



**STATE OF HAWAII**  
**OFFICE OF HAWAIIAN AFFAIRS**  
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December 16, 2013

Ms. Valerie T. Poindexter, Chair  
Mr. Greggor Ilagan, Vice-Chair  
Finance Committee  
County Council  
County of Hawaii  
Hawaii County Building  
25 Aupuni Street, Room 1401,  
Hilo, HI 96720

**Re: Hawai'i County Council Resolution 140-13, "Resolution Accepting a Grant of Easements from Kohala Kai, LLC, for Public Access Purposes, December 17, 2013, 2:00p.m.**

Aloha piha kākou:

The Office of Hawaiian Affairs (OHA) hereby offers the following testimony in opposition to the Hawaii County Resolution 140-13 regarding the acceptance of an easement<sup>1</sup> from the Kohala Kai, LLC, development project<sup>2</sup> and seeks protection of the existing historic Ala Loa trail system located within the project area.

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<sup>1</sup> On June 6, 2013, a Grant of Public Easements (GOE) was executed by the landowner Kohala Kai, LLC, received by the Planning Department, and approved by the Planning Director, Corporation Counsel, and Mayor. On June 27, 2013, the GOE was signed by the Managing Director on behalf of Mayor Billy Kenoi and forwarded to the County Council for acceptance on July 1, 2013.

<sup>2</sup> The original 63.823 acre parcel (TMK 5-9-01:007) was subdivided into 7-lots in 2001. In 2006 an application was submitted to the Planning Department to further subdivide one of those 7 lots, being Lot 77, a 28.175 acre bulk lot, into 5 lots. The two subdivisions combined would create a total of 11 lots out of the original 63.823 acre parcel.

The County of Hawai‘i is obligated and mandated by constitutional and statutory law, as well as existing judicial precedent, to protect this historic Ala Loa trail important to our Native Hawaiian beneficiaries and an integral component to the exercise of the Native Hawaiian religion and culture, including subsistence.

### **Office of Hawaiian Affairs**

OHA is established by Article 12, Section 5 of the Constitution of the State of Hawai‘i. The purpose of OHA is set forth in the Hawaii Revised Statutes (HRS) as follows:

**[§10-1] Declaration of purpose.** (a) The people of the State of Hawai‘i and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, **betterment of conditions for native Hawaiians. The people of the State of Hawai‘i reaffirmed their solemn trust obligation and responsibility to native Hawaiians** and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawai‘i. (emphasis added)

Furthermore, with regards to the County of Hawai‘i in this matter, Section 10-1(b), HRS also sets forth:

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs. [L 1979, c 196, pt of §2]

With regards to OHA’s specific advocacy function, Section 10-3, HRS sets forth:

**§10-3 Purpose of the office.** The purposes of the office of Hawaiian affairs include:

- (2) The betterment of conditions of Hawaiians;
- (4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;<sup>3</sup>

### **Traditional and Customary Rights**

Pursuant to the Constitution of the State of Hawaii, Article XII, Section 7:

**Section 7.** The State<sup>4</sup> reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who

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<sup>3</sup> In this matter, OHA is assessing the policies and practices of the County of Hawai‘i in upholding Constitutional, Statutory, and Judicial mandates in protecting the interests of Native Hawaiians.

<sup>4</sup> This Section requires county planning commission to "preserve and protect" reasonable exercise of customary or traditional native Hawaiian rights to the extent feasible when issuing special management area use permits. PASH 79 H. 425, 903 P.2d 1246.

inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

Traditional and customary rights pertain to among other practices, use of trails, such as the Ala Loa, for subsistence and religious practices. Aside from the State Constitution, such protections also can be found in the Hawaii Revised Statutes section 7-1<sup>5</sup> and 1-1<sup>6</sup>.

### **Obligations of State and County Agencies to Protect Such Rights**

Agencies responsible for protecting traditional and customary Native Hawaiian rights, such as the County of Hawai‘i and the Hawai‘i County Council, must conduct detailed inquiries into the impacts on those rights to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way. Agencies must make these inquiries independent of the developer or applicant.<sup>7</sup>

The County of Hawaii is obligated to apply the framework set forth by the Hawai‘i Supreme Court in *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission* (Ka Pa‘akai), 94 Hawai‘i 31, 7 P.3d 1068 (2000). Specifically, the County must make specific findings and conclusions regarding:

1. the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;

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<sup>5</sup> The Kuleana Act of 1850 was designed to ensure and provide native tenants residing in an ahupua‘a with the opportunity to obtain fee simple title to the lands upon which they resided and cultivated their crops. Kamehameha III insisted upon including a provision in the law to protect the claims of native tenants to gather “wood, house timber, aho cord, thatch or ti leaf” for private, non-commercial use, as well as their rights to “drinking water, and running water, and the **right of way**.” Although the other provisions have all since been repealed, the provision added by the king has remained essentially unchanged since 1851 and is currently codified as Hawai‘i Revised Statutes (H.R.S.) section 7-1. According to the Hawai‘i Supreme Court, this provision applies to any person who lawfully occupies a kuleana parcel or is a lawful tenant of an ahupua‘a. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 9, 656 P.2d 745, 750 (1982). (Emphasis added.)

