which were made illegal by the CZO adoption.

Ms. Elmore: So the vacation rentals that were nonexistent in 1972.

Ms. Yukimura: Vacation rentals that were in existence in 1972.

Ms. Elmore: Right.

Ms. Yukimura: Would be grandfathered in.

Ms. Elmore: Right, and I would be happy with that. That makes sense but...

Ms. Yukimura: Right, but if Blaine Kobayashi's opinion is correct that they are not legal because arguably the CZO did not make vacation rentals, it didn't even define it, there wasn't even a need back then because...

Ms. Elmore: There is a definition of transient vacation rentals in the CZO.

Ms. Yukimura: And it's defined as a multi-family and was adopted in 1982.

Ms. Elmore: So they were aware of vacation rentals...

Ms. Yukimura: In 1982, ten (10) years after the CZO was originally passed.

Ms. Elmore: Even 1982 if someone was operating in 1982 that would be fine?

Ms. Yukimura: And that is what the Chair is arguing right now and we're having the County Attorney look at that.

Ms. Elmore: Right, I have nothing against tourist. I never came here as a tourist myself, I came for other reasons, but I have nothing against tourist and it's not the money that bothers me, it's just the change, this drastic change over the entire island, this is just the North Shore, but it's happening. I've got information on vacation rentals up in the mountains of Kalāheo and other places so, I just, again, am opposed to grandfathering unless it wasn't back in those dates that they talked about 82 or 72 or whatever.

Ms. Yukimura: Thank you.

Ms. Elmore: Thank you.

Ms. Yukimura: Any questions? If not, is there anyone else who wishes to speak? Ms. Diamond?

CAREN DIAMOND: Hi, Caren Diamond. I just want to thank Kaipo for an excellent, excellent presentation. I think that was really, really excellent and I think it explained and put together the history of how this has happened in a really useful way and, so thank you Kaipo. I think you all know by now the rest of my position and I don't need to repeat myself. I do just want to say one thing. Yesterday, I was at the Planning Commission, lot seven (7) was on the Planning Commission agenda on the subdivision that Kaipo was talking about and one of the things they did was put together a size of the structures that have been approved there and lot two (2) has 5,580 square feet, lot three (3) is 5,496 square feet, this is the size of these structures that have been approved for that subdivision. New structures that haven't been built yet that have recently got approval... lot six (6) has gotten approval for 3,707 square feet, lot seven (7) yesterday just got approval for 5,718 square feet house, lot eleven (11) got approval last month for 5,413 square foot house. I want to say that the things that Planning are approval are not single family houses and a lot of the things that are happening up here really do need control because these are turning into vacation rentals such that rent for \$14,000 a week and the larger... they are, the more families they can put in them and the more money they can rent them for and that area has turned into hotel and motel row, and consequently whether it's by design or by accident the houses that have put fences in front of the beach front and have fenced off the people and have put walls up, are vacation rentals and um and so it's really posing a problem in our

neighborhoods and I really ask this council and hope you will enact laws that do protect the residents of this island because there are far more visitors than there are residents and the residents need places to live and play and work and I thank you for all your work and, again, thank you Kaipō.

Ms. Yukimura: Thank you. Any questions on Ms. Diamond? I have one. You mentioned the approval yesterday. I thought they were down sized too...

Ms. Diamond: They were down sized to 4,000 which was what they approved yesterday.

Ms. Yukimura: Okay, so you said 5,000...

Ms. Diamond: They had asked for five (5), the whole project size was 8,800 and somewhat square feet.

Ms. Yukimura: Right.

Ms. Diamond: And with the house itself being 5,718 square feet and the Planning Commission had them reduce it to being 4,000 square feet.

Ms. Yukimura: Okay, so 5,000 something is not allowed, but 4,000 was...

Ms. Diamond: Well, for this particular house.

Ms. Yukimura: Right.

Ms. Diamond: There's many others that were.

Ms. Yukimura: Right, right, but you had mentioned 5,000 for this house, okay, Councilmember Iseri-Carvalho?

Ms. Iseri-Carvalho: Just a follow up on the question, what was the reason for Planning's downsizing what the original application called for?

Ms. Diamond: Well, because this was a location and design, building design review and this subdivision has the ability for a Planning Commission to... that is what they are doing in reviewing the design and so they can make the house smaller, they can set them back further.

Ms. Iseri-Carvalho: Yeah, and I guess my question was what was the criteria that Planning was using and is this criteria being applied, you know, formally.

Ms. Diamond: I don't think so from the looks of this list. I think this was the first time I had ever seen them look at a structure and say that that looks excessively large.

Ms. Iseri-Carvalho: Was that a finding that Planning made or not?

Ms. Diamond: It was really quick... it was over lunch, Dale put this paper together and you can make a copy.

Ms. Iseri-Carvalho: Okay.

Ms. Diamond: And then after lunch they decided it really quickly.

Mr. Furfaro: Maybe I can clarify that. There are conditions in the subdivision law that complied to the percentage of the lots square footage which would allow the maximum foot print of a house, just to answer your question. In most cases, that does exist and I think we got clarity that the Commission did respond although the applicant came in for a large house at the end of the day, it wasn't the commission that approved that application, they did reduce it to about 4,200 you said?

Ms. Diamond: Yeah, it was for...

Mr. Furfaro: And so I guess the next question would be to see how much that complied to the actual lot size.

Ms. Iseri-Carvalho: Right, and that was...

Mr. Furfaro: And I think that was your question.

Ms. Iseri-Carvalho: So I'll go find out, I just wanted to know if you had the answer readily available, but I'll go gather the information.

Ms. Diamond: And I think if you start out with 8,000 square feet and, you know, end up at 4,000, it sounds reasonable, but if you compare 4,040 feet from the shoreline, that may not be quite reasonable.

Mr. Furfaro: And Caren, I just want to put it in the right perspective the commission ended up doing the right thing.

Ms. Diamond: That's correct.

Mr. Furfaro: But, you know, in the world of negotiation, people always ask for more than they are entitled to. I mean, we do it in the Office of Hawaiian Affairs, we do it in many native issues that deal with the fact that we want the true reconciliation and accountability of lands that were left for the State of Hawai'i and Trust and you know those things, they're just a nature of people attempting to get more than what they are entitled to. And I don't mean that in any way other than that's part of people's negotiating tools.

Ms. Diamond: Thank you.

Mr. Asing: Um.

Ms. Yukimura: You have a question Council Chair?

Mr. Asing: I don't have a comment, could I have a copy of that information?

Ms. Diamond: Sure.

Mr. Asing: Ernie, please. Thank you.

Ms. Yukimura: Anyone else wishes to speak? If not, I have asked that the Planning Director be found because I... we have been asking for input from the Planning Department throughout this process and we have not received anything in writing from them. They are going to be the implementers and enforcers of the law and so we've wanted to get their input, but we keep losing them today.

Ms. Iseri-Carvalho: Just today?

Ms. Yukimura: So, in the meantime, I'm going to call this meeting back to order and ask for comments from the Committee as I stated right after we came back into session.

The meeting was called back to order, and proceeded as follows:

Ms. Yukimura: We will be deferring this bill to allow the County Attorney's Office to respond to some of the questions that were raised by the Council Chair's presentation and by various testimony from the public, so it's going to be one more deferral if I had anything to do with it. We will move this thing out of Committee next time and so right now if Councilmembers want to make any comment this would be an appropriate time Councilmember Furfaro.

Mr. Furfaro: Councilwoman Yukimura, I just wanted to, at this point, thank you for your efforts over the last couple of years in working with stakeholders and trying to arrive at what the General Plan implies as the need to regulate vacation rental industry and I just wanted to take a moment to thank you for all of your work and everybody that has been working with you. I also want to tell the Chair thank you very much for a great look back into the history of activities along the North Shore and especially the enlightenment on the Mahuiki versus Planning Department issues back in the 80's, so thank you both.

Ms. Yukimura: Thank you.

Mr. Furfaro: And I look forward to further information from some of the items posed to the County Attorney today.

Ms. Yukimura: Thank you Councilmember Furfaro. Anyone else? Councilmember Iseri-Carvalho?

Ms. Iseri-Carvalho: Yes, I guess the question I would have would be when is it expected that the County Attorney's opinion will get to our office because if you're expecting amendments, and we don't get the opinion until the day of the hearing, then I hope you're not expecting us to have our amendments done on that date.

Ms. Yukimura: Well, you know, we have... I mean there's a couple of key questions that the County Attorney is working on. I think when we left off with them they were to have their opinion ready in two (2) weeks which will mean our next Committee meeting. I will ask them to try to have it ready the Friday before the meeting. I think most of the amendments can be worked on without their opinion and then we'll incorporate their opinion in the last few days before the... is the way I'm looking at it.

Ms. Iseri-Carvalho: And the reason I say this is because I already have a planned off island trip and I won't be here at the next meeting. I had already indicated that I will be proposing amendments, so I will not be able to have those amendments ready. I am actually going to be gone from the 21<sup>st</sup>.

Ms. Yukimura: Well, you know, I... if you're talking about the two (2) amendments that you and I discussed, I think we can probably get that prepared and circulated and then we can have a discussion even vote on it in Committee, but you'll be back hopefully for the Council meeting.

Ms. Iseri-Carvalho: I should be.

Ms. Yukimura: And so that would be the next.

