

C. Kimo Alameda, Ph.D.
Mayor

William V. Brilhante, Jr.
Managing Director

West Hawai'i Office
74-5044 Ane Keohokālole Hwy
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County of Hawai'i PLANNING DEPARTMENT

Jeffrey W. Darrow
Director

Michelle S. Ahn
Deputy Director

East Hawai'i Office
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Phone (808) 961-8288
Fax (808) 961-8742

April 17, 2026

Pacific Resource Partnership
c/o Cox Fricke LLP
Abigail M. Holden, Esq
Andrew K. Recktenwald, Esq.
800 Bethel Street, Suite 600
Honolulu, HI 96813
VIA EMAIL

Dear Abigail M. Holden, Esq. and Andrew K. Recktenwald, Esq.:

**SUBJECT: Acknowledge Petition for Standing in Contested Case Hearing
(PL-CCH-2026-000031)
Special Management Area (SMA) Use Permit Application
(PL-SMA-2026-000087)
(Amend SMA 07-000019)
Applicant: DHL Mahi Site M LLC & DHL Mahi PropCo LLC
Tax Map Keys: (3) 6-8-001:050, 052, 054 and (3) 6-8-022:010**

This is to acknowledge receipt of the Petition for Standing in Contested Case Hearing that you filed with the Planning Department on April 16, 2026, in a complete and timely fashion. The petition will be forwarded to the Leeward Planning Commission for discussion and action prior to their hearing on the subject Special Management Area Use Permit Amendment Application.

Your petition will be addressed at the next scheduled Leeward Planning Commission hearing on **Thursday, April 23, 2026, at 9:30A.M.** Your presence will be required at this hearing to respond to questions that the Leeward Planning Commission may have regarding the petition for standing. The hearing notice is attached herein for your convenience.

Pacific Resource Partnership
c/o Cox Fricke LLP
Abigail M. Holden, Esq
Andrew K. Recktenwald, Esq
April 17, 2026
Page 2

Please refer to Planning Commission Rules of Practice and Procedure, Rule 4 (Contested Case Hearing Procedure) for information about the contested case process. The rules can be found on the Planning Department website at: <https://www.planning.hawaiicounty.gov/about-us/boards-committees/planning-commission-applications>.

If you have any questions, please feel free to contact Maija Jackson at Maija.Jackson@hawaiicounty.gov or via phone at (808) 961-8159.

Sincerely,

Maija Jackson for
Maija Jackson for (Apr 17, 2026 12:33:55 HST)

JEFFREY W. DARROW
Planning Director

DSH:rms

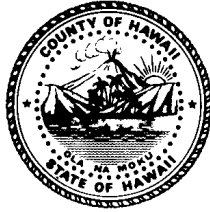
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Enclosures: Hearing Notice
 Petition for Standing

cc via email w/ enclosures: Patrick Fitzgerald, Landowner
 Hugh Brady, Wilson Okamoto Corporation
 Katherine Garson, Carlsmith Ball LLP
 Leeward Planning Commission
 Deputy Corporation Counsel for Planning Commission
 Deputy Corporation Counsel for Planning Department

C. Kimo Alameda, Ph.D.
Mayor

William V. Brilhante, Jr.
Managing Director



Dean Au, Chair
Donna "Kinuko" Noborikawa, Vice Chair
Alexandria "Lexie" Ayers
Michael Dela Cruz
Rebecca "Kawehi" Inaba
Shawn "Kele" Makaiau
Armando Rodriguez

Ke Komikina Ho'olālā Komohana, Kalana 'o Hawai'i

County of Hawai'i

LEEWARD PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720
Phone (808) 961-8288 • Fax (808) 961-8742

AGENDA

NOTICE IS HEREBY GIVEN of the following matters to be considered by the Leeward Planning Commission of the County of Hawai'i at a regular meeting in accordance with the provisions of Chapters 91 and 92, Hawai'i Revised Statutes, Section 6-7.5(a) of the Charter of the County of Hawai'i and Planning Commission Rules of Practice and Procedure.

DATE: Thursday, April 23, 2026

TIME: 9:30 a.m.

LOCATION: West Hawai'i Civic Center, Council Chambers, Building A
74-5044 Ane Keohokālole Highway, Kailua-Kona, Hawai'i

Public Participation: This is an in-person meeting, and the Leeward Planning Commissioners will participate in person. The primary way to view or testify at this meeting is in-person; however, as a courtesy to the public, the Commission provides the following additional ways to view or testify remotely at this meeting.

Optional Alternative to Provide Remote Oral Testimony: The public has the option to provide verbal testimony at the meeting by joining Zoom. To provide verbal testimony via Zoom, please use the link below to register prior to the meeting:

<https://www.zoomgov.com/meeting/register/8JxQ-GRSPGWRHE6clD1Xg>

Optional Alternative to View Meeting:

https://www.youtube.com/channel/UCAFoRMb3rfWLQMPd6TAkEGA?view_as=subscriber

Please note, as this is an in-person meeting, the hearing may proceed if the Zoom and/or YouTube connections fail.

Submitting Written Testimony: To ensure timely delivery to Commissioners prior to the meeting, written testimony should be submitted no later than 4:30 p.m. on Monday, April 20, 2026, by: (1) email to LPCtestimony@hawaiicounty.gov; (2) mail to the Leeward

Planning Commission at 101 Pauahi Street, Suite 3, Hilo, Hawai'i or (3) drop-off at the Planning Department offices in Hilo at the address above or Kona at 74-5044 Ane Keohokālole Highway, Building E, 2nd Floor, Kailua-Kona, Hawai'i. If you are submitting written testimony at the meeting, provide twelve (12) copies. All written testimony, regardless of time of receipt, will be made part of the permanent record. Please submit separate testimony for each item.

Meeting Materials/Board Packet: Pursuant to Hawai'i Revised Statutes Section 92-7.5, the meeting materials provided to the commission is available for public inspection three business days before the meeting date during regular business hours at the Planning Department offices in Hilo and Kona and by clicking 'Board Packets' at the following Planning Department website link: www.planning.hawaiicounty.gov/about-us/boards-committees/planning-commission-applications. This information can also be requested by sending an email to LPCtestimony@hawaiicounty.gov or by calling (808) 961-8288.

CALL TO ORDER

APPROVAL OF MINUTES

Review and Approval of December 18, 2025 Leeward Planning Commission Minutes

STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

Members of the public may provide public testimony regarding any agenda item now or at the time the agenda item is called to order.

NEW BUSINESS

1. **INITIATOR: PLANNING DIRECTOR (ANDY/KERRY XIE TRUST, WEI LIN ZHAO, EULIX CHIU; FANG/HAN TR, FRED MING LI- FORMERLY T&M PROPERTIES) (PL-PDI-2026-000015/ REZ 17-000220)**

The Planning Director has initiated the repeal of Change of Zone Ordinance Nos. 19-38, 09-50, 09-49, 06-138, 06-137, 95-118, 92-36, 90-10, 86-49, 533 (1980), and 594 (1973), amendment to Section 25-8-3 (North Kona Zone Map) and 25-8-5 (Kailua Urban Zone Map), Chapter 25, Article 8, of the Hawai'i County Code 1983 (2016 edition, as amended), which will revert the current zoning of 3.331 acres from Village Commercial-7,500 square feet (CV-7.5) to its original Double-Family Residential-3,750 square feet (RD-3.75) and 3.227 acres from Multiple-Family Residential-2,500 square feet (RM-2.5) to its original Unplanned (Agricultural-5 acres) zoning district. The subject parcel is located on the north side of Hualālai Road, approximately 1,000 feet east of its intersection with Kuakini Highway, Hienaloli 4th & 5th, North Kona, Hawai'i, TMK: 7-5-010:013.

2. **APPLICANT: DHL MAHI SITE M LLC and DHL MAHI PROPCO LLC (PL-SMA-2026-000087/AMEND SMA 07-019)**

Application to amend Special Management Area (SMA) Use Permit No. 07-019 for a 10-year time extension to Condition No. 2 (Complete Construction); reduce the

density of the Mauna Lani Site M master planned development from 1,207 Units (691 Residential & 516 Hotel) to 925 Units (551 Residential & 374 Hotel); remove proposed golf course and conference center use; increase preserved open space; and construct an emergency evacuation road. The project is situated within the Special Management Area and is located approximately 0.75 miles west of Queen Ka'ahumanu Highway, approximately 0.4 miles north of Mauna Lani Drive, Mauna Lani Resort, South Kohala, Hawai'i, TMKs: (3) 6-8-001:050; 052-055, (3) 6-8-022:010.

3. Discussion of proposed amendment to Planning Commission's Rules of Practice and Procedure, Rule 1 regarding General Rules of the Commission. The Commission will discuss adding commissioner attendance standards to Rule 1.
4. Discussion of Planning Commissioners' suggestions for future amendments to the Planning Commission Rules of Practice and Procedure.

PLANNING DIRECTOR'S REPORT

Report on Special Management Area (SMA) determinations and minor permits issued by the Planning Director for December 2025, January, February and March 2026.

AGENDA ITEMS FOR THE NEXT MEETING

The Commissioners will comment on matters not on the current agenda, for consideration for the Commission's next meeting.

ANNOUNCEMENTS

The Leeward Planning Commission's next regular meeting is scheduled for Friday, May 22, 2026, at the County Council Chambers in Kona and the public can also testify via Zoom. The date and venue of the meeting are subject to change.

ADJOURNMENT

Contested Case Procedure: Pursuant to PC Rule 4, Contested Case Procedure, of the County of Hawai'i Planning Commission Rules of Practice and Procedure, any person seeking to intervene as a party to a contested case hearing on Agenda Item No.2 above is required to file a written request which must be received by the office of the Planning Department no later than seven (7) calendar days prior to the Planning Commission's first public meeting on the matter. Such written request shall conform with the PC Rule 4-6(a), relating to Prehearing Procedure on a form as provided by the Planning Department entitled "Petition for Standing in a Contested Case Hearing." The notarized petition form and a filing fee of \$200 shall be submitted online via County of Hawai'i Electronic Processing and Information Center (EPIC) at the following website: <https://hawaiicountyhi-energovpub.tylerhost.net/Apps/SelfService#/home>

Notice to Lobbyists: If you are a lobbyist, you must register with the Hawai'i County Clerk within five days of becoming a lobbyist {Article 15, Section 2-91.3(b), Hawai'i County Code}. A lobbyist means "any individual engaged for pay or other consideration who spends more than five hours in any month or \$275 in any six-month period for the purpose

of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.” {Article 15, Section 2-91.3(a)(6), Hawai‘i County Code} Registration forms and expenditure report documents are available at the Office of the County Clerk, 25 Aupuni Street, Room 1402, Hilo, Hawai‘i 96720.

Anyone who requires an auxiliary aid or service, or other accommodation due to a disability, please contact the Planning Department at (808) 961-8288 or LPCtestimony@hawaiiicounty.gov as soon as possible. If a request is received later than five working days prior to the meeting date, we will try to obtain the auxiliary aid/service or other accommodation, but we cannot guarantee that the request will be fulfilled.

Upon request, this notice is available in alternate formats such as large print, Braille, or electronic copy.

Hawai‘i County is an Equal Opportunity Provider and Employer

LEEWARD PLANNING COMMISSION
Dean Au, Chairperson

(Hawai‘i Tribune Herald: Friday, March 27, 2026)
(West Hawai‘i Today: Friday, March 27, 2026)

PETITION FOR STANDING IN A CONTESTED CASE HEARING

(Page 1 of 2)

NAME: Pacific Resource Partnership c/o Abigail M. Holden, Esq. and Andrew K. Recktenwald, Esq.

ADDRESS: Cox Fricke LLP
800 Bethel Street, Suite 600
Honolulu, HI 96813

PHONE NO.: (808) 585-9440

APPLICANT/

DOCKET NO.: PL-SMA-2026-000087/ Amend SMA 07-000019

A. Is your interest in this matter clearly distinguishable from that of the general public?

Yes ☒ No ☐

If the answer is "yes", please explain:

Please see discussion in attached Petition to Intervene.

If the answer is "no", please explain how the proposed action will nevertheless cause you actual or threatened injury:

Please see discussion in attached Petition to Intervene.

B. Are you a government agency whose jurisdiction includes the land involved in the subject request?

Yes ☐ No ☒

If the answer is "yes", please explain the nature of the agency's jurisdiction:

C. Do you lawfully reside on or have some property interest in the land involved in the subject request?

Yes ☐ No ☒

If the answer is "yes", please explain:

PETITION FOR STANDING IN A CONTESTED CASE HEARING

(Page 2 of 2)

- D. Are you a person or persons descended from native Hawaiians who inhabited the Hawaiian Islands prior to 1778, who practiced those rights which were customarily and traditionally exercised for subsistence, cultural, or religious purposes?

Yes _____ No x _____

If the answer is "yes", please submit any genealogical evidence and historical evidence showing the exercise of those rights to support your statement:

Nathaniel

Petitioner's Signature

STATE OF HAWAII)
) SS.
COUNTY OF HAWAII)

On this 16 day of April, 2026, before me personally appeared Nathaniel Kinney, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

NOTARY CERTIFICATION
Date of Doc: 4/16/26 No. of Pages: 2
Doc. Description: Petition for standing in a contested case hearing
Patricia K. Mukai
Name: Patricia K. Mukai Doc: 4/16/26

Patricia P. Mukai
Notary Public, State of Hawaii

My commission expires: March 17, 2027



Appendix A



COX FRICKE LLP
A LIMITED LIABILITY LAW PARTNERSHIP LLP

ABIGAIL M. HOLDEN 8793-0
aholden@cfhawaii.com
ANDREW K. RECKTENWALD 10223-0
arecktenwald@cfhawaii.com
800 Bethel Street, Suite 600
Honolulu, Hawai'i 96813
Telephone: (808) 585-9440
Facsimile: (808) 275-3276

Attorneys for
PACIFIC RESOURCE PARTNERSHIP

BEFORE THE LEEWARD PLANNING COMMISSION

COUNTY OF HAWAI'I

STATE OF HAWAI'I

In the Matter of the Application
of

DHL MAHI SITE M LLC and DHL MAHI PROPCO LLC, for an Application to amend Special Management Area (SMA) Use Permit No. 07-019 for a 10-year time extension to Condition No. 2 (Complete Construction); reduce the density of the Mauna Lani Site M master planned development from 1,207 Units (691 Residential & 516 Hotel) to 925 Units (551 Residential & 374 Hotel); remove proposed golf course and conference center use; increase preserved open space; and construct an emergency evacuation road. The project is situated within the Special Management Area and is located approximately 0.75 miles west of Queen Ka'ahumanu Highway, approximately 0.4 miles north of Mauna Lani Drive, Mauna Lani Resort, South Kohala, Hawai'i, TMKs: (3) 6-8-001:050; 052-055, (3) 6-8-022:010.