<sup>6</sup> The Hawaiian kingdom was governed until 1839 by a system of usage. Less than a decade later, the Act that created the Land Commission specifically directed that body to perform its duties “in accordance with . . . native usages in regard to landed tenures.” Likewise, judges were required to take ancient Hawaiian usage into account and were prohibited from issuing decisions that contradicted with the laws and customs of the kingdom. These provisions in the kingdom’s Civil Code were in effect until passage of the Act to Reorganize the Judiciary Department in 1892, which replaced them with a provision now referred to as H.R.S. section 1-1. The Hawai‘i Supreme Court held that the reference to Hawaiian usage in section 1-1 insures the continuance of a “range of practices associated with the ancient way of life.” *Kalipi*, 66 Haw. at 10, 656 P.2d at 751.

<sup>7</sup> In *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission* (Ka Pa‘akai), 94 Hawai‘i 31, 7 P.3d 1068 (2000), a coalition of Native Hawaiian community organizations (named Ka Pa‘akai O Ka ‘Aina) challenged an administrative decision by the Hawai‘i Land Use Commission (LUC) to reclassify from conservation to urban use, nearly 1,010 acres of land in the ahupua‘a of Ka‘upulehu on the island of Hawai‘i. The reclassification would have allowed petitioner Kaupulehu Development to proceed with plans for a luxury development project including upscale homes, a golf course, and other amenities. Ka Pa‘akai argued that its Native Hawaiian members would be adversely affected by the LUC’s decision because the proposed development would infringe upon the exercise of their traditional and customary rights. The Hawai‘i Supreme Court agreed, noting that “[a]rticle XII, section 7 of the Hawai‘i Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians *to the extent feasible* when granting a petition for reclassification of district boundaries.” *Ka Pa‘akai*, 94 Hawai‘i at 46, 7 P.3d at 1083. The court held that the LUC did not provide a sufficient basis to determine “whether [the agency] fulfilled its obligation to preserve and protect traditional and customary rights of native Hawaiians” and, therefore, the LUC “failed to satisfy its statutory and constitutional obligations.”

2. the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
3. the feasible action, if any, to be taken by the County Planning Department and County Council to reasonably protect native Hawaiian rights if they are found to exist.

The Ka Pa‘akai court held that the state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible. Furthermore, agencies are obligated to make an assessment, independent of the developer or applicant, of impacts on customary and traditional practices of Native Hawaiians; and the independent assessment must include the three factors (1, 2, and 3) listed above, otherwise known as the “Ka Pa‘akai framework.”

### **Cultural Impact Assessment**

Recognizing the fact that important Native Hawaiian cultural resources had been lost or destroyed in the past, the Hawai‘i State Legislature added a cultural impact assessment (CIA) requirement for proposed projects subject to the environmental review process. Act 50, § 1, 2000 Haw. Sess. Laws 93, 93 (codified as amended at H.R.S. § 343-2 (2005)). As a result, Environmental Assessments and Environmental Impact Statements completed after April 6, 2000, must include an assessment of the impacts to community cultural practices together with “measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects” among other requirements.<sup>8</sup>

There are guidelines for conducting a Cultural Impact Assessment<sup>9</sup>. In this particular project, a CIA was conducted. OHA finds the CIA woefully deficient. Developers need to follow detailed protocol, which includes, but is not limited to:

- Identifying and consulting with individuals and organizations with expertise concerning the
- types of cultural resources, practices, and beliefs found within the broad geographical
- area, e.g., district or ahupua‘a;
- Identifying and consulting with individuals and organizations with knowledge of the area potentially affected by the proposed action;
- Receive information from or conduct ethnographic interviews and oral histories with persons having knowledge of the potentially affected area.

In the Kohala Kai, LLC, CIA document, only three informal telephone interviews occurred. William Ah You “Papa” Akau, Herbert Montague “Monty” Richards, Jr., and Harry Martens Von Holt, II were interviewed. Clearly, these three individuals, however experienced and

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<sup>8</sup> See H.R.S. § 343-2.