Ms. Iseri-Carvalho: 27<sup>th</sup>, well, we missed the 4<sup>th</sup>, we don't have a meeting.

Ms. Yukimura: Let's make sure because...

Ms. Iseri-Carvalho: That's the July 4<sup>th</sup> Holiday.

Ms. Yukimura: We have our calendar up there too, so our next meeting will be the 27<sup>th</sup> and then the Council meeting will be... is that the 3<sup>rd</sup>?

Mr. Nakamura: The Council meeting will be on the 11<sup>th</sup> and the next Committee meeting will be on the 19<sup>th</sup> which is a Thursday.

Ms. Yukimura: Okay, so we're talking about the... will you be here on the 11<sup>th</sup>?

Ms. Iseri-Carvalho: We will. It is anticipated that we will be leaving that evening though, on the last flight for the National Association of Counties conference.

Ms. Yukimura: Well, um...

Ms. Iseri-Carvalho: So.

Ms. Yukimura: With the Chair's okay, assuming that we moved it out of Committee because, as you know, the longer that we delay this, you know the more possibility of nonconforming uses, so with the Chair's permission, maybe we can take that up front Chair?

Ms. Iseri-Carvalho: And that would be fine, I mean.

Ms. Yukimura: Okay.

Ms. Iseri-Carvalho: I just wanted to let my schedule be known so...

Ms. Yukimura: Thank you. We want you to know... make sure that your amendments and any other inputs are... and your ultimately your vote will be registered.

Ms. Iseri-Carvalho: Thank you.

Ms. Yukimura: Other? Councilmember Bynum.

Mr. Bynum: I also want to thank Councilmember Yukimura for all of her hard work, all of her hard work.

Ms. Yukimura: Thank you.

Mr. Bynum: And, you know, we and everybody who comes every time and gives their input which is often very thoughtful and as an ex-officio member of this Committee, I can't really offer amendments at this time, but I would like to go over six (6) points in the current amendment that I have concerns or questions about and I'll go through in order real quickly. I don't mean to necessarily have a big discussion, but just lay these points to think about on page three (3). The definition of bed and breakfast operations as we seen in our... in all the materials, we have... there are many definitions around the country and as we move forward in the future, with looking at bed and breakfasts more closely I think. The definition in this bill may be important and my concern here is that on Kaua'i a number of potential bed and breakfast operations may not occur in the attached dwelling and the current thing talks about basically a bedroom... (change side of tape).

Mr. Bynum: ...in a detached dwelling and sometimes B&B might appropriately be run in an 'ohana unit or a small unit that's on the same property and in some definitions the definition is owner unless he lives on the property and what the difference is with bed and breakfast I think that's really critical and makes them a different person is that there's a resident manager or owner. There's an owner who lives there who is hosting someone and often that will be in a bedroom in their home, but they may be in a unit that's nearby, so I think...

Ms. Yukimura: But on the property...

Mr. Bynum: It's on the property.

Ms. Yukimura: On the same lot.

Mr. Bynum: Because and I think that's critical, but I think looking at that definition might be important, also the definition in many jurisdictions of transient accommodations or bed and breakfast is accommodations with a period less than thirty (30) days and on this bill it's currently a hundred and eighty (180) days which I think might be too much. I would suggest something like sixty (60) days because I think there's situations where say a retired couple who lives in their home, but as a practice they visit their children on the mainland for two (2) or three (3) months, and they may want to rent their home for a two (2) or three (3) month period while they're gone away from it, I don't think that's in the same category as transient accommodation and it's something that we may want to accommodate through this definition and my suggestion would be sixty (60) days. The other one on page 11, I think or, no, on page 10 where it talks about regulations. It discusses a nonconforming use certificate number should be on a sign and I think for ease of regulation that we should have a section there that says that a nonconforming use certificate number should appear on any advertising whether it's in print or on the internet or in a listing from a vacation rental agent so it's easy for people to say when you see an advertisement to know which visitor, you know, which regulated accommodation that is connected with. There's another section in the bill where it says that the effective visitor destination, on the effective date of this ordinance shall be July, they have to obtain the nonconforming use certificate by July 31, 2008 and my concern there, is that obtaining relies on the performance on the Planning Department to actually get it done and perhaps one of the things we could look at there is that the application be applied for, you know, a check list of the appropriate documents provided by a certain date as opposed to obtaining or (inaudible) at the end. It's like, oh, it relies on the performance of the people that have to process the permits and it wouldn't really be fair to someone who had met all of the criteria to not get the nonconforming use permit because they couldn't get through the regulatory process on the ag land which I've expressed before is an area that I'm struggling with and we're constrained with the, you know, law and what the law says and we are... it's important for us to follow what is the legally defensible position and any bill that we put forward as a Council, but in this section where it says, it defines what actual agricultural demonstrating actual bonafide agriculture

says, one of the provisions says more than half of the household income comes from farming operations, and my concern there is that it also... because the County can only relate law, regulate lots no greater than fifteen (15) acres that there are circumstances where people I think are doing modified agriculture, they're working very hard, but it may not constitute half of their household income. You know, I can see someone who is doing very serious agriculture and that they have other income from retirement or they have a spouse that works and so what if you were, you know, had revenue of \$40,000 to \$50,000 from agriculture, but, you know, you had a spouse who was working who had a job that was \$40,000 to \$50,000 of household income and you didn't make that criteria, so I think looking at that may be important if this section going to remain in the bill. And I just wanted to point those issues out that I wanted to take a closer look as we move forward.

Ms. Yukimura: Thank you. That's very useful and I appreciate the comments and thoughts about it. Other comments? Councilmember Iseri-Carvalho?

Ms. Iseri-Carvalho: I guess I have a comment. You know, with respect to laws that we make, you know, we cannot legislate for every single instance to help every single family. I mean, you looking at laws in a general sense of the masses of what the intent is that we're protecting is, you know, agriculture property is it, you know, protect the rural character. I mean we're looking at mission statements and not legislating for every specific instance that comes about because we could never do that. I mean, there's some people that going to fall in a loop hole and some people that aren't and the overall concept is to try to look at, you know, generally, is this what we want and a huge policy prospective, so I think trying to get into all these minute details really detracts from the whole purpose of what we're trying to accomplish and that's basically my comments here.

Ms. Yukimura: Thank you. Any other comments? If not, I want to suspend the rules and ask the Planning Director to come forward.

There being no objections, the rules were suspended.

Mr. Costa: Good afternoon Councilmembers, Ian Costa, Planning Director.

Ms. Yukimura: Thank you. We've been soliciting comments from your Department because the Planning Department is the Department that's going to be implementing and enforcing this bill. We haven't received anything in writing, so I just wanted to take the opportunity to ask, first of all, if you have any comments right now, or whether you will be submitting comments in writing before we move this bill out of Committee which we are planning to do by next Committee meeting.

Mr. Costa: We are actually... we are planning on submitting comments. We do have a draft and I'm just not able to submit it right now.

Ms. Yukimura: Okay, so our next Committee meeting is the 27<sup>th</sup> and so if we can receive your comments by the 20<sup>th</sup> that would allow us to have some dialog back and forth, prepare some amendments if we, you know, deemed.

Mr. Costa: No problem. Actually, we'll probably get it in by next week, beginning of next week.

Ms. Yukimura: Okay, that's very good. Does anybody have any questions of the Planning Director at this point? Councilmember Iseri-Carvalho?

Ms. Iseri-Carvalho: Yes, Ian, I think I would like to ask if you can pay particular attention to the... I guess the enforcement provisions of what Planning will be responsible for and the time it's going to take and how you intend to utilize your existing staff in order to review, you know, all of these request because like how we went through the ADU I think it put a tremendous burden on your staff to be checking all these documents etc. and so I'm not sure if, you know, if you have the staff that we would have to allocate more resources because we would want to do it. I mean, we want to make sure that if we're going to put some meat into the law that there will be some real and actual enforcement and it won't be hindered by your ability to provide the manpower in order to execute the intent of what the bill was about.

Mr. Costa: Yeah, thank you. We will, with respect to the ADU, Additional Dwelling Units, I think that was a one shot thing and we've been managing that, but I think with respect to vacation rentals, they'll be an ongoing recertification, so we'll have to look at that.

Ms. Iseri-Carvalho: Okay, so if you can address that when you do your responses, thank you.

Mr. Costa: We'll do.

Ms. Yukimura: Any other questions? Councilmember Bynum?

Mr. Bynum: One other part of this bill Ian talks about the nonconforming use permit has to be renewed every year is that... too frequent in your opinion... I mean in a... would that put a strong regularatory burden upon your staff?

Mr. Costa: Probably, and we'll address that as well. I think we would probably suggest and you would hate to go... I think, personally, I would hate to go longer than bi-annual or, you know, every two (2) years, but every year might be, not only burdensome for the Department, but certainly the operators.

Ms. Yukimura: Okay, any other questions? I have. I would also like to ask you folks to look at the registration requirement.

Mr. Costa: Okay.

Ms. Yukimura: Because my intention in requiring a class one (1) zoning permit and they may have problems, but was to try to use an existing process rather than create another process for Planning Department, but it may turn out to be more confusion or more trouble and so any input your Department has on that as... would be helpful as I mentioned there was one thing that everybody agreed on and that was that we have a registration process.

Mr. Costa: Yeah, yeah.