SPECIAL PERMIT: PL-SMA-2026-000087/AMEND SMA 07-019

TMK: (3) 6-8-001:050; 052-055, (3) 6-8-022:010

PACIFIC RESOURCE PARTNERSHIP'S
PETITION TO INTERVENE;
DECLARATION OF ABIGAIL M.
HOLDEN; EXHIBITS 1 – 3;
DECLARATION OF NATHANIEL
KINNEY; CERTIFICATE OF SERVICE

PUBLIC HEARING DATE:

DATE: April 23, 2026

TIME: 9:30 a.m.

PACIFIC RESOURCE PARTNERSHIP'S PETITION TO INTERVENE

Pacific Resource Partnership (“PRP”), a market recovery trust fund doing business in Hawai‘i whose stated mission is to, among other things, guide the community toward a stronger, more sustainable Hawai‘i in a way that promotes a vibrant economy, preserves Hawai‘i’s environment, creates jobs and enhances the quality of life for all residents of Hawai‘i, hereby seeks to intervene in the above-captioned proceeding pursuant to Rule 4-6 of the County of Hawai‘i Planning Commission’s (“Commission”) Rules of Practice and Procedure (“Commission Rules”) and, accordingly, obtain status as a party in a Contested Case proceeding. As set forth below, PRP is entitled to intervene as of right under Commission Rule 4-6(a) and, therefore, should be permitted to intervene in the above-captioned proceeding.

I. INTRODUCTION

PRP submits this Petition to Intervene (“Petition”) in response to DHL Mahi Site M LLC and DHL Mahi Propco LLC’s (“Applicant”) January 2026 Application for Amendment to Special Management Area Use Permit: SMA 07-019 (“Application”), which requests to amend an existing Special Management Area Permit (SMA 07-019) (“Permit”) to: (1) allow for a 10-year time extension to Condition No. 2 of the Permit which, at present, requires construction on Applicant’s proposed mixed hotel and residential development (“Project”) to be completed by September 4, 2028; and (2) alter certain aspects of the Project itself, namely, to reduce the unit density from 1,207 units (691 residential & 516 hotel) to 925 Units (551 residential & 374 hotel), remove a proposed golf course and conference center use, increase open space, and construct an emergency evacuation road. The Project is situated within the Special Management Area and is located approximately 0.75 miles west of Queen Ka‘ahumanu Highway, approximately 0.4 miles north of Mauna Lani Drive, Mauna Lani Resort, South

Kohala, Hawai'i, TMKs: (3) 6-8-001:050; 052-055, (3) 6-8-022:010 (the "Property"). The Application is scheduled for hearing before the Commission on April 23, 2026 at 9:30 a.m.

The Applicant's proposed Project has been plagued by substantial delays and inaction — a state of affairs that only stands to be further perpetuated if the Application is granted. The original application, which was submitted in 2007 and approved in 2008 by the issuance of the Permit, called for the development of 1,207 total units: 691 residential and 516 hotel. The original approval called for the project to be "developed over an 8 to 10 year period[.]" yet this was not done and five-year extensions were granted from 2018 to 2023 and from 2023 to 2028. The current deadline is September 4, 2028, and the pending Application requests a further 10-year extension (i.e., to 2038)—**30 years after the initial Permit issuance in 2008.**

This Project has stagnated. And the Applicant is now requesting an additional ten years to complete construction. The Project delays have directly and negatively impacted the interests of PRP and its members, and of the broader community of Hawai'i Island. As such, PRP is entitled to intervene in this Contested Case.

II. PRP IS ENTITLED TO INTERVENE

Rule 4-6 of the Commission Rules provides that any person seeking to intervene as a party "shall file a written request on a form approved by the Planning Director"¹ and further provides that, "[u]pon receipt of a written request to intervene, the Commission, at the first meeting on the matter, shall hold a hearing on the written request" and that "[t]he petitioner shall be admitted as a party if it can demonstrate that[.]" *inter alia*, "[h]is or her interest is clearly distinguishable from that of the general public" or, alternatively, that "even though they do not

¹ A Petition for Standing in a Contested Case Hearing form, with a notarized signature by PRP, is attached hereto as Exhibit 1.

have an interest different than the public generally, that the proposed action will cause them actual or threatened injury in fact.” As discussed *infra*, PRP has a right to intervene under each of these provisions.

A. PRP Has a Right to Intervene Because PRP Has an Interest in this Matter That Is Clearly Distinguishable from That of the General Public

PRP has organizational and associational standing to intervene in this matter in that its interests, as well as the interests of its members, will be directly and immediately impacted by the Application, which proposes a ten-year time extension to initiate construction on the Project, in a manner that is distinguishable from the interests of the general public. (Exhibit 2 to Holden Decl., Notice of Public Hearing.) If the Request is granted, Applicant would be permitted to complete construction on the Project as late as 2038.

PRP is a market recovery trust fund which represents approximately 6,000 men and women union carpenters and 250 large and small contractors throughout the State of Hawai‘i, including approximately 600 union members on Hawai‘i Island. (Declaration of Nathaniel Kinney (“Kinney Decl.”) at ¶ 2.) PRP has expertise in, and is committed to, guiding the community toward a stronger, more sustainable Hawai‘i in a way that promotes a vibrant economy, preserves a healthy environment, creates jobs and enhances the quality of life for all residents of Hawai‘i. (Kinney Decl. at ¶ 3.) PRP believes that creating a stronger, more sustainable Hawai‘i requires a broad commitment from all – government officials, businesspeople, educators, environmentalists, parents and concerned citizens from all islands and all walks of life – to work together toward this common goal and make a difference for generations to come. (*Id.*) This involves, among other things, ensuring that development projects reflect responsible, and environmentally sound, planning and execution. (*Id.*) Indeed, by building responsibly, PRP seeks to preserve the island lifestyle we all treasure. (*Id.*)

PRP has organizational standing to intervene because organizations, like individuals, have standing where they satisfy the following questions in the affirmative: “(1) has the plaintiff suffered an actual or threatened injury . . . (2) is the injury fairly traceable to the defendant’s actions; and (3) would a favorable decision likely provide relief for plaintiff’s injury.” *Sierra Club v. Dep’t of Transp.*, 115 Hawai‘i 299, 319, 167 P.3d 292, 312 (2007), *as corrected* (Oct. 10, 2007). Additionally, as noted above, Commission Rule 4-6 confers standing where, *inter alia*, the proposed intervenor’s interest is “clearly distinguishable from that of the general public.”

PRP satisfies all three prongs of the *Sierra Club* test. The interests of PRP and its members in responsible development are affected by the proposed extension inasmuch as it would allow Applicant to continue to delay the proposed Project while avoiding the scrutiny that would come with re-applying for an SMA Use Permit – directly undercutting PRP’s efforts to advocate for a stronger, more sustainable Hawai‘i through responsible development. Indeed, PRP asserts that allowing the Applicant a further continuance for completing construction on its Project directly undercuts PRP’s interests as stated above and, indeed, incentivizes **irresponsible** development.

Irresponsible development and unplanned changes in development, such as those proposed here by Applicant directly impact contractors like those represented by PRP. Indeed, the 2005 Hawai‘i County General Plan specifically notes the direct relationship between the construction of resort-residential developments and appropriately planned development, stating that “[c]ontinued investor interest in resort and resort-residential development in the County suggests an economic future that promises new jobs and more commercial, recreational, and cultural activities.”

(2005 General Plan, available at <https://dlnr.hawaii.gov/mk/files/2017/03/B.26-Hawaii-County-GP2005.pdf>, at Section 2-7.) The inverse, of course, is true as well — projects that languish in the planning stage for decades deprive PRP’s members of the ability to appropriately plan potential investment, scheduling, employment, allocation of resources and other opportunities. This fact is further reflected in the Hawai‘i County 2045 draft General Plan, which is currently in a draft form and which is cited by the Application, as that document reflects a policy in favor of responsible and efficient development. (2045 draft General Plan, available at <https://cohplanning.konveio.com/draft-2-general-plan-2045>, at Section 4.1 (stating a policy goal to “[r]emove barriers to residential development in the appropriate districts to **reduce development timelines**, increase housing stock availability, and increase affordability” and to “[c]ollaborate across State and County agencies to facilitate **efficient and effective land use processes**.”) (emphases added).)

PRP and its members – as critical members of the local development sector – have an interest in development and land use that comprehensively accounts for the local economy and environment by including community members in the administrative process. PRP seeks intervention to vindicate these specific policy concerns, which are at the core of its mission, and which distinguish the interests of PRP and its members from those of the general public with respect to this matter.

A decision by the Commission to deny the Application for an extension would vindicate PRP and its members’ interests in this regard. By contrast, if granted, this extension will directly and significantly undermine PRP’s efforts to advocate for responsible development and, even more insidiously, may encourage other developers to sit on SMA Use Permit approvals for inordinate amounts of time as potential adverse effects mount.

Because PRP meets the requirements for intervention under the Commission Rules, inasmuch as PRP's interests (and those of its members) will be directly and immediately impacted by the approval of the Application in a manner that is distinguishable from the general public, the Commission should grant PRP's Petition and admit PRP as a Party-Intervenor in a Contested Case in opposition to the Application.

B. Alternatively, PRP Has Organizational Standing to Intervene on Behalf of Its Members, Who Stand to Suffer an Actual Injury If the Application is Granted

As noted above, a party also has standing to intervene under Commission Rule 4-6 even though they do not have an interest different than the public generally, if the proposed action will cause them actual or threatened injury in fact. Importantly in this regard, organizations such as PRP have associational standing to sue on behalf of their members, even though they have not themselves been injured, when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Sierra Club*, 115 Hawai‘i at 334, 167 P.3d at 327.

PRP satisfies the requirements to sue on behalf of its members because (1) its members, as citizens of the broader Hawai‘i Island community, would have standing on their own to raise issues relating to responsible development concerns; (2) PRP seeks to advocate for responsible development as part of its mission; and (3) the participation of individual members is not necessary. Accordingly, even if the Commission does not find that PRP has an interest that is distinguishable from that of the general public, PRP nevertheless has standing to intervene in this Contested Case proceeding to vindicate the interests of its members. *Pub. Access Shoreline*

Hawai‘i by Rothstein v. Hawai‘i Cnty. Plan. Comm’n by Fujimoto, 79 Hawai‘i 425, 434, 903 P.2d 1246, 1255 (1995) (explaining that the “restrictive interpretation of standing requirements is not entitled to deference”) (quotation marks and citations omitted).² The Application on its face raises questions regarding potential intervening events since the initial Permit approval that warrant additional scrutiny as to whether the Project continues to align with the needs of the community. These include, without limitation:

1) The Application acknowledges that an August 2025 Ka Pa‘akai O Ka ‘Āina (“KPA”) analysis undertaken to evaluate the potential impacts of the proposed Project on traditional and customary Native Hawaiian rights concluded that a prior 2007 Cultural Impact Assessment (“CIA”), which determined that “there were no ongoing traditional practices within the ‘Site M’ area,” was ‘incomplete’ inasmuch as the 2007 CIA was “based on limited consultation and focused on recent history, thereby not representing a full picture of the area's cultural history and practices.” (Application at 28.) The Application thus concedes that “while no active traditional gathering is occurring on the property, the ‘Site M’ area is part of a broader cultural landscape with historical resources and ancestral knowledge” such that “[t]he primary cultural concern is the potential for development to further detach the area from its cultural narratives and stewardship ethics.” (*Id.*) Although the Application lists certain proposed measures, and vaguely asserts that applicant “commits to incorporating all recommendations and

² PRP notes in this regard that, in a recent decision in another contested case, the Circuit Court of the Fifth Circuit concluded, in Findings of Fact and Conclusions of Law issued on August 4, 2025, that PRP had standing to pursue an appeal arising from the use of land within the special management area for a wooden truss manufacturing facility, finding, *inter alia*, that “PRP and its members also have an interest in development and land use projects that comprehensively account for the local economy and environment by including community members in the permitting process.” (Exhibit 3 to Holden Decl., Findings of Fact, Conclusions of Law and Order in Case No. 5CCV-24-0000068, Circuit Court of the Fifth Circuit, State of Hawai‘i, at ¶¶ 37-52.)

findings into the Proposed Project’s design and long-term stewardship][,]” yet provides scant details about the specifics of the commitments it purports to make.

2) The Application states that “[t]raffic impacts were thoroughly addressed in the original SMA 07-019 application” and states that Applicant is not requesting to amend the traffic mitigation conditions associated with that Application. Applicant’s reliance on a nearly two decades-old stale traffic analysis warrants further scrutiny to assess whether additional conditions are necessary to mitigate traffic impacts from the proposed development.

The impact of these intervening issues on the Project merits further scrutiny such that intervention by PRP in a Contested Case proceeding is appropriate inasmuch as Applicant’s failure to account for these intervening events in a holistic manner reflects a spirit of irresponsible development that directly undercuts PRP’s core mission, and the interests of its members as citizens of the broader Hawai‘i island community.

Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Hawai‘i 150, 231 P.3d 423 (2010), is instructive in this regard. That case arose from a proposed expansion of the Turtle Bay Resort. The applicant submitted an EIS in 1985, which identified various adverse impacts of the development including “drainage, traffic, dust generation, water consumption, marsh drainage input, loss of agricultural uses, construction noise, air quality, and solid waste disposal.” Over the course of the next twenty years, the project encountered several delays and then, in 2005 — twenty years after the permit was granted — the applicant submitted a Site Development Division Master Application Form and contended there was no basis for requiring a supplemental EIS to assess changes to the surrounding area. The Honolulu Department of Planning and Permitting agreed, ruling that no supplemental EIS was required, reasoning that no

time frame for development was either implied or imposed in connection with the original approval, this finding was upheld by the lower courts.

The Hawai‘i Supreme Court reversed, noting that “the evidence in the record indicates that: (1) traffic studies analyzed traffic impact projections through 2000; (2) visitor units, hotel demand, and population growth were also projected and analyzed only through 2000; and (3) monk seal populations were nearly non-existent in the project area at the time and, thus, were not even considered in the 1985 EIS.” *Id.* at 178, 231 P.3d at 451. As such, the passage of twenty years created “an ‘essentially different action’” than the one proposed, necessitating a supplemental EIS. *Id.* at 178, 231 P.3d at 451. Similarly, PRP seeks intervention here to, among other things, assess whether the intervening changes in the surrounding area render the proposed Project misaligned with the needs of the surrounding community such that further scrutiny of the Application is warranted.

III. CONCLUSION

Based on the foregoing, PRP respectfully requests that the Commission grant its Petition and permit PRP to Intervene in the Contested Case in order to oppose the Application.

DATED: Honolulu, Hawai‘i, April 16, 2026.

/s/ Abigail M. Holden

ABIGAIL M. HOLDEN

ANDREW K. RECKTENWALD

Attorneys for
PACIFIC RESOURCE PARTNERSHIP

BEFORE THE LEEWARD PLANNING COMMISSION

COUNTY OF HAWAI'I

STATE OF HAWAI'I

In the Matter of the Application

of

DHL MAHI SITE M LLC and DHL MAHI PROPCO LLC, for an Application to amend Special Management Area (SMA) Use Permit No. 07-019 for a 10-year time extension to Condition No. 2 (Complete Construction); reduce the density of the Mauna Lani Site M master planned development from 1,207 Units (691 Residential & 516 Hotel) to 925 Units (551 Residential & 374 Hotel); remove proposed golf course and conference center use; increase preserved open space; and construct an emergency evacuation road. The project is situated within the Special Management Area and is located approximately 0.75 miles west of Queen Ka'ahumanu Highway, approximately 0.4 miles north of Mauna Lani Drive, Mauna Lani Resort, South Kohala, Hawai'i, TMKs: (3) 6-8-001:050; 052-055, (3) 6-8-022:010.

SPECIAL PERMIT: PL-SMA-2026-000087/AMEND SMA 07-019

TMK: (3) 6-8-001:050; 052-055, (3) 6-8-022:010

DECLARATION OF ABIGAIL M. HOLDEN

DECLARATION OF ABIGAIL M. HOLDEN

I, ABIGAIL M. HOLDEN, declare as follows:

1. I am an attorney duly licensed to practice law in the State of Hawai'i, a member of the law firm of Cox Fricke LLP, and counsel of record for Pacific Resource Partnership ("PRP"). I make this Declaration based on personal knowledge unless stated otherwise, and I am competent to testify with respect to the matters set forth herein.
2. Attached hereto as Exhibit 1 is a true and correct copy of a Petition for Standing in a Contested Case Hearing form, with a notarized signature by PRP.

3. Attached hereto as Exhibit 2 is a true and copy of a Notice of Public Hearing published in the Honolulu Star-Advertiser, which my office obtained at the following URL: <https://statelegals.staradvertiser.com/2026/03/27/0001523917-01/> (last accessed April 16, 2026).

4. Attached hereto as Exhibit 3 is a true and correct copy of Findings of Fact, Conclusions of Law, and Order issued by the Court in the PRP Kaua‘i Case on or about August 4, 2025.

I, ABIGAIL M. HOLDEN, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai‘i, April 16, 2026.

/s/Abigail M. Holden
ABIGAIL M. HOLDEN

PETITION FOR STANDING IN A CONTESTED CASE HEARING

(Page 1 of 2)

NAME: Pacific Resource Partnership c/o Abigail M. Holden, Esq. and Andrew K. Recktenwald, Esq.
ADDRESS: Cox Fricke LLP
800 Bethel Street, Suite 600
Honolulu, HI 96813
PHONE NO.: (808) 585-9440
APPLICANT/
DOCKET NO.: PL-SMA-2026-000087/ Amend SMA 07-000019

A. Is your interest in this matter clearly distinguishable from that of the general public?

Yes ☒ No ☐

If the answer is "yes", please explain:

Please see discussion in attached Petition to Intervene.

If the answer is "no", please explain how the proposed action will nevertheless cause you actual or threatened injury:

Please see discussion in attached Petition to Intervene.

B. Are you a government agency whose jurisdiction includes the land involved in the subject request?

Yes ☐ No ☒

If the answer is "yes", please explain the nature of the agency's jurisdiction:

C. Do you lawfully reside on or have some property interest in the land involved in the subject request?

Yes ☐ No ☒

If the answer is "yes", please explain:

Appendix A

PETITION FOR STANDING IN A CONTESTED CASE HEARING

(Page 2 of 2)

- D. Are you a person or persons descended from native Hawaiians who inhabited the Hawaiian Islands prior to 1778, who practiced those rights which were customarily and traditionally exercised for subsistence, cultural, or religious purposes?

Yes _____ No x _____

If the answer is "yes", please submit any genealogical evidence and historical evidence showing the exercise of those rights to support your statement:

Nathaniel Kinney

Petitioner's Signature

STATE OF HAWAII)
) SS.
COUNTY OF HAWAII)

On this 16 day of April, 2026, before me personally appeared Nathaniel Kinney, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

NOTARY CERTIFICATION
Date of Doc.: 4/16/26 No. of Pages: 2
Doc. Description: Petition for standing in a contested case hearing
Nathaniel Kinney
Name: Patricia K. Mukai Doc: 4/16/26

Patricia K. Mukai

Notary Public, State of Hawaii

My commission expires: March 17, 2027



Appendix A

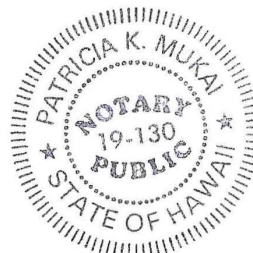


EXHIBIT 1



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Notice #: 0001523917-01 Public Notices

AGENDA LEEWARD PLANNING COMMISSION COUNTY OF HAWAII

NOTICE IS HEREBY GIVEN of the following matters to be considered by the Leeward Planning Commission of the County of Hawaii at a regular meeting in accordance with the provisions of Chapters 91 and 92, Hawaii Revised Statutes, Section 6-7.5(a) of the Charter of the County of Hawaii and Planning Commission Rules of Practice and Procedure.

DATE: Thursday, April 23, 2026

TIME: 9:30 a.m.

**LOCATION: West Hawaii Civic Center, Council Chambers, Building A
74-5044 Ane Keohokalole Highway, Kailua-Kona, Hawaii**

Public Participation: This is an in-person meeting, and the Leeward Planning Commissioners will participate in person. The primary way to view or testify at this meeting is in-person; however, as a courtesy to the public, the Commission provides the following additional ways to view or testify remotely at this meeting.

Optional Alternative to Provide Remote Oral Testimony: The public has the option to provide verbal testimony at the meeting by joining Zoom. To provide verbal testimony via Zoom, please use the link below to register prior to the meeting:

https://www.zoomgov.com/meeting/register/_8JxQ-GRSPGWRHE6cID1Xg

Optional Alternative to View Meeting:

https://www.youtube.com/channel/UCAFoRMB3rFWLQMPd6TAKEGA?view_as=subscriber

Please note, as this is an in-person meeting, the hearing may proceed if the Zoom and/or YouTube connections fail.

Submitting Written Testimony: To ensure timely delivery to Commissioners prior to the meeting, written testimony should be submitted no later than 4:30 p.m. on Monday, April 20, 2026, by: (1) email to LPCtestimony@hawaiicounty.gov; (2) mail to the Leeward Planning Commission at 101 Pauahi Street, Suite 3, Hilo, Hawaii or (3) drop-off at the Planning Department offices in Hilo at the address above or Kona at 74-5044 Ane Keohokalole Highway, Building E, 2nd Floor, Kailua-Kona, Hawaii. If you are submitting written testimony at the meeting, provide twelve (12) copies. All written testimony, regardless of time of receipt, will be made part of the permanent record. Please submit separate testimony for each item.

Meeting Materials/Board Packet: Pursuant to Hawaii Revised Statutes Section 92-7.5, the meeting materials provided to the commission is available for public inspection three business days before the meeting date during regular business hours at the Planning Department offices in Hilo and Kona and by clicking 'Board Packets' at the following Planning Department website link:

www.planning.hawaiicounty.gov/about-us/boards-committees/planning-commission-applications. This information can also be requested by sending an email to LPCtestimony@hawaiicounty.gov or by calling (808) 961-8288.

CALL TO ORDER

APPROVAL OF MINUTES

Review and Approval of December 18, 2025 Leeward Planning Commission Minutes
STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

Members of the public may provide public testimony regarding any agenda item now or at the time the agenda item is called to order.

NEW BUSINESS

1. INITIATOR: PLANNING DIRECTOR (ANDY/KERRY XIE TRUST, WEI LIN ZHAO, EULIX CHIU; FANG/HAN TR, FRED MING LI- FORMERLY T&M PROPERTIES) (PL-PDI-2026-000015/ REZ 17-000220)

The Planning Director has initiated the repeal of Change of Zone Ordinance Nos. 19-38, 09-50, 09-49, 06-138, 06-137, 95-118, 92-36, 90-10, 86-49, 533 (1980), and 594 (1973), amendment to Section 25-8-3 (North Kona Zone Map) and 25-8-5 (Kailua Urban Zone Map), Chapter 25, Article 8, of the Hawaii County Code 1983 (2016 edition, as amended), which will revert the current zoning of 3.331 acres from Village Commercial-7,500 square feet (CV- 7.5) to its original Double-Family Residential-3,750 square feet (RD-3.75) and 3.227 acres from Multiple-Family Residential-2,500 square feet (RM-2.5) to its original Unplanned (Agricultural-5 acres) zoning district. The subject parcel is located on the north side of Hualalai Road, approximately 1,000 feet east of its intersection with Kuakini Highway, Hienaloli 4th & 5th, North Kona, Hawaii, TMK: 7-5-010:013.

2. APPLICANT: DHL MAHI SITE M LLC and DHL MAHI PROPCO LLC
(PL-SMA-2026-000087/AMEND SMA 07-019)

Application to amend Special Management Area (SMA) Use Permit No. 07-019 for a 10-year time extension to Condition No. 2 (Complete Construction); reduce the density of the Mauna Lani Site M master planned development from 1,207 Units (691 Residential & 516 Hotel) to 925 Units (551 Residential & 374 Hotel); remove proposed golf course and conference center use; increase preserved open space; and construct an emergency evacuation road. The project is situated within the Special Management Area and is located approximately 0.75 miles west of Queen Kaahumanu Highway, approximately 0.4 miles north of Mauna Lani Drive, Mauna Lani Resort, South Kohala, Hawaii, TMKs: (3) 6-8-001:050; 052-055, (3) 6-8-022:010.

3. Discussion of proposed amendment to Planning Commission's Rules of Practice and Procedure, Rule 1 regarding General Rules of the Commission. The Commission will discuss adding commissioner attendance standards to Rule 1.

4. Discussion of Planning Commissioners' suggestions for future amendments to the Planning Commission Rules of Practice and Procedure.

PLANNING DIRECTOR'S REPORT

Report on Special Management Area (SMA) determinations and minor permits issued by the Planning Director for December 2025, January, February and March 2026.

AGENDA ITEMS FOR THE NEXT MEETING

The Commissioners will comment on matters not on the current agenda, for consideration for the Commission's next meeting.

ANNOUNCEMENTS

The Leeward Planning Commission's next regular meeting is scheduled for Friday, May 22, 2026, at the County Council Chambers in Kona and the public can also testify via Zoom. The date and venue of the meeting are subject to change.

ADJOURNMENT

Anyone who requires an auxiliary aid or service, or other accommodation due to a disability, please contact the Planning Department at (808) 961-8288 or LPCTestimony@hawaiicounty.gov as soon as possible. If a request is received later than five working days prior to the meeting date, we will try to obtain the auxiliary aid/service or other accommodation, but we cannot guarantee that the request will be fulfilled.

Upon request, this notice is available in alternate formats such as large print, Braille, or electronic copy.

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LEEWARD PLANNING COMMISSION

Dean Au, Chairperson

(HTH/WHT1523917 3/27/26)



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APPROVED

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Attorneys for Appellant
PACIFIC RESOURCE PARTNERSHIP

**Electronically Filed
FIFTH CIRCUIT
5CCV-24-0000068
04-AUG-2025
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Dkt. 71 FOF**

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

PACIFIC RESOURCE PARTNERSHIP,
Appellant,

vs.

COUNTY OF KAUA'I PLANNING
DEPARTMENT; JOHN DOES 1-10;
JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE LIMITED
LIABILITY COMPANIES 1-10; DOE
PARTNERSHIPS 1-10; DOE
GOVERNMENTAL ENTITIES 1-10; and
DOE ENTITIES 1-10,

Appellees.

CASE NO. 5CCV-24-0000068
(Agency Appeal)

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

ORAL ARGUMENT

Date: July 23, 2025

Time: 1:00 p.m.

Judge: Hon. Kathleen N.A. Watanabe

Judge: Hon. Kathleen N.A. Watanabe

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appellant Pacific Resource Partnership's ("PRP") Notice of Appeal to the Circuit Court and Statement of the Case filed on August 4, 2024 [Dkt. No. 1], PRP's Opening Brief filed on April 7, 2025 [Dkt. No. 30], Appellee County of Kaua'i Planning Department ("Planning Department") Answering Brief filed on May 16, 2025 [Dkt. No. 47], and PRP's Reply Brief to

the Planning Department’s Answering Brief filed on May 30, 2025 [Dkt. No. 59], came for hearing before the Honorable Kathleen N.A. Watanabe on July 23, 2025, at 1:00 p.m., with Abigail M. Holden, Esq. appearing on behalf of PRP and Chris Donahoe, Esq. appearing on behalf of the Planning Department. Mauna Kea Trask, Esq. appeared for non-party HPM Building Supply (“HPM”) but did not submit argument.

