

Regarding the balance of respective interests and harms, the proposed measures will NOT prevent the development from being built and used. Any harm caused by any required adjustments to the proposed structure's design, relocation, downsizing, and minimizing of excavation is less than the continuing loss of the traditional and customary rights. For example, the permanent construction and entitlement of the structure as proposed would permanently conflict with and degrade the religious and cultural practices associated with the sacred mauna and connection to Pele. In addition, it would prevent the practice of kilo that relies upon views of the mauna within 20 degree from the horizon.

Relocating the house to a location on the mountain that is not prominently visible from anywhere in Kīlauea would further minimize any impacts to key resources used for subsistence gathering, as well as traditional and customary practices that rely on the view of the mauna including kilo. Reducing the square footage of the house would reduce the required excavation and overall massing of the development, which would impacts to practitioners' reverence for the mauna and Native Hawaiian traditional and customary rights reliant on the unaffected view of the mauna.

The reservation of an access easements to other areas on Nihokū and a cultural easement on the north-western corner of the property for traditional and customary Native Hawaiian practices would affect the owner's ability to exclude people from using and entering the property. However, the "western concept of exclusivity is not universally applicable in Hawai'i."<sup>154</sup> The use of the cultural easement would be limited in time, place, and manner. Namely, the access easement would be limited to 10 feet in width and located either on the northern border or southern and western border of the property. The cultural access easement would be limited to a 50 foot by 50 foot area. The use of the cultural easement would be up to once a month for an 8-hour period and for up to 25 practitioners or Na Kia'i O Nihokū members and representatives. The exercise itself would also comport with traditional uses where non-interference with the well-being of other residents were integral parts of the culture. On the other hand, not allowing use of a portion of the property for practices like kilo, hula, oli, or ceremonies like makahiki would encourage these practices to be regulated out of existence. As noted in various kama'āina testimony, the subject property is ideal for kilo since it is a key spot "[t]o see the southern hemisphere" and "to see the Koolau, and Halele, and go all the way from the Anahola mountains all the way to Makana in Haena." In addition, the USFWS access is not permanently assured.

## **VI. PRELIMINARY RECOMMENDATION**

Based on the foregoing evaluation and conclusion, it is hereby recommended Class IV Zoning Permit Z-IV-2022-1, Use Permit U-2022-1, and Special Management Area Use Permit SMA(U)-2022-1, be APPROVED with the above additional conditions of approval incorporated. If approved, the following conditions shall be implemented:

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<sup>154</sup> Id.

1. The proposed improvements shall be constructed as represented. Any changes to said development shall be reviewed by the Planning Director to determine whether Planning Commission review and approval is warranted.
2. Prior to commencement of the proposed development, written confirmation of compliance with the requirements from all reviewing agencies shall be provided to the Planning Department. Failure to comply may result in forfeiture of the SMA Permit.
3. The proposed dwelling and guest house shall not be utilized for any transient accommodation purposes. It shall not be used as a transient vacation rental (TVR) or as a homestay. This restriction shall be incorporated into the deed restrictions of the subject parcel in the event the property is sold to another party, draft copies of which shall be submitted to the Planning Department prior to building permit application approval.
4. To ensure that the project is compatible with its surroundings and to minimize the visual impact of the structures, the external color of the proposed dwelling, guest house, and detached garage shall be of moderate to dark earth-tone color. The proposed color scheme and a landscape plan should be submitted to the Planning Department for review and acceptance prior to building permit application.
5. The Applicant is advised that should any archaeological or historical resources be discovered during ground disturbing/construction work, all work in the area of the archaeological/historical findings shall immediately cease and the Applicant shall contact the State Department of Land and Natural Resources, Historic Preservation Division and the Planning Department to determine mitigation measures.
6. Relocate the development down the hill an additional 150 feet from the "Existing Building Setback Line" that created a semi-circle area as the building envelop.
7. Reduce the total square footage of the roofed areas including the house, portico, lanais, garage, and guest house (excluding driveway and pool) by 15 percent.
8. Grading and excavation shall be minimized to the maximum extent possible.
9. Provide a 10-foot-wide access easement for Native Hawaiian traditional and customary practices to access the USFWS refuge (with USFWS approval) and cultural easement.
  - a. Access will be provided above the "Existing Building Setback Line," along the fence line on the northern boundary of the property to the north-western corner of the property; or