Ms. Yukimura: So, you know, that is... that component was the one place where there was total consensus.

Mr. Costa: Yeah, it would either be Class I or a Class II.

Ms. Yukimura: Okay, so if that Class I works, then we'll try to do it that way, but any input you have would be good.

Mr. Costa: Okay, will do.

Ms. Yukimura: Okay, and then there was something else. I can't think of it now, so we'll... anyway, appreciate receiving some input early next week or at the latest next Wednesday.

Mr. Costa: Also, what we are addressing and I finally compiled the information as requested information regarding permitted B&B's, who the operators are... what the terms were?

Ms. Yukimura: Okay, very good.

Mr. Costa: So we've...

Ms. Yukimura: That would be good information. And I'm exercising a privilege here, but I believe the deadline for ADU's is...

Mr. Costa: Two (2) days from now.

Ms. Yukimura: What?

Mr. Costa: Friday.

Ms. Yukimura: Friday, so just since we have the opportunity, I want to announce that because that is a deadline and if anybody is still trying to establish an ADU, that the time to get a ADU clearance form is... the deadline for that is this Friday so just a reminder, okay, any other questions of Mr. Costa? If not, thank you very much.

Mr. Costa: Thank you.

Ms. Yukimura: And the Committee will come back to order.

The meeting was called back to order, and proceeded as follows:

Ms. Yukimura: Are there any other last thoughts? If not, I just want to also thank the Council Chair for his presentation today which was a really important part of history. I don't know how it will actually play out legally, but we're going to be getting some input from the County Attorney on it. I want to say that one of the things I really appreciate are the maps that have been prepared, and as we look at them, and if we can pan them photographer... BC, you know, the two (2) representing Hā'ena conservation and non-conservation lands on the right?

Ms. Iseri-Carvalho: JoAnn (inaudible).

Ms. Yukimura: Oh, I don't think I need to point, the two (2) on my right, oh, well let me point on it. Yeah, okay, so okay, and correct me if I'm wrong Chair, but I believe these are the Hā'ena non-conservation land?

Mr. Asing: Yes.

Ms. Yukimura: Okay, and these are the Hā'ena conservation lands?

Mr. Asing: Yes.

Ms. Yukimura: Okay, and this is Kīlauea?

Mr. Asing: Yes.

Ms. Yukimura: And that's Hanalei Bay?

Mr. Asing: Yes.

Ms. Yukimura: The two (2) on my right, Hā'ena are... Sorry, okay, where shall we start? Okay, the two (2) on... alright, so the two (2) on my right are Hā'ena lands, these are the non-conservation lands, these are the conservation lands.

Mr. Asing: Yes.

Ms. Yukimura: And these represent... the pink represent vacation rentals actual locations?

Mr. Asing: Yes.

Ms. Yukimura: The blue represents other lots with buildings on them?

Mr. Asing: Yes.

Ms. Yukimura: Okay, and.

Mr. Asing: And also, in addition to that, if you notice that there are some of the lots that...

Ms. Yukimura: That have.

Mr. Asing: Are pink with the dark red ah...

Ms. Yukimura: Okay, like these?

Mr. Asing: Yes, around it. That means those are vacation rentals owned by...

Ms. Yukimura: Off...

Mr. Asing: Kaua'i residents.

Ms. Yukimura: Oh, Kaua'i residents, okay.

Mr. Asing: And the others are off-island residents.

Ms. Yukimura: The pink without red boundaries are...

Mr. Asing: Yes.

Ms. Yukimura: Owned by...

Mr. Asing: We own the red border.

Ms. Yukimura: Right, okay, and these are actual representations and I want to say I can... it's so easy to see that they all start turning pink. I mean, because that's what we're concerned about that what starts as a small number starts to take over the whole neighborhood. You'll see here in Kīlauea that and these are not representative, they are not accurate locations.

Mr. Asing: Yes.

Ms. Yukimura: They're just kind of a picture of the general proportions of...

Mr. Asing: Yes, the proportion is correct.

Ms. Yukimura: Correct, yes, of what we know to be vacation rentals again in pink and then in blue would be more residential or non vacation rental they might still be second homes. But you can see that and these are all on ag lands and I think there are some vacation rentals within Kilauea town too.

Mr. Asing: And that was the reason we broke that down into... there are actually sixty-one (61) I believe...

Ms. Yukimura: That are on ag lands?

Mr. Asing: And, no.

Ms. Yukimura: Oh, excuse me.

Mr. Asing: Sixty-one (61) total.

Ms. Yukimura: Oh, total.

Mr. Asing: But out of the sixty-one (61), we took out six (6) of them. We said ninety percent (90%) so we said because of the testimony that we received from the public appears as though most of the vacation rentals were on ag lands and because of that, we said ninety percent (90%) of the study that was made by Mr. Stokes belong on ag land and, therefore, we broke it down as to six (6) of them was going to be not shown, but it is actually, yes, in the core town area.

Ms. Yukimura: Okay, so you can see in that in certain areas and these are all North Shore areas in it would be interesting to look at places like Kekaha, Babies Beach area, you know, some may look like Kilauea, not as many as say, Hā'ena? But over time, they could become like Hanalei which is not an accurate representation by location, but by proportion it is.

Mr. Asing: Yes.

Ms. Yukimura: And, oh thank you, and so all this... oh, Ron, sorry. Thank you. These maps show vividly the basic need for some regulation. Thank you for the need for some regulation. No, I'm done, I'm done thank you, thank you BC for accommodating that and thank you again Chair Asing for showing very graphically what we're facing here and what we're looking at. And so I just want to say that the basic rationale for this bill is really a legitimate one and I've been reading literature from elsewhere, we're not the only place, they are places like us where tourism is a big industry. There are places like us which just beautiful places to live in and we're all having to deal with this phenomenon of technology that allows people to work from far away, people of affluence looking for nice investments and places to stay and some of it being very useful and helpful to the economy, but also having other impacts which are taking away neighborhoods, raising the cost of land and housing and creating impacts that are conflicts with our other goals for our community. So we have our work cut out for us, we're still not

finish, I'm hoping that next, in our next Committee meeting we will be able to move this bill out and I want to thank everyone who's been helping us with all of the input from all of the angles. We still welcome your input and and hope that we can come up with a good bill that's not going to solve all of the problems, some of the issues of ag land are going to have to be addressed by an ag planning process and I should've asked Mr. Costa about that, but we'll have another chance, but at least hopefully we'll take one piece of this long standing issue and deal with it in a fair and firm and clear way. So with that, if there's no more, no more comment, then the Chair would entertain a motion to defer.

Upon motion duly made by Councilmember Iseri-Carvalho, seconded by Councilmember Kouchi, and unanimously carried, Bill No. 2204 was deferred.

There being no objections, the Committee recessed at 3:37 p.m.

The meeting was called back to order at 6:46 p.m., and proceeded as follows:

Mr. Furfaro: Thank you. I will call to order the Planning Committee as Vice-Chair, we have two (2) items yet to attend to.

**Bill No. 2226** A BILL FOR AN ORDINANCE ESTABLISHING A NEW ARTICLE 27, CHAPTER 8, KAUAI COUNTY CODE 1987, RELATING TO SHORELINE SETBACK AND COASTAL PROTECTION (Planning Commission recommendation)  
**[Approved as amended, then deferred.]**

I want to say that at this point we have actually circulated an amendment which is actually a new section that we had looked at earlier, but under the Ramseyer rules, as it was circulated in the previous meeting, it should not have reflected lines and brackets as it is a new particular section, so I'm asking that we would amend this accordingly with the piece that's being circulated and then I would hope to defer this to another meeting. What is the, ah...

Councilmember Kouchi moved to recommend approval of Bill No. 2226 on second and final reading, seconded by Councilmember Iseri-Carvalho.

Councilmember Kouchi moved to amend Bill No. 2226 as shown in the Floor Amendment which is attached hereto, seconded by Councilmember Iseri-Carvalho.

Mr. Furfaro: Thank you. There's been a motion to amend as circulated and seconded, but is there anyone in the public that would want to testify at this point? It is the intent of the Vice-Chair who is Chairing this Council to defer this...

Ms. Iseri-Carvalho: Matter?

Mr. Furfaro: Matter at the end. Go right ahead Caren.

CAREN DIAMOND: Thank you, good evening, Caren Diamond. It's been a long day, so I'll be short. Thank you for entertaining the setback bill. As we can see from all your previous discussions with Planning, it's really crucial that this setback bill really be gone over with a fine-tooth comb, so that the rules and regulations regarding our coastal area are really in place to protect the coastal area. The way we have it now, I don't even think Planning understands what the rules are and it certainly seems like the objective and the policies of special management area are not followed. And I know in your draft, the Ramseyer is going to move some of the portions, but I would suggest that you look at some of those portions because some of the things that were removed during Planning Department are some of the most crucial parts of this bill. ...that are the actual content of this bill and some of those things give the procedure for how Planning goes about doing those actual setback permits and, so I'd ask you to please look at some of those and refer to the comments that I had before. I did bring a few pictures that I would like to show you. I'll pass these around, these are old pictures, so this is what our beach used to look like and this actually is in the Sylvester Stallone subdivision where Kaipo was talking about, and you can see from this top picture right here, you can see the dune and the trees are well back.