Having considered the memoranda of law submitted, the arguments of the parties, and the record and files of these proceedings, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. To the extent that any of the following Findings of Fact shall be determined to be Conclusions of Law, they shall be construed as such for the purpose herein.

HPM’s Initial Permits for a Neighboring Location Were Vacated

2. In or about 2022, HPM submitted an Application for a Class IV Zoning Permit (Z-IV-2022-08), Use Permit (U-2022-8), and Special Permit (SP-2022-1) (“Application”) to build an industrial manufacturing facility (the “Factory”) that would manufacture wooden trusses and prefabricated wall panels on a three-acre portion of that certain parcel of real property, situated at Pa’a, District of Koloa, Island and County of Kaua‘i, State of Hawai‘i bearing TMK No. (4) 2-9-001-001 (the “Property”) which was zoned for agricultural use. [Dkt. No. 31, Findings of Fact (“FOF”) ¶¶ 2, 6, 13.¹]

3. On May 6, 2022, PRP filed a Petition to Intervene to the County of Kaua‘i Planning Commission (“Commission”) with respect to HPM’s Application. [Dkt. No. 32 at

¹ The Court takes judicial notice of the records and files of the related action in the Circuit Court of the Fifth Circuit, State of Hawai‘i in Case No. 5CCV-22-0000049 and Case No. 5CCV-22-0000060. *Peters v. Aipa*, 118 Hawai‘i 308, 312 n.3, 188 P.3d 822, 826 n.3 (App. 2008), *as amended* (July 25, 2008)).

4. The Commission denied PRP's Petition to Intervene and subsequently granted HPM's Application during a June 14, 2022 Meeting, thereby approving HPM's Special Permit, Use Permit, and Class IV Zoning Permit. [Dkt. No. 32 at COK001040-1043.]

5. PRP filed a Notice of Appeal on June 9, 2022 based on the Commission's denial of PRP's Petition to Intervene and, after briefing and argument, this Court vacated HPM's permits, holding that the Commission had erred in denying PRP's Petition to Intervene. [Dkt. No. 31, *passim*.]

6. In so holding, the Court also determined that PRP had standing to intervene in the proceeding, explaining as follows:

75. At the outset, PRP has established that it has both organizational and associated standing to intervene inasmuch as its interests, as well as the interests of its members, would be directly and immediately impacted by HPM's Application and requested Permits.

...

78. Specifically, with regard to PRP's constitutional rights, the Hawai'i Supreme Court has stated that "[c]onstitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." *Pele Defense Fund v. Puna Geothermal Venture*, 77Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994).

79. Article XI, Section 9 of the Hawai'i State Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

² The Court takes judicial notice of these records and files from the related action in the Circuit Court of the Fifth Circuit, State of Hawai'i in Case No. 5CCV-22-0000049 and Case No. 5CCV-22-0000060. *See* fn.1 *supra*.

80. The Hawai‘i Supreme Court has held that “HRS chapter 205 is a law relating to the conservation, protection and enhancement of natural resources, and thus falls within the scope the enforcement right established by article XI, section 9.” *Cnty. of Hawaii v. Ala Loop Homeowners*, 123 Hawai‘i 391, 409, 235 P.3d 1103, 1121 (2010), abrogated on other grounds by *Tax Found. of Hawai‘i v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019); see also *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i at 269, 408 P.3d at 21 (holding that petitioners have a right to intervene where they have established a “protected property interest in a clean and healthful environment”); *Protect & Pres. Kahoma Ahupua‘a Ass’n v. Maui Plan. Comm’n*, 149 Hawai‘i 304, 311, 489 P.3d 408, 415 (2021) (“*Protect & Pres. Kahoma Ahupua‘a Ass’n II*”), as amended (June 17, 2021), reconsideration denied, No. SCWC-15-0000478, 2021 WL 2828030 (Haw. July 7, 2021) (same).

81. Courts use a two-step analysis to determine whether there was a due process right to a contested case hearing: “(1) [whether] the particular interest which [the] claimant seeks to protect by a hearing [is] ‘property’ within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is ‘property,’ what specific procedures are required to protect it.” *Protect & Pres. Kahoma Ahupua‘a Ass’n II*, 149 Hawai‘i at 312, 489 P.3d at 416.

82. “[W]here a source of state law—such as article XI, section 9—grants any party a substantive right to a benefit—such as a clean and healthful environment—that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created.” *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i at 264, 408 P.3d at 16.

83. Thus, PRP’s right to a clean and healthful environment, as defined by laws relating to environmental quality such as HRS Chapters [sic] 205 and 205A, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai‘i Constitution. [See also Dkt No. 90, COL ¶ 31.]

....

88. Similarly, here, PRP asserted its members’ constitutional right to a clean and healthful environment under article XI, section 9 of the Hawai‘i Constitution, as described above.

89. PRP’s members have an interest in development and land use projects that support local jobs and provide living wages, and also meet the statutory environmental, economic, and cultural requirements; PRP has an interest in development and land use projects that

comprehensively account for the local economy and environment by including community members in the application process; PRP is concerned that HPM's requested industrial manufacturing plant to produce prefabricated materials for housing "packages" would not actually support the purpose of HRS Chapter 205 and 205A or the Kaua'i General Plan; and PRP is concerned that, contrary to HPM's assertions in its Application, granting permits for HPM's requested industrial manufacturing plant would lead to a significant reduction in local jobs, as well as a potential reduction in payment of a living wage on Kaua'i, present a use of the land that is entirely out of character for the area (which the General Plan deems as having an "historic 'old town' charm" with "vast cultural treasures") and be an inappropriate use of lands zoned for agriculture.

....

91. Thus, PRP asserted its and its members' constitutional right to a clean and healthful environment under article XI, section 9 of the Hawai'i Constitution and was therefore denied due process when it was denied the opportunity to intervene.

[Dkt. No. 31 at COL, ¶¶ 75, 78-83, 88-89, 91 (internal citations to record omitted).]

PRP Submitted a Petition for Declaratory Order to the Commission in 2023 Regarding Further Violations by HPM, Which Was Denied

7. HPM did not resubmit its Application or appeal this Court's ruling vacating its permits but, instead, began operating its Factory without permits at the Old Koloa Sugar Mill, located on agricultural land. [Dkt. No. 1, ¶ 1.]

8. Accordingly, on August 16, 2023, PRP submitted a Petition for Declaratory Order ("Declaratory Petition") to the Commission regarding the legality of HPM's unpermitted use of the Old Koloa Sugar Mill, located on agricultural land, for its factory. [Dkt. No. 1 at ¶¶ 1-2; Dkt. No. 127 in Case No. 5CCV-23-0000148 at Exhibit 4, *passim*.³]

9. PRP's Declaratory Petition sought a determination that HPM was in violation of Hawai'i Revised Statutes ("HRS") § 205-4.5, Rules of Practice and Procedure of the

³ The Court takes judicial notice of these records and files from the related action in the Circuit Court of the Fifth Circuit, State of Hawai'i in Case No. Case No. 5CCV-23-0000148. *See fn.1 supra*.

Kaua‘i County Planning Commission (“RPPPC”) Rule 1-13-6, and Kaua‘i County Code (“KCC”) Comprehensive Zoning Ordinance (“CZO”) § 8-3.2 because it failed to obtain the permits required for its industrial operations on land zoned Agricultural at the Old Koloa Sugar Mill. [Dkt. No. 127 in Case No. 5CCV-23-0000148 at Exhibit 4, 1-2.]

10. The Commission held a hearing on PRP’s Declaratory Petition on September 12, 2023, during which Commissioner Jerry Ornellas informed the parties as follows:

I don’t have a question, but I would like to say something. And that is that I’m supporting HPM’s use of the property for several reasons. I am very familiar with the property being an agricultural equipment storage up until three weeks ago in the very building that its built.... One of the buildings.... You are correct, the buildings are newer. They are not part of the mill itself. That is not agricultural. That’s a construction contractor on the opposite side of the room. So, let’s be fair. . . . This is a valuable asset to our community. **So regardless of what the board feels, I’m going to support HPM[.]**

[Planning Commission Meeting Streaming Video at 4:48:08 – 50:13 (emphases added).]⁴

11. During the hearing, the Planning Director confirmed the Planning Department had heard “rumblings” of HPM’s unlawful operations at the Old Koloa Sugar Mill but had not previously investigated HPM’s use. [Planning Commission Meeting Streaming Video at 4:53:36 – 53:50.]

12. The Planning Director indicated during the hearing that the Planning Department would consider PRP’s Declaratory Petition a “complaint” and would “spin up” an investigation. [Planning Commission Meeting Streaming Video at 4:54:24 – 54:46.]

13. The Commission denied PRP’s Declaratory Petition and issued a Decision and Order holding that it lacked authority under its rules to rule on the Declaratory Petition

⁴ Streaming Video, Planning Commission Hearing (Sept. 6, 2023), https://kauai.granicus.com/player/clip/2604?view_id=2&redirect=true&h=349a2c4d01fda290580726ffe8b4fae5.

inasmuch as the Declaratory Petition “seeks the Commission’s substantive adjudication on the merits of an enforcement issue” and, instead, stated that an “enforcement investigation shall commence under the Comprehensive Zoning Ordinance § 8-305, which is the proper course of action pursuant to a public complaint.” [Dkt. No. 127 in Case No. 5CCV-23-0000148 at Exhibit 5, *passim*.]

The Planning Department Investigated HPM’s Use of the Property for Its Factory and Issued a Notice of Violation

14. On October 18, 2023, an inspector from the Planning Department went to observe HPM’s operations at the Old Koloa Sugar Mill, and, on October 20, 2023, the Planning Department issued a First Notice of Violation (“NOV”) to the owner of the Property, Mahaulepu Farm LLC (“Mahaulepu Farm”), stating that it conducted an investigation of the property and verified violations of Sections 8-2.4 (“Uses in Districts”) and 8-3.5 (“Enforcement, Legal Procedures and Penalties”) of the KCC. [Dkt. No. 12 at COK000018-19.]

15. The NOV stated, in relevant part:

On October 18, 2023, Planning Inspector Joan Ludington, through her investigation, verified that a building truss manufacturing facility (HPM Building Supply) was operating within the Agriculture Zoning District at the subject property.

Pursuant to Section 8-2.4 of the Kauai County Code, a truss manufacturing facility is not a generally permitted use within the Agriculture Zoning District. Operation of a truss manufacturing facility within the Agriculture Zoning District without the proper zoning permit(s) constitutes a violation.

[Dkt. No. 12 at COK000019.]

16. The NOV required that, pursuant to KCC § 8-3.5, “you must correct the violation, remove the construction or development, or obtain the proper zoning permits for the referenced alteration, and cease and desist the unpermitted activity and use **immediately**.” [Dkt. No. 12 at COK000019.] (Emphasis in original.)

17. The NOV further provided that failure to rectify the violation could result in fines and criminal prosecution. [Dkt. No. 12 at COK000019.]

18. The NOV indicated that the Planning Department must receive a remedial action plan within fifteen (15) calendar days of receipt of the letter or it would pursue enforcement action. [Dkt. No. 12 at COK000019.]

19. On December 29, 2023, PRP filed a Complaint in 5CCV-23-0000148 seeking information and documents from the Planning Department under the Uniform Information Practices Act related to the NOV and seeking to enforce the NOV as to HPM and Mahaulepu Farm (the “Declaratory Action”). [Dkt No. 1 in 5CCV-23-0000148.⁵]

**The Planning Department Thereafter Erroneously Rescinded the NOV By
Determining that HPM’s Two-Year Use of the Old Sugar Mill was Somehow a
Non-Conforming Use Existing Prior to 1972**

20. On November 9, 2023, HPM, through counsel, provided a written response to the Planning Department’s NOV. [Dkt. No. 12 at COK000024-27.]

21. In its response, HPM acknowledged that the Old Koloa Sugar Mill is “within the State Land Use Agricultural District and the County Agricultural Zoning District.” [Dkt. No. 12 at COK000024.]

22. HPM also admitted that, despite the fact that the Old Koloa Sugar Mill is zoned for agricultural use, “HPM is currently using the office, warehouse, and electrical shop buildings . . . at the Koloa Sugar Mill . . . for wooden truss and wall panel assembly operations[.]” [Dkt. No. 12 at COK000024.]

23. HPM asserted, however, that HPM’s operation of its factory was “legal and outright permitted under the CZO as a continuous use of ‘accessory structures and uses’

⁵ The Court takes judicial notice of this record from the related action in the Circuit Court of the Fifth Circuit, State of Hawai‘i in Case No. 5CCV-23-0000148. *See* fn.1 *supra*.

pursuant to CZO § 8-2.4(g)(1), and ‘any other use or structure which the Planning Director finds to be similar in nature to those listed in [the CZO] and appropriate to the district’ pursuant to CZO § 8-2.4(r)(20).” [Dkt. No. 12 at COK000026.]

24. In support of its “non-conforming use” argument, HPM submitted the declarations of two individuals: Adam Killermann and Casey Watabu. [Dkt. No. 12 at COK000029-38.]

25. According to Mr. Killermann’s Declaration, Mr. Killermann began working for McBryde Sugar Plantation (“McBryde”) in 1978, and worked for McBryde until 1996 “when McBryde closed its sugar operations.” [Dkt. No. 12 at COK000029, ¶¶ 2-5.]

26. Per Mr. Killermann, McBryde used the Old Koloa Sugar Mill in support of its agricultural operations (*i.e.*, its sugar mill operations) at the Old Koloa Sugar Mill until 1996. [Dkt. No. 12 at COK000030, ¶ 15 (stating that the electric shop and warehouse were used for purposes “in support of the plantation’s operations”).]

