BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of:	)	CC-2022-3
	)	
Petition for Intervention involving Special Management Area Use Permit SMA(U)-2022-1, Class IV Zoning Permit Z-IV-2022-1, and Use Permit U-2022-1 for the Construction of a Farm Dwelling Unit, Guest House, Garage and Associated Site Improvements, within Lot 11-A of the Seacliff Plantation Subdivision in Kīlauea, involving a parcel situated approximately 1,000 feet West of the Pali Moana Place/Makanaʻano Place Intersection, further identified as Tax Map Key: (4) 5-2-004: 084 (Unit 1) affecting a Larger Parcel approximately 12.305 acres in size,	)	Special Management Area Use Permit: SMA(U)-2022-1 Class IV Zoning Permit: Z-IV-2022-1 Use Permit: U-2021-1 TMK: (4) 5-2-004:084 (Unit 1) HEARING OFFICER'S REPORT AND RECOMMENDATION OF CONTESTED CASE; CERTIFICATE OF SERVICE <u>HEARING (Held)</u>: Dates: November 14, 15, and 17, 2022, December 12, 13, and 15, 2023, and January 9, 10, and 12, 2023
NĀ KIAʻI O NIHOKŪ, Petitioner-Intervenor, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI, Respondent, and PHILIP J. GREEN and LINDA M.	)	*(caption continued on next page)*

GREEN, Trustees of the Philip J. Green, Jr., Trust, dated December 4, 2018, and the Linda M. Green Trust, dated December 4, 2018,

Applicants.

HEARING OFFICER'S
REPORT AND RECOMMENDATION OF CONTESTED CASE

I. INTRODUCTION.

Applicants PHILIP J. GREEN and LINDA M. GREEN, Trustees of the Philip J. Green, Jr., Trust, dated December 4, 2018, and the Linda M. Green, Trust, dated December 4, 2028 ("Applicants"), submitted to Respondent PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI ("Planning Department") in June 2021 their Application for a Special Management Area Use Permit (SMA(U)-2022-1), Class IV Zoning Permit (Z-IV-2022-1) and Use Permit (U-2022-1) ("SMA Application"), proposing to construct a single-family dwelling, guest house, garage, pool, rock retaining wall, site grading, agricultural and landscape plan, driveway, fencing, outside shower, and associated utilities, on Lot 11-A of the Seacliff Plantation Subdivision ("Proposed Project"). Exhibit I[1]

[1] Exhibits identified by **Roman Numerals** are those introduced by Applicants, Exhibits referenced by **Alphabets** were offered by the Planning Department, and Exhibits submitted by Intervenor NĀ KIAʻI O NIHOKŪ ("Intervenor") have been identified by the letter "I" followed by **Numbers** such as "I-1, I-2, etc." See generally Hearing Officer's Scheduling Order dated February 8, 2022 ("Scheduling Order") at 3-4.

at 7. The SMA Application was first considered by the Planning Commission for the County of Kauaʻi ("Planning Commission") at its September 14, 2021 Meeting, but deferred decision-making until its next meeting scheduled for October 26, 2021. Compare Exhibit E at 31, with *Id.* at 43-44.

On October 5, 2021, Intervenor as "a community-based intergenerational organization of cultural practitioners, educators, scientists, and citizens founded in April 2016"[2], filed its Petition To Intervene requesting a contested case hearing on the SMA Application ("Petition To Intervene"). See Exhibit G. In response, Applicants filed their opposition to the Petition To Intervene. See Exhibit H. At the October 26, 2021 Planning Commission Meeting, action on the Petition To Intervene was deferred until its December 14, 2021 Meeting in order to provide time for the Planning Department to complete its analysis for the Planning Commission's consideration the effect the Proposed Project would have on the "reasonable exercise of customary and traditionally exercised rights of Hawaiians to the extent feasible"[3] (sometimes "NH Rights") as detailed in *Ka Pa'akai O Ka 'Aina v. Land Use*

[2] Exhibit G at 2. Note that although Intervenor is stated to have been founded in 2016, it was not registered with Department of Commerce and Consumer Affairs for the State of Hawaiʻi until November 18, 2020. See Exhibit VII.

[3] *Matter of Conversation District Use Application HA-3568* ("*Mauna Kea II*"), 143 Hawaiʻi 379, 395, 431 P.3d 752, 768 (2018) *citing Public Access Shoreline Hawaii by Rothstein v. Hawaii County Planning Commission by Fujimoto* ("*PASH*"), 79 Hawaiʻi 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995).

Commission, 94 Hawai'i 31, 35, 7 P.3d 1068, 1072 (2000) (sometimes "*Ka Pa'akai* Analysis"). Compare Exhibit L at 20-21, with *Id.* at 18-20.

On November 24, 2021, the Planning Department completed the *Ka Pa'akai* Analysis,[4] and with its Supplement # 6 To Planning Director's Report (Amended), recommended preliminary approval of the SMA Application with the following conditions:

1. The proposed improvements shall be constructed as represented. Any changes to said development shall be reviewed by the Planning Director to determine whether Planning Commission review and approval is warranted.

2. Prior to commencement of the proposed development, written confirmation of compliance with the requirement from all reviewing agencies shall be provided to the Planning Department. Failure to comply may result in forfeiture of the SMA Permit.

3. The proposed dwelling and guest house shall not be utilized for any transient accommodation purposes. It shall not be used as a transient vacation rental (TVR) or as a homestay. This restriction shall be incorporated into the deed restrictions of the subject parcel in the event the property is sold to another party, draft copies of which shall be submitted to the Planning Department prior to building permit application approval.

4. To ensure that the project is compatible with its surroundings and to minimize impact of the structures, the external color of the proposed dwelling, guest house, and detached garage shall be of moderate to dark earth-tone color. The proposed color scheme and a landscape plan should be submitted to the Planning Department for review and acceptance prior to

[4] See generally Exhibit N.

building permit application.

5. The Applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the Applicant shall contact the State Department of Land and Natural Resources, Historic Preservation Division and the Planning Department to determine mitigation measures.

6. Relocate the development down the hill an additional 150 feet from the "Existing Building Setback Line" that created a semi-circle area as the building envelop.

7. Reduce the total square footage of the roofed areas including the house, portico, lanais, garage, and guest house (excluding driveway and pool) by 15 percent.

8. Grading and excavation shall be minimized to the maximum extent possible.

9. Provide a 10-foot-wide access easement for Native Hawaiian traditional and customary practices to access the USFWS[5] refuge (with USFWS approval) and cultural easement.

    a. Access will be provided above the "Existing Building Setback Line," along the fence line on the northern boundary of the property to the north-western corner of the property; or
    b. Access will be provided along the southern boundary of the property and connected to the western boundary of the property to the north-western corner of the property.

10. For the use and exercise of Native Hawaiian traditional and customary practices, provide an easement that encompasses a 50-foot by 50-foot area that is located at the north-western corner of the property, entirely above the setback line.

[5] "USFWS" stands for "United States Fish and Wildlife Service."

a. Access and use of the cultural easement may be up to one time per month, for up to an 8-hour period.
b. Access and use of the cultural easement may be for up to 25 individuals including practitioners of Native Hawaiian traditional and customary rights and members of Nā Kiaʻi o Nihokū. At least one member or representative of Nā Kiaʻi o Nihokū will be present and in attendance at all times during the use of the cultural easement.
c. Representatives of Nā Kiaʻi o Nihokū shall provide a minimum of 14 days' notice. Within 7 days of the proposed access, the owner shall permit the proposed access day or propose an alternative day within the designated month.

11. To avoid and minimize potential project impacts to Nene the following measures shall be incorporated:

a. Do not approach, feed, or disturb Nene.
b. If Nene are observed loafing or foraging within the project area during the Nene breeding season (September through April), a biologist familiar with the nesting behavior of Nene shall conduct a survey for nests in and around the project area prior to the resumption of any work. Repeat surveys shall be conducted after any subsequent delay of work of three or more days (during which the birds may attempt to nest).
c. All work shall immediately cease and contact the Service[6] for further guidance if a nest is discovered within a radius of 150 feet of proposed work, or a previously undiscovered nest is found within said radius after work begins.
d. In areas where Nene are known to be present, post and implement reduced speed limits, and inform personnel and contractors about the presence of endangered species on-site.
e. Pool areas shall be covered when not in use.

[6] "Service" is the United States Fish and Wildlife Service ("USFWS").

f. Predators on the property shall be eliminated and managed.

12. To avoid and minimize potential project impacts to Hawaiian seabirds the following measures shall be incorporated:

    a. Fully shield all outdoor lights so the bulb can only be seen from below bulb height and only use when necessary. Spotlights aimed upward or spotlighting of structures shall be prohibited.
    b. Install automatic motion sensor switches and controls on all outdoor lights or turn off lights when human activity is not occurring in the lighted area.
    c. No nighttime construction is allowed during the seabird fledging period, September 15 through December 15.
    d. Utility lines associated with this property shall be undergrounded.
    e. Light emitted from inside the structures shall be minimized to the maximum extent possible.
    f. Predators on the property shall be eliminated and managed.

13. The Applicant shall develop and utilize Best Management Practices (B.M.P's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.

14. The Applicant shall resolve and comply with the applicable standards and requirements set forth by the State Health Department, State Historic Preservation Division-DLNR, and the County Departments of Public Works, Fire, Transportation, and Water.

15. To the maximum extent possible and within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the Applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors and shall seek to employ residents of Kauai in temporary construction and permanent resort-related jobs. It is recognized that the Applicant may have

to employ non-Kauai residents for particular skilled jobs were no qualified Kauai residents possesses such skills. For purposes of this condition, the Commission shall relieve the Applicant of this requirement if the Applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.

16. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may, create, or to revoke the permits through the proper procedures should conditions of approval not be complied with or be violated.

17. Unless otherwise stated in the permit, once permit is issued, the Applicant must make substantial progress, as determined by the Director, regarding the development or activity within two (2) years, or the permit shall be deemed to have lapsed and be no longer in effect.

Exhibit O at 27-30 (footnotes added).

At its meeting on December 14, 2021, the Commission granted the Petition To Intervene and referred this matter to the Office of Boards and Commissions of the County of Kauaʻi ("Office of Boards and Commissions") to appoint a Hearing Officer to conduct a contested case hearing on the SMA Application ("Contested Case Hearing" or "Hearing"). Exhibit P at 29-30.

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II. PROCEDURAL HISTORY.

A. Preliminary Matters.

Shortly after the Office of Boards and Commission appointed this Hearing Officer on January 21, 2022, several Prehearing and Status Conferences were conducted during the remainder of that year and resolved a number of Prehearing Motions and Requests of the Parties.[7] As a result of the several Prehearing and Status Conferences, the Planning Department and Intervenor confirmed the two (2) issues to be addressed at the Contested Case Hearing were: (a) whether Applicants' proposed construction of a single-family dwelling, guest house, garage, pool, rock retaining wall, site grading, agricultural and landscape plan, driveway, fencing, outside shower, and associated utilities on Lot 11-A of the Seacliff Plantation Subdivision (i.e. Proposed Project) was subject to the Setback Requirement established in 1982, or the Setback Requirement adopted in 1994; and (b) whether Traditional and Customary Native Hawaiian Cultural Practices

[7] See generally: (1) Scheduling Order; (2) Minute Order Regarding Status Conference dated April 5, 2022; (3) ***Second*** Minute Order Regarding Status Conference dated May 31, 2022 ("***Second*** Minute Order"); (4) ***Third*** Minute Order Regarding Status Conference dated August 30, 2022 ("***Third*** Minute Order"); (5) Order Denying Without Prejudice Intervenor's Motion To Allow Site Visit During Intervenor's Presentation Of Evidence Dated October 17, 2022, dated November 7, 2022 ("Order Denying Site Visit"); (6) Order Denying Applicants Philip J. Green And Linda M. Green's Motion For Summary Judgment And/Or Adjudication, Dated October 17, 2022, dated November 8, 2022 ("Order Denying Summary Judgment"); and (7) ***Fourth*** Minute Order Regarding Status Conference dated November 9, 2022 ("***Fourth*** Minute Order").

(i.e. NH Rights) dictate the denial of the SMA Application and the Proposed Project.[8] See ***Third*** Minute Order at 5.

B. <u>Contested Case Hearing And Exhibits</u>.

The Contested Case Hearing was conducted on November 14, 2022, and continued on November 15 and 17, 2022, December 12, 13, and 15, 2022, and January 9, 10, and 12, 2023. There were a total of eighteen (18) witnesses[9] testifying during the nine (9) days of the Hearing. At the Hearing the following exhibits were admitted into evidence, either by agreement of the Parties,[10] witness testimony,[11] or by way of Judicial Notice:

1. <u>Applicants' Exhibits</u>: I through XXX; XXXII through XXXV; and XLIV through L during Applicants' Rebuttal Case;[12]
2. <u>Planning Department's Exhibits</u>: A through BB;[13] and

[8] Applicants also agreed these were the two (2) issues to be addressed at the Hearing. ***Third*** Minute Order at 5-6.
[9] There would be **nineteen (19)** witnesses if you include Applicant PHILLIP J. GREEN ("Green"). See e.g., Jan. 12, 2023 Tr. at 1. References to the Contested Case Hearing Transcripts are in the following format: "[date] Tr. [page]:[line(s)]" or "[date] Tr. [page]:[line] to [page]:[line]."
[10] The Parties stipulated to the authenticity and admission of the exhibits, but reserved the right to provide evidence and argument to contest their weight and relevancy.
[11] Exhibits admitted by witness testimony were either without objection, or over the objection of the non-offering Party or Parties.
[12] Exhibits XLIV through L were admitted into evidence by Green on day nine (9) of the Hearing. See ***Amended*** Minutes Of Contested Case Hearing - Days Seven (7) Through Nine (9) dated January 21, 2023 ("***Amended*** Minutes: Days 7-9") at 6.
[13] Exhibit BB was admitted by stipulation of the Parties on day (5) of the Hearing. See Minutes Of Contested Case Hearing - Days Four (4) Through Six (6) dated December 23, 2022 ("Minutes: Days 4-6") at 5.