Ms. Iseri-Carvalho: Caren, can you just state... I know you said Stallone property, but a little more definition, I mean area.

Ms. Diamond: Yes, okay. So this is Wainiha... sorry and it's just a little bit... it's in the Camp Naue area of Hā'ena and now what is known as the Sylvester Stallone subdivision which is actually Wainiha, not Hā'ena. Traditionally, our dunes were sand dunes and (inaudible) on the trees, but you can see the naupaka is far back, it's well on the way behind the dune. I want to show you that same place right now, here it is. The dune is covered, the naupaka has encroached forward, forward, forward... what the naupaka does is cause the sand to build up, so the naupaka traps the sand. This isn't on the dune where it is supposed to be trapped, this is far seaward of the dune, way much sooner than it is supposed to be trapped. And so this sand has trapped, it builds, it builds, and then when the waves come, it causes a scarp which is happening all over our beaches because the vegetation is planted too far seaward. One of the things that my recommendations are recommending is that we don't allow people to plant on the shoreline and that we give some distance whether it's the first forty (40) feet or some distance that people are not allowed to plant and irrigate. I think it's really, really, important because the shorelines have to migrate and if the shorelines can't migrate, that's the end of the beach. If the sand can't reach the back side of the dune, when that sand is needed, when the big waves come, that sand has already been washed away in a much smaller wave event. The beach does not exist if we don't have the back shore along with the beach and if you read old reports about Hā'ena, they talked about how beautiful our beaches are across the entire State. Our beaches were famed Hā'ena, Wainiha beaches, a gift to the entire State. They weren't supposed to disappear every time a landowner put a house or vacation rental up. The beach is

supposed to be enacted and the development is supposed to happen following the objectives and policies that protect the beach as well. What we had happen is no beach protection whatsoever, the houses get developed too close to the shoreline and what's happened all across the State once you put a house when the house... when the shoreline starts migrating landward which happens on the regular basis, pretty soon the house is threatened and I want to show you a couple of pictures of Hā'ena.

Mr. Furfaro: You know, Caren, I do want to share with you that I am going to, you know, ask that we amend as circulated, but I'm actually going to defer this item, so there would be an opportunity for you to speak again at the Committee level, but, you know, I'll go ahead and give you some more time.

Ms. Diamond: Thank you, I'll be quick.

Mr. Furfaro: But I did want to point that out.

Ms. Diamond: Thank you. I just want to, so that you have something to think about. This is Hā'ena and it's actually conservation land. There is the neighboring parcel, conservation land, this is what happens when houses are built too close to the ocean. These houses are falling into the ocean, but they didn't allow them to fall into the ocean and they didn't remove them, what they did was armor the shoreline, so they've put sand bags on those shorelines and every single year, they scoop up all the sand and they push that sand up and cover those sand bags up. Well, as a result of that, the beach park, Hā'ena Beach Park is severely diminished because the sand doesn't reach the park anymore. The sand has gotten taken away and pushed up much higher on the parcel that's protecting this house and, so it's really crucial to have houses to be setback and to be setback for our future because not only are they being sited where they are today, but they have to sit there. An average house last seventy (70) years which is why this bill has a seventy (70) year erosion rate and, so I really... Our beaches are a gift to everybody and once people develop them, if the development isn't done properly, then the beaches disappear. On Maui and O'ahu, we've had... they said thirty percent (30%) of the beaches are gone, just gone and the thing that we had hoped in Wainiha and Hā'ena is to impact the development, so that that didn't happen. But, unfortunately, Planning was not (inaudible), so the houses have been all approved to be really large and really close to the ocean. I don't think anyone ever gave a thought about the coastal hazards of the people that are going to be in those houses and the coastal hazards that are going to happen to the people that are going to be walking across the beach when there is no beach. We've lost the things that we shouldn't lose, so I really hope that you would address this bill in a timely manner and make it really strong.

Mr. Furfaro: Thank you. Councilwoman Iseri-Carvalho?

Ms. Iseri-Carvalho: Yes, Caren, thank you for your testimony and for those photos. I just wanted to clarify, I think you're referring specifically to residences, but it's not only residences right? I mean you're talking about any kind

of structure that is built close to the beaches that... what you're referring to, right?

Ms. Diamond: That's right, any structure, so that all the structures should be far back, so ideally, they'd be no structures at all within forty (40) feet of the shoreline. And the current shoreline rules and regulations even provide for that, so there's not at the moment no fencing allowed, no planting, nothing allowed within forty (40) feet of the shoreline, unfortunately, it's not enforced and so we have a large problem.

Ms. Iseri-Carvalho: And if I could follow up, Caren, that was one of the points. I mean, it wasn't, you know, whether it be a concrete slab or it be a fence or it be, you know, any kind of artificial structure. I mean, I think this bill will address... (change side of tape)... it's that comprehensive in nature so that our beaches are protected.

Ms. Diamond: Thank you. And thank you for your time.

Mr. Furfaro: Okay, I'm going to call the meeting back...

Ms. Iseri-Carvalho: Oh, Anne.

Mr. Furfaro: Oh, go ahead, Anne, I'm sorry. You sit behind the camera all the time and I can't see you, so this is like the third time I've done that to you, my apologies.

ANNE PUNOHU: I'm having a bad hair day, I'm hiding. I was at a Planning Commission meeting and I've got to tell you that in my humble opinion as humble, I don't know how humble it is at this point. These Commissioners did not know what their authority was and they were scrambling like crazy and the issue was exactly this, exactly what this bill covers. So when I went up to testify, I said to them, "What, you guys, why don't you hang on giving approval to these guys?" The issue is setback and shoreline and where it is. We had a lot of discussion about beach naupaka which I'll talk about in a second if you give me a chance. But the problem is, they didn't know where their authority was and they wouldn't wait to listen to what you guys had to say today and wait for this ordinance, for this whole issue. I asked them, "Can you just hang on giving these guys approval and wait to find out what their going to do on the Council side because the Council is addressing this right now". Well, the applicants got up and said "no" they said, look, they wanted thirty-five (35) feet. Then they said, look, if you give us, we'll go back to forty-one (41), but give us our approval today. We urge them to defer and wait for you guys, but they decided to just defer it to after lunch, so when they came back, they gave it to them. I didn't feel that that was appropriate because we had huge issues especially about naupaka which I'm really here to discuss about the naupaka thing because I'm basically... been living most of my life on that side. My kids are from there, they're born and raised there, Hā'ena/Wainiha and I can tell you that these guys take their sprinkler, this is what they were doing, I'm an eye witness to this. They take their sprinkler, they put it on the sand, they grow the naupaka onto the

sand. You can't walk on naupaka, we'll Commissioner Kato-Kluge said she would walk on it. She didn't care what anybody said, she would go, but most of us don't because it's a root thing and it's not easy to walk on. But she's a toughy, she can, but the issue is about the dune. Now, (inaudible) Laureta brought up a very interesting point which bothers me because he's my dear, dear friend. I love this guy, but I don't agree with him on this because he said you need to stabilize the dune and beach naupaka is a great way to do it. Incorrect, because in my humble opinion, again, not too humble, but give me one second, that dune historically was where you buried the iwi or the bones of the people. Hawaiians are not stupid or we're not stupid before, why you're going to bury somebody where the sands not going to be? Dunes are historical, they stay there, they're big pile and it was safe to plant the bones under the dunes because the dunes would shift small kine. But they really weren't going to go anywhere, so that tells me dunes, historically, do not need stabilization. However, if you're trying to increase your land area, keep people away from you, and prevent them from walking anywhere on your property. You're going to use this stabilization issue in order to say you're okay to plant the naupaka which, unfortunately, is a Hawaiian plant, so using a Hawaiian plant against the people which is not very nice either. So this is not a justification for using naupaka, naupaka does not... you do not need to stabilize the dunes, the dunes need to move and shift enough, so just like what Caren said. I am not going to repeat it because she's right and just same thing, so this is what I had to say about this whole issue. These guys are claiming, number one, my land and they're saying that, oh, we're going to grow the naupaka and keep you away. It does it, it keeps people away. I'm not going to walk with my kids on the naupaka, it's got roots, it's not safe to walk in and it's not necessary to plant it. ...artificially planting it by putting the irrigation and watering this sand and making this thing grow, so that meeting was really, really funny because the guy said, okay, look, here's your shoreline by the way. We... you had incretion and the naupaka grew eight (8) or ten (10) feet (inaudible). I don't even remember, wow, that's some naupaka, no? That's triple sixteen (16) you're throwing on there, boy, those things are growing like crazy. No, it doesn't work that way.

Mr. Furfaro: I need to ask you to summarize.

Ms. Punohu: Okay, well that's my summarizing, so, you know, what I'm saying, okay. I'll come back.

Mr. Furfaro: And I just want to say something to you again and to Caren as well. I was very proud two (2) years ago to be part of this Council that had funded Chip Fletcher's documenting by photographs the shoreline. I am extremely disappointed that it has taken him two (2) years (inaudible) and hearing things that flights haven't been able to document and so forth, so there is a (inaudible). Thank you. So there is a methodical approach to this with this Council who is committed to establishing some shoreline policy similar to Maui if not better than Maui. But we need to note that this going to be the amendment change today and then I'm going to defer this to the Committee again, but you should not be questioning the Council's effort here.

Ms. Punohu: No, I'm not.