27. Per Mr. Killermann and Mr. Watabu, after McBryde ended its sugar mill operations in 1996, Pioneer HI-Bred Seed (“Pioneer”) occupied the Old Koloa Sugar Mill, again, used “in support of their agricultural operations[.]” [Dkt. No. 12 at COK000031, ¶ 18; *id.* at COK000037, ¶ 9.]

28. Mr. Killermann further attested that, after Pioneer ceased its operations (Mr. Killermann does not specify when this occurred), Hawaii Dairy Farms subsequently used the buildings “in support of their agricultural activities” and, after Hawaii Dairy Farms ceased its operations (again this date is not specified), the “site was used by various movie crews and as a local venue by Fred Atkins.” [Dkt. No. 12 at COK000031, ¶ 23-24.]

29. Similarly, Mr. Watabu averred that, after Pioneer ceased operations, the building in question “were used by various movie crews, a farmer for equipment storage, a tour

operator to store equipment, and as a local venue by Fred Atkins.” [Dkt. No. 12 at COK000038, ¶ 9.]

30. Additionally, according to Mr. Killermann, AJAR Incorporated (“AJAR”) has used the buildings at the Old Koloa Sugar Mill since 1996 for its agricultural irrigation operations. [Dkt. No. 12 at COK000031, ¶ 20-21.]

31. AJAR “construct[s], operate[s], and maintain[s] canals, ditches and irrigation systems,” and “repairs water infrastructure such as irrigation lines, flumes, and ditches,” and has used the buildings at the Old Koloa Sugar Mill “for fabrication work, repair work and storage of machinery, along with various other large and small companies.” [Dkt. No. 12 at COK000031, ¶ 20-21.]

32. Both Declarations submitted by HPM acknowledged that HPM “started storing their materials in the Building on or about 2022” and that, “[o]n or about early 2023, HPM began manufacturing and fabricating wooden trusses and wall panels at the buildings.” [Dkt. No. 12 at COK000031, ¶¶ 25-26; Dkt. No. 12 at COK000038, ¶¶ 10-11.]

33. Neither Mr. Killermann nor Mr. Watabu purported to attest in their Declarations to the use of the Old Koloa Sugar Mill as of September 1, 1972, or at any time prior to 1978. [Dkt. No. 12 at COK000037, ¶ 3 (Mr. Watabu states that he is “familiar with the records and files of Grove Farm concerning the uses and operations at the Koloa Mill . . . from when McBryde . . . ceased operations at the Mill to the present”); Dkt. No. 12 at COK000029, ¶ 2-3, 8 (Mr. Killermann states that he began working for McBryde after graduating from college in 1978, and that he is “intimately familiar with McBryde’s operations at the Mill and the various operations at the Mill since McBryde shut down in 1996”).]

34. On January 25, 2024, the Planning Department conducted a follow-up investigation “to verify remedial action and claims” regarding the NOV and provided an

Investigation Report dated February 1, 2024 (the “Investigation Report”). [Dkt. No. 12 at COK000005.]

35. In connection with the Investigation Report, the Planning Department compiled a chronological order of events related to the Old Koloa Sugar Mill which established that the buildings being used by HPM at the Old Koloa Sugar Mill had been used for agricultural purposes (or purposes connected to agriculture), namely sugar mill operations, from 1913 to approximately 2022. [Dkt. No. 12 at COK000006-08.]

36. The chronology does not state that the Old Koloa Sugar Mill was used as a truss and wall panel manufacturing facility before HPM began using it for this purpose in or about 2023. [Dkt. No. 12 at COK000006-08.]

37. The Planning Department also compiled two zoning permit applications by McBryde, one dated October 24, 1974 to construct a “new electrical shop, machine shop and warehouse facilities to replace existing facilities” [Dkt. No. 12 at COK000072] and another dated May 12, 1975 for “Alteration – Office Wood Structure, 3rd Floor – Above Chemical & Plant Office[,]” which notes an existing use of the property as a “Mill[,]” [Dkt. No. 12 at COK000076], however these documents, which are both dated after September 1, 1972, do not state that the Old Koloa Sugar Mill was used to manufacture housing materials before HPM began to use them for this purpose in or about 2023.

38. However, the Planning Department concluded that, “[b]ased on the above information evidenced in the Chronological Order of Events related to the subject property, (Koloa Mill area), the Planning Department finds the subject area with ongoing industrial use, (from 1913 to the present), within the Agricultural district is not a violation.” [Dkt. No. 12 at COK000009.]

39. On May 8, 2024, the Director rescinded the NOV, stating: “Upon further

review based on the Investigation Report (dated April 25, 2024), the Planning Department conducted a follow-up investigation of the subject property and found the truss manufacturing facility within the Agriculture Zoning District is a continued and ongoing (“Nonconforming use”) use and not a violation of the KCC chapter 8.” [Dkt. No. 12 at COK000108.]

PRP Appealed the Rescission of the NOV to the Zoning Board of Appeals, Which Was Denied, Then PRP Initiated this Administrative Appeal

40. PRP sought to determine what, if any, action was required on its part to exhaust any administrative remedies with regard to the Planning Department’s rescission of the NOV.

41. Pursuant to the RPPPC, intervention in appeals of actions from the Director pursuant to Chapter 9 of the Rules (such as the one at issue here in the rescission of the NOV) are explicitly excluded. RPPPC Rule 1-4-1.

42. Moreover, only an “applicant” may appeal an action of the Director such as the one at issue here. RPPPC Rule 1-9-1.

43. PRP had already sought to bring an action for declaratory relief with the Commission for HPM’s operations at the Old Koloa Sugar Mill and been told that the Commission did not have authority to act on such request. [Dkt. No. 127 in Case No. 5CCV-23-0000148 at Exhibit 5, *passim*.]

44. Thus, there was no remedy for PRP to exhaust under the RPPPC.

45. However, Article XIV, Section 14.13.B of the Charter of the County of Kaua‘i (the “Charter”) requires that the “Zoning Board of Appeals” (“ZBA”) shall “[h]ear and determine appeals alleging error from any person aggrieved by a decision or order of the director regarding the application, interpretation, or enforcement of zoning and subdivision ordinances as prescribed by ordinance.”

46. PRP sought to appeal the rescission of the NOV and, accordingly, PRP, through its counsel, submitted an Appeal (“PRP’s ZBA Appeal”) to the ZBA on June 28, 2024. [Dkt. No. 33, *passim*.]

47. PRP’s ZBA Appeal requested that the ZBA “order that the Planning Director erred in determining that HPM’s wooden truss manufacturing operations constitute a valid nonconforming use.” [Dkt. No. 33 at 11.]

48. PRP’s ZBA Appeal specifically explained as follows:

PRP prepared its appeal, as shown in Exhibit 1, but was unable to locate information regarding a ZBA. Accordingly, on May 28, 2024, my office left a voicemail for the Planning Department inquiring where to submit filings for review by the ZBA. On May 29, 2024, Laura K. Barzilai, Deputy County Attorney, responded via e-mail to my office “regarding practice before the Zoning Board of Appeals[.]” In that e-mail, Ms. Barzilai indicated that “[t]he Zoning Board of Appeals is not assembled.” On June 3, 2024, my office asked that Ms. Barzilai confirm “that there is no administrative remedy for a decision by the Planning Department under Kauai County Charter 14.13(B)[.]” Ms. Barzilai did not respond. On June 12, 2024, I spoke with Ms. Barzilai on the phone, confirming that there is no administrative remedy to appeal a decision by the Planning Department under Kauai County Charter 14.13(B). I subsequently sent an e-mail that same day confirming our discussion. On June 17, 2024, I e-mailed Ms. Barzilai again requesting a response to my earlier e-mail, but I did not receive a response.

Pursuant to our communications with Ms. Barzilai, it is our understanding that the pertinent ZBA does not exist and, moreover, that PRP is without any administrative remedies to exhaust. If there is some administrative remedy to exhaust, please have the ZBA issue a decision on Exhibit 1 by Friday, July 5, 2024. If we do not receive a response by that date, we will proceed with the understanding that PRP has exhausted any and all available administrative remedies.

[Dkt. No. 33 at 1-2.]

49. On July 5, 2024, a Deputy Kaua‘i County Attorney wrote a response letter denying PRP’s ZBA Appeal (the “Denial”), stating that the Planning Department “reviewed” PRP’s Appeal “with the Planning Department,” and concluding that “the Planning Director does

not possess the authority to determine whether all administrative remedies have been exhausted.”

[Dkt. No. 34.⁶]

50. No further action was taken by the County on PRP’s ZBA Appeal and, thus, PRP initiated the instant administrative appeal by timely filing a Notice of Appeal on or about August 2, 2024. [Dkt. No. 1, *passim*.]

51. Further, PRP, on May 1, 2025, filed a Third Amended Complaint in the Declaratory Action, asserting the following causes of action: (1) Count I, seeking a declaratory ruling that HPM and Mahaulepu Farm’s use of the Old Koloa Sugar Mill for HPM’s Factory requires permits; (2) Count II, seeking a declaratory ruling that the Planning Department erroneously determined that HPM’s operations are a nonconforming use; and (3) Count III, an injunctive relief claim seeking an order enjoining HPM and Mahaulepu Farm from operating the Factory without the proper zoning permits. [See Dkt. No. 83 in Case No. 5CCV-23-0000148, ¶¶ 53-96.⁷]

The Briefing

52. PRP filed its Opening Brief (“Opening Brief”) on April 7, 2025 [Dkt. Nos. 30-35.]

53. PRP’s Opening Brief presented the question on appeal as “[w]hether the Director of the County of Kaua‘i Planning Department’s rescission of the NOV, and the County’s subsequent denial of PRP’s appeal regarding said rescission, were made upon unlawful

⁶ The parties stipulated to supplement the record on appeal to include PRP’s ZBA Appeal and the Planning Department’s Denial. [Dkt. No. 41.]

⁷ The Court takes judicial notice of these records and files from the related action in the Circuit Court of the Fifth Circuit, State of Hawai‘i in Case No. Case No. 5CCV-23-0000148. *See* fn.1 *supra*.

procedure, was affected by other error of law, or was in violation of statutory provisions.” [Dkt. No. 30 at 13-14.]

54. HPM filed a non-hearing Motion to Intervene (“Motion to Intervene”) on May 12, 2025. [Dkt. No. 43.]

55. The Planning Department filed its Answering Brief (“Answering Brief”) on May 16, 2025. [Dkt. No. 47.]

56. The Planning Department’s Answering Brief raised two arguments in response to PRP’s Appeal: (1) that PRP failed to exhaust its administrative remedies before the Commission; and (2) that the Planning Department’s Rescission of the NOV was not clearly erroneous. [Dkt. No. 47 at 8-27.]

57. PRP filed a Memorandum in Opposition to HPM’s Motion to Intervene on May 22, 2025. [Dkt. Nos. 49-55.]

58. HPM filed a Reply Memorandum in support of its Motion to Intervene on May 28, 2025. [Dkt. No. 57.]

59. PRP filed its Reply Brief on May 30, 2025 [Dkt. No. 59.]

60. PRP’s Reply Brief asserted that PRP had exhausted any existing administrative remedies, and that the Planning Department erred in rescinding the NOV because the rescission was based on the Planning Department’s determination that HPM’s use of the Buildings to manufacture wooden trusses and wall panels for residential housing construction materials was a valid nonconforming use, and because that determination was not supported by substantial evidence in the record that HPM’s nonconforming use existed as of September 1, 1972 and remained continuous to the present. [Dkt. No. 59 at 2-10.]

61. The Court denied HPM’s Motion to Intervene by Order entered June 16, 2025, denying the Motion to Intervene “on the basis that it is untimely.” [Dkt. No. 63.]

62. Oral argument on PRP's appeal was heard before the Honorable Kathleen N.A. Watanabe on July 23, 2025.

63. During the hearing, the Planning Department's counsel raised, for the first time, (1) an oral request to consolidate this matter with the Declaratory Action and (2) the argument that the Planning Department's Denial of PRP's ZBA Appeal was not an appealable final order such that the Court does not have subject matter jurisdiction.

CONCLUSIONS OF LAW

Based upon the preceding Findings of Fact, the Court concludes as follows:

1. To the extent that any of the following Conclusions of Law shall be determined to be Findings of Fact, they shall be construed as such for the purpose herein.

Public Policy Favors Openness of, and Public Participation in, Governmental Processes

2. In evaluating this matter, the Court recognizes and is guided by the legislative intent set forth in HRS § 92-1:

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of governmental agencies—shall be conducted as openly as possible. To implement this policy the legislature declares that:

(1) It is the intent of this part to protect the people's right to know;

(2) The provisions requiring open meetings shall be liberally construed; and

(3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

The Court Has Jurisdiction Over This Appeal Pursuant to HRS § 91-14

Jurisdictional Framework Under HRS § 91-14

3. “[E]very court must ... determine as a threshold matter whether it has jurisdiction to decide the issue[s] presented.” *Pub. Access Shoreline Hawaii by Rothstein v. Hawai‘i Cnty. Planning Comm’n by Fujimoto*, 79 Hawai‘i 425, 431, 903 P.2d 1246, 1252 (1995) (citation omitted).

4. The Hawai‘i Supreme Court has formulated the following “necessary inquiry” to determine whether a court may review an agency appeal under HRS § 91-14(a): (1) there must have been a contested case hearing; (2) the agency’s action must represent a final decision and order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief; (3) the claimant must have followed the applicable agency rules and, therefore, have been involved in the contested case; and (4) the claimant’s legal interests must have been injured such that the claimant has standing to appeal.” *Cnty. Associations of Hualalai, Inc. v. Leeward Planning Comm’n*, 150 Hawai‘i 241, 255, 500 P.3d 426, 440 (2021) (quotation marks and citation omitted).

5. “In other words, there are four requirements for judicial review over an agency appeal: a contested case hearing, finality, compliance with agency rule, and standing.” *Leeward Planning Comm’n*, 150 Hawai‘i at 255, 500 P.3d at 440.

6. For the reasons discussed below, the Court concludes that all of the requirements for jurisdiction under HRS § 91-14 are satisfied here.