3. Intervenor's Exhibits: I-1 through I-108, and I-51A.[14]

See ***Amended*** Minutes Of Contested Case Hearing – Days One (1) Through Three (3) dated December 1, 2022 ("***Amended*** Minutes: Days 1-3") at 3-4.

C. Transcripts And Briefing.

On January 11, 2024, the Final Transcripts of the Hearing was distributed to the Parties. Consequently, Applicants submitted their Closing Brief dated February 9, 2024 that same day ("Applicants' Closing Arguments"), as well as their Proposed Findings of Fact and Conclusions of Law dated February 9, 2024 ("Applicants' Proposed FoF/CoL"). Thereafter, the Planning Department provided to this Hearing Officer its Closing Brief dated February 23, 2024 ("Planning Department's Closing Arguments"), and Proposed Findings of Fact and Conclusions of Law also dated February 23, 2024 ("Planning Department's Proposed FoF/CoL") that same day. Also on that same day, this Hearing Officer received Intervenor's Closing Responsive Brief dated February 23, 2024 ("Intervenor's Closing Arguments") and Proposed Findings Of Facts, Conclusions Of Law And Order also dated February 23, 2024 ("Intervenor's Proposed FoF/CoL"). Finally, on March 1, 2024, Applicants submitted their Reply Brief To 1) *Respondent Planning Department Of The County Of Kauai's Closing*

[14] Exhibit I-51A was admitted into evidence by stipulation of the Parties on day eight (8) of the Hearing. See ***Amended*** Minutes: Days 7-9.

Brief And 2) *Intervenor's Closing Responsive Brief,* Dated February 23, 2024 ("Applicants' Reply").

III. FINDINGS OF FACT.

A. The Subject Property And Parties.

1. On August 12, 2019, and October 19, 2019, Applicants purchased condominium apartment Unit No. 1 and Unit No. 2, respectively, both of which combined comprise Lot 11-A located in the Seacliff Plantation Subdivision[15] in Kīlauea, Kauaʻi, Hawaiʻi, and more particularly identified as Tax Map Key: (4) 5-2-004:084 ("Subject Property"). Exhibits XXVI and XXVII.[16]

2. The Subject Property is 12.305 acres and located on the upper backside of Nihokū,[17] within the ahupuaʻa[18] of Kīlauea (sometimes "Ahupuaʻa").

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[15] The Seacliff Plantation Subdivision is a gated community accessible by car through a keyed gate or by foot through a pedestrian access ("Subdivision"). See generally Exhibit I at 8-10 and Nov. 14, 2022 Tr. 41:17 to 42:17.

[16] Since Exhibits XXVI and XXVII are virtually identical in all material respects, except as to the Condominium Unit conveyed (i.e. Unit No. 1 for Exhibit XXVI, as compared to Exhibit XXVII for Unit No. 2), and date of execution and recordation thereof, this Report and Recommendation shall hereinafter cite to only Exhibit XXVI (sometimes "Deed"), unless otherwise indicated to the contrary.

[17] Nihokū, also referred to as "Crater Hill," is nestled along the side of a dormant volcano crater. See generally Exhibits I-1 to I-3 and Jan. 9, 2023 Tr. at 51:7-19, and compare with Exhibits I-62 and I-63.

[18] "An ʻahupuaʻa' is a land division usually extending from the mountains to the sea along *rational* lines, such as ridges or other nature characteristics." *PASH,* 79 Hawaiʻi at 429 n.1, 903 P.2d at 1250 n.1 (*italics* in original) *citing In re Boundaries of Pulehunui,* 4 Haw. 239, 241 (1879) (acknowledging that these "rational" lines may also be based upon tradition, culture, or other factors).

Compare Exhibit VI, with Exhibit G at 2, and Nov. 15, 2022 Tr. at 109:28 to 110:12.

3. The Subject Property also abuts the 203-acre United States Fish & Wildlife Service Kīlauea National Wildlife Refuge ("the Refuge"), a wildlife preserve for various seabird species, including the endangered ʻuaʻu (Hawaiian Petrel) and threatened endemic ʻaʻo (a sub-species of the Newell's Shearwater). See generally Exhibit I-4 at 1.

4. The Deed discloses the Subject Property is SUBJECT TO, among other encumbrances:

> 2. Building setback line as referenced on Subdivision map approved by the Planning Commission of the County of Kauai on May 26, 1994 [("1994 Building Setback Line" or "1994 Setback Line")].
>
> . . .
>
> 12. The terms and provisions contained in the following:
>
> DECLARATION OF CONDOMINIUM PROPERTY REGIME FOR "SEACLIFF KILOHANA["] dated March 31, 2017, recorded as Document No. A-63160587 [("Declaration")].
>
> . . .
>
> Said Declaration was amended by instrument dated June 9, 2017, recorded as Document No. A-63730575 [("Amendment To Declaration")].

Exhibit XXVI at 11-12 (emphasis in original).

5. The Amendment To Declaration, among other things, replaced the description of the property identified as Exhibit "A" in the Declaration, and noted the Subject Property was further SUBJECT TO, among other encumbrances, the "Building setback line as shown on [the] map prepared by Cesar C. Portugal, Land Surveyor, dated [and] revised July 1983 [('1982 Building Setback Line' or '1982 Setback Line')]." Compare Exhibit I-26 at Exhibit "A" and *Id.* at page 3 of 5, with Exhibit I-25 at Exhibit "A".[19]

6. The Subject Property is vacant land in the Subdivision "improved with road and utility infrastructure as a condition of the Planning Commission's approved planned community." Exhibit I at 10, § 3.1.

7. The Subject Property has the following special zoning designations and development standards:

a. Special Management Area Designation;

b. Development Standards prescribed in §§ 8-4.3 and 8-9.2 of the *Comprehensive Zoning Code* ("CZO"),[20]

c. Use Permit Requirements set forth in § 8-3.2 of the CZO;

d. County Zoning Designation of Open (O)/Special Treatment-Resource (STG-R) Designation;

[19] Item No. 2 of this Exhibit "A" to the Declaration also references the 1982 Building Setback Line. See Exhibit I-25 at Exhibit "A," Page 1 of 2.

[20] The CZO is contained in Chapter 8 of the *Kaua'i County Code 1987*.

e. State Land Use District of Agricultural Designation;

f. General Plan Designation of Natural; and

g. North Shore Development Planning Area Goals and Objectives.

Exhibit B at 2-6.

8. The Planning Department is an agency within the Executive Branch of the County of Kauaʻi, a municipal corporation organized under the laws of the State of Hawaiʻi. Compare Art. XIV, with Art. I, both in *The Charter of the County of Kaua'i (2022 Codified Version)*.

9. Intervenor, in addition to the description in the Petition To Intervene, stated it would be so directly and immediately affected by the SMA Application that its interest in this Contested Case is clearly distinguishable from that of the general public because it "holds a Special Use Permit with the United States Fish and Wildlife Services [sic] (USFWS) to escort groups for cultural, educational, and ecological restoration purposes from Wōwōni point to Mōkōlea, including the land of Nihokū within the ahupuaʻa[s] of Kīlauea and Kāhili. These lands encompass the Kīlauea Point National Wildlife Refuge (KPNWR)." Exhibit G at 2, and Compare with Rule 1-4-1 of the *Rules Of Practice And Procedure Of The Kaua'i County Planning Commission (Codified May 2014)* ("Commission Rules").

B. The Proposed Project.

10. The Proposed Project is situated on Unit No. 1 of the Subject Property and consists of a 6,113 square foot single-family farm dwelling unit ("FDU")[21] with a covered portico, a 1,849 square foot detached garage, a five hundred square foot guest house with a kitchen ("Guest Cottage"), a swimming pool, and miscellaneous site improvements, such as rock retaining walls, fencing, outside shower, driveway, ground mounted photovoltaic (PV) solar array, and landscaping for the Subject Property. Exhibit A at Exhibit "D", Sheet 9 and Exhibit B at 3.

11. The FDU features three bedrooms, three-and-one half bathrooms, a great room, library media room, kitchen, pantry, laundry area, portico, and two lanais. Exhibit I at 11 and Exhibit "D," Sheet 13.

[21] Applicants argue the "living area" of the FDU is only 4,586 square feet, rather than 6,113 square feet. See Applicants' Reply at 2 citing Exhibit I at Exhibit "D," Sheet 11. Applicants are correct that the "living area" of the FDU is only 4,586 square feet. See *Id.* However, the entire "footprint" of the FDU is 6,113 square feet when including the lanai area of 992 square feet and portico of 535 square feet. See *Id.* Applicants acknowledge this distinction. See Applicants' Reply at 2.
Applicants further argue they "agreed to reduce the size of the development and move it lower down the hill to accommodate concerns raised." Applicants' Reply at 2 citing Nov. 14, 2022 Tr. at 46:2-10 and 59:33-37, and Compare Exhibit IV, with Exhibit V at Exhibit 4, page 21. However, Applicants have not directed this Hearing Officer to any admitted Exhibits and/or testimony indicating the amount of reduction. Additionally, Exhibit IV which appears to reflect the relocation of the Project "lower down the hill" does not include any square foot calculations. Exhibit IV at 1-2.

12. The Guest Cottage contains one bedroom, one bath, and a kitchen/living room. *Id.* at Exhibit "D," Sheet 12.

13. The four (4) bay Garage is for two vehicles, farm equipment, and a workshop.[22] *Id.* and Exhibit "D," Sheet 11.

14. The proposed Agricultural and Landscape Plan identifies a number of Fruit Trees, Palm Trees, Flower Trees, Floral Vegetation and other Plants. *Id.* at Exhibit "D," Sheets 7 and 8.

C. <u>The 1982 Building Setback Line.</u>

15. "The Planning Commission at its meeting held on February 10, 1982, voted to reconsider its action of December 23, 1981, and approved the SMA Use Permit [SMA(U)-82-2] . . . [indicating t]he proposed building limit setback line 'C' shall be established on the ground and on the map . . . submitted by the Applicant with the February 2, 1982, letter to the Planning Commission [(i.e. 1982 Building Setback Line)]." Exhibit I-13 at 1.

16. One of the conditions for approval of SMA(U)-82-2 was for the developer to "dedicate the 75± acres of prime agricultural land to the County [of Kauaʻi] for agricultural purposes [("Ag Park").] Exhibit I-13 at 2.

[22] Green testified "initially it was a four car garage. We were gonna move it down to a three-car garage." Nov. 14, 2022 Tr. at 46:6-8.

17. The Ag Park was dedicated as referenced in SMA(U)-82-2. Jan. 9, 2023 Tr. at 15:7-32.[23]

18. The 1982 Building Setback Line's location was designed to prohibit any building with a maximum height of 25 feet measured from grade at all points along its roof peak: (a) from penetrating the ridgeline horizon when viewed from Kīlauea Town when such building is located on the western portion of Nihokū; or (2) when that building is located on the eastern portion of Nihokū, its' roof line may not be higher than the profile line of the flat land between Kuhio Highway and Nihokū, when viewed from the visible points along Kuhio Highway.[24] Exhibit I-13 at 1-2.

19. The 1982 Building Setback Line was located in the flat area of the Subdivision, and the result of an agreement between the developer, The O'Connor Corporation, and the intervenors in Special Management Use Permit SMA(U)-82-2. Compare Dec. 13, 2022 Tr. at 115:36-41, with *Id* at 116:1-26.

20. The 1982 Building Setback Line is shown on the map prepared by Cesar C. Portugal, Land Surveyor dated and revised July 1983

[23] The Ag Park was dedicated sometime after December 5, 1994. Compare Jan. 9, 2023 Tr. at 15:26-28, with Exhibit XV at 1 and 18. However, approval of SMA(U)-82-2 did not set forth a timetable for dedication of the Ag Park. See Exhibit I-13 at 1-4.

[24] Staff from the Planning Department and the members of the Planning Commission conducted site visits to craft these conditions to protect the view planes from those locations (i.e. Kuhio Highway, and Kīlauea Town). Dec. 13, 2022 Tr. at 113:15 to 114:33.

("Portugal Map"). Exhibit XXVIII at Exhibit "B," Page 1 of 4, Encumbrance No. 3.

21. A copy of the Portugal Map was admitted into evidence as Exhibit I-19.

D. <u>The 1994 Building Setback Line</u>.

22. The 1982 Building Setback Line for the Subdivision (including the Subject Property) was amended by the Planning Commission at its meeting held on November 10, 1994 (i.e. 1994 Building Setback Line). Exhibit XV at unnumbered 19 (Page 1 of the Planning Department's letter dated November 30, 1994 to The O'Connor Corp., et al. ("O'Connor Letter")).

23. The 1994 Building Setback Line appeared as a semicircle on each of the applicable lots in the Subdivision, including the Subject Property. See Exhibit V at Exhibit 9, last page, and Exhibit XV at unnumbered 30.

24. As a condition for approval of the 1994 Setback Line, among other things, the developer of the Subdivision (i.e. The O'Connor Corp., et al. and hereinafter "Developer") "shall remit $125,000 to [the Kauai Public Land Trust] [(']KPLT[')] to be used for infrastructure and improvements . . . associated with the ag lots, community park, and other community benefits including construction of the irrigation system, minor road improvements, community park amenities

('Improvements'), and a $25,000 administration fee for the KPLT." Exhibit XV at unnumbered 19-20 (O'Connor Letter at 1-2).

25. Prior to Final Subdivision Approval, the Developer "shall either construct the [Improvements], or file a subdivision agreement and bond or security with the Planning Commission in a form approved by the County Attorney." *Id.* at unnumbered 20 (O'Connor Letter at 2).

26. The Improvements were never constructed and therefore, the $125,000 tendered by the Developer to the KPLT was returned by KPLT to the Developer. Compare Dec. 13, 2022 Tr. at 12:4-7, Jan. 9, 2023 Tr. at 15:21-24 and Exhibit I-22 at 3, with Dec. 15, 2022 Tr. at 137:5 to 138:16.

27. Since the Improvements were not constructed, "and the two year duration of the SMA Permit as indicated in the County of Kauai SMA Rules and Regulations[25] has expired[,] . . . the original 1982 setback line remains in effect, and the applicant's structure should be located behind that 1982 line." Exhibit I-22 at 3 (footnote added) and see also SMA Rules Section 10.0.

28. In 2002, Planner George Kaliski ("Kalisik") for the Planning Department in reviewing an application for a Zoning Permit and Use Permit for the Subject Property determined that the "original 1982 setback line remains in effect, and the applicant's structure should be located behind that 1982 line [because the

conditions for approval of the 1994 Setback Line were not met]."[26] Exhibit I-22 at 3 and see generally Dec. 13, 2022 Tr. at 5:10-37.

29. The Planner after Kalisik reviewing applications for construction of improvements on Lots 13 and 15 in the Subdivision ("Other Applications" unless otherwise indicated to the contrary) applied the incorrect 1994 Setback Line, instead of the 1982 Setback Line, in approving those applications. See generally Dec. 15, 2022 Tr. at 15:6 to 16:7 and 17:11 to 18:8. In other words, the Other Applications were approved in error. *Id.* at 18:24-31.

30. The SMA Application and Other Applications were also reviewed and analyzed differently because "Crater Hill [(i.e. Nihokū)] has a – has an array of different zoning overlays, um, as well as some are within the Special Management Area and some are not." *Id.* at 18:34-36, and see also *Id.* at 18:32 to 19:11.

31. The Director of the Planning Department ("Director") concurred with the reasoning of Kalisik that any development on the Subject Property shall be constructed within the 1982 Setback Line, and therefore, determined the Proposed Project should also comply with the

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[25] The complete citation for "SMA Rules and Regulations" is *Special Management Area Rules And Regulations, As Amended October 2011 and March 5, 2015* ("SMA Rules").
[26] Kalisik also authored the Report recommending approval of SMA(U)-94-14 which amended the 1982 Building Setback Line and replaced it with the 1994 Setback Line. Compare Exhibit XV at 18, with *Id.* at 11-12, ¶1 and 16, ¶16.

1982 Building Setback Line because the SMA Permit authorizing the 1994 Building Setback Line had expired and no longer in effect due to the conditions in that permit not being met. Compare Exhibit I-22, with Nov. 15, 2022 Tr. at 139:33 to 140:29, Dec. 13, 2022 Tr. at 8:2-20, *Id.* at 10:2-8 and 20:13 to 21:16. See also Exhibit XVIII at 3.

32. Mr. Keith Nitta ("Nitta") was qualified as an Expert Witness in the area of Land Use Planning having previously been employed by the State of Hawaii Land Use Commission for three (3) years, and then with the Planning Department as a Planner for the next twenty-seven (27) years. Compare Jan. 12, 2023 Tr. at 57:5-30, with *Id.* at 50:24-35.

33. Nitta reviewed the Planning Department's files and documents for the lots in the Subdivision to determine whether the 1982 Setback Line, or 1994 Setback Line, governs the location of the Proposed Project on the Subject Property. Compare *Id.* at 62:21 to 63:22, with Exhibit I-8[27] at 1-2.

34. The Nitta Report observed there was a 1994 and 2002 request to amend the 1982 Building Setback Line. Exhibit I-8 at 4. However, "[t]he 1994 request was declared null and void through the subdivision process, and the second one in 2002 was withdrawn." *Id.*

[27] Exhibit I-8 shall sometimes hereinafter be referred to as the "Nitta Report."

35. Based upon Nitta's findings regarding the 1994 and 2002 request, the Nitta Report concluded "the 1994 [Building Setback Line was] . . . terminated at the subdivision level on July 10, 2001 after non-performance on all three (3) of the involved properties (**EXHIBITS A, B, and C**)[28]". *Id.* at 3 (emphasis in original; footnote added). "Therefore, the 1982 [Setback Line] approved under SMA permit SMA(U)-82-2 should still be in effect." *Id.* at 6.

36. Alternatively, the Nitta Report posited that "in the event the 1994 permits [to amend the 1982 Building Setback Line] are still valid, the [1994 Building Setback Line] cannot take effect until the conditions of the [1994] permits are met. Therefore, **up until such time that the 1994 conditions are met, the**

[28] Exhibit "A" is a letter dated July 12, 2001, from the Planning Department to The O'Connor Corporation "officially terminating [the Subdivision Application for Tax Map Key: (4) 5-2-04:99, including the 1994 Setback Line,] . . . in accordance with Section 9-3-8(c)(1) of the Subdivision Ordinance, Kauai County Code (1987)." Exhibit I-8 at Exhibit "A."

Exhibit "B" is a letter also dated July 12, 2001, from the Planning Department to Kīlauea Development Associates "officially terminating [their Subdivision Application for Tax Map Key: (4) 5-2-04:102, including the 1994 Setback Line,] . . . in accordance with Section 9-3-8(c)(1) of the Subdivision Ordinance, Kauai County Code (1987)." *Id.* at Exhibit "B."

Exhibit "C" is a letter similarly dated July 12, 2001, from the Planning Department to Ideal Acres & Farms, Inc. "officially terminating [its' Subdivision Application for Tax Map Key: (4) 5-2-04:30-34, including the 1994 Setback Line,] . . . in accordance with Section 9-3-8(c)(1) of the Subdivision Ordinance, Kauai County Code (1987)." *Id.* at Exhibit "C."

Although the "three involved properties" did not include the Subject Property, the 1994 Setback Line approved under Special Management Area Use Permit SMA(U)-94-14 was likewise terminated due to non-performance of the conditions in that permit, and reverted back to the 1982 Setback Line established with Special Management Area Use Permit SMA(U)-82-2. Compare Exhibit XVI , with Exhibit I-8 at 3 and 6.

1982 [Building Setback Line] should still be applicable." *Id.* at 5 (emphasis in original).

E. Applicability Of Native Hawaiian Customary And Traditional Practices Affecting The Subject Property.

1. Cultural Significance Of Nihokū.

37. Nihokū has great cultural significance because it is believed to have been once the home of the fire goddess Pele before relocating to Halemaʻumaʻu on Hawaiʻi Island. See generally Jan. 9, 2023 at 193:34 to 194:22, Jan. 10, 2023 Tr. at 130:32 to 132:12 and *Id.* at 144:17 to 147:22 and Jan. 12, 2023 Tr. at 28:9 to 29:1.

38. Nihokū is also significant for its' distinct winds and famous Hawaiian Chief that governed that area. Compare Dec. 15, 2022 Tr. at 123:3-30 and Exhibits I-34 through I-37, with Dec. 15, 2022 Tr. at 129:20-36.

39. The Refuge is also located at Nihokū and is the home of various seabird species, including the endangered ʻuaʻu (Hawaiian Petrel) and threatened endemic ʻaʻo (a sub-species of the Newell's Shearwater). See generally Exhibit I-4 at 1, I-87 to I-94, and I-101. These seabirds are considered kinolau, or

manifestations of different akua and ancestors.[29] See generally Exhibit I-1 at 3 and Jan. 10, 2023 Tr. at 133:15 to 134:5.

2. Native Hawaiians As Lawful Occupants Of The Ahupuaʻa And Beyond.

40. Several members of the general public that submitted testimony before the Planning Commission regarding the SMA Application, interviewed by the Planning Department in order to prepare Supplement #6 To Planning Director's Report (i.e. Exhibit N and sometimes "Supplement #6"), and/or testified at the Hearing, are native Hawaiians[30] residing in the Ahupuaʻa and beyond.[31]

41. Ms. Hōkū Cody ("Cody") **resides part-time in the Ahupuaʻa.** Exhibit I-1 at unnumbered 1 and Dec. 12, 2022 Tr. at 128:9-14. Cody is a Co-Founder of Intervenor. Dec. 12, 2022 Tr. at 105:25-36.

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[29] "Kinolau" and "Akua" are the many forms of Hawaiian "gods," and the cultural significance of the "seabirds [is that they] are able to traverse between the heavens were the akua dwell and the earth where humans reside[, serving as the medium between both worlds]." Exhibit I-1 at unnumbered 3.

[30] The term "native Hawaiian" refers to all "descendants of the indigenous peoples who inhabited the Hawaiian islands prior to 1778, regardless of blood quantum." *Flores-Case ʻOhana v. Univ. of Hawaiʻi,* 153 Hawaiʻi 76, 82 n.10, 526 P.3d 601, 607 n.10 (2023). By contrast, "'**N**ative Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778 as defined by the Hawaiian homes commission Act ('HHCA') § 201(a) (1920)." *Kanahele v. State,* --- Hawaiʻi ---, ---, --- P.3d ---, --- (2024), 2024 WL 2762503, *21 n.2 (emphasis added; internal quotation marks omitted).

[31] These native Hawaiians exercising their NH Rights need not only be lawful occupants of the "relevant" ahupuaʻa, but may have traveled from another part of the island. *See Pele Defense Fund v. Paty,* 73 Haw. 578, 619-20, 837 P.2d 1247, 1271-72 (1992).

42. Mr. William "Billy" Kinney, Sr. ("Kinney") **resides in the Ahupuaʻa.** Compare Exhibit N at Exhibit C, page 28, with *Id.* at Exhibit C, page 1 and see Dec. 12, 2022 Tr. at 32:21-40, 34:21-33 and 93:2-32. Kinney is a member of Intervenor. *Id.* at 33:24-25.

43. Mr. David Sproat ("Sproat") **resides at Kalihiwai Bay on Kauaʻi.**[32] Dec. 13, 2022 Tr. at 103:7-29.

44. Mr. Devin Forrest ("Forrest") **resides in Halelea, Kauaʻi.** Exhibit N at Exhibit D, page 5 and see also Dec. 13, 2022 Tr. at 162:22 to 163:11.

45. Kapua Chandler, Ph.D. ("Chandler") **resides in the Ahupuaʻa.** Jan. 9, 2023 Tr. at 130:5-11 and 132:23-26, and Exhibit I-2 at unnumbered 1.

46. Ms. Jessica Anne Kauʻionalani Fu ("Fu") **resides in the Ahupuaʻa.** Jan. 10, 2023 Tr. at 86:29 to 87:32 and Exhibit I-3 at unnumbered 1.

47. Kehaulani Kekua ("Kekua") **was born in Anahola were she still resides.** Compare Jan. 10, 2023 Tr. at 125:10-21, with *Id.* at 123:21 to 124:22.

48. Ms. Jenevieve Kuʻuipo Tori-Kaʻuhane ("Tori-Kaʻuhane") **resides in Anahola.**[33] Dec. 15, 2022 Tr. at 63:16-23 and 66:9-17.

[32] Sproat's daughter, Ms. Kapua Sproat is identified as a witness in the transcript for this proceeding on December 13, 2022, but actually she was only present to assist her father in locating and identifying the exhibits referenced in the questions asked of him. Compare Dec. 13, 2022 Tr. at 1, with *Id.* at 102:34-42.

49. Mehana Vaughan, Ph.D. ("Vaughan") **grew up in the Ahupuaʻa**. Exhibit N at Exhibit D, page 24, and see also Jan. 12, 2023 Tr. at 182:4 to 183:4. Vaughn is one of the founding members of Intervenor. Jan. 12, 2023 Tr. at 183:6-10.

50. Cody, Kinney, Sproat, Forrest, Chandler, Fu, Kekua, Tori-Kaʻuhane and Vaughan (sometimes "native Hawaiians") all testified under oath at the Hearing. See e.g., Dec. 12, 2022 Tr. at 96:24-27, Dec. 13, 2022 Tr. at 102:20-24, Dec. 13, 2022 Tr. at 162:2-6, Jan. 9 2023 Tr. at 79:11-14, Jan. 9 2023 Tr. at 202:10-13, Jan. 10, 2023 Tr. at 123:3-5, Dec. 15, 2022 Tr. at 62:36-39 and Jan. 12, 2023 Tr. at 180:12-15.

3. Customary And Traditional Native Hawaiian Practices At Nihokū.

a. In Existence Prior To November 25, 1892.

51. The native Hawaiians testified at the Hearing that their practices customarily and traditionally exercised for subsistence, cultural and religious purposes in the Ahupuaʻa predate November 25, 1892.

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[33] Tori-Kaʻuhane's classification as a native Hawaiian is not based upon a "direct blood lineage, but through her father who was "hanai" into a Hawaiian family whose direct lineage goes back to 1778. Dec. 15, 2022 Tr. at 96:5-22.
"Hanai" means to feed or nourish, and "refers to a child who is reared, educated, and loved by someone other than the child's natural parents." *Interest of AB,* 145 Hawaiʻi 498, 519 n.1, 454 P.3d 439, 460 n.1 (2019) *quoting Native Hawaiian Law: A Treatise* 1140 (Melody Kapilialoha MacKenzie with Susan K. Serrano, D. Kapuaʻala Sproat, eds., 2015) (citation omitted).

52. Kinney is certain that the practice of Kilo was established as a customary and traditional native Hawaiian practice as of November 25, 1892. See Dec. 12, 2022 Tr. at 93:43 to 94:7.

53. Sproat testified that his wife's family for seven (7) generations engaged in customary and traditional native Hawaiian practices such as Marine Resource Management, Fishing and Kilo, at Nihokū and neighboring areas. See generally Dec. 13, 2022 Tr. at 105:8 to 108:23.

54. Forrest noted that Hula, the Awa Ceremony,[34] Pule,[35] the Makahiki Ceremony and Kilo, were customary and traditional native Hawaiian practices in existence prior to November 25, 1892. See Dec. 13, 2022 Tr. at 164:28 to 165:23, Jan. 12, 2023 Tr. at 155:13-18 and Jan. 12, 2023 Tr. at 160:14 to 161:30.

55. Chandler explained that Kilo, practices during Solstices and Equinoxes, Oli (chant) and Moʻolelo (stories, myths and legends) were all established as practices since November 25, 1892. Jan. 9, 2023 Tr. at 133:12 to 134:24.

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[34] See Dec. 13, 2022 Tr. at 184:14 to 185:6. The "awa ceremony" involves the sharing of the awa drink (kava root extract mixed with coconut water) as a sacrifice to the gods marking an important occasion. See generally *Id.* at 184:3-37.

[35] Dec. 13, 2022 Tr. at 165:12 to 166:6, 184:39 to 185:11, 186:27 to 187:8 and Jan. 12, 2023 Tr. at 167:13-31. "Pule" is a prayer to an area to be entered and offering to Pele and other gods. Dec. 13, 2022 Tr. at 186:9-10.

56. Chandler further testified the feathers of native Hawaiian birds from Nihokū were used to make ceremonial wear for royalty. *Id.* at 162:6-10.

57. Fu explained that the customary and traditional practice of Mālama ʻĀina and Kilo predated November 25, 1892. Jan. 10, 2023 Tr. at 88:13 to 89:21, 119:12 to 120:7, and Exhibit I-3 at unnumbered 1-2.

58. Kekua is the 8th generation Kumu Hula of Kalau Palaihiwa O Kaipuwai, which hālau[36] was in existence since prior to November 25, 1892. Jan. 10, 2023 Tr. at 124:15 to 125:7.

59. Vaughan described Haku Oli[37] and Mālama ʻĀina, or caring for the land, as traditional cultural practices established prior to November 25, 1892. Jan. 12, 2023 Tr. at 184:7 to 185:29 and 186:36 to 187:32.

60. Kalei Nuʻuhiwa, Ph.D. ("Nuʻuhiwa") verified with documentation from the Bishop Museum that the practice of Kilo was in existence prior to November 25, 1892. Jan. 9, 2023 Tr. at 189:2-32.

61. Tori-Kaʻuhane described the gathering of medicinal plants and flowers for leis, as well as story-telling (i.e. moʻolelo) and chants (i.e. oli), as

[36] "Hālau" is a school that teaches hula. "Hula" is more than just dance, chants and/or songs, "it includes the ritual practices, . . . and protocols and processes that have been handed down through the generations." Jan. 10, 2023 Tr. at 124:27-29.

[37] "Haku" is to weave or create something, "oli" is a song and therefore, "Haku Oli" is "putting a song together to chronicle the place and also the place with a certain experience and time." Jan. 12, 2023 Tr. at 186:19-35.

native Hawaiian practices that were in existence before November 25, 1892. Dec. 15, 2022 Tr. at 98:39 to 100:6 and 101:21-43.

b. <u>Recent Practices Conducted At Nihokū</u>.

62. Kinney engaged in kilo from the age of five[38] when he was (and still is) living in Kīlauea, and his grandfather would take him to Nihokū to engage in that practice.[39] Compare Dec. 12, 2022 Tr. at 63:36-39, with *Id.* at 34:21 to 35:3.

63. Kinney participated in an awa ceremony in 2015 at Nihokū. *Id.* at 35:33-38 and see also Exhibit I-78.

64. Like a number of other witnesses, Nihokū is Kinney's pānānā.[40] Compare Jan. 9, 2023 Tr. at 213:43-44 and Jan. 10, 2023 Tr. at 91:27 to 93:23, with Dec. 12, 2022 Tr. at 36:6 to 37:3 and 39:31-32.

65. With respect to the Subject Property according to Kinney, just "**seaward on the upper boundary of lot 11-a, the Green's property** is a fence line that separates it from US Fish and Wildlife property on the Fish and Wildlife property is where Na Kia o Nihoku goes and myself typically kilo from." Dec. 12, 2022 Tr. at 40:2-5 (emphasis added) and see also *Id.* at 43:34 to 44:5 and Exhibit I-51.

[38] Kinney is now 40 years old. Dec. 12, 2022 Tr. at 55:36-37.
[39] Kinney also visited the Subject Property as a child. *Id.* at 63:14-25.

66. On September 20, 2015, Cody coordinated the gathering of seventy-six (76) persons comprised of Service Staff, Community Leaders, Cultural Experts, Kīlauea Residents, Scientists and Seabird Biologists, "to kilo (observe) sunrise, go to the upper lookout of Nihokū to hear the story of Pele & Lohiau, and then conduct the awa ceremony before heading to Kalihiwai for a post-event feast and talk story." Exhibit I-1 at unnumbered 2 and see also Exhibits I-64 to I-71, and I-73 to I-83.

67. In April 2016 Cody also led a small group of eight and hiked up to Mōkōlea to practice Kilo, Mālama ʻĀina and ʻĀina-Based Education. Exhibit I-1 at unnumbered 2.

68. Cody through Intervenor, "conduct 4 quarterly kilo events and an average of 10 Mālama ʻĀina and ʻĀina-Based Education events per year [at the Refuge] with the likelihood of growing." *Id.*

69. Cody due to her connection with the Refuge, is permitted to gather salvaged seabirds that are deemed able to be "decommissioned for cultural uses." Dec. 12, 2022 Tr. at 147:12. In other words, after the dead seabirds have gone through the protocols to honor repository agreements with state or federal authorities, and related agencies, "they are deemed able to be given for cultural purposes." *Id.* at 147:19-20. At that point, the decommissioned seabirds and their

[40] "Pānānā" has often been described as one's "compass." *Id.* at 36:31-35.

feathers are used for leis and other ceremonial wear, and their wing bones are used for the traditional art of tattooing. See generally *Id.* at 143:6 to 148:31.

70. Up until approximately five (5) years ago, Sproat and his wife's family would regularly kilo at Nihokū, and then engage in traditional fishing practices depending upon what was observed. Compare, Dec. 13, 2022 Tr. at 155:6-9, with *Id.* at 108:15-23 and 139:12 to 140:16. However, Sproat last visited Nihokū to kilo only about a week prior to his testimony. *Id.* at 155:11 to 156:7.

71. Forrest also participated in six or seven customary and traditional native Hawaiian practices at Nihokū since 2015. Compare Jan. 12, 2023 Tr. at 174:7-10, with *Id.* at 141:9 to 148:25 and Exhibits I-76 and I-80.

72. While at Nihokū in 2015, Forrest participated in offerings made to the gods, including awa during that time. Jan. 12, 2023 Tr. at 143:37 to 146:33, and Compare with *Id.* at 147:24 to 152:5 and Exhibit I-64 to I-71.

73. In approximately 2017, Pule was offered by the group in which Forrest was a part at the beginning of their entry into Nihokū through the Subdivision. Jan. 12, 2023 Tr. at 141:32 to 143:27 and Exhibit I-82.

74. Forrest has never conducted any native Hawaiian traditional cultural practices on the Subject Property and the Proposed Project would not prevent him from doing so. Jan. 12, 2023 at 176:34 to 177:7.

75. In 2021, Chandler and Vaughan, "started an ʻāina-based summer program for students from Kīlauea families[41] . . . [traveling] to Nihokū where they did oli (chants), share moʻolelo (stories) of Nihokū and the three sisters, grew their kilo (observation) skills through mapping, worked to mālama ʻāina through weeding, and learned about various birds, specifically uaʻa kani as they witnessed their underground burrows." Exhibit I-2 at unnumbered 2 and see also Exhibits I-56, I-57 and I-88.

76. Cody, Chandler and Fu further identified Nihokū as their cultural and spiritual wahi pana (place of significance), as well as for other residents of Kīlauea and the neighboring ahupuaʻas. Exhibits I-1 at unnumbered 3, I-2 at unnumbered 2 and I-3 at unnumbered 2, respectively.

77. Chandler does not have any knowledge whether anyone conducted traditional and customary native Hawaiian practices on the Subject Property. Jan. 9, 2023 Tr. at 107:20-29.

78. The creation of the Subdivision in the 1980s restricted access to parts of Nihokū and temporarily suspended the practices of native Hawaiian

[41] Presumably, some of these families would be native Hawaiians.

Traditional and Customary Practices in that area, but they resumed with the initiatives of native Hawaiian cultural practitioners, and in coordination with USFWS. Compare Exhibit I-13 and Dec. 13, 2022 Tr. at 110:17-28, with Exhibits XXXII at unnumbered 3-10, I-1 at unnumbered 2, I-2 at unnumbered 2-3, I-3 at unnumbered 2, and I-64 to I-86.

79. "Nihokū is [also Fu's] pānānā, a physical platform and internal compass that [she] use[s] to orient [her]self to [her] environment. . . . Without access to [her] pānānā on Nihokū, [she] would be unable to continue [her] kilo practice to become a skilled kilo (stargazer, reader of omens, seer, astrologer, necromancer; to watch closely, spy, examine, look around, observe, forecast). Exhibit I-3 at unnumbered 2.

80. Fu's practice of Mālama ʻĀina, or caring for the land, "create[s] a reciprocal relationship with the land and all things that feeds [everyone]." *Id.* and see also Exhibit I-95.

81. Kekua first visited Nihokū in approximately 1999, and annually engaged in cultural practices in that area with her hālau until 2018. See generally Jan. 10, 2023 Tr. at 167:33 to 170:8.

82. Kekua has neither been to the Subject Property nor had any contact with the Applicants. Jan. 12, 2023 at 24:23-26.

83. While in high school, Vaughan learned to drive on the asphalt roads in the area that became the Subdivision. *Id.* at 182:4-11. She also spent a lot of time at the Refuge banding albatross, engaging in a lot of native plantings at Nihokū, and watching the sunset. *Id.* at 182:13-28.

84. Since 2009 or 2010, Vaughan began accessing Nihokū to engage in customary and traditional native Hawaiian practices such as weeding and plant restoration (mālama ʻāina), oli (chants) and teaching the younger generation about that place. Compare *Id.* at 184:7-17, with *Id.* at 182:34 to 184:5.

85. In 2013, Vaughan took her three (3) children to Nihokū and the youngsters performed their own form of kilo. Compare *Id.* at 187:38 to 189:20, with Exhibit I-96. That experience was part of the transfer of knowledge and Kuleana for the ʻĀina to the next generation. Jan. 12, 2023 Tr. at 189:16-20.

86. Vaughan also participated in the cultural practices at Nihokū and offered "her hoʻokupu, her gift to the area." *Id.* at 152:7-11 and see also Exhibit I-72. She was also inspired to write a mele (song) of that place. See Jan. 12, 2023 Tr. 152:9-29 and Exhibit I-50.

87. Tori-Kaʻuhane described the gathering of medicinal plants and flowers for leis in Nihokū by her grandmother. Dec. 15, 2022 Tr. at 101:6-25.

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4. The Effect Of Proposed Project On Customary And Traditional Native Hawaiian Practices.

88. The testimony presented at the Hearing indicated some customary and traditional native Hawaiian practices for subsistence, cultural and/or religious purposes, may be affected by the Proposed Project.

89. In her written and oral testimony, Cody focused on the adverse effect the Proposed Project would have on the seabird population at Nihokū as grounds to oppose any development on the Subject Property. Compare Exhibit I-1 at unnumbered 3 and Dec. 12, 2022 Tr. at 134:39 to 136:9, with Dec. 12, 2022 Tr. at 136:11-38.

90. Kinney opined that the Proposed Project would adversely impact his ability to Kilo at Nihokū due its' planned location. Dec. 12, 2022 Tr. at 41:27 to 42:3 and 48:16 to 49:42.

91. Sproat is not claiming any customary and traditional native Hawaiian cultural practices with respect to the Subject Property. Dec. 13, 2022 Tr. at 143:15-26. However, his primary concern is the Proposed Project should be located within the 1982 Building Setback Line. See *Id.* at 152:3-15.

92. Forrest noted the Proposed Project "wouldn't prevent [him] from practicing [customary native Hawaiian traditions], but it would affect the practice". Jan. 12, 2023 Tr. at 179:8-20, and Compare with *Id.* at 177:4 to 178:38.

93. Chandler objected to the location of the Proposed Project as originally sited along the slope of Nihokū and wanted it to be in the setback line.[42] Jan. 9, 2023 Tr. at 145:39-43.

94. Fu's written testimony indicated the Proposed Project would adversely affect her Kilo Practice. Exhibit I-3 at unnumbered 3 and Jan. 10, 2023 Tr. at 71:9-14 and 99:12 to 104:3.

95. Kekua considers Nihokū, including the Subject Property and the rest of lots in the Subdivision, to be revered, and both Wahi Pana (storied place) and Wahi Kapu (sacred place), that need to be protected out of sheer respect.[43] Jan. 12, 2023 Tr. at 28:9 to 29:6.

96. Vaughan had the same concerns expressed by others during the Hearing concerning the Proposed Project. *Id.* at 214:38-41. Although the Proposed Project would not prevent Vaughan from carrying out her native Hawaii traditional and customary practices at Nihokū, it would have a "much greater impact than any of the existing development on Nihokū." *Id.* at 203:31-36, and compare with *Id.* at 203:37 to 206:8.

[42] Chandler's reference to the "setback line" appears to be the 1982 Setback Line. See generally Jan. 9, 2023 Tr. at 146:4-5 and I-13.

[43] In other words, the Proposed Project will negatively impact the mana (spiritual power) and the integrity of Nihokū because of its size and location up its' slope. See Jan. 12, 2023 Tr. at 29:13-42.

97. The testimony of André F. Raine, Ph.D. ("Raine") indicated the close proximity of the Proposed Project to the Refuge would impact the bird population because of light attraction from the FDU and other improvements, sound and vibration disturbance from construction of the Proposed Project, existence of a swimming pool, and dogs and cats threatening the endangered birds and their offspring should the Applicants have any at the Subject Property. Exhibit I-4 at unnumbered 1-2 and see also Dec. 15, 2022 Tr. at 3:40 to 5:17.

5. Proposed Mitigation Efforts To Address The Impact The Proposed Development Would Have On Native Hawaiian Traditional And Customary Practices.

98. As applicable, suggestions were presented at the Hearing by the native Hawaiians to address the impact the Proposed Project would have upon their customary and traditional practices.

99. Cody maintained that none of the conditions in Supplement #6 would address the impact the Proposed Project would have on the seabird population at Nihokū. Compare Dec. 12, 2022 Tr. at 136:14-38, with Exhibit O at 27-30 and Dec. 12, 2022 Tr. at 134:39 to 136:9.

100. Kinney generally agreed with the conditions in Supplement #6. Compare Dec. 12, 2022 Tr. at 90:4 to 92:38, with Exhibit O at 27-30.

101. Sproat also generally agreed with the conditions set forth in Supplement #6. Compare Dec. 13, 2022 Tr. at 149:36 to 153:6, with Exhibit O at 27-30.

102. Forrest noted the rights of the Applicants to construct the Proposed Project should be weighed in balance with the rights of the customary and traditional practices of native Hawaiians. Jan. 12, 2023 Tr. at 177:20-24.

103. Chandler wanted the Proposed Project to be built in accordance with the 1982 Setback Line. See generally Jan. 9, 2023 Tr. at 145:41-43.

104. Fu agreed that the rights of the Applicants, and native Hawaiian Practitioners, "shouldn't outweigh another." Compare Exhibit I-3 at unnumbered 2, with Jan. 10, 2023 Tr. at 99:12-18. Consequently, the conditions in Supplement #6 imposed by the Planning Department for approval of the Proposed Project would be acceptable to her. Compare Jan. 10, 2023 Tr. at 99:20 to 104:3, with Exhibit O at 27-30.

105. Kekua could support the Proposed Project if it were relocated to the lower portion of the Subject Property, reduced in size and complied with a number of the other conditions in Supplement #6. See Jan. 12, 2023 at 30:3-16 and 33:12 to 37:25, and Compare with *Id.* at 34:5-9 and 35:22-27.

106. Vaughan also agreed the rights of Applicants to build the Proposed Project should be balanced with the Practitioners' right to practice their

traditional and customary rights and therefore, she was in general agreement with the conditions set forth in Supplement #6. *Id.* at 215:2-8, and Compare with Exhibit O at 27-30 and Jan. 12, 2023 Tr. at 215:23 to 217:24.

107. Raine indicated that no lighting from the Proposed Project would be best so the birds in the Refuge are not attracted to it, but acknowledged that "there is a threshold through which, like, weak light will not attract birds." Dec. 15, 2022 Tr. at 5:26-27.

108. Raise also testified that the further away the Proposed Project is from the Refuge "down the hill, . . . would be a positive thing." *Id.* at 6:33-37.

6. *Ka Paʻakai* Analysis For The Proposed Project.

109. The *Ka Paʻakai* Analysis for the Proposed Project is contained in Supplement #6, as augmented with the evidence received at the Contested Case Hearing.

110. The Archaeological Field Inspection Report prepared by Nancy McMahon ("McMahon") focused on the presence, if any, of archaeological, historical, or burial sites on the Subject Property and concluded there were "[n]o cultural resources nor historic properties . . . observed or identified within [that] survey areas for this field inspection." Exhibit II (sometimes "McMahon Green Report") at 14.

111. The McMahon Green Report is not a *Ka Paʻakai* Analysis because the former focuses on historical burial sites and related archeological artifacts, but the latter addresses the question whether there are native Hawaiian traditional and customary rights and practices conducted in a designated area. Compare *Id.,* with Nov. 15, 2022 Tr. at 61:34 to 62:3.

112. The Applicants did not request the McMahon Green Report to include a *Ka Paʻakai* Analysis. See generally Nov. 15, 2022 Tr. at 52:5-14 and 99:19-27.

113. The *Ka Paʻakai* analysis for Lot 15 in the Subdivision prepared by McMahon dated September 20198 ("McMahon Barker Report") is about 1,900 linear feet from the Subject Property and therefore, too far away to be used as the *Ka Paʻakai* Analysis for the Subject Property. Compare Exhibit XXV and Dec. 12, 2022 Tr. at 167:18-25, with Nov. 15, 2022 Tr. at 59:7 to 60:12 and 90:23-27.

F. <u>Relevant Authorities</u>.

114. The **Hawaiʻi Constitution, Article XII, § 7** provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Island prior to 2778, subject to the right of the State to regulate such rights.

115. ***Haw. Rev. Stat.* § 1-1** provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

116. ***Haw. Rev. Stat.* § 7-1** provides:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

117. **KCC § 8-3.2** adopted by the Council of the County of Kauaʻi, State of Hawaiʻi ("Council"), on July 17, 2013 as part of Ordinance No. 950 provides in pertinent part:

> § 8-3.2 **Use Permits.**
>
> **(a)** Purpose. The purpose of the Use Permit procedure is to assure the proper integration into the community of uses which may be suitable only in specific locations in a district, or only under certain conditions, or only if the uses are designed, arranged or conducted in a particular manner, and to prohibit such uses if

the proper integration cannot be assured.

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

(c) Application. An application for a Use Permit may be filed by any person authorized to file an application for a Zoning Permit under Sec. 8-3.1(b). The application, whenever feasible, shall be filed together with the application for the required zoning permit, and a single application shall be used for both permits in those cases. The application shall contain the information required by Sec. 8-3.1(b) and other information justifying the issuance of the Use Permit.

. . .

(e) Standards.

(1) A Use Permit may be granted only if the Planning Commission finds that the establishment, maintenance, or operation of the construction, development, activity or use in the particular case is a compatible use and is not detrimental to health, safety, peace, morals, comfort and the general welfare of persons residing or working in the neighborhood of the proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the community, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters, and will not be inconsistent with the intent of this Chapter and the General Plan.

(2) The Planning Commission may impose conditions on the permit involving any of the following matters: location, amount and type and time of construction, type of use, its maintenance and operation, type and amount of traffic, off-

street parking, condition and width of adjoining roads, access, nuisance values, appearance of the building, landscaping, yards, open areas and other matters deemed necessary by the Planning Commission.

. . .

118. **KCC § 8-4.3** adopted by the Council on May 7, 2020 as part of Ordinance No. 1073 provides:

§ 8-4.3 **Development Standards for Residential Structures Not Involving the Subdivision of Land.**

(a) Parcel Area. The parcel area required for single family detached dwelling units shall be calculated in accordance with the density and acreage limitations in the particular Residential Density District, as provided in Sec. 8-4.2, except that, one single family detached dwelling unit may be constructed on any legal lot or parcel of record as of August 17, 1972, even if the lot or parcel is smaller than is required in the density district in which the lot or parcel is located.

(b) Setback requirements. Setback requirements shall be as follows:

(1) Front setback: No structure, including but not limited to garages, carport, decks above grade, and accessory or storage structures may be closer than 10 feet to the right-of-way line of a public thoroughfare or the property line of a private street or the pavement line of a driveway or parking lot serving more
than three dwelling units.

(2) Rear setback: No structure shall be closer than (5) feet or 1/2 the total height of the building wall nearest the rear property line, whichever is greater.

(3) Side setback: No building shall be closer to a side property line than five feet or 1/2 the total height of the highest building wall from the ground level nearest the property line, whichever is greater.

(4) No eave, roof overhang, or other appurtenance to a building, other than a fence under six feet in height, shall project into any setback more than 1/2 the distance of the setback, or four feet, whichever is less.

(5) No balconies, overhead walkways, decks, carports or other exterior spaces intended for human occupancy above the ground floor of any building, shall penetrate the setback area.

(6) Accessory buildings and garden or service shelters not higher than seven feet nor covering more than 400 square feet, nor exceeding 20% of the rear side property line in the longest dimension facing the rear property line, may be built without setback.

(7) Greater setbacks because of topographic, drainage, sun exposure or privacy conditions may be required and made a condition for a Zoning Permit.

(c) Minimum distance between structures. Minimum distance between structures shall be 10 feet.

(d) Parcel Dimension Requirements. Parcel dimension requirements shall be as follows:

(1) A parcel large enough to qualify for two or more dwelling units shall conform to the following requirements before any person is permitted to develop more than one single family dwelling unit and accessory buildings on the parcel:

(A) The minimum frontage on a public or private street shall be 25 feet unless the parcel is a flag lot.

(B) The minimum average width of the existing parcel, excluding the flag portion of a flag lot, shall be 60 feet.

(2) Requirements for parking, access, driveways, building height, utilities and other regulations not specified in this Section shall be the same as those required of all residential development as established in Sec. **8-4.5**.

(3) The amount of land coverage created for R-1 to R-6 Zoning Districts including buildings and pavement, shall not exceed 60% of the lot or parcel area. Land coverage for the R-10 Zoning District shall not exceed 80% and land coverage for the R-20 Zoning District shall not exceed 90%.

(e) Open Space. When development on a parcel meeting the density and parcel area requirements of this Section results in the designation of areas within the parcel for open space use, the area shall be designated on a map of the parcel as permanent open space and the map shall be recorded with the Bureau of Land Conveyances. In addition, the areas shall automatically be transferred to the Open District for zoning purposes.

119. **KCC § 8-9.2** adopted by the Council on November 14, 2012, as part of Ordinance No. 935 provides:

§ 8-9.2 **Open District Development Standards.**

(a) Land Coverage.

(1) The amount of land coverage created, including buildings and pavement, shall not exceed 10% of the lot or parcel area.

(2) No existing structure, use or improvement shall be increased in size, or any new structure, use or improvement undertaken so as to exceed the 10% land

coverage limitation.

(3) At least 3,000 square feet of land coverage shall be permissible on any parcel of record existing prior to or on September 1, 1972.

(b) Residential Densities.

(1) Except as otherwise provided in this Article, no more than one single family detached dwelling unit per three acres of land shall be permitted when the parcel is located within an area designated "Urban" or "Rural" by the State Land Use Commission.

(2) No more than one single family detached farm dwelling unit per five acres of land shall be permitted when the parcel is located within an area designated as "Agricultural" by the State Land Use Commission, and provided that no more than five dwelling units may be developed on any one parcel.

(3) Where the parcel is located within an area designated "Urban" by the State Land Use Commission, one single family detached dwelling unit per one acre of land shall be permissible if the existing average slope of the parcel is no greater than 10%.

(4) Provided that the provisions of this Article shall not prohibit the construction or maintenance of one single family detached dwelling with necessary associated land coverage on any legal parcel or lot existing prior to or on September 1, 1972.

(5) Existing Structures—Permits and Condominium Property Regimes (C.P.R.s).

(A) Any lot of record which has a valid Zoning Permit(s) for more than five units prior to August 19, 2010, shall be allowed to build to the density for which there

are permits.

(B) Any lot of record which has been submitted to a condominium property regime ("C.P.R.") that has been registered with the Real Estate Commission prior to August 19, 2010, shall be allowed to build to the density in place at the time of the registration of the C.P.R. with the Real Estate Commission.

(C) Any dwelling unit constructed under these provisions or lawfully existing prior to May 21, 2010 may be replaced, expanded, altered or enlarged in accordance with all other applicable provisions of this Chapter.

(c) Subdivision.

(1) No parcel or lot shall be created which is less than three acres in size within an area designated as "Urban" or "Rural" by the State Land Use Commission, or less than five acres in size within an area designated as "Agriculture" by the State Land Use Commission, except within an "Urban" area a lot or parcel may be created which is one acre or more in size if the existing average slope of the lot or parcel thus created is no greater than 10%.

(2) No parcel or lot shall be subdivided when the improvements on the parcel meet or exceed the density and land coverage requirements of this Article.

(3) No portion of any parcel previously used as the basis for the calculation of allowable density or subdivision in any other District shall subsequently be subdivided or used as the basis for any other density or land coverage calculation.

(4) For contiguous lots or parcels of record in common ownership existing prior to or on September 1, 1972, within an area designated as "Agricultural" by the State Land Use Commission the following standards shall apply.

Parcel area shall be calculated in accordance with Sec. 8-1.4(d):

(A) Parcels not more than 50 acres, may be subdivided into parcels not less than five acres in size.

(B) Parcels larger than 50 acres, but not more than 300 acres may be subdivided into 10 or fewer parcels, none of which may be smaller than five acres.

(C) Contiguous lots or parcels of record in common ownership existing prior to or on September 1, 1972, larger than 300 acres may be subdivided only in accordance with the following criteria:

(i) A maximum of 75 acres may be subdivided into not more than 10 parcels, none of which shall be smaller than five acres;

(ii) An additional 20% of the total parcel area or 300 acres, whichever is less, may be subdivided into parcels, none of which shall be smaller than 25 acres;

(iii) The balance of the parcel area shall not be subdivided.

(5) Standards for Subdivision on State Land Use District Agricultural. Any subdivision on land in State Land Use Commission Agricultural District shall be consistent with the provisions of H.R.S. Chapter 205 and Article 8 of Chapter 8 of Title IV of the Kaua'i County Code.

(d) Development Standards. Subject to the density and subdivision restrictions in Subsection **(c)**, the development requirements for use development or subdivision within an Open District shall be:

(1) The same as the requirements for the District in which the proposed use would be permitted under other provisions of

this Chapter.

(2) The same as the requirements of Secs. 8-4.4 and 8-4.5 of the Residential District if no use is indicated or if the use proposed is not readily assignable to any other Use District.

(3) Public Access. The Planning Commission may require the dedication of adequate public access ways not less than 10 feet in width to publicly-owned land or waters and may require the preservation of all historic and archaeological sites, known or discovered on the parcel subject to development.

120. **KCC § 9-3.8** adopted by the Council on June 19, 1973 as part of Ordinance No. 175, amended by the Council on March 16, 1982 as Ordinance No. 422, and further amended by the Council on June 28, 2001 as Ordinance No. 771 provides in pertinent part:

§ 9-3.8 **Final Subdivision Map.**

(a) If the final map is to be filed with the Land Court for recordation, it shall comply with the requirements specified under the rules of the Land Court for Land Court subdivisions. If the final map is not to be filed with the Land Court, it shall contain the following data:

(1) The final map of all registered land shall conform as to size and scale with the standards set forth in Section 502-19, H.R.S. Where the final map is not to be filed with the Land Court, it may be acceptable to the Planning Commission if it is legal size, eight and one-half by thirteen(8 1/2 x 13) inches, or of other size as it may be acceptable to the Planning Commission. When more than one (1) sheet is required an index sheet of the same size shall be filed to show the entire

subdivision on one (1) sheet with block and lot numbers.

(2) The final map shall show the following information:

(A) Name and address of the owner of record, subdivider or his or her agent, and of the registered surveyor who prepared the map.

(B) The date, title, north arrow, scale and tax key. The title shall include the name of the subdivision under which it is to be recorded.

(C) Locations of all proposed streets, easements, parks and other open spaces, reservations, lot lines, set-back lines; also names and lines of all adjoining or existing streets.

(D) The length and true azimuths of all straight lines, radii, chords, and central angles of all curves along the property lines of each street, all dimensions and true azimuths along the lines of each lot, and also any other data necessary for the location of all building lines proposed to be imposed by the subdivider, including set-back lines.

(E) All subdivisions shall be shown to have been accurately surveyed, coordinated to the government survey triangulation stations and permanently monumented on the ground with approved survey monuments. The error of closure in traverse around the subdivision and around interior lots or blocks shall not exceed one (1) foot to ten thousand (10,000) feet of perimeter.

(F) Names of all subdivisions immediately adjoining; or when adjoining property is not a recorded subdivision, the names of the owners thereof.

(G) Boundary of the subdivided tract, with courses and

distances marked thereon. The boundary shall be determined by survey in the field by a registered land surveyor and certified to be correct.

(H) Any conditional requirements imposed as a condition for subdivision by the respective agencies.

. . .

(c) Filing of Final Subdivision Map.

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

(2) An applicant may elect to file for approval of a final map covering only a portion of the approved preliminary map if he or she declares his or her intention at the time he or she files the preliminary map. Each partial final map shall apply to approval for a partial final map and the subdivision agreement required of the applicant shall provide for the construction of improvements as may be necessary to constitute a logical and orderly development of the whole subdivision by units.

(d) Action on Final Subdivision Map.

(1) Planning Director. After accepting the filing of the final subdivision map, the Planning Director shall send a report to the Planning Commission indicating whether the final map conforms to the terms, conditions and format of the preliminary subdivision map which has been previously approved or conditionally approved by the Planning Commission and to the approved construction plans. The report shall incorporate written

reports by the County Engineer and the Manager and shall also indicate whether the other requirements of this Chapter, other ordinances and State law have been satisfied.

(2) Planning Commission. After the receipt of the report from the Planning Director, the Planning Commission shall determine whether the final subdivision map substantially conforms to the terms, conditions and format of the preliminary subdivision map which has been previously approved or conditionally approved, and to the approved construction plans, and whether the applicant has satisfied all other requirements imposed by law. The Planning Commission shall accordingly approve or disapprove the final subdivision map.

(3) Time Limits. If the Planning Commission fails to take action on the final subdivision map within forty-five (45) calendar days from the date of acceptance, unless the applicant assents to a delay, the final subdivision map shall be deemed approved.

(4) Recordation. The final subdivision map or a metes and bounds description of the subdivision must be recorded prior to or at the time of conveyance of interest in any lot or parcel. If no such timely recordation is made, the approval of the preliminary subdivision map, the construction plans, and the final subdivision map shall become void.

(5) Errors and Discrepancies. The approval of the final subdivision map by the Planning Commission shall not relieve the applicant of the responsibility for any error in the dimensions or other discrepancies or oversights. Errors, discrepancies, or oversights shall be revised or corrected, upon request to the satisfaction of the Planning Commission.

121. **Special Management Area Rules and Regulations of the County of Kauaʻi, As Amended October 2011**, provides in pertinent part:

. . .

Section 10.0 ACTION

. . .

Unless otherwise stated in the permit, once a permit is issued, the applicant must make substantial progress, as determined by the Director, regarding the development or activity within two (2) years or the permit shall be deemed to have lapsed and be no longer in effect.

. . .

Section 12.0 REVOCATION

Permits can be revoked through the procedure outlines in Chapter 12 of the Rules of Practice and Procedures of the Planning Commission.

122. **Rule 1-12-5 of the Commission Rules** provides:

1-12-5 Revocation of Permits by the Planning Commission. The Director shall review and investigate the basis for any petition for revocation of a permit which the Commission has final authority to grant or which the Commission makes a recommendation and report to the Kauaʻi County Council, State Land Use Commission or other agency which as the final authority to grant. The Director shall file his report with the Commission within sixty (60) days from the date of acceptance of the petition, unless the Commission allows the Director more time to investigate the contents of the petition. The Commission shall review the Director's report and if the Commission finds that there is reasonable cause to believe that there currently is a failure to perform according to the conditions imposed, the Commission shall issue and serve upon the party bound by the conditions an Order to

Show Cause why the permit should not be revoked or modified.

123. **Rule 1-12-8 of the Commission Rules** provides in pertinent part:

. . .

> (b) For Class III and IV zoning permits, variances, use permits, subdivision approvals, special management area permits, special permits, state land use boundary amendments, or any other permit or approval for which the Commission has final authority, the procedures as set forth in section 1-6-18 and 1-6-19 shall apply. If the Commission finds that any term or condition of a permit has been violated or not complied with, the Commission may revoke, amend or modify the permit or may allow the permit holder a reasonable opportunity to correct, remedy or rectify the violation.

124. If any Finding of Fact herein should be designated as a Conclusion of Law, the same shall be deemed to have been identified as such.

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IV. CONCLUSIONS OF LAW.[44]

A. The 1982 Building Setback Line Determines The Location Of The Project Because Special Management Area Use Permit SMA(U)-94-14 Authorizing The 1994 Building Setback Line Lapsed And Is No Longer In Effect.

1. Applicants' argue the 1994 Setback Line governs the location of the Proposed Project because:

> [t]he applicability of the 1994 Setback line was confirmed by [the Planning Department] in 2009 (via the concurrence letter[- Exhibit XVII at 1-2]) and in 2021 (via the recommendation for approval of Applicant's application [by Planning Director Hull - Exhibit IX]) as well as by the Commission in 2020 in approving a dwelling on Lot 15 based on the 1994 Setback line [(Exhibits Y and Z)]. Moreover, **unless and until the Commission takes further action on the 1994 SMA [to revoke it, that permit] remains valid and enforceable.**

Applicants' Closing Arguments at 15 (emphasis added; citations to Exhibits omitted).

2. Next, Applicants argue "[t]here is nothing in the SMA permitting process that calls for a tentative approval and a subsequent approval—

[44] Only the arguments raised in Applicants' Closing Arguments and Reply are addressed in this Conclusions of Law Section because all prior arguments not incorporated into those submittals are deemed waived. *See generally Rosa v. Johnson,* 3 Haw.App. 420, 430, 651 P.2d 1228, 1236 (1982) (Specified errors may be deemed abandoned if appellant presents no argument in briefs concerning them.) *citing Quality Furniture, Inc. v. Hay,* 61 Haw. 89, 595 P.2d 1066 (1979) *reh'g denied,* 61 Haw. 661 (1979), *State v. Kahua Ranch,* 47 Haw. 466, 390 P.2d 737 (1964), *reh'g denied,* 47 Haw. 485; and *Dement v. Atkins & Ash,* 2 Haw. App. 324, 631 P.2d 606 (1981).

there is only one approval. Unlike a preliminary map in the subdivision process that is by local ordinance tentative, an SMA is a final approval." *Id.* at 16.

3. Applicants further argue imposition of the 1982 Building Setback Line and relocation of the Proposed Project one hundred and fifty (150) feet downslope "would place the Dwelling pool within Makaano road." *Id.* at 28 *citing* Nov. 14, 2022 Tr. at 52:34 to 54:16 and Exhibit VI. Further, "[n]o analysis was provided as to the feasibility of developing a ten (10) foot wide access along the south side of the [Subject Property], through dense trees and brush in order to access FWS[45] lands that may or may not be accessible." Applicants' Closing Arguments at 29.

4. Applicants finally argue even if the Planning Commission "were to seek to revoke the 1994 SMA and related approvals, principles of equitable estoppel and vested rights would bar such action." *Id.* at 17.

5. The Planning Department counters the "1982 Setback should apply [to the Proposed Project]." Planning Department's Closing Arguments at 16 *citing* Nov. 15, 2022 Tr. at 140:17-21. The Planning Department's position is based upon the "extensive research into the building setback line issue [conducted by Planning Director Kaʻāina S. Hull]." Planning Department's Closing Arguments at 16 *citing* Dec. 13, 2022 Tr. at 21:5-16.

[45] "FWS" refers to the U.S. Fish and Wildlife Service.

6. The expert testimony of Nitta also confirmed the 1982 Setback line should apply to the Proposed Project, and therefore, Applicants' reliance on the 1994 Semi-Circle Setback line in their Application is incorrect. See Jan. 12, 2023 Tr. at 63:42 to 64:3. "According to Nitta, in his opinion the mere approval of permit applications by the Planning Commission for lots like Lot 13 and Lot 15 based on the incorrect application of the 1994 Semi-Circle Setback rather than the correct 1982 Setback line would not alone modify the setback line." Planning Department's Closing Arguments at 18, *citing* Jan. 12, 2023 Tr. at 138:10 to 129:8.

7. The Planning Department further argues the letter from Planner Mike Laureta of the Planning Department:

> is not reflective of any adjudicative action by the Planning Commission with respect to confirming the 1994 Semi-Circle Setback is the applicable setback line [for the Subject Property]. Additionally, the letter does not indicate that the Planning Department is joining in Mike Laureta's analysis or evaluation of this applicable setback line. Since the authority to establish setback lines rests with the Planning Commission, the Applicants do not have a right to reply upon the representation, if any, of the Planning Department as to the setback line.

Planning Department's Closing Arguments at 19 (citation to transcripts and case law omitted).

8. The Planning Department finally argues the Applicants were on notice the 1982 Setback Line applied to the Subject Property because the Deed

notes the "map reflecting the original 1982 building setback line [prepared by Cesar C. Portugal, Land Surveyor, dated and revised July 1982]." *Id.* at 19.

9. Intervenor argues the 1982 Setback Line applies to the Proposed Project because it:

> is the only building setback line that has been approved by the [Planning] Commission and reflected in Commission-approved maps. **This original 1982 building setback line is reflected in the Seacliff Plantation subdivision map, prepared by Cesar C. Portugal in July 1983 and approved by the [Planning] Commission on August 15, 1983.** The 1983 Seacliff Plantation Subdivision map is also referenced in recent conveyance documents for Lots 12, 13, 14 and 15 indicating that those lots are subject to the original 1982 building setback line.

Intervenor's Closing Arguments at 27 (emphasis added; citations to Exhibits omitted).

10. Both the Planning Department and Intervenor argue the 1994 Setback Line was subject to conditions which were never met and therefore, did not amend or replace the 1982 Setback Line. See generally Planning Department's Closing Arguments at 15-20 and Intervenor's Closing Arguments at 29-33.

11. The Planning Department further counters that even with the application of the 1982 Building Setback Line, the Subject Property "will have a triangular shaped buildable area with more than adequate space for a residence." Planning Department's Closing Arguments at 20 *citing* Exhibit I-21 [at unnumbered page 8]. Expert Witness Nitta also estimated depending upon the

size of the Proposed Project, Applicants "could still build two farm dwellings and a guest unit on Lot 11-A because the setback line area is about 40,000 square feet under the 1982 Setback." Planning Department's Closing Arguments at 20 *citing* Jan. 12, 2023 Tr. at 108:33 to 109:5.

12. Intervenor responds to Applicants equitable estoppel and vested rights arguments that they do not apply because: (a) the cases cited by them are inapposite;[46] (b) they cannot rely upon equity when Applicants failed to exercise due diligence to discover the 1982 Building Setback Line was a recorded encumbrance against the Subject Property;[47] and (c) they cannot rely upon SMA-Approval of other lots within the Subdivision based upon the 1994 Building Setback Line because "the topography of Lot 11-A is distinct from the other parcels located along Nihokū".[48]

13. Special Management Area Use Permit SMA(U)-94-14 which established the 1994 Setback Line is no longer valid because the related Subdivision Application was declared null and void effective July 10, 2001. Compare Exhibit XVI, with Exhibit I-8 at 3 and Exhibits A-C attached thereto.

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[46] Intervenor's Closing Arguments at 33-34.
[47] *Id.* at 35.
[48] *Id.* at 36 referencing: (a) Nov. 15, 2022 Tr. at 93:19-33; (b) Dec. 12, 2022 Tr. at 46:40-41, 54:10-13, and 71:10-11; (c) Dec. 12, 2022 Tr. at 167:18-25; (d) Dec. 13, 2022 Tr. at 18:32-37; and (e) Exhibits I-15 and I-51.

14. The Planning Department may declare the 1994 Building Setback Line null and void without the action of the Planning Commission to revoke Special Management Area Use Permit SMA(U)-94-14 because Section 10.0 of the SMA Rules authorizes the Director to determine whether substantial progress has been made within two (2) years of issuance thereof, and if not, that permit "shall be deemed to have lapsed and be no longer in effect." SMA Rules Section 10.0 and *Morgan v. Planning Dept., County of Kauai,* 104 Hawaiʻi 173, 179, 86 P.3d 982, 988 (2004) ("It is well-established that decisions of administrative agencies acting within the realm of their expertise are accorded a presumption of validity, and, therefore, the appellant carries a heavy burden of convincing the court that the decision is invalid because it is unjust and unreasonable in its consequences.") *citing Ka Paʻakai O Ka ʻAina,* 94 Hawaiʻi at 40, 7 P.3d at 1077 and *Korean Buddhist Dae Wong Sa Temple of Hawai'i v. Sullivan,* 87 Hawaiʻi 217, 229, 953 P.2d 1315, 1327 (1998).

15. The Applicants' argument the 1994 Building Setback Line is final because there is only one approval, as compared to a tentative subdivision approval, followed by final subdivision approval, does not prevent the Director from determining that setback line is null and void since there was no related final subdivision approval pursuant to KCC § 9-3-8(c)(1), and that decision is not arbitrary, or capricious, or characterized by an abuse of discretion or clearly

unwarranted exercise of discretion. *See Morgan,* 104 Hawai‘i at 179, 86 P.3d at 988.

16. The Director's decision that the 1994 Building Setback Line is no longer valid because the SMA Use Permit authorizing that setback had lapsed and no longer in effect without the action by the Planning Commission to revoke Special Management Area Use Permit SMA(U)-94-14, and the 1982 Building Setback Line determines the location of the Proposed Project, is not arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.[49] *Morgan,* 104 Hawai‘i at 179, 86 P.3d at 988.

17. Confirmation from Planner Mike Laureta of the Planning Department ("Planner Laureta") that the 1994 Building Setback Line remains in effect to determine the location of the Proposed Project is not binding upon the Planning Department. *Brescia,* 115 Hawai‘i at 500, 168 P.3d at 952 ("It is well accepted that a public employee not vested with decision making authority may not bind the state in its exercise of the police power.") *citing Godbold v. Manibog,* 36 Haw. 206 (1942).

[49] Black's Law Dictionary defines "revocation" as "[a]n annulment, cancellation, or reversal, [usually] of an act or power." *Black's Law Dictionary* 1346 (8th ed. 2004). By contrast, "lapse" is "to revert to someone else because conditions have not been fulfilled or because a person entitled to possession has failed in some duty." *Id.* at 896. In either event, both terms indicate the holder of that right or privilege no longer has that right or privilege.

18. Location of the Proposed Project within the 1982 Setback Line is not unreasonable or infeasible because the testimony of Expert Witness Nitta concluded Applicants would still be able to construct two farm dwellings and a guest unit on the Subject Property because the buildable area is about 40,000 square feet. *See generally Brescia,* 115 Hawai'i at 497, 168 P.3d at 949 (Reasonable use of the land is "not necessarily the use most desired by the owner.") *quoting Korean Buddhist Dae Wong Sa Temple of Hawai'i,* 87 Hawai'i at 234, 953 P.2d at 1332 (citation omitted).

19. The requirements of KCC §§ 8-3.2(e), 8-4.3 and 8-9.2 may also be relied upon by the Director and Planning Commission in locating the Proposed Project within the 1982 Setback Line.

20. Applicants' claims of Equitable Estoppel, violation of their Equal Protection Rights, and violation of their Vested Rights, are unsupportable because the Deed, Declaration and Amendment To Declaration, all advised them the 1982 Building Setback Line was an encumbrance on the Subject Property. *Hawaiian Ocean View Estates v. Yates,* 58 Haw. 53, 63, 564 P.2d 436, 442 (1977) ("Since the whole doctrine [of estoppel] is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but **must have acted with good faith and reasonable diligence, otherwise no equity will**

arise in his favor.") (emphasis added) *quoting 3 Pomeroy's Equity Jurisprudence § 813* (5th ed. 1941).

21. Equitable Estoppel also cannot be relied upon by Applicants because Planner Laureta had no authority to bind the Planning Department into agreeing that the 1994 Building Setback Line applies to the Subject Property. *See generally Brescia,* 115 Hawai'i at 499, 168 P.3d at 951 (Estoppel "cannot be applied to actions for which the agency or agent of the government has no authority.") *quoting Turner v. Chandler,* 87 Hawai'i 330, 334, 955 P.2d 1062, 1066 (App. 1998).

22. Applicants further may not rely upon their Vested Rights argument because KCC § 9-3.8(c)(1) referenced by the Planning Department to conclude the 1982 Setback Line, rather than the 1994 Setback Line, controls the location of the Proposed Project is a proper exercise of the County of Kaua'i's police power. *Brescia,* 115 Hawai'i at 499-500, 168 P.3d at 951-52 ("It is well established that zoning which terminates inchoate rights to develop land is a legitimate exercise of the police power.") *citing County of Kauai v. Pac. Standard Life Ins. Co.,* 65 Haw. 318, 336-37, 653 P.2d 766, 779 (1982).

23. Although the approval of the Other Applications was based upon the 1994 Setback Line, Applicants' Equal Protection rights are not violated because the lots for those applications are not alike in all relevant respects to the

Subject Property. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074, 145 L.Ed.2d 1060 (2000) (An equal protection violation only occurs when the state action is motivated by a "spiteful effort to get him" for reasons unrelated to any legitimate state objective.) and see also *DiBuonaventura v. Washington Township*, 225 A.3d 1060, 1066 (2020) ("Persons are similarly situated under the Equal Protection Clause when they are alike in "all relevant aspects.").

24. The conditions set forth in Supplement #6, as revised in this Report and Recommendation, do not violate the Takings Clause of the United States or Hawai'i Constitution because "mere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance." *Brescia,* 115 Hawai'i at 497, 168 P.3d at 949 *quoting City of Eastlane v. Forest City Enters, Inc.,* 426 U.S. 668, 674 n.8, 96 S.Ct. 2358, 2362 n.8, 49 L.E.2d 132 (1976) (internal quotation marks, citations, and brackets omitted).

25. The location of the Proposed Project shall be constructed within the 1982 Setback Line approved under Special Management Area Use Permit SMA(U)-82-2 because Special Management Area Use Permit SMA(U)-94-14

establishing the 1994 Setback Line lapsed and no longer in effect pursuant to Section 10.0 of the SMA Rules. See also KCC § 9-3.8(c)(1).

B. Native Hawaiian Customary And Traditional Practices Affected By The Subject Property.

26. Applicants argue the Proposed Project will not impact customary and traditional native Hawaiian practices because: (1) Intervenor lacks standing to claim Native Hawaiian Access and Gathering Rights on the Subject Property;[50] (2) Intervenor has not presented Native Hawaiian Descendants with sufficient connection to the Kīlauea Ahupuaʻa to claim Assess and Gathering Rights;[51] (3) Intervenor has not established any native Hawaiian Traditional and Customary Practices on the Subject Property;[52] (4) the Subject Property is "Fully Developed" and therefore, no Customary and Traditional Native Hawaiian Practices may take place on it;[53] (5) the Planning Department's *Ka Paʻaki* Analysis is flawed as a matter of law and cannot be relied upon to establish any Native Hawaiian Traditional and Customary Practices;[54] and (6) the

[50] *See* Applicants' Closing Arguments at 18-19. This argument is based upon their claim that none of Intervenor's members "**reside** in the relevant ahupuaʻa or, if they **reside** within an abutting ahupuaʻa[,] they must establish that they have customarily and traditionally used and continued to use the relevant area for gathering or other native Hawaiian T&C practices". *Id.* (emphasis added).
[51] *See Id.* at 20. This ancillary argument is essentially the same as the first one.
[52] *See Id.* at 20-23.
[53] *See Id.* at 23.
[54] *See Id.* at 24-27.

recommendations of the Planning Department for the Proposed Project are Unreasonable, Infeasible and Unconstitutional.[55]

27. The Planning Department counters that the *Ka Paʻakai* Analysis was prepared for consideration by the Planning Commission because it acknowledged the affirmative duty of the latter to do so and protect Native Hawaiian Traditional and Customary Rights. Planning Department's Closing Arguments at 11-13, and Compare with Exhibits N and O. In order to receive that protection, the: (a) occupants of an ahupuaʻa are permitted to gather in that ahupuaʻa, or a neighboring ahupuaʻa, where such rights have customarily and traditionally been exercised in that manner; (b) occupants of an ahupuaʻa may gather what is needed for traditional and customary subsistence, cultural, and religious purposes; (c) occupants of an ahupuaʻa may gather on less than fully developed lands; (d) rights of the Native Hawaiian practitioners of Customary and Traditional practices lawfully residing in an ahupuaʻa, or neighboring ahupuaʻa, must be balanced against the rights of the owner of the property which is subject to those practices; and (e) balance weighs in favor of the property owner, and against the occupants of the ahupuaʻa who exercise otherwise valid customary rights in an unreasonable manner. Planning Department's Closing Arguments at 25.

[55] *See Id.* at 27-30.

28. Intervenor counters Applicants' arguments on grounds that the Proposed Project infringes on the rights of their Native Hawaiian Practitioners, and others similarly situated, because: (1) the Proposed Project will impair the Customary and Traditional Native Hawaiian Practices of its members while engaging in those activities at Nihokū;[56] and (2) the Planning Commission has an affirmative duty to consider the effects of the Proposed Project on Native Hawaiian Traditions and Practices.[57]

29. The Planning Commission has an affirmative obligation to "protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians". *Flores-Case 'Ohana,* 153 Hawai'i at 82, 526 P.3d at 607 *citing PASH,* 79 Hawaii at 450-51, 903 P.2d at 1271-72.

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[56] Intervenor's Closing Arguments at 37-42. Nihokū is part of the ahupua'a in which the Subject Property is located. See e.g., Exhibits G at 2. Second, Applicants failed to affirmatively demonstrate the Proposed Project does not impact native Hawaiian customary and traditional practices. Intervenor's Closing Arguments at 38-39. Third, nine (9) of Intervenor's witnesses "testified that they are Native Hawaiians who can trace their ancestry back to individuals who inhabited the Hawaiian islands prior to 1778." *Id.* at 39. Four, the "relevant area" upon which native Hawaii traditional practices take place is not limited to the Subject Property, but includes the entire Subdivision. *See Id.* at 40 n.2. Five, the Subject Property is "less than fully developed" and therefore, the Hawaii Supreme Court has reserved for another day whether native Hawaii traditional practices applies to property at that stage of development. *See Id.* at 42.

[57] *See Id.* at 49. The Planning Department in conducting its own *Ka Pa'akai* Analysis on behalf of the Planning Commission met that obligation. See Exhibits N and O. First, the *Ka Pa'akai* Analysis indicated gathering and cultural practices were occurring at Nihokū. *Id.* at 44-46. Second, the Planning Department evaluated the impact of the Project on native Hawaiian Traditional Practices. *Id.* at 46-47. Finally, the Planning Department proposed terms and conditions for approval of the Proposed Project to mitigate the impact on native Hawaiian traditions and practices. *Id.* at 47-49.

30. The NH Rights are protected by Article XII, § 7, of the Hawaiʻi Constitution (for subsistence, cultural and religious purposes), *Haw. Rev. Stat.* § 7-1 (gathering, access and water rights) and *Haw. Rev. Stat.* § 1-1 (certain customary Hawaiian rights beyond those found in *Haw. Rev. Stat.* § 7-1). *Pele Defense Fund,* 73 Hawaiʻi at 616-18, 837 P.2d at 1270-71.

31. The individuals to be protected must be "descendants of the indigenous peoples who inhabited the Hawaiian islands prior to 1778, regardless of blood quantum." *Flores-Case ʻOhana,* 153 Hawaiʻi at 82 n.10, 526 P.3d at 607 n.10.

32. The "native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupuaʻa in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner." *Pele Defense Fund,* 73 Hawaiʻi at 620, 837 P.2d at 1272.

33. The native Hawaiian customs and practices must have been in existence as of November 25, 1892. *PASH,* 79 Hawaii at 447, 903 P.2d at 1268.

34. The rights of each native Hawaiian "to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest." *Id.* at 450, 903 P.2d at 1271.

35. The "relevant area" for the *Ka Pa'akai* Analysis is determined by the administrative agency responsible for the enforcement of the NH Rights. *Mauna Kea II*, 143 Hawai'i at 396 n.16, 431 P.3d at 769 n.16.

36. If the "relevant area" is "'fully developed,' i.e., lands zoned and used for residential purposes **with existing dwellings, improvements, and infrastructure,**[58] it is *always* 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property." *Hanapi,* 89 Hawai'i at 186-87, 970 P.2d at 494-95 (**bold** emphasis added; *italics* in original; footnote in original, albeit identified with a different number).

37. The Subject Property is part of Nihokū, but only the Subject Property and the Refuge immediately adjacent to it, constitute the "relevant area" for purposes of the *Ka Pa'akai* Analysis.[59] *Mauna Kea II,* 143 Hawai'i at 396 n.16, 431 P.3d at 769 n.16 (The governing agency defines the "relevant area," subject to judicial review under *Haw. Rev. Stat.* §91-14(g)).

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[58] "We cite property used for residential purposes as an example of 'fully developed' property. **There may be other examples of 'fully developed' property as well where the existing uses of the property may be inconsistent with the exercise of protective native Hawaiian rights.**" *State v. Hanapi,* 89 Hawai'i 177, 187 n.10, 970 P.2d 485, 495 n.10 (1998) (emphasis added).

[59] The remainder of the *Ka Pa'akai* Analysis will focus primarily on the Subject Property because exercise of NH Rights at the Refuge requires a Special Permit issued by USFWS. See generally Exhibit G at 2 and *Cf. S.R.A., Inc. v. State of Minn.,* 327 U.S. 562-63, 66 S.Ct. 749, 753, 90 L.Ed. 851 (1946) ("[N]ot only is the federal property immune from taxation because of the supremacy of the Federal Government but state laws, not adopted directly or impliedly by the United States, are ineffective to tax or regulate other property or persons upon that enclave.").

38. Cody, Kinney, Forrest, Chandler, Fu and Vaughan, are native Hawaiians lawfully occupying the Ahupuaʻa, or neighboring ahupuaʻa, entitled to enforce the exercise of their customary and traditional practices in the "relevant area." *See generally Pele Defense Fund,* 73 Hawaiʻi at 616-20, 837 P.2d at 1269-72 (Native Hawaiian rights protected by Art. XII, § 7 may extend beyond the ahupuaʻa in which descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778 reside, where such rights have been customarily and traditionally exercised in this manner.).

39. Sproat, Kekua and Tori-Kaʻuhane, are also native Hawaiians residing beyond the Ahupuaʻa, but still on the island of Kauaʻi, and engaged in customary and traditional practices within the Ahupuaʻa.[60] *See Pele Defense Fund,* 73 Hawaiʻi at 619, 837 P.2d at 1271 ("The Committee on Hawaiian Affairs added what is now article XII, § 7 . . . contemplated that some traditional rights might extend beyond the ahupuaʻa; for instance it was **customary for a Hawaiian to use trails outside the ahupuaʻa in which he lived to get to <u>another part of the island</u>.**") (emphasis added).

[60] Although Nuʻuhiwa is also a native Hawaiian, she resides in Hilo, Hawaii, and therefore, not included in the group entitled to advance their claims that the Proposed Project affect their rights to exercise customary and traditional practices at Nihokū. Compare Jan. 9, 2023 Tr. at 180:7-15, with *Id.* at 180:2-5.
Nuʻuhiwa also testified under oath. Jan. 9, 2023 Tr. at 179:19-22.

40. The NH Rights were first exercised by the ancestors of Cody, Kinney, Sproat, Forrest, Chandler, Fu, Kekua, Tori-Kaʻuhane and Vaughan, prior to November 25, 1892.[61] *PASH*, 79 Hawaii at 447, 903 P.2d at 1265 (*Haw. Rev. Stat.* §1-1's predecessor fixed "November 25, 1892 as the date Hawaiian usage must have been established in practice.").

41. Cody, Kinney, Sproat, Forrest, Chandler, Fu, Kekua, Tori-Kaʻuhane and Vaughan (sometimes "Practitioners"), have demonstrated they engaged in customary and traditional native Hawaiian practices within Nihokū. *Hanapi,* 89 Hawaiʻi at 86, 970 P.2d at 494 (In order to establish his or her conduct is constitutionally protected as a native Hawaiian, he or she must show: (1) he or she is a native Hawaiian within the guidelines set out in *PASH*; (2) his or her claimed right is constitutionally protected as a customary and traditional native Hawaiian practice in art. XII, § 7 of the Hawaiʻi Constitution, or *Haw. Rev. Stat.* §§ 1-1 or 7-1; and (3) exercise of the right occurred on undeveloped or less than fully developed property.).

[61] These individuals may lay the "adequate foundation" connecting their claimed right to a firmly rooted traditional or customary native Hawaiian practice because kamaʻaina testimony has been accepted as proof of ancient Hawaiian tradition, custom, and usage. *Hanapi,* 89 Hawaiʻi at 187 n.12, 970 P.2d at 495 n.12 *citing Palama v. Sheehan,* 50 Haw. 298, 440 P.2d 95 (1968) (holding that testimony from kamaʻaina witnesses were sufficient to find the existence of an ancient Hawaiian right of way); *Application of Ashford,* 50 Haw. 314, 316, 440 P.2d 76, 78 *reh'g denied,* 50 Haw. 452, 440 P.2d 76 (1968) (recognizing that Hawaiʻi "allow[s] reputation evidence by kamaʻaina witnesses in land disputes"); *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879) (permitting kamaʻaina witnesses to testify about the location of ancient Hawaiian land boundaries).

42. The rights of the Practitioners must be balanced against those of the Applicants' rights to the Subject Property because that property is "fully developed." *PASH,* 79 Hawai'i at 442, 903 P.2d at 1263 ("Traditional and customary rights are properly examined [and balanced] against the law of property as it has developed in this state.), *Id.* at 450, 903 P.2d at 1271 ("[R]ights of access and collection will not necessarily prevent landowners from developing their lands.") *citing Pele Defense Fund,* 73 Hawai'i at 621 n.36, 837 P.2d at 1272 n.36 ("reiterating the early holding that article XII, section 7 does not require the preservation of undeveloped lands in their natural state and that *Kalipi* rights only guarantee access to undeveloped lands") (internal quotation marks, brackets, and ellipses omitted), and *Hanapi,* 89 Hawai'i at 187 n.10, 970 P.2d at 495 n.10 (Property may be "fully developed" even though it lacks dwellings, improvements, and infrastructure, "where the existing uses of that property may be inconsistent with the exercise of protected native Hawaiian rights.").

43. Enforcement of the NH Rights are to reasonably accommodate competing development interests. *Mauna Kea II*, 143 Hawai'i at 395, 431 P.3d at 768 *quoting citing Ka Pa'akai O Ka 'Aina,* 94 Hawai'i at 35, 7 P.3d at 1072.

44. The Customary and Traditional native Hawaiian practices of Kilo, and gathering of medicinal plants and flowers to make leis, have taken place on the Subject Property prior to development of the Subdivision.[62]

45. Currently, consent of the Applicants is required for entry unto the Subject Property for the gathering of medicinal plants and flowers to make leis. See *PASH,* 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43 ("The State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights . . . necessarily allows the State to permit development that interferes with such rights in certain circumstances-for example, where the preservation and protection of such rights would result in 'actual harm' to the 'recognized interests of others.'") *citing Kapili v. Hawaiian Trust Co., Ltd.,* 66 Haw. 1, 12, 656 P.2d 745, 752 (1982).

46. Kilo is the only Customary and Traditional native Hawaii Practice that may be exercised from outside the boundaries of the Subject Property (i.e. the Refuge) without the consent of Applicants, but would be affected by the Proposed Project.

47. The Proposed Project will affect the practice of Kilo during daylight hours due to the visibility of the FDU with a covered portico, detached

[62] "[T]he right of each [native Hawaiian] tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is

garage, guest house, swimming pool and miscellaneous site improvements ("Structures"), and during nighttime hours by reason of the illumination of some of the Structures.

48. The endangered birds at the Refuge would also be impacted by the construction of the Proposed Project, illumination of the applicable Structures during nighttime hours, swimming pool if left uncovered, and any dogs and/or cats should Applicants have them on the Subject Property.

49. The conditions proposed in Supplement #6, as amended by this Report and Recommendation, would reasonably protect NH Rights of Kilo and protect the birds in the Refuge, while acknowledging the private property rights of Applicants to the Subject Property.[63] *See PASH,* 79 Hawai'i at 447, 903 P.2d at 1268 ("State retains the ability to reconcile competing interests under article XII, section 7.")

50. The conditions proposed in Supplement #6, as amended by this Report and Recommendation, are not unreasonable and infeasible because Applicants will be able to proceed with the Proposed Project, albeit on a reasonably reduced scale at a different location on the Subject Property. See

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potentially subject to regulation in the public interest." *PASH,* 79 Hawai'i at 450, 903 P.2d at 1271.

[63] See condition nos. 4, 5, 6, 7, 8, 11, 12 and 13. Exhibit O at 27-30.

Brescia, 115 Hawai‘i at 497, 168 P.3d at 949 (Reasonable use of the land is not necessarily the use most desired by the owner.).

51. The conditions proposed in Supplement #6, as revised in this Report and Recommendation, in recognition of customary and traditional Hawaiian rights of the Practitioners does not constitute a judicial taking. *PASH,* 79 Hawaii at 451, 903 P.2d at 1272 ("[R]ecognition of customary and traditional Hawaiian rights . . . does not constitute a judicial taking.").

52. The conditions proposed in Supplement #6, as revised in this Report and Recommendation, does not constitute a regulatory taking because: (a) Applicants may still enjoy economically beneficial use of the Subject Property; (b) there is an "essential nexus" between those conditions and protection of NH Rights to the extent feasible, compliance with SMA(U)-82-2 and the 1982 Building Setback Line, and adherence to the requirements of KCC §§ 8-3.2(e), 8-4.3 and 8-9.2 ("Legitimate State Interests"); and (c) those conditions are "roughly proportional" to the impact of the Proposed Project upon the Legitimate State Interests. *PASH,* 79 Hawaii at 452, 903 P.2d at 1273 *citing Dolan v. City of Tigard,* 512 U.S. 374, 386-89, 114 S.Ct. 2309, 2317-19, 129 LE.2d 304 (1994).

53. If any Conclusion of Law herein should be designated as a Conclusion of Law, the same shall be deemed to have been identified as such.

V. CONCLUSION.

It is recommended that the Planning Commission AFFIRM the decision of the Director to APPROVE Applicants' SMA Application SUBJECT TO THE FOLLOWING CONDITIONS:

1. The proposed improvements shall be constructed as represented. Any changes to said development shall be reviewed by the Planning Director to determine whether Planning Commission review and approval is warranted.

2. Prior to commencement of the proposed development, written confirmation of compliance with the requirement from all reviewing agencies shall be provided to the Planning Department. Failure to comply may result in forfeiture of the SMA Permit.

3. The proposed dwelling and guest house shall not be utilized for any transient accommodation purposes. It shall not be used as a transient vacation rental (TVR) or as a homestay. This restriction shall be incorporated into the deed restrictions of the subject parcel in the event the property is sold to another party, draft copies of which shall be submitted to the Planning Department prior to building permit application approval.

4. To ensure that the project is compatible with its surroundings and to minimize impact of the structures, the external color of the proposed dwelling, guest house, and detached garage shall be of moderate to dark earth-tone color. The proposed color scheme and a landscape plan should be submitted to the Planning Department for review and acceptance prior to building permit application.

5. The Applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the

archaeological/historical findings shall immediately cease and the Applicant shall contact the State Department of Land and Natural Resources, Historic Preservation Division and the Planning Department to determine mitigation measures.

6. Relocate the development within the 1982 Building Setback Line approved with Special Management Area Use Permit SMA(U)-82-2.

7. Reduce the total square footage of the roofed areas including the house, portico, lanais, garage, and guest house (excluding driveway and pool) by 15 percent.

8. Grading and excavation shall be minimized to the maximum extent possible.

9. DELETED AS REQUESTED OF THE PLANNING DEPARTMENT;[64]

10. DELETED AS REQUESTED OF THE PLANNING DEPARTMENT;[65]

11. To avoid and minimize potential project impacts to Nene the following measures shall be incorporated:

    a. Do not approach, feed, or disturb Nene.
    b. If Nene are observed loafing or foraging within the project area during the Nene breeding season (September through April), a biologist familiar with the nesting behavior of Nene shall conduct a survey for nests in and around the project area prior to the resumption of any work. Repeat surveys shall be conducted after any subsequent delay of work of three or more days (during which the birds may attempt to nest).
    c. All work shall immediately cease and contact the Service for further guidance if a nest is discovered within a radius of

[64] See Planning Department's Closing Arguments at 35-36. See also Intervenor's Errata To Closing Responsive Brief Dated February 23, 2024 at 2.
[65] See prior footnote.

150 feet of proposed work, or a previously undiscovered nest is found within said radius after work begins

d. .In areas where Nene are known to be present, post and implement reduced speed limits, and inform personnel and contractors about the presence of endangered species on-site.
e. Pool areas shall be covered when not in use.
f. Predators on the property shall be eliminated and managed.

12. To avoid and minimize potential project impacts to Hawaiian seabirds the following measures shall be incorporated:

    a. Fully shield all outdoor lights so the bulb can only be seen from below bulb height and only use when necessary. Spotlights aimed upward or spotlighting of structures shall be prohibited.
    b. Install automatic motion sensor switches and controls on all outdoor lights or turn off lights when human activity is not occurring in the lighted area.
    c. No nighttime construction is allowed during the seabird fledging period, September 15 through December 15.
    d. Utility lines associated with this property shall be undergrounded.
    e. Light emitted from inside the structures shall be minimized to the maximum extent possible.
    f. Predators on the property shall be eliminated and managed.

13. The Applicant shall develop and utilize Best Management Practices (B.M.P's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.

14. The Applicant shall resolve and comply with the applicable standards and requirements set forth by the State Health Department, State Historic Preservation Division-DLNR, and the County Departments of Public Works, Fire, Transportation, and Water.

15. To the maximum extent possible and within the confines of union requirements and applicable legal prohibitions against

discrimination in employment, the Applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors and shall seek to employ residents of Kauai in temporary construction and permanent resort-related jobs. It is recognized that the Applicant may have to employ non-Kauai residents for particular skilled jobs were no qualified Kauai residents possesses such skills. For purposes of this condition, the Commission shall relieve the Applicant of this requirement if the Applicant is subjected to anti-competitive restraints on trade or other monopolistic practices

16. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may, create, or to revoke the permits through the proper procedures should conditions of approval not be complied with or be violated.

17. Unless otherwise stated in the permit, once permit is issued, the Applicant must make substantial progress, as determined by the Director, regarding the development or activity within two (2) years, or the permit shall be deemed to have lapsed and be no longer in effect.

DATED at Honolulu, Hawaii, July 15, 2024.

/s/ Harlan Y. Kimura___
HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi

BEFORE THE HEARING OFFICER

OF THE PLANNING COMMISSION

OF THE COUNTY OF KAUAʻI

In the Matter of:	CC-2022-3
Petition for Intervention involving Special Management Area Use Permit SMA(U)-2022-1, Class IV Zoning Permit Z-IV-2022-1, and Use Permit U-2022-1 for the Construction of a Farm Dwelling Unit, Guest House, Garage and Associated Site Improvements, within Lot 11-A of the Seacliff Plantation Subdivision in Kīlauea, involving a parcel situated approximately 1,000 feet West of the Pali Moana Place/Makanaʻano Place Intersection, further identified as Tax Map Key: (4) 5-2-004: 084 (Unit 1) affecting a Larger Parcel approximately 12.305 acres in size,	Special Management Area Use Permit: SMA(U)-2022-1 Class IV Zoning Permit: Z-IV-2022-1 Use Permit: U-2021-1 TMK: (4) 5-2-004:084 (Unit 1) CERTIFICATE OF SERVICE
NĀ KIAʻI O NIHOKŪ, Petitioner-Intervenor, vs. PLANNING DEPARTMENT OF THE COUNTY OF KAUAʻI, Respondent, and PHILIP J. GREEN and LINDA M.	*(caption continued on next page)*

GREEN, Trustees of the Philip J. Green, Jr., Trust, dated December 4, 2018, and the Linda M. Green Trust, dated December 4, 2018,

Applicants.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following parties listed below, in the manner described thereto, at their last-known addresses, on July 15, 2024.

	U.S. Mail	Hand Delivery	Email
KIRSHA DURANTE, ESQ. TERINA F. FAʻAGAU, ESQ. Native Hawaiian Legal Corporation 1164 Bishop Street, Suite 1205 Honolulu, HI 96813 Email: kirsha.durante@nhlchi.org terina.faagau@nhlchi.org Attorneys for Petitioner-Intervenor NĀ KIAʻI O NIHOKŪ			X
CHRIS DONAHOE, ESQ. Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: cdonahoe@kauai.gov Attorney for Kaʻāina S. Hull, Director, County of Kauaʻi, Department of Planning			X

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PAUL ALSTON, ESQ. TIMOTHY H. IRONS, ESQ. Dentons US LLP 1001 Bishop Street, Suite 1800 Honolulu, HI 96813 Email: paul.alston@dentons.com tim.irons@dentons.com Attorneys for PHILIP J. GREEN and LINDA M. GREEN, Trustees of the Philip J. Green, Jr., Trust, dated December 4, 2018, and the Linda M. Green Trust, dated December 4, 2018			X
LAURA BARZILAI, ESQ. Deputy County Attorney County of Kauaʻi 4444 Rice Street, Suite 220 Līhuʻe, Kauaʻi, HI 96766 Email: lbarzilai@kauia.gov Attorney for Planning Commission of the County of Kauaʻi			X

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	U.S. Mail	Hand Delivery	Email
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DATED at Honolulu, Hawaii, July 15, 2024.

/s/ Harlan Y. Kimura

HARLAN Y. KIMURA
Hearing Officer for the
Planning Commission of the
County of Kauaʻi