Mr. Furfaro: We no, no, no, but earlier there was some... we are committed to come up with a bill and the question here is, is the bill to the point more intense and defined in the Maui bill because, quite frankly, until we get photos from Chip Fletcher, you know, we're uncertain if it's a interim bill because there might be... there might be adjustments made after the shoreline is documented and we know what the historical starting point is and so on that I just wanted to share that. I hope that answers some of your questions, we're committed to developing something, but there are rules for the current commission and the quicker Mr. Fletcher documents... our contracted request, the quicker we'll get to finalizing this.

Ms. Punohu: Can I just... I'm on you guys side. No, no, I'm happy what you're doing.

Mr. Furfaro: I didn't mean that, I didn't mean that to say that nobody is sensing our commitment.

Ms. Punohu: I sense.

Mr. Furfaro: I meant to say we're dealing with a huge delay here based on the fact that our photo documentation is now two (2) years from being completed. It has taken two (2) years even to get some of the planes in the air.

Ms. Punohu: My concern, though, is watching how the commission is making decisions at this time and I feel that it's slightly irresponsible and they don't have any clear direction and that's my concern. How long is this going to go on, and so it's all good.

Mr. Furfaro: And, again, it's possible that this bill might end up being an interim bill until such time that we have the appropriate documentation and can go back through really evaluate the erosion schedule as documented. So I will call the meeting back to order.

The meeting was called back to order, and proceeded as follows:

Ms. Iseri-Carvalho: Ah, yes, are we... do we have discussion?

Mr. Furfaro: Yes, we had a first and second.

Ms. Iseri-Carvalho: Yes.

Mr. Furfaro: We had a motion to approve with a second, but if there's further dialog, that's fine with me.

Ms. Iseri-Carvalho: That was my question Councilmember Furfaro. We had heard testimony from Dr. Fletcher that it has been two (2) years.

Mr. Furfaro: Two (2) years.

Ms. Iseri-Carvalho: And that, you know, what impact is that going to have on this bill because I hear you discussing that it can be interim, but I mean what data are we relying on in coming up with the forty (40) plus seventy (70) and, you know, is that something we can do without (inaudible)... because it refers here to the coastal erosion study, you know, as a basis of making this decision. So I don't know what that is and... and I don't know how close we are to getting those photographs and I would like to get more information on that, you know, as soon possible.

Mr. Furfaro: Yes.

Ms. Iseri-Carvalho: Because two (2) years is a long time and I was surprised to hear the testimony and it actually came on something else. We were talking about the Pono Kai issue.

Mr. Furfaro: Right.

Ms. Iseri-Carvalho: When that... so if we can get some direction from Planning as to...

Mr. Furfaro: I hope to raise this question with the Committee Chairwoman because I think it's very important that, you know, we can move through this bill and not have the appropriate documentation.

Ms. Iseri-Carvalho: Right.

Mr. Furfaro: So...

Ms. Iseri-Carvalho: You know, and some guidance that we going to be requiring that data because it's not a matter, I think, of just taking photographs. I mean, they have to put it in some kind of analysis.

Mr. Furfaro: Yes.

Ms. Iseri-Carvalho: You know, analytical form and come up with some kind of recommendation.

Mr. Furfaro: Seasonal?

Ms. Iseri-Carvalho: Yes.

Mr. Furfaro: Swell directions.

Ms. Iseri-Carvalho: Right.

Mr. Furfaro: Time of the year, all of those.

Ms. Iseri-Carvalho: So would that hold up, you know, passage of this bill or can we like you say pass an interim measure until we get the statistical data to support whether increasing or decreasing the setback, you know, those are still issues that haven't been answered. I would like to get some guidance as to how we're going to proceed.

Mr. Furfaro: Yes, I will pursue that with Planning as a question.

Ms. Iseri-Carvalho: Thank you.

Mr. Furfaro: Thank you for concurring with the concern I raised. Is there any further dialog? May I, again, ask... all those in favor of the amendment.

The motion was then put, and unanimously carried.

Mr. Furfaro: May I then ask that we go back to the main motion and I'm asking for a deferral to put that back on Committee. May I have a motion as such?

Upon motion duly made by Councilmember Iseri-Carvalho, seconded by Councilmember Kouchi, and unanimously carried, Bill No. 2226, Draft 1 was deferred.

Mr. Furfaro: That will close that particular item, we have one (1) more bill.

**BILL NO. 2221** A BILL FOR AN ORDINANCE TO AMEND CHAPTER 9, KAUAI COUNTY CODE 1987, RELATING TO STREET REQUIREMENTS FOR SUBDIVISIONS (Traffic calming elements)  
**[This item was deferred.]**

Mr. Furfaro: I am going to ask for a deferral on this because we have had a request from the Administration to have some additional time on this item. Is there any discussion on that?

Ms. Iseri-Carvalho: I would, unless there's public testimony, but then I'd be more than willing to make a motion to defer.

Mr. Furfaro: Is there anyone in the public that would like to discuss or give testimony on Bill No. 2221?

Ms. Iseri-Carvalho: Um.

Mr. Furfaro: Seeing no one, okay.

Upon motion duly made by Councilmember Iseri-Carvalho, seconded by Councilmember Kouchi, and unanimously carried, Bill No. 2221 was deferred.


There being no further business, the meeting was adjourned at 7:03 p.m.

Respectfully submitted,



Darrellyne Simao  
Clerk Typist

APPROVED at the Committee Meeting held on August 1, 2007:



JOANN A. YUKIMURA  
Chair, Planning Committee Chair



(June 6, 2007)  
FLOOR AMENDMENT

BILL NO. 2226, Relating To Shoreline Setback And Coastal Protection

Introduced by: JoAnn Yukimura, Councilmember

Amend Bill No. 2226 in its entirety to correct drafting errors related to adding new code sections (delete underscoring, brackets and bracketed material) to read as follows:

"SECTION 1. Findings and Purpose. The Council finds that Kaua'i's coastline is subject to a wide variety of natural hazards, such as tsunamis, high surf, sea level rise, hurricanes, coastal flooding, and coastal erosion that pose dangers to people and property located near the shoreline. Proper siting of structures based on hazard recognition and long term planning principles is critical to the protection of life and property, the mitigation of coastal hazards, and the preservation of coastal resources. Furthermore, the Planning Department is in the process of producing coastal erosion hazard maps that will be used as a basis for new shoreline setback requirements. Current shoreline setback requirements were established without adequate data on historical shoreline positions and trends. Development and other improvements on coastal lands have occurred without regard to erosion hazards. Because chronically retreating shorelines eventually threaten these improvements, there has been widespread construction of shore protection structures such as seawalls and revetments. These structures distort the natural shoreline environment, leading to accelerated erosion on adjoining properties, impacted public access, and beach loss. This pattern of coastal zone management seriously degrades the natural attributes of the Kaua'i coast as documented in the Kauai Shoreline Erosion Management Study (September, 1990).

The shoreline environment is one of Kaua'i's most important economic and natural resources. Kaua'i's beaches provide scenic beauty and recreational opportunities for residents and visitors. They are culturally important to the people of Hawai'i. Beaches, dunes, and offshore topographic features also help to minimize risks from coastal hazards by dissipating wave energy, which could otherwise cause significant damage to coastal property. Beaches provide important habitat for seabirds, turtles, monk seals, and other animals and plants. In all of the abovementioned ways, beaches and coastal areas are part of the public trust, and it is government's fiduciary responsibility to protect beaches and coastal areas.

It is important that information regarding natural hazards such as coastal erosion data be incorporated into the planning process at the earliest stages of development, i.e., at the time of zoning, general plan, and development plan changes before lot sizes and shapes are established, so as to give landowners more environmentally sound options and to save decision makers from the agonizing dilemma of choosing between protection of one owner to the detriment of another owner and/or the public.

In order to protect life, property, and coastal resources against coastal hazards, this bill sets forth a procedure for establishing building setbacks from the shoreline based on scientifically documented rates of shoreline change and the history of coastal hazards in a specific place. Using a precautionary approach, the bill promotes proper siting of structures and reduced use of the shoreline area for structures in order to ensure the longevity and integrity of Kaua'i's coastal and beach resources.

The ongoing coastal erosion study by the Planning Department will provide a public database to assist the Planning Department and shoreline area owners in this regard. Until the public data base is established, landowners will be allowed to site improvements by developing their own data through scientifically accepted methodologies specified herein. This bill serves as an interim measure until the public database of science-based erosion rates is formally established and new setback rules and ordinance are adopted by the Planning Commission, County Council, and Mayor, as appropriate.

The County is authorized to protect the coastal area pursuant to Public Law No. 92-583, as amended, ("Coastal Zone Management Act"), Chapter 205A, Hawai'i Revised Statutes, as amended, ("Shoreline Protection Act"), Article XI Section 1 of the Hawai'i State Constitution, Public Law 92-583, and the County's police powers to protect public health and safety. This ordinance shall be known as the "Shoreline Setback and Coastal Protection Ordinance."

SECTION 2. Chapter 8 of the Kaua'i County Code 1987 is hereby amended by adding a new article to be appropriately designated and to read as follows:

#### "ARTICLE 27. SHORELINE SETBACK AND COASTAL PROTECTION

Sec. 8-27.1 Applicability. This Article shall be applicable to a) all lands abutting the shoreline, and to (b) all lands located within 500 feet of the shoreline area of the County of Kaua'i, State of Hawai'i, unless the applicant can demonstrate to the satisfaction of the Director that the applicant's proposed improvement will not be affected by coastal erosion or hazards. Factors to be considered shall include, but not be limited to, proximity to the shoreline, topography, properties between the shoreline and applicant's property, elevation, and the history of coastal hazards in the area.