The Proceedings Before the Planning Department and ZBA Were a Contested Case

7. “A ‘contested case’ is ‘a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.’” *Leeward Planning Comm’n*, 150 Hawai‘i at 255, 500 P.3d at 440 (citing HRS § 91-

1).

8. “For an agency hearing to be ‘required by law’ it must be required by agency rule, statute, or constitutional due process.” *Leeward Planning Comm’n*, 150 Hawai‘i at 255, 500 P.3d at 440.

9. Critically, “[a] case in which no formal contested case hearing is held can be considered a ‘contested case’ within the meaning of chapter 91.” *Leeward Planning Comm’n*, 150 Hawai‘i at 255, 500 P.3d at 440.

10. As such, in *Leeward Planning Comm’n*, the Hawai‘i Supreme Court held that the requirement of a contested case was satisfied by the appellant’s submission of a Petition to Intervene in a special permit application proceeding before the appellee planning commission, even though no hearing was actually held, because “an agency hearing was required by the [planning commission’s] rules and statutes relevant to the issuance of special permits.” *Leeward Planning Comm’n*, 150 Hawai‘i at 255-56, 500 P.3d at 440-41.

11. Section 14.13 of the Charter, which sets forth the duties and functions of the ZBA, provides, in pertinent part:

Section 14.13. Duties and Functions of the Zoning Board of Appeals. In accordance with such principles, conditions, and procedures prescribed by ordinance or administrative rule, the zoning board of appeals **shall** . . .

A. **Conduct hearings in accordance with chapter 91, Hawai‘i Revised Statutes** regarding the violation of the zoning and subdivision ordinance and the regulations adopted thereunder;

B. **Hear and determine appeals alleging error from any person aggrieved by a decision or order of the director regarding the application, interpretation, or enforcement of zoning and subdivision ordinances** as prescribed by ordinance[.]

...

(Emphases added).

12. As the Planning Department acknowledges in its Answering Brief,

“‘[s]hall’ means mandatory.” (Answering Brief at 10 (citing *Malahoff v. Saito*, 111 Hawai‘i 168, 140 P.3d 401 (2006)).)

13. In other words, it is a mandatory function of the ZBA to conduct hearings regarding violations of the zoning ordinance and regulations, such as those alleged in PRP’s ZBA Appeal.

14. As such, the “required by law” prong of the contested case requirement is satisfied here because a hearing was required by the Charter.

15. Moreover, a hearing on PRP’s ZBA Appeal, if held, would have determined the “legal rights, duties, or privileges of specific parties” inasmuch as PRP’s ZBA Appeal requested that the ZBA “order that the Planning Director erred in determining that HPM’s wooden truss manufacturing operations constitute a valid nonconforming use.”

16. Indeed, the ZBA’s inaction on PRP’s ZBA Appeal had the effect of determining the legal rights, duties, and privileges of HPM because, by failing to act, the ZBA effectively left the rescission of the NOV in place and, as such, the “rights, duties, or privileges” prong of the contested case analysis is satisfied here. *Kilakila ‘O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai‘i 193, 202, 317 P.3d 27, 36 (2013) (“Even in the absence of a formal contested case hearing, we point out that the proceedings that otherwise took place, including the vote to grant the permit [without a hearing], in fact did determine UH’s rights, duties, and privileges.”).

17. Accordingly, the Court concludes that the proceedings before the ZBA constituted a “contested case” inasmuch as these were “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing” and, as such, the first requirement for jurisdiction under HRS § 91-14 is satisfied here. *Leeward Planning Comm’n*, 150 Hawai‘i at 255, 500 P.3d at 440.

The Denial of (or Inaction on) PRP's ZBA Appeal Was an Appealable Final Decision

18. As stated above, the Court has jurisdiction under HRS § 91-14 “that the appeal is from a final decision made by the agency.” *Leeward Planning Comm’n*, 150 Hawai‘i at 256, 500 P.3d at 441 (citation omitted).

19. “A final decision or order is one that ends the proceedings, leaving nothing further to be accomplished.” *Leeward Planning Comm’n*, 150 Hawai‘i at 256, 500 P.3d 426, 441 (quotation marks and citation omitted).

20. In this regard, the Hawai‘i Supreme Court has held that “the denial of a request for a contested case hearing (or to participate in one) is a sufficiently final decision for judicial review.” *Kaleikini v. Thielen*, 124 Hawai‘i 1, 26, 237 P.3d 1067, 1092 (2010); *see also Leeward Plan. Comm’n*, 150 Hawai‘i at 256, 500 P.3d at 441 (noting that a final decision “can take the form of an agency’s formal denial of a party’s request for a contested case hearing” or “an agency’s denial of a party’s request to intervene in a contested case[.]”).

21. Indeed, even an agency’s “non-action” in the form of “[e]lecting to let a proceeding ‘lie as a closed matter’ is reviewable agency action given that it ha[s] the consequence of effectively ending the proceeding[.]” *Leeward Planning Comm’n*, 150 Hawai‘i at 257, 500 P.3d at 442 (quotation marks omitted).

22. PRP submitted its ZBA Appeal to the Planning Director on June 28, 2024, noting that “it is our understanding that the pertinent ZBA does not exist and, moreover, that PRP is without any administrative remedies to exhaust[.]” and requesting that “[i]f there is some administrative remedy to exhaust, please have the ZBA issue a decision . . . by Friday July 5, 2024[.]” and stating that, if no response was received by that date, PRP would “proceed with the understanding that PRP has exhausted any and all available administrative remedies.”

23. The Denial of PRP’s ZBA Appeal was issued on July 5, 2024, stating that

the Planning Director “does not possess the authority to determine whether all administrative remedies have been exhausted.”

24. There was no indication in the Denial that PRP’s ZBA Appeal would be considered at a later date or that any further administrative remedies were available to PRP relating to the rescission of the NOV and the denial of PRP’s ZBA Appeal.

25. Rather, the denial of PRP’s ZBA Appeal ended any administrative proceedings with respect to the rescission of the NOV.

26. As such, the Court concludes that the Denial of PRP’s ZBA Appeal constituted an appealable final decision as required for judicial review under HRS § 91-14.

PRP Followed the Applicable Agency Rules in Appealing the Rescission of the NOV

27. As set forth above, “[t]he third requirement for judicial review under HRS § 91-14 is that the claimant follow agency rules and be involved in the contested case.” *Leeward Planning Comm’n*, 150 Hawai‘i at 257, 500 P.3d at 442.

28. Satisfaction of this requirement “is not conditioned upon formal intervention in the agency proceeding[,]” and “adversary participation need not be confined to formal proceedings before the agency.” *Leeward Planning Comm’n*, 150 Hawai‘i at 257-58, 500 P.3d at 442-43 (quotation marks, ellipsis, and citations omitted).

29. As such, in *Leeward Planning Comm’n*, the Hawai‘i Supreme Court concluded that the appellant satisfied this requirement by following the planning commission’s rules by submitting a petition to intervene. *Leeward Planning Comm’n*, 150 Hawai‘i at 258, 500 P.3d at 443.

30. Similarly, in this case, PRP followed the applicable rules, as established by the Charter, in appealing the decision of the Planning Department to rescind the NOV.

31. Section 14.13 of the Charter provides, in pertinent part:

Section 14.13. Duties and Functions of the Zoning Board of Appeals. In accordance with such principles, conditions, and procedures prescribed by ordinance or administrative rule, the zoning board of appeals **shall** . . .

B. Hear and determine appeals alleging error from **any person aggrieved** by a decision or order of the director regarding the application, interpretation, or enforcement of zoning and subdivision ordinances as prescribed by ordinance[.]

(Emphases added).

32. The language of the Charter unambiguously vests the ZBA with sole jurisdiction to hear appeals from persons aggrieved by a decision or order of the Director as to the enforcement of zoning ordinances.

33. Accordingly, PRP, as a party aggrieved by an action of the Planning Department and Planning Director with respect to the rescission of the NOV, was required to submit an appeal directly to the ZBA.

34. PRP timely submitted its appeal directly to the ZBA -- the only body with jurisdiction to hear it.

35. The Planning Department does not point to, and the Court has not found, any rule setting forth a procedure to appeal a decision of the Director where the ZBA is not assembled.

36. In light of the foregoing, the Court concludes that PRP followed the applicable agency rules and regulations in appealing the May 8, 2024 rescission of the NOV, such that the third requirement for jurisdiction under HRS § 91-14 is satisfied here.

PRP Has Standing to Appeal

37. As set forth above, the fourth requirement for judicial review under HRS § 91-14 “is that the claimant show its legal interests were injured such that it has standing to appeal.” *Leeward Planning Comm’n*, 150 Hawai‘i at 258, 500 P.3d at 443.

38. Hawai‘i courts “evaluate[] standing using the ‘injury in fact’ test requiring: (1) an actual or threatened injury, which, (2) is traceable to the challenged action, and (3) is likely to be remedied by favorable judicial action.” *Leeward Planning Comm’n*, 150 Hawai‘i at 258, 500 P.3d at 443 (citation omitted).

39. The Hawai‘i Supreme Court has explained that “where the interests at stake are in the realm of environmental concerns, we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.” *Leeward Planning Comm’n*, 150 Hawai‘i at 258, 500 P.3d at 443 (brackets and citation omitted).

40. As stated above, and as the Court has previously found, the interests of PRP, and of its members, would be directly impacted by HPM’s continued use of the Old Koloa Sugar Mill as a wooden truss and wall panel manufacturing facility without the proper permits.

41. Article XI, Section 9 of the Hawai‘i State Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

42. The Hawai‘i Supreme Court has held that “HRS chapter 205 is a law relating to the conservation, protection and enhancement of natural resources, and thus falls within the scope the enforcement right established by article XI, section 9.” *Cnty. of Hawaii v. Ala Loop Homeowners*, 123 Hawai‘i 391, 409, 235 P.3d 1103, 1121 (2010), abrogated on other grounds by *Tax Found. of Hawai‘i v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019); see also *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i at 269, 408 P.3d at 21 (holding that petitioners have a right to intervene where they have established a “protected property interest in a clean and

healthful environment”); *Protect & Pres. Kahoma Ahupua‘a Ass’n v. Maui Plan. Comm’n*, 149 Hawai‘i 304, 311, 489 P.3d 408, 415 (2021), as amended (June 17, 2021), reconsideration denied, No. SCWC-15-0000478, 2021 WL 2828030 (Haw. July 7, 2021) (same).

43. “[W]here a source of state law—such as article XI, section 9—grants any party a substantive right to a benefit—such as a clean and healthful environment—that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created.” *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i at 264, 408 P.3d at 16.

44. Thus, PRP’s right to a clean and healthful environment, as defined by laws relating to environmental quality such as HRS Chapter 205, is a substantive right guaranteed by the Hawai‘i Constitution. [Dkt. No. 31 at COL, ¶ 83.]

45. PRP is asserting its members’ constitutional right to a clean and healthful environment under article XI, section 9 of the Hawai‘i State Constitution, as described above.

46. Further, the interests of PRP and its members that are affected by the challenged action include the interest in development and land use projects that support local jobs and provide living wages, and also meet the statutory environmental requirements.

47. PRP and its members also have an interest in development and land use projects that comprehensively account for the local economy and environment by including community members in the permitting process.

48. PRP is concerned that HPM’s Old Koloa Sugar Mill to produce prefabricated materials for housing “packages” would not actually support the purpose of HRS Chapter 205 and 205A or the Kaua‘i General Plan but, rather, would lead to a significant reduction in local jobs, as well as a potential reduction in payment of a living wage on Kaua‘i, present a use of the land that is entirely out of character for the area and be an inappropriate use

of lands zoned for agriculture.

49. The Court concludes that, in light of the foregoing interests, PRP has suffered an actual and/or threatened injury that is traceable to the challenged action (namely, the rescission of the NOV in violation of HRS Chapter 205). *Leeward Planning Comm’n*, 150 Hawai‘i at 258, 500 P.3d at 443 (finding that the appellant’s alleged injury “to the property and environmental and aesthetic interests of area property owners” constituted an injury-in-fact sufficient to confer standing).

50. The Court further concludes that the actual and/or threatened injury to PRP and its members would be remedied by favorable judicial action (namely a finding that the Planning Department erred in rescinding the NOV).

51. Accordingly, the Court concludes that PRP has satisfied the standing requirement of HRS § 91-14.

52. As such, PRP has satisfied each of the four requirements for the Court to exercise jurisdiction over this administrative appeal under HRS § 91-14.

PRP Exhausted Its Administrative Remedies

53. The Planning Department argues in its Answering Brief that PRP failed to exhaust its administrative remedies such that the Court has been “divest[ed]” of jurisdiction. [Dkt. No. 47 at 8-13.]

54. The doctrine of exhaustion of administrative remedies is a doctrine of “comity designed to outline the relationship between courts and administrative agencies and secure their proper spheres of authority.” *Kellberg v. Yuen*, 131 Hawai‘i 513, 527, 319 P.3d 432, 446 (2014) (citation omitted).

55. “The doctrine of exhaustion of administrative remedies provides that where a claim is cognizable in the first instance by an administrative agency alone, judicial

review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process.” *Kellberg*, 131 Hawai‘i at 527, 319 P.3d at 446 (quotation marks, brackets, and citation omitted).

56. As such, where it applies, “the doctrine of exhaustion of remedies *temporarily* divests a court of jurisdiction.” *Kellberg*, 131 Hawai‘i at 527, 319 P.3d at 446 (citation omitted, emphasis in original).

57. “[T]he doctrine of exhaustion is not absolute[,]” and “[a]n aggrieved party need not exhaust administrative remedies where no effective remedies exist” or where “exhaustion of administrative remedies will be futile.” *Kellberg*, 131 Hawai‘i at 531, 319 P.3d at 450 (citations and quotation marks omitted).

58. As such, for administrative exhaustion to apply, “[t]he statute, ordinance or regulation under which the agency exercises its power must establish clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties.” *Kellberg*, 131 Hawai‘i at 536, 319 P.3d at 455 (quotation marks omitted, emphasis in original).

59. Article XIV of the Charter sets forth the rules applicable to the Planning Department.

60. Section 14.01 of the Charter provides that there “shall be a planning department consisting of a planning commission, a zoning board of appeals, a planning director, and the necessary staff.”