<sup>9</sup> In June 2004, the State Department of Health’s Office of Environmental Quality Control (OEQC) published a Guidebook for the Hawai‘i State Environmental Review Process (OEQC Guidebook) 25 containing specific guidelines for assessing cultural impacts that may be associated with proposed projects or actions. For example, a CIA should survey a geographical area greater than the area of proposed development, reference historical data dating back to the initial presence of the group whose cultural practices are being assessed, and may include “traditional cultural properties or other types of historic sites, both man made and natural, including submerged cultural resources, which support such cultural practices and beliefs.”

knowledgeable, cannot adequately represent<sup>10</sup> the breadth and depth of cultural practices and resources in and around the project area.<sup>11</sup>

### **Ala Loa Trail**

Access is necessary for the exercise of traditional and customary Native Hawaiian cultural practices for subsistence, cultural and religious purposes. State statutes protect access along trails running over government property, as well as public trails to the shoreline and forest areas. In addition, it is possible that access to ancient trails running over private property may be established by historic or customary use, implied dedication of a public right-of-way, or under the public trust doctrine.

In the current controversy, Kohala Kai, LLC's Special Management Area Use Permit Application noted an initial deficiency in the developer's acknowledgment that the Ala Loa, or any trail for that matter, traversed the developer's project area.

In their application, prepared by Belt Collins Hawaii, Ltd. in 2006, it was noted that "no trails have been identified within Kohala Kai." It was also noted that Paul H. Rosendahl, Inc. (PHRI) revisited the project area and again found no evidence of trails. PHRI specifically examined the "Mahukona-Kawaihae "Jeep" Trail Ala Loa on a 1935 tax map drawing. "No evidence" was found that the "Jeep Trail" ran along the alignment of the Ala Loa, and if so, "all traces of it were obliterated by long-term use and alteration." We now know that the "Jeep Trail" in fact is the historic Ala Loa trail through historic maps<sup>12</sup> and corroborative testimony.<sup>13</sup>

Throughout the history of Hawai'i, on all islands, many foot-paths have evolved into dirt roads, then into paved streets and sometimes major thoroughfares including portions of highways. While physical integrity is important, especially in portions of the Ala Loa where great labor has been expended to fortify and outline this important trail (such as water-worn stones across 'A'ā lava fields), the cultural and spiritual significance of the ability to "walk in the footsteps of the ancestors" is equally important for those portions of the Ala Loa which have been modified or even destroyed.

The fact that the portion of the Ala Loa trail system which runs through the subject development project has been expanded and modified into a "Jeep Trail" does not alter the historical significance or importance of this trail system to our Native Hawaiian beneficiaries and their cultural, religious and subsistence practices.

### **Public Access Rights**

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<sup>10</sup> Testimony of Kailapa Community Association and Kaneali'i 'Ohana before Hawaii County Council Finance Committee on December 3, 2013

<sup>11</sup> In addition, the Developer shall also: (4) Conduct ethnographic, historical, anthropological, sociological, and other culturally related documentary research; (5) Identify and describe the cultural resources, practices and beliefs located within the potentially affected area; and (6) Assess the impact of the proposed action, alternatives to the proposed action, and mitigation measures, on the cultural resources, practices and beliefs identified.

<sup>12</sup> See also *Breemer v. Weeks*, 104 Hawai'i 43, 64-65, 85 P.3d 150, 171-72(2004) (the clearly marked trail on a 1908 survey map was sufficient to suggest that the trail was well defined, in existence for over ninety years and frequently traversed prior to 1908).

<sup>13</sup> Testimony of Aric Arakaki, Superintendent, Ala Kahakai National Historic Trail, before Hawaii County Council Finance Committee on December 3, 2013.

Native Hawaiians hold access rights to the mountains, seashore and other designated natural areas, in common with members of the general public. For example, “the right of public access to the sea, shorelines, and inland recreational areas, and transit along the shorelines” is guaranteed by H.R.S. section 115-1, which further “provide[s] for the acquisition of land for the purchase and maintenance of public rights-of-way and public transit corridors.”

Similarly, the state is required to establish rights-of-way across public lands to provide public access to beaches, game management areas, public hunting areas, and forests. H.R.S. § 171-26. In addition, Hawai‘i’s Coastal Zone Management Act requires the state to protect and preserve historic, scenic and open space resources, which includes providing and managing public access to shoreline areas for recreational purposes. H.R.S. § 205A-2(b) to (c).<sup>14</sup>

### **Native Hawaiian Access Rights**

In addition to the “general” access rights described above, Native Hawaiians also have unique rights relating to the exercise of traditional and customary practices for subsistence, cultural and religious purposes. As detailed above, these rights are derived from article XII, section 7 of the Hawai