Sec. 8-27.2 Definitions. For purposes of this article, unless it is plainly evident from the context that a different meaning is intended, certain words and phrases used herein shall be defined as follows:

"Adversely affect beach processes" means to pose a potential immediate or future adverse effect on beach processes as a result of a structure or activity located within the coastal erosion hazard zone, or to create an immediate or future need to artificially fix the shoreline.

"Annual coastal erosion rate" means the annual rate of coastal erosion calculated by following a procedure established in the Hawai'i Coastal Hazard Mitigation Guidebook, (January 2005), which was prepared for the State of Hawai'i, Department of Land and Natural Resources, Coastal Zone Management Program, University of Hawai'i Sea Grant College Program and the Pacific Services Center and Coastal Services Center of the National Oceanic and Atmospheric Administration at section 4.1.

"Average lot depth" means the measurement obtained by adding the lengths of the two sides of a lot which are at or near right angles with the shoreline to the length of a line obtained by drawing a line from a point in the center of the makai (seaward) side of the lot to a point in the center of the mauka (landward) side of the lot and dividing the resulting sum by three. For irregularly shaped lots including flag lots, triangular parcels, lots on peninsulas, and/or lots having ocean on two or more sides of the lot, the average lot depth will be determined by the Director using a minimum 60 foot width as a guideline for determining the portions of the lot in which lot depth is calculated (e.g., the mauka side of the lot shall be determined where the lot reaches a minimum width of 60 feet.)

"Board" shall mean the Board of Land and Natural Resources, State of Hawai'i.

"Building footprint" shall mean all parts of a main building (excluding roof overhangs) that rest, directly or indirectly, on the ground, including those portions of the building that are supported by posts, piers, or columns. Building footprint also includes attached garages, covered carports, bay windows with floor space, lanais, decks, cantilevered decks, spas, and in-ground swimming pools.

"Certified Shoreline" means the shoreline established by Board pursuant to HRS 205A-42, as amended.

"Coastal erosion" means the natural loss of coastal lands, usually by wave attack, tidal or littoral currents, or wind. Coastal erosion is synonymous with shoreline retreat.

"Coastal erosion hazard zone" shall include all of the land between the shoreline and the shoreline setback line.

"Coastal erosion study" means a quantitative study of historical shoreline behavior utilizing orthorectified aerial photographs or other imagery to carry out high-resolution mapping of historical shoreline positions to obtain a statistically valid annual erosion rate of the Shoreline Reference Feature (SRF) and vegetation line. The coastal erosion study shall be carried out by a qualified professional consultant as defined in this article following procedures described in Section 4.1 of the Hawai'i Coastal Mitigation Guidebook, (January 2005). The coastal erosion study shall include but not be limited to:

(1) Mapping of the historical shoreline positions including both the SRF and the vegetation line for the subject parcel, as well as the local and regional littoral cell;

(2) The method resulting in the larger erosion rate (SRF/toe of beach vs. vegetation line) shall be used to establish the erosion rate unless there is clear evidence to indicate another method is a more accurate representation of historic shoreline change. (For example, inaccuracies can be introduced by using artificial changes in the vegetation line and by large seasonal changes in the beach toe.)

(3) Uncertainty or error calculation of the data and the annual erosion rate;

(4) Additional information relevant to the erosion study shall include: a current certified shoreline survey, construction plans, if any, existing and finished contours; photographs of the shoreline setback area, analysis of the coastal erosion rates and shoreline processes.

(5) Where required or done voluntarily, the coastal erosion study shall be accepted by the Director before an application for a shoreline setback determination is deemed complete.

(6) Any non-governmental study shall be valid for a period of five (5) years from the date of its acceptance by the Director which shall be by certified letter issued by the Planning Department.

(7) The coastal erosion study shall consider the purpose of the study—to safely site structures away from hazards such as erosion so that shoreline hardening will not be required to protect the property during its useful life.

"Coastal hazard" means natural processes in the coastal zone that are generated by geologic, oceanographic, and/or meteorological processes that place people and/or improvements at risk for injury and/or damage.

"Commission" means the Planning Commission of the County of Kauai.

"Department" means the Planning Department of the County of Kaua'i.

"Director" means the Planning Director of the Planning Department of the County of Kaua'i.

"Dwelling Unit" means any building or any portion thereof which is designed or intended for occupancy by one (1) family or persons living together or by a person living alone, and provides complete living facilities within the unit for sleeping, recreation, eating and sanitary facilities, including installed equipment for only one (1) kitchen.

"FEMA" means the Federal Emergency Management Agency.

"FIRM" means the Flood Insurance Rate Map.

"Hazard Assessment" means assessment for erosion, wave, flood, and inland zone following the standards in Section 4.3 of the Hawai'i Coastal Mitigation Guidebook, (January 2005).

"Lot" means a portion of land shown as a unit on an approved and recorded subdivision map.

"Minimum buildable footprint" means the building footprint of 2,100 square feet.

"Minor activity" means an activity that:

- (1) costs less than \$125,000; and
- (2) does not adversely affect beach processes, does not artificially fix the shoreline, does not interfere significantly with public access or public views to and along the shoreline; and
- (3) does not impede the natural processes and/or movement of the shoreline or sand dunes, and does not alter the grade of the shoreline setback area, except for landscaping, clearing (grubbing) of vegetation, and grading to the extent that those exceptions are not subject to HRS Chapter 343; and
- (4) is consistent with the purposes of this article and HRS Chapter 205A, as amended.

"Minor structure" means:

- (1) a structure that costs less than \$125,000 and provides temporary emergency protective measures for a legally habitable structure that is imminently threatened by coastal hazards provided that the protective measure has received approval in accordance with the Special Management Area Rules of the Kaua'i Planning Commission, relocation of the endangered structure has been considered and is not reasonable given the nature of the emergency, the protective measure is removed within ninety (90) days of its installation, and given the significance of the emergency, the protection is the best management alternative with respect to beach, shoreline, and/or coastal resource conservation, or
- (2) a structure that:
  - (A) costs less than \$125,000; and
  - (B) does not adversely affect beach processes, does not artificially fix the shoreline, and does not interfere with public access or public views to and along the shoreline; and
  - (C) does not impede the natural processes and/or movement of the shoreline and/or sand dunes, and does not alter the grade of the shoreline setback area; and
  - (D) is consistent with the purposes of this article and HRS Chapter 205A, as amended; and
  - (E) includes, but is not limited to, lighting in conformance with HRS Chapter 205A, landscape features, barbeques, picnic tables, benches, chairs, borders, wooden

trellis, bird feeders, signs, safety improvements, movable lifeguard stands, walkways for access, outdoor showers and water faucets, public utility lines, utility poles and accessory structures along existing corridors, temporary tents for special events not exceeding fourteen (14) consecutive days in duration during any three-month period, walls and fences provided they are located more than forty (40) feet from the shoreline, landscape planting and irrigation systems provided that they are directed away from the shoreline and do not artificially extend the shoreline or shoreline area; and

(F) excludes, but is not limited to, any in-ground swimming pools or spas, garages, carports, concrete walkways that are reinforced, concrete walkways that are not saw-cut at a minimum of three (3) foot intervals, and concrete steps.

"Nonconforming structure or activity" means a structure or activity which is lawfully existing within the shoreline area because it:

- (1) Was completely built, in its present form, prior to June 22, 1970; or
- (2) Received either a building permit, board approval, or shoreline area variance prior to June 16, 1989; or
- (3) Was outside the shoreline area when it received either a building permit or board approval; or
- (4) Provided that if any portion of a structure is non-conforming, then for the purposes of these rules, the entire structure shall be defined as non-conforming.

"Plan" or "site plan" means a detailed construction plan drawn to scale of 1" = 20' 0" that shows the design of a structure proposed to be built within the shoreline area. The plan shall be based on an accurate instrument by a surveyor licensed in the State of Hawaii and shall consist of data including but not limited to:

- (1) Property boundaries;
- (2) Natural features such as large trees, rock outcroppings, and any primary or secondary coastal dunes;
- (3) Topography in and around the proposed construction;
- (4) Any and all shoreline hardening;
- (5) Flood zones, where applicable;
- (6) Existing and proposed structures and their proximity to the shoreline and shoreline setback area;
- (7) Fences, walls, and any other structures in the shoreline setback area and any potential hindrances to lateral access along the shoreline;
- (8) A geo-referenced survey of the site; and
- (9) Any other information which identifies the existing condition of the subject parcel of land.

"Qualified professional consultant" means a coastal scientist with a masters of science degree or doctorate in geology, geography, or other appropriate physical science relating to coastal processes, or an engineer licensed in the State of Hawai'i that has experience in coastal processes.