- b. Access will be provided along the southern boundary of the property and connected to the western boundary of the property to the north-western corner of the property.
- 10. For the use and exercise of Native Hawaiian traditional and customary practices, provide an easement that encompasses a 50-foot by 50-foot area that is located at the north-western corner of the property, entirely above the setback line.
  - a. Access and use of the cultural easement may be up to one time per month, for up to an 8-hour period.
  - b. Access and use of the cultural easement may be for up to 25 individuals including practitioners of Native Hawaiian traditional and customary rights and members of Nā Kia'i o Nihokū. At least one member or representative of Nā Kia'i o Nihokū will be present and in attendance at all times during the use of the cultural easement.
  - c. Representatives of Nā Kia'i o Nihokū shall provide a minimum of 14 days' notice. Within 7 days of the proposed access, the owner shall permit the proposed access day or propose an alternative day within the designated month.
- 11. To avoid and minimize potential project impacts to Nene the following measures shall be incorporated:
  - a. Do not approach, feed, or disturb Nene.
  - b. If Nene are observed loafing or foraging within the project area during the Nene breeding season (September through April), a biologist familiar with the nesting behavior of Nene shall conduct a survey for nests in and around the project area prior to the resumption of any work. Repeat surveys shall be conducted after any subsequent delay of work of three or more days (during which the birds may attempt to nest).
  - c. All work shall immediately cease and contact the Service for further guidance if a nest is discovered within a radius of 150 feet of proposed work, or a previously undiscovered nest is found within said radius after work begins.
  - d. In areas where Nene are known to be present, post and implement reduced speed limits, and inform project personnel and contractors about the presence of endangered species on-site.
  - e. Pool areas shall be covered when not in use.
  - f. Predators on the property shall be eliminated and managed.
- 12. To avoid and minimize potential project impacts to Hawaiian seabirds the following measures shall be incorporated:
  - a. Fully shield all outdoor lights so the bulb can only be seen from below bulb height and only use when necessary. Spotlights aimed upward or spotlighting of structures shall be prohibited.

- b. Install automatic motion sensor switches and controls on all outdoor lights or turn off lights when human activity is not occurring in the lighted area.
  - c. No nighttime construction is allowed during the seabird fledging period, September 15 through December 15.
  - d. Utility lines associated with this property shall be undergrounded.
  - e. Light emitted from inside the structures shall be minimized to the maximum extent possible.
  - f. Predators on the property shall be eliminated and managed.
13. The Applicant shall develop and utilize Best Management Practices (B.M.P's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.
14. The Applicant shall resolve and comply with the applicable standards and requirements set forth by the State Health Department, State Historic Preservation Division-DLNR, and the County Departments of Public Works, Fire, Transportation, and Water.
15. To the maximum extent possible and within the confines of union requirements and applicable legal prohibitions against discrimination in employment, the Applicant shall seek to hire Kauai contractors as long as they are qualified and reasonably competitive with other contractors and shall seek to employ residents of Kauai in temporary construction and permanent resort-related jobs. It is recognized that the Applicant may have to employ non-Kauai residents for particular skilled jobs where no qualified Kauai residents possesses such skills. For the purposes of this condition, the Commission shall relieve the Applicant of this requirement if the Applicant is subjected to anti-competitive restraints on trade or other monopolistic practices.
16. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may, create, or to revoke the permits through the proper procedures should conditions of approval not be complied with or be violated.
17. Unless otherwise stated in the permit, once permit is issued, the Applicant must make substantial progress, as determined by the Director, regarding the development or activity within two (2) years, or the permit shall be deemed to have lapsed and be no longer in effect.

The Planning Commission is further advised that this report does not represent the Planning Department's final recommendation in view of the continuing public hearing process scheduled for December 14, 2021 where the entire record should be considered prior to decision-making. The entire record should include but not be limited to:

- 1. Pending government agency comments;
- 2. Testimony from the general public and interested others; and

3. The Applicant's response to staff reports and recommendations.

By   
JODI HIGUCHI SAYEGUSA  
Deputy Director, Planning Department

Approved & Recommended to Commission:

By   
KA'AINA S. HULL  
Director of Planning

Date: 11/24/2021