61. Section 14.03.G provides the Commission shall “[h]ave the discretion to refer hearings to the zoning board of appeals.”

62. Section 14.05 of the Charter provides that the Director “shall[,]” *inter alia*, “[b]e charged with the administration of the zoning and subdivision ordinance and the regulations adopted thereunder.”

63. Section 14.13 of the Charter provides, in pertinent part:

Section 14.13. Duties and Functions of the Zoning Board of Appeals. In accordance with such principles, conditions, and procedures prescribed by ordinance or administrative rule, the zoning board of appeals **shall** . . .

B. Hear and determine appeals alleging error from **any person aggrieved** by a decision or order of the director regarding the application, interpretation, or enforcement of zoning and subdivision ordinances as prescribed by ordinance[.]

(Emphases added).

64. As the Planning Department acknowledges in its Answering Brief, “[s]hall’ means mandatory.” (Answering Brief at 10 (citing *Malahoff v. Saito*, 111 Hawai‘i 168, 140 P.3d 401 (2006)).)

65. As such, the language of the Charter unambiguously vests the ZBA with sole jurisdiction to hear appeals from persons aggrieved by a decision or order of the Director as to the enforcement of zoning ordinances.

66. Accordingly, PRP, as a party aggrieved by an action of the Planning Department and Planning Director with respect to the rescission of the NOV, was required to submit an appeal directly to the ZBA.

67. PRP timely submitted its appeal to the ZBA -- the only body with jurisdiction to hear it.

68. The Planning Department does not point to, and the Court has not found, any rule setting forth a procedure to appeal a decision of the Director where the ZBA is not assembled.

69. Indeed, there does not appear to be an established process or procedure for the Planning Department and/or the Commission to inform the public when the ZBA is not assembled.

70. Under the Charter, the ZBA’s existence is mandatory, as Section 14.01 the Charter provides there “**shall be** a planning department consisting of a planning commission, **a zoning board of appeals**, a planning director, and the necessary staff.” (Emphases added.)

71. The Planning Department argued in its Answering Brief that, rather than appealing directly to the ZBA, PRP was required to place this matter on the agenda before the Commission and request that the Commission refer the matter to the ZBA. [Dkt. No. 47 at 10.]

72. The Planning Department’s argument that PRP was required to first lodge its appeal with the Commission, with a request that the Commission refer the matter to the ZBA, conflicts with the plain language of the Charter, which charges the Planning Department (through its Director) with administering the zoning ordinances, and vests the ZBA with exclusive jurisdiction to hear appeals from the Director’s decisions and orders in this regard.

73. Indeed, the Planning Department’s position that the ZBA cannot hear appeals submitted to the ZBA in the first instance, and that the ZBA’s authority is limited to matters referred to it by the Commission, would improperly render Section 14.13.B of the Charter superfluous. *Keliipuleole v. Wilson*, 85 Hawai‘i 217, 221, 941 P.2d 300, 304 (1997) (“[C]ourts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant[.]”).

74. The Court therefore concludes that PRP did not fail to exhaust its administrative remedies by failing to place this matter on the Commission’s agenda with a request that the matter be referred to the ZBA.

75. The Planning Department also argues in its Answering Brief that PRP failed to exhaust its administrative remedies because it did not petition the Commission to issue a declaratory order pursuant to RPPPC Rule 1-10-1(a), which provides that “[o]n petition of an interested person, the Commission may issue a declaratory order as to the applicability of any

statutory provision or of any rule or regulation or order of the Commission.” [Dkt. No. 47 at 11.]

76. The Planning Department’s argument that PRP was required to petition the Commission to issue a declaratory order is unpersuasive inasmuch as the Commission previously denied PRP’s Declaratory Petition relating to HPM’s Factory specifically on the grounds that such a Declaratory Petition is **not** the proper mechanism to seek a “substantive adjudication on the merits” of an enforcement action by the Director.

77. Given the Commission’s denial of PRP’s previous Declaratory Petition on the grounds that such a Declaratory Petition was an improper mechanism to seek a substantive adjudication as to an enforcement decision of the Planning Department and Director, it would have been futile for PRP to petition the Commission for a declaratory order as to the rescission of the NOV, which also would have required a substantive adjudication on the merits of an enforcement decision by the Planning Department and the Director. *Kanahele v. State*, 154 Hawai‘i 190, 204, 549 P.3d 275, 289 (2024) (reasoning that “requesting a contested case hearing would have been futile” and “Plaintiffs lacked an effective administrative remedy” because “DHHL had already issued a public statement asserting the DOT now had jurisdiction over the MKAR”); *Kellberg*, 131 Hawai‘i at 531, 319 P.3d at 450 (explaining that administrative exhaustion does not require the pursuit of “futile” remedies).

78. Additionally, any direct appeal to the Commission would have been futile pursuant to RPPPC Rule 1-9-1, which provides:

An applicant may petition to appeal an action of the Director in the administration of the Comprehensive Zoning and Subdivision ordinances .
... **Intervention, pursuant to Chapter 4 of these Rules, shall not be allowed in appeals from actions of the Director.**

(Emphases added.)

79. As such, any appeal to the Commission would have been denied because

the RPPPC specifically prohibits any party other than an applicant (which PRP is not) from intervening in a case to appeal a decision of the Director.

80. Further, even assuming *arguendo* that a declaratory petition to the Commission was not futile, PRP still did not fail to exhaust its remedies because the language of RPPPC Rule 1-10-1(a) is permissive, stating that “[o]n petition of an interested person, the Commission may issue a declaratory order[.]” (Emphases added.)

81. The doctrine of administrative exhaustion does not apply to remedies that are merely permissive—like a declaratory petition in this instance. *Coconino Cnty. v. Antco, Inc.*, 148 P.3d 1155, 1159 (Ariz. Ct. App. 2006) (stating administrative exhaustion does not apply “when the administrative remedy prescribed by statute is merely permissive”); *Nat’l Coll. Of Bus. & Tech. v. Tennessee Higher Educ. Comm’n*, No. M200900137COAR3CV, 2010 WL 987161, at *5 (Tenn. Ct. App. Mar. 18, 2010) (same) (citation omitted); *cf. Kanahele*, 154 Hawai‘i at 203–04, 549 P.3d at 288–89 (recognizing in *dicta* that the operative rule stated a person “may” request a contested case hearing, and that “‘may’ is defined as “[t]o be permitted to ... [t]o be a possibility.”).

82. The Court therefore concludes that PRP did not fail to exhaust its administrative remedies because it did not petition the Commission for a declaratory order because such a petition would have been futile, and because such a petition was, if anything, permissive.

83. In light of the foregoing, the Court concludes that the submission by PRP of PRP’s ZBA Appeal to the ZBA -- the only administrative remedy available to PRP -- satisfied the doctrine of exhaustion of administrative remedies.

84. The Court further concludes that, to the extent any administrative remedies were available to PRP, but that PRP did not pursue prior to initiating this administrative

appeal, the doctrine of administrative exhaustion does not apply because: (1) the County of Kaua‘i, the Planning Department, and/or the Commission have failed to establish a “clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties” under the circumstances present here, such that the doctrine of administrative exhaustion does not apply; and (2) the pursuit of such remedies was futile and/or permissive.

85. Having concluded that the Court has jurisdiction over this administrative appeal, the Court proceeds to address the merits of this matter below.

Applicable Standards of Review

86. This Court reviews an agency decision under the standards of review set forth in HRS § 91–14, which provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91–14(g); *see also Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc.*, 121 Hawai‘i 16, 24, 211 P.3d 74, 82 (2009) (same).

87. Under HRS § 91-14(g), conclusions of law are reviewed *de novo*, pursuant to subsections (1), (2) and (4); questions regarding procedural defects are reviewable under

subsection (3); findings of fact are reviewable under the clearly erroneous standard, pursuant to subsection (5); and an agency's exercise of discretion is reviewed under the arbitrary and capricious standard, pursuant to subsection (6). *Save Diamond Head Waters*, 121 Hawai'i at 24, 211 P.3d at 82.

88. Mixed questions of law and fact are “reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case.” *Save Diamond Head Waters*, 121 Hawai'i at 25, 211 P.3d at 83 (quoting *Del Monte Fresh Produce (Hawaii), Inc. v. Int'l Longshore & Warehouse Union*, 112 Hawai'i 489, 499, 146 P.3d 1066, 1076 (2006)).

89. “To be granted deference, however, the agency's decision must be consistent with the legislative purpose.” *Camara v. Aghsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984).

90. The Court's construction of statutes is guided by established rules:

When construing a statute, [the court's] foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And [the court] must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

State v. Pacheco, 96 Hawai'i 83, 94, 26 P.3d 572, 583 (2001) (citations omitted).

91. In interpreting administrative rules,

[t]he general principles of construction which apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

Kaleikini v. Yoshioka, 128 Hawai'i 53, 67, 283 P.3d 60, 74 (2012) (citations omitted).

The Planning Department’s Rescission of the NOV Was Clearly Erroneous

92. PRP requests the Court hold that the Planning Department erred when it found that HPM’s manufacturing operations at the Factory constitute a “nonconforming use” and rescinded the NOV. [Dkt. No. 59, Reply Brief, at 10.]

93. Hawai‘i courts have explained that “[a]ny use not expressly allowed in subsection (a) is prohibited, unless an HRS § 205-6 . . . special permit or an HRS § 205-8 (2001) nonconforming use certificate is obtained” and, therefore “any use permitted by a county not expressly allowed in HRS § 205–4.5(a), or by virtue of HRS §§ 205–6 or 205–8, conflicts with the statutory regime.” *Campos v. Plan. Comm’n*, 153 Hawai‘i 386, 393–94, 539 P.3d 170, 177–78 (App. 2023).

94. HRS § 205–4.5(a) enumerates the permissible uses within the agricultural zone, none of which include the manufacturing of residential housing materials. HRS § 205–4.5(a)(1) – (24).

95. Further, as noted above, HPM did not apply for a special permit pursuant to HRS § 205-6 for its Factory after the Court vacated its earlier permits for a neighboring location in Case No. 5CCV-22-0000049 and Case No. 5CCV-22-0000060.

96. Accordingly, HPM’s use of the Old Koloa Sugar Mill for its Factory conflicts with the statutory regime, and is therefore prohibited, unless it constitutes a valid nonconforming use. *Campos*, 153 Hawai‘i at 393–94, 539 P.3d at 177–78.

97. HRS § 205-8, governing nonconforming uses, provides as follows:

The lawful use of land or buildings existing on the date of establishment of any interim agricultural district and rural district in final form may be continued although the use, including lot size, does not conform to this chapter; provided that no nonconforming building shall be replaced, reconstructed, or enlarged or changed to another nonconforming use and no nonconforming use of land shall be expanded or changed to another nonconforming use. In addition, if any nonconforming use of land or

building is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited.

98. KCC § 8-13.2 provides:

- (a) A nonconforming use of land, buildings, or other structures may continue to the extent that **the use existed on September 1, 1972** or any amendment hereto, as provided in this Section, provided that the Planning Commission may, after hearing, order the termination of a nonconforming use that creates substantial danger to public health or safety.
- (b) If any nonconforming use **ceases for any reason for a continuous period of 12 calendar months** or for one season if the use be seasonal, then the use shall not be resumed and any use of the land or building thereafter shall be in full conformity with the provisions of this Chapter.
- (c) If the nonconforming use is carried on in a nonconforming building or structure and the portion of the building or structure within which nonconforming use is conducted is destroyed or damaged, the use may be resumed if restoration or reconstruction, as permitted by this Article, is completed within one year from the date of the damage or destruction. If the building or structure may not be restored or reconstructed under the provisions of this Chapter, or if the building or structure was conforming, the nonconforming use may not be resumed and any use of the land or building thereafter shall be in full conformity with the provisions of this Chapter.
- (d) Any building lawfully in existence and vacant prior to or on September 1, 1972 may within six months thereafter, be occupied by the use for which it was manifestly designed or arranged.

(KCC § 8-13.2 (emphases added).)

99. The Hawai‘i Supreme Court has explained that “[t]he zoning law concept of ‘non-conforming use’ protects landowners who have vested rights to use their land in a fashion later prohibited by restrictive zoning regulations” and, as such, a nonconforming use is one “which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning

restrictions applicable to the district in which it is situated.” *Young v. Planning Comm’n of Cnty. of Kauai*, 89 Hawai‘i 400, 410, 974 P.2d 40, 50 (1999) (emphases and brackets omitted).

100. Therefore, the “burden to prove that a nonconforming use is valid is on the owner, occupant or user, who must prove that a lot, a structure, a use, a dwelling unit, or parking or loading was legally established as it now exists.” *Campos*, 153 Hawai‘i at 394, 539 P.3d at 178.

101. In other words, HPM bore the burden, in the proceedings before the Planning Department, to prove that its use of the Old Koloa Sugar Mill to operate a truss manufacturing Factory was established as of September 1, 1972, and has continued since then.

102. In turn, on review, the core issue for the Court is whether the Planning Department erred in determining that HPM carried its burden to prove its use of the Old Koloa Sugar Mill to operate a truss manufacturing Factory was a valid nonconforming use -- *i.e.*, that the Old Koloa Sugar Mill was in use as a truss manufacturing facility as of September 1, 1972 and that this use has continued since then -- a mixed question of law and fact subject to a “clearly erroneous” standard of review. *Save Diamond Head Waters*, 121 Hawai‘i at 25, 211 P.3d at 83 (citation omitted).

103. “An FOF or a mixed determination of law and fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made.” *Dao v. Zoning Bd. of Appeals of Honolulu*, 144 Hawai‘i 28, 39, 434 P.3d 1223, 1234 (App. 2019).

104. In this context, “substantial evidence” is defined as “credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.” *Dao*, 144 Hawai‘i at 39, 434 P.3d at 1234.

105. The record in this case lacks substantial evidence to support the Planning Department's determination that HPM carried its burden of proving its use of the Property for its truss and wall panel manufacturing Factory was a valid non-conforming use.

106. Specifically, the record is devoid of any substantial evidence to establish the use of the Old Koloa Sugar Mill as a truss and wall panel manufacturing facility as of September 1, 1972, or at any time prior to 2023, when HPM began using it for this purpose.

107. In connection with the proceedings before the Planning Department, HPM submitted Declarations by Mr. Killermann and Mr. Watabu, neither of which even purports to establish the use of the Old Koloa Sugar Mill as of September 1, 1972, given that both of these individuals appear to have become involved with the operations at the Old Koloa Sugar Mill in 1978 at the earliest.

108. Further, these Declarations do not establish a continuing use of the Old Koloa Sugar Mill as a truss and wall panel manufacturing facility.

109. Indeed, to the contrary, Mr. Killermann's Declaration establishes that McBryde used the Property for "sugar operations[.]" and that, once the sugar mill operations ended in 1996, the buildings at the Old Koloa Sugar Mill continued to be used for agricultural operations by Pioneer, Hawaii Dairy Farms, and AJAR.

110. These agricultural uses were not nonconforming uses, but rather were specifically permitted pursuant to HRS § 205-4.5 (allowing as permissible uses with the agricultural districts "[b]uildings and uses, including mills, storage, and processing facilities, maintenance facilities . . . and vehicle and equipment storage areas that are normally considered directly accessory to the above-mentioned uses").

111. The undisputed facts further establish that the Old Koloa Sugar Mill was not used to manufacture wooden trusses and wall panels for residential housing construction

materials until HPM commenced its operations in 2023, as both Declarations submitted by HPM acknowledged that HPM “started storing their materials in the Building on or about 2022” and that “[o]n or about early 2023, HPM began manufacturing and fabricating wooden trusses and wall panels at the buildings.”

112. The Planning Department also proffers a chronology purporting to show the history of the Old Koloa Sugar Mill, however, at no point does the chronology state the Old Koloa Sugar Mill was used to manufacture wooden trusses and wall panels prior to HPM’s beginning to use it for that purpose.

113. Similarly, the chronology does not show that there was any nonconforming use prior to 1972.

114. Indeed, the opposite appears to be true. The use of the Old Koloa Sugar Mill was actually conforming with HRS Chapter 205 at least until 1996.

115. The Planning Department also points to two zoning permit applications by McBryde, one dated October 24, 1974 to construct a “new electrical shop, machine shop and warehouse facilities to replace existing facilities” [Dkt. No. 12 at COK000072] and another dated May 12, 1975 for “Alteration – Office Wood Structure, 3rd Floor – Above Chemical & Plant Office[,]” which notes an existing use of the property as a “Mill[,]” however these documents are both dated after the critical date of September 1, 1972, and do not state that the Old Koloa Sugar Mill was used as a truss and wall panel manufacturing facility prior to HPM’s use of it for this purpose beginning in or about 2023.

116. The Planning Department’s own Investigation Report, as well as HPM’s own evidence, therefore establish an ongoing, conforming agricultural use of the Old Koloa Sugar Mill as of September 1, 1972, and continuing well past that date.

117. Accordingly, HPM’s use of the Old Koloa Sugar Mill was not a valid nonconforming use because the use that existed on September 1, 1972, was “in support of the plantation’s operations” – not to build prefabricated housing materials. *See Save Diamond Head Waters*, 121 Hawai‘i at 27, 211 P.3d at 85 (recognizing that, to establish a “nonconforming use” a party must prove a legally established prior nonconforming use of the property prior to the zoning change, and finding that a surf school situated in the ground floor of a hotel did not constitute a valid nonconforming use because, although the premises at issue had previously been used for beach equipment rental, “the record does not support a finding that the beach equipment rental use was an accessory use of the Hotel[.]” as was required to determine whether the beach equipment rental use was permissible or nonconforming under the applicable ordinance, and therefore “it cannot be considered a valid prior nonconforming accessory use” of the premises at issue); *Windward Marine Resort, Inc. v. Sullivan*, 86 Hawai‘i 171, 178-82, 948 P.2d 592, 599-603 (App. 1997) (finding that an “expansion and intensification” of hotel’s nonconforming use relating to commercial marine activities, which occurred after enactment of land use ordinance in 1986, could support agency’s determination that “the marine activities for customers other than bona fide guests had resulted in a change in the nature and general impact of Windward’s nonconforming hotel use from that which existed prior to the adoption of the LUO in 1986 and as a result, Windward had violated” the LUO).

118. The Court is not persuaded by the Planning Department’s attempts to categorize both HPM’s use and the prior agricultural uses under the catch-all term “industrial use[.]”

119. The requirement that a nonconforming use remain the same is applied rigidly. *Wechter v. Bd. of Appeals*, 119 N.E.2d 747, 748 (Ill. 1954) (finding that the prior use of a building for a tinsmith and wood working shop was not the same as the present use—the

spraying of paint and protective coating on metal parts or fabrications—and reasoning that although both uses could be “generically described as ‘manufacturing’ this did “not make them identical” because **“[i]t is the particular use, and not its general classification, that is contemplated by the ordinance”**) (emphasis added); *Rosenthal v. City of Dallas*, 211 S.W.2d 279, 285 (Tex. Civ. App. 1948) (stating that a nonconforming use means “substantially the same use which existed at the time of the adoption of the ordinance, and not some other and different kind of nonconforming use which the owner of the land might subsequently find to be profitable or advantageous[.]” and rejecting factory operator’s contention that change in use from an ice factory to a meat processing and curing operation was the same use).

120. Further, even in reference to the categories of uses identified in KCC § 8-1.5, the Planning Department’s attempt to classify HPM’s use as “industrial” is unpersuasive given that one of the enumerated uses is “[m]anufacturing, construction material[.]” which is defined to include, *inter alia*, “wood millwork and the production of prefabricated structural wood products” -- a more accurate description of HPM’s use of the Old Koloa Sugar Mill, and a significantly different use from that of HPM’s predecessors.

121. The Court is also unpersuaded by the Planning Department’s alternative argument that HPM’s use of the Old Koloa Sugar Mill was in fact a permitted use, namely, as an “industrial mill.”

122. HRS § 205-2(d), cited by the Planning Department, states that permitted uses in agricultural district include, *inter alia*, “[b]ona fide agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities . . . including . . . mills[.]” (Emphases added.)

123. HRS § 205-4.5, also cited by the Planning Department, allows as permissible uses within the agricultural district, *inter alia*, “[b]uildings and uses, including mills,

storage, and processing facilities, maintenance facilities . . . and vehicle and equipment storage areas that are normally considered **directly accessory** to” permissible agricultural uses.

(Emphases added.)

124. These statutes provide that a mill is a permissible use within the agricultural district only where the mill supports bona fide agricultural activities on the premises, yet there is no evidence in the record to establish that HPM’s use of the Old Koloa Sugar Mill as a truss manufacturing facility is somehow accessory to an agricultural use.

125. As such, the Court rejects the Planning Department’s assertion that HPM’s use is permitted within the agricultural district pursuant to HRS Chapter 205.

126. In light of the foregoing, the Court concludes that, because the Planning Department’s rescission of the NOV was based on its determination that HPM’s use of the Old Koloa Sugar Mill to manufacture wooden trusses and wall panels for residential housing construction materials was a valid nonconforming use, and because that determination was not supported by substantial evidence in the record that HPM’s nonconforming use existed as of September 1, 1972 and remained continuous to the present, that determination was clearly erroneous and, by extension, the Planning Department’s rescission of the NOV was also clearly erroneous.

127. Under HRS § 91-14(g)(5), a court may reverse or modify an agency decision if it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and if the substantial rights of the petitioners may have been prejudiced because of the agency’s decision. *McGlone v. Inaba*, 64 Haw. 27, 34, 636 P.2d 158, 163 (1981) (quotation marks omitted) (*abrogated in part on other grounds by Camara v. Agsalud*, 67 Haw. 212, 685 P.2d 794 (1984)); *AOAO Queen Emma Gardens v. Ma*, 153 Hawai‘i 430, 431, 540 P.3d 971, 972, 2023 WL 8789100, *1 (App. 2023) (Table), *cert. denied sub*

nom. AOA Queen Emma Gardens & Touchstone Properties, Ltd. v. Hung Ma, No. SCWC-18-0000717, 2024 WL 1050869 (Haw. Mar. 11, 2024) (emphases in original).

128. The Court finds that the Planning Department's erroneous rescission of the NOV paved the way for HPM to continue operating its truss manufacturing facility without the proper permits, and accordingly substantially prejudiced PRP and its members' interests and, as such, the Court can, and should, reverse the rescission of the NOV.

129. Accordingly, the Court reverses the Planning Department's rescission of the NOV.

130. The Court does not rule herein on the Planning Department's oral request, made for the first time at the hearing, to consolidate this appeal with the Declaratory Action.

DECISION AND ORDER

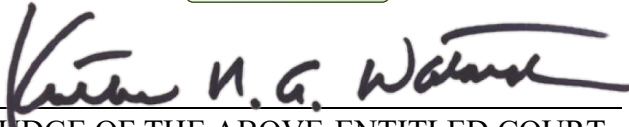
In accordance with the foregoing Findings of Fact and Conclusions of Law, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

For the reasons discussed above, the Planning Department clearly erred when it found that HPM's manufacturing operations constitute a valid nonconforming use. Therefore, the Planning Department's May 8, 2024 rescission of the First Notice of Violation issued October 20, 2023 is hereby reversed and vacated.

DATED: Honolulu, Hawai'i, August 4, 2025.

APPROVED


JUDGE OF THE ABOVE-ENTITLED COURT

Findings of Fact, Conclusions of Law and Order; *Pacific Resource Partnership vs. County of Kaua'i Planning Department*; Case No. 5CCV-24-0000068

BEFORE THE LEEWARD PLANNING COMMISSION

COUNTY OF HAWAI'I

STATE OF HAWAI'I

In the Matter of the Application

of

DHL MAHI SITE M LLC and DHL MAHI PROPCO LLC, for an Application to amend Special Management Area (SMA) Use Permit No. 07-019 for a 10-year time extension to Condition No. 2 (Complete Construction); reduce the density of the Mauna Lani Site M master planned development from 1,207 Units (691 Residential & 516 Hotel) to 925 Units (551 Residential & 374 Hotel); remove proposed golf course and conference center use; increase preserved open space; and construct an emergency evacuation road. The project is situated within the Special Management Area and is located approximately 0.75 miles west of Queen Ka'ahumanu Highway, approximately 0.4 miles north of Mauna Lani Drive, Mauna Lani Resort, South Kohala, Hawai'i, TMKs: (3) 6-8-001:050; 052-055, (3) 6-8-022:010.

SPECIAL PERMIT: PL-SMA-2026-000087/AMEND SMA 07-019

TMK: (3) 6-8-001:050; 052-055, (3) 6-8-022:010

DECLARATION OF NATHANIEL KINNEY

DECLARATION OF NATHANIEL KINNEY

I, NATHANIEL KINNEY, declare as follows:

1. I am the Executive Director for Pacific Resource Partnership ("PRP"). I make this Declaration as part of my duties and based on personal knowledge unless stated otherwise, and I am competent to testify with respect to the matters set forth herein.
2. PRP is a market recovery trust fund which represents approximately 6,000 men and women union carpenters and 250 large and small contractors throughout the State of Hawai'i, including approximately 600 union members on Hawai'i island.

3. PRP has expertise in, and is committed to, guiding the community toward a stronger, more sustainable Hawai'i in a way that promotes a vibrant economy, preserves a healthy environment, creates jobs and enhances the quality of life for all residents of Hawai'i. PRP believes that creating a stronger, more sustainable Hawai'i requires a broad commitment from all – government officials, businesspeople, educators, environmentalists, parents and concerned citizens from all islands and all walks of life – to work together toward this common goal and make a difference for generations to come. This involves, among other things, ensuring that development projects reflect responsible, and environmentally sound, planning and execution. Indeed, by building responsibly, PRP seeks to preserve the island lifestyle we all treasure.

I, NATHANIEL KINNEY, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, April 16, 2026.



NATHANIEL KINNEY

BEFORE THE LEEWARD PLANNING COMMISSION

COUNTY OF HAWAI'I

STATE OF HAWAI'I

In the Matter of the Application

of

DHL MAHI SITE M LLC and DHL MAHI PROPCO LLC, for an Application to amend Special Management Area (SMA) Use Permit No. 07-019 for a 10-year time extension to Condition No. 2 (Complete Construction); reduce the density of the Mauna Lani Site M master planned development from 1,207 Units (691 Residential & 516 Hotel) to 925 Units (551 Residential & 374 Hotel); remove proposed golf course and conference center use; increase preserved open space; and construct an emergency evacuation road. The project is situated within the Special Management Area and is located approximately 0.75 miles west of Queen Ka'ahumanu Highway, approximately 0.4 miles north of Mauna Lani Drive, Mauna Lani Resort, South Kohala, Hawai'i, TMKs: (3) 6-8-001:050; 052-055, (3) 6-8-022:010.

SPECIAL PERMIT: PL-SMA-2026-000087/AMEND SMA 07-019

TMK: (3) 6-8-001:050; 052-055, (3) 6-8-022:010

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document was duly served upon the following parties via the means and on the date indicated below:

NAME(S)	U.S. MAIL POSTAGE PREPAID	HAND DELIVERY	EMAIL	EPIC
Leeward Planning Commission County of Hawai'i West Hawai'i 74-5044 Ane Keohokalole Highway, Bldg E Kailua-Kona, Hawai'i 96740 planning@hawaiiicounty.gov	☒			☒
DHL MAHI SITE M LLC c/o Prospecthill Group LLC 235 Montgomery St Ste 1130 San Francisco, California 94104	☒			
DHL MAHI PROPCO LLC c/o Prospecthill Group LLC 235 Montgomery St Ste 1130 San Francisco, California 94104	☒			

DATED: Honolulu, Hawai'i, April 16, 2026.

/s/ Abigail M. Holden

ABIGAIL M. HOLDEN

ANDREW K. RECKTENWALD

Attorneys for
PACIFIC RESOURCE PARTNERSHIP