"Qualified Demolition" means the demolition of a structure or structures where such demolition:

- (1) Will not adversely affect beach processes;
- (2) Will not artificially fix the shoreline;
- (3) Will not interfere with public access, except for public safety reasons during demolition operations;
- (4) Will not interfere with public views to and along the shoreline, except during demolition operations;

(5) Will be consistent with the intent of open space enhancement as reflected in these rules and HRS 205A; and

(6) Will comply with applicable County Codes.  
 "Revetment" shall mean a facing of stone, concrete, blocks, or other similar materials built to protect a scarp, embankment, or shore structure against erosion by wave action or currents.

"Shoreline" is as defined in Section 205A-1, Hawai'i Revised Statutes, as amended, and as established pursuant to Section 205A-42, Hawai'i Revised Statutes, as amended.

"Shoreline area" is as defined in Section 205A-41, Hawai'i Revised Statutes, as amended.

"Shoreline Reference Feature (SRF)" means a morphologic feature commonly referred to as the "toe" of the beach, which represents the base of the foreshore or approximating the Mean Lower Low Water (MLLW).

"Shoreline setback line" is as defined in Section 205A-41, Hawai'i Revised Statutes, as amended.

"Storm buffer zone" is the first forty feet (40') of the shoreline setback area as measured from the shoreline.

"Structure" is as defined in Section 205A-41, Hawai'i Revised Statutes, as amended.

"Use" means the purpose for which land or building is arranged, designed, or intended, or for which either land or building is or may be occupied or maintained.

Sec. 8-27.3 Establishment of the Shoreline Setback Line.

(a) No shoreline setback line shall be established for any lot subject to this Article unless the application for a shoreline setback line is accompanied by a shoreline survey certified within six (6) months of the application.

(b) For lots with an average depth of one hundred sixty (160) feet or less, the shoreline setback line shall be established based on the average depth of the lot as provided in Table 1, or at the option of the applicant, upon a coastal erosion study as provided in Table 2.

Table 1: The distance in feet of the shoreline setback line as measured from the certified shoreline based on the average lot depth in feet. See attached table and substitute for below:

If the average lot depth is:	100 feet or less	101 to 120 feet	121 to 140 feet	141 to 160 feet	161 to 180 feet	More than 180 feet
Then the minimum setback distance is:	40 feet	50 feet	60 feet	70 feet	80 feet	100 feet

(c) For lots with an average depth of more than one hundred sixty (160) feet, the shoreline setback line shall be established based on a coastal erosion study as provided in Table 2 and shall be no less than the setback distances set forth in Table 1 as applicable.

Table 2: The distance in feet of the shoreline setback line as measured from the certified shoreline based on the building footprint and a coastal erosion study.

For structures with a building footprint that is:	Less than or equal to 5,000 square feet	Greater than 5,000 square feet
Then the setback distance is:	40 feet plus 70 times the annual coastal erosion rate	40 feet plus 100 times the annual coastal erosion rate

(d) The average lot depth notwithstanding, any shoreline setback line established based on a coastal erosion study shall be reviewed by the Planning Commission.

(e) No zoning amendment, general plan amendment, development plan amendment, or subdivision, any of which involves lands, or any portion of land, subject to this Article, shall be approved without a coastal erosion study and a shoreline setback line established in accordance with Table 1 and Table 2. In cases where these methods result in lines that cross or intersect each other, the most mauka (landward) segments of each line shall form the shoreline setback line.

(f) Upon receipt of a completed application on a form prescribed by the Director, the Director shall issue a Shoreline Setback Determination which shall confirm the proper delineation of the shoreline setback line on a site plan, and shall require that substantial construction be commenced within two (2) years from the date of shoreline setback determination, and that construction be completed as evidenced by a certificate of occupancy in the case of buildings for habitation within three (3) years from the shoreline setback determination.

(g) Prior to commencement of grubbing, grading, or construction activities, the shoreline and shoreline setback line shall be identified on the ground and posted with markers, posts, or other appropriate reference marks by a surveyor licensed in the State of Hawai'i.

(h) For purposes of this Article, the application of Section 8-27.3 by itself shall not make a dwelling unit nonconforming.

#### Sec. 8-27.4 Minimum Shoreline Setback Requirements

Under no circumstances shall a lot have a shoreline setback line of less than forty (40) feet.

#### Sec. 8-27.5 Structures and activities subject to these rules.

All structures and activities located or proposed to be located within the shoreline area shall conform to the requirements of this article. The requirements of this article shall not abrogate the requirements of any other applicable statutes, codes, ordinances, rules and regulations, or other law. Construction immediately inland of the shoreline area shall also be subject to these rules unless a certified and confirmed survey map, prepared in accordance with the provisions of section 8-27.3, is filed with the department showing that the construction is outside the shoreline.

#### Sec. 8-27.6 Prohibited Activities in the Shoreline Setback Area.

(a) Certain activities are prohibited in the shoreline setback area pursuant to HRS 205A-44, as amended:

(1) The mining or taking of sand, dead coral or coral rubble, rocks, soils, or other beach or marine deposits from the shoreline area is prohibited with the following exceptions:

(2) The taking from the shoreline area of the materials, not in excess of one gallon per person per day, for reasonable, personal noncommercial use; or

(A) Where the mining or taking is authorized by a variance pursuant to these rules; or

(B) The clearing of these materials from existing drainage pipes and canals and from the mouths of streams, including clearing for the purposes under HRS section 46-11.5; provided that, the sand removed shall be placed on adjacent areas unless such placement would result in significant turbidity; or

(C) The cleaning of the shoreline area for state or county maintenance purposes, including the clearing of seaweed, limu, and debris under HRS section 46-12; provided that, the sand removed shall be placed on adjacent areas unless the placement would result in significant turbidity.

(b) A coastal dune shall not be altered, graded, or filled in any way except for the addition of sand of compatible quality and character. Non-native vegetation may be removed only if done in conjunction with a dune restoration and re-vegetation program that uses naturally occurring historical endemic plant species.

(c) Storm Buffer Zone.

(1) No structure or any portion thereof, including seawalls, groins, revetments, and other similar structures, such as fences and walls, whether built above, on, or below the ground surface, shall be permitted within the storm buffer zone as defined herein. Roads, streets, driveways, walkways, utility lines, grading and filling work and any and all other construction work not necessarily related to structures shall not be permitted within the storm buffer zone.

(2) Minor structures shall be permitted, including portable/movable public access walkways, portable/movable lighting for safety purposes, landscape planting/above-ground irrigation, and emergency temporary protection of legally habitable structures approved pursuant to Section 8-27.7(a)(8). Provided further that landscape planting/irrigation shall be directed away from the shoreline so that no landscape planting occurs seaward of the most recent certified shoreline or artificially extends the shoreline area without the appropriate approvals from the Department of Land and Natural Resources.

(3) If any new structures are proposed to be located in the storm buffer zone, as defined herein, the following restrictions shall apply:

(A) All new structures shall be constructed in accordance with the standards for development in Chapter 15, Flood Ordinance, Kaua'i County Code, relating to coastal high hazard districts and FEMA guidelines regarding FIRM maps.

(B) The applicant, its successors, and permitted assigns shall defend, indemnify, and hold the County of Kaua'i harmless from and against any and all loss, liability, claim or demand arising out of damages to said structures or activities from coastal natural hazards and coastal erosion.

(C) The construction of all erosion-control or shoreline hardening structures or activities shall be prohibited throughout the life of the structure or activity, with the exception of approved beach or dune nourishment fill activities, and landscape planting and irrigation.

The requirements of subsections 8-27.6(c)(3)(A), (B) and (C) shall run with the land and shall be set forth in a unilateral agreement recorded by the applicant with the bureau of conveyances or land court, whichever is

applicable, prior to the date of approval of all structures or activities. A copy of the recorded unilateral agreement shall be filed with the director and the director of public works and environmental management.

Sec 8-27.7 Permitted structures and activities within the shoreline area.

(a) Except as provided in this section, structures are prohibited in the shoreline area without a variance pursuant to this Article. The following structures and activities are permitted in the shoreline area without a variance:

- (1) Existing nonconforming structures/activities.
  - (2) Structure or activity that received a shoreline variance or administrative approval prior to the effective date of this ordinance.
  - (3) A structure or activity that is necessary for, or ancillary to, continuation of agriculture or aquaculture existing in the shoreline area on June 16, 1989.
  - (4) A structure or activity that consists of maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime, or water sports recreational facilities, which are publicly owned, and which result in no interference with natural beach processes; provided that permitted structures may be repaired, but shall not be enlarged within the shoreline area without a variance.
  - (5) A structure that has been legally permitted by a government agency and which is not defined as nonconforming, and is the subject of repairs that are valued by a licensed professional engineer or architect at less than fifty percent of the current replacement cost of the structure and which neither enlarges the structure nor intensifies the use of the structure or its impact on coastal processes.
  - (6) Repairs to an existing dwelling unit including an attached garage or carport that was damaged or destroyed by fire, termites, natural disaster, accidental means, or other calamity, provided that:
    - (A) The repairs shall not enlarge, expand or intensify the use beyond the former building footprint of the dwelling unit, provided however, for every ten (10) feet the replacement structure is setback away from the shoreline compared to its original position, the replacement structure can be enlarged by one hundred (100) square feet in area;
    - (B) The repairs are permitted by the building code, flood hazard regulations, and special management area requirements; and
    - (C) The repairs are started within two-years from the date of the damage.
    - (D) Except that the rebuilding of the dwelling unit that is nonconforming pursuant to Article 23 of the CZO that is destroyed or damaged more than 50% shall not be allowed.
    - (E) For purposes of this Article, the application of Section 8-27.3 by itself shall not make a dwelling unit nonconforming.
  - (7) Beach nourishment or dune restoration projects approved by all applicable governmental agencies.
  - (8) A structure or activity that has been determined by the director to be a minor structure or activity.
  - (9) Qualified demolition of existing structures.
- (b) Minor structures or activities shall be completed or operating within one year from the latter of the date of the department's determination or the date of approval of the last discretionary permit.

Sec. 8-27.8 Variance application. (a) A written application for variance shall be made in a form prescribed by the director and shall be filed with the director. The application shall include plans, site plans, photographs, and any other plans, drawings, maps, or data determined by the director to be necessary to evaluate the application. The application shall also include:

(1) An administrative fee of \$300.00. The administrative fee shall be \$7,300.00 if the application is after-the-fact;

(2) Certification from the owner or lessee of the lot which authorizes the application for variance;

(3) An environmental assessment prepared in accordance with HRS chapter 343, and the environmental impact statement rules and applicable guidelines of the State of Hawai'i;

(4) The names, addresses, and the tax map key identification of owners of real property situated adjacent to and abutting the boundaries of the land on which the proposed use, activity, or operation is to occur;

(5) A site plan of the shoreline setback area, drawn to scale, showing:

(A) Existing natural and man-made features and conditions within;

(B) Existing natural and man-made features and conditions along properties immediately adjacent to the shoreline setback area and proposed improvements;

(C) The certified shoreline and the shoreline setback line;

(D) Contours at a minimum interval of two (2) feet unless waived by the director; and

(E) Proposed development and improvements showing new conditions with a typical section (if a structure).

(6) A copy of the certified shoreline survey map of the property;

(7) Detailed justification of the proposed project, which addresses the purpose and intent of these rules and the criteria for approval of a variance;

(8) Analysis and report of coastal erosion rates and coastal processes; and

(9) Any other information required by the director.

(b) Upon a determination by the director that the application is complete and in compliance with HRS Chapter 205A, part II and this article, the director shall submit the application to the commission. If the application is determined to be incomplete by the director, the director shall return the application to the applicant with a written description identifying the portions of the application determined to be incomplete. The director shall submit a written report, a copy of the application, and all other documents submitted on the application to the commission prior to the matter appearing on an agenda of the commission.

(c) Except as otherwise provided in this section, all applications for variances shall be heard, noticed, and processed as public hearing matters. Not less than thirty (30) calendar days before the public hearing date, the applicant for a variance shall mail notices of public hearing by certified or registered mail, postage prepaid, to owners of real property which abut the parcel that is the subject of the application. Not less than thirty (30) days prior to the public hearing date, the director shall publish a notice of hearing once in a newspaper that is printed and issued at least twice weekly in the County and which is generally circulated throughout the County. The notice

shall state the nature of the proposed development, the date, time, and place of the hearing, and all other matters required by law.

(d) Exceptions. Prior to action on a variance application, the commission may waive a public hearing on the application for:

(1) Stabilization of shoreline erosion by the moving of sand entirely on public lands;

(2) Protection of a legal structure costing more than \$20,000; provided that, the structure is at risk of immediate damage from shoreline erosion;

(3) Other structures or activities; provided that, no person or agency has requested a public hearing within twenty-five calendar days after public notice of the application. For the purposes of this section "public notice of the application" shall be publication of a notice of the application in a newspaper which is printed and issued at least twice weekly in the County of Kaua'i, which informs the public of the subject matter of the application and which identifies the date and time by which a written request for a public hearing must be received by the commission; or

(4) Maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime or watersports recreational facilities, which result in little or no interference with natural shoreline processes.

#### Sec. 8-27.9 Criteria for approval of a variance.

(a) A shoreline area variance may be considered for a structure or activity otherwise prohibited by this Article, if the commission finds in writing, based on the record presented, that the proposed structure or activity is necessary for or ancillary to:

(1) Cultivation of crops;

(2) Aquaculture;

(3) Major landscaping; provided that, the commission finds that the proposed structure or activity will not adversely affect beach processes, public access or public views and will not artificially fix the shoreline;

(4) Drainage;

(5) Boating, maritime, or water sports recreational facilities;

(6) Facilities or improvements by public agencies or public utilities regulated under HRS chapter 269;

(7) Private facilities or improvements that are clearly in the public interest;

(8) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the commission also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area;

(9) Private facilities or improvements that may artificially fix the shoreline but not adversely affect beach processes; provided that, the commission also finds that shoreline erosion is likely to cause severe hardship to the applicant if the facilities or improvements are not allowed within the shoreline area and all alternative erosion control measures, including retreat, have been considered;

(10) The commission may consider granting a variance for the protection of a dwelling unit or public infrastructure; provided that, the structure is at imminent risk of damage from coastal erosion, such damage poses a danger to the health, safety, and welfare of the public,

and the proposed protection is the best shoreline management option in accordance with relevant state policy on shoreline hardening.

(11) In the case where the applicable shoreline setback line does not allow for the minimum buildable footprint for a single-family dwelling unit, the commission may consider granting a variance for the protection of a single-family dwelling unit under the following guidelines:

(A) The front yard setback may be reduced where feasible to allow for the minimum buildable footprint;

(B) The side yard setback may be reduced where feasible to allow for the minimum buildable footprint;

(C) The minimum buildable footprint may be reduced to 1500 square feet.

(D) If the foregoing approaches (a), (b), and (c) are done to the maximum extent practicable, the calculated shoreline setback may be reduced, provided that under no circumstance shall the shoreline setback line be less than forty (40) feet;

(E) Provided further that any new structure(s) approved within the shoreline setback area shall not be eligible for protection by shoreline hardening during the life of the structure, and that this limitation shall be written in a unilateral agreement that is recorded by the Bureau of Conveyances. A copy of the unilateral agreement shall be submitted to the Planning Department prior to the issuance of the required zoning and/or shoreline permit. Failure of the grantor to include the aforesaid deed restriction shall constitute a violation of this section, and grantor shall be subject to the penalties set forth in this article.

(b) A structure or activity may be considered for a variance upon grounds of hardship if:

(1) The applicant would be deprived of all reasonable use of the land if required to fully comply with the shoreline setback rules;

(2) The applicant's proposal is due to unique circumstances and does not draw into question the reasonableness of the shoreline setback rules; and

(3) The proposal is the best practicable alternative which best conforms to the purpose of the shoreline setback rules.

(c) Before granting a hardship variance, the commission must determine that the applicant's proposal is a reasonable use of the land. Because of the dynamic nature of the shoreline environment, inappropriate development may easily pose a risk to individuals or to the public health and safety or to the coastal zone management and resources. For this reason, the determination of the reasonableness of the use of land should properly consider factors such as shoreline conditions, erosion, surf and flood conditions and the geography of the lot.

(d) For purposes of this section, hardship shall not include economic hardship to the applicant resulting from: (1) county zoning or setback changes, planned development permits, cluster permits, or subdivision approvals after June 16, 1989; (2) any other permit or approval which may have been issued by the commission, or (3) actions by the applicant.

(e) No variance shall be granted unless appropriate conditions are imposed:

(1) To maintain and require safe lateral access to and along the shoreline for public use or adequately compensate for its loss;

(2) To minimize and mitigate risk of adverse impacts on beach processes;

(3) To minimize and mitigate risk of structures failing and becoming loose rocks or rubble on public property; and

(4) To minimize adverse impacts on public views to, from, and along the shoreline. For purposes of this section only, "adversely impacts public views" means the adverse impact on public views and open space resources caused by new building structures exceeding the height limits set forth in Chapters 8 and 10 of the Kaua'i County Code, as amended; and

(5) To comply with County Code provisions relating to flood plain management, Chapter 15, Article 1, Kaua'i County Code, and Drainage, Chapter 22, Article 16, Kaua'i County Code, respectively.

(f) The applicant may apply to the department for an amendment to the variance in a manner consistent with the procedures of the special management area rules of the Kaua'i Planning Commission.

Sec. 8-27.10 Enforcement. The director shall enforce this article in accordance with HRS Chapter 205A.

Sec. 8-27.11 Penalties. Any person who violates any provision of these rules shall be subject to the penalties provided for in HRS Section 205A-32.

Sec 8-27.12 Appeal of director's decision. Any person, including the applicant, may appeal the director's decision establishing the shoreline setback line, accepting the coastal erosion study or establishing a minor structure or activity classification pursuant to Chapter 9 of The Rules of Practice and Procedure of the County of Kaua'i Planning Commission.

Sec. 8-27.13 Promulgation of Rules and Regulations.

This ordinance shall supersede the Shoreline Setback Rules and Regulations of the Planning Department of the County of Kaua'i in existence at the time of adoption of this ordinance. Pursuant to HRS Chapter 91, as amended, the Planning Commission may promulgate rules and regulations consistent with this Article as may be necessary to implement any of the provisions of this Article."

SECTION 3. If any provision of this ordinance or application thereof to any person, persons, or circumstances is held invalid, the invalidity does not affect the other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this ordinance are severable.

SECTION 4. This ordinance shall take effect upon its approval. This ordinance shall not affect any application which has been approved by the County Council or the Commission prior to the effective date of this ordinance. This ordinance shall apply to any subsequent application for approval on said land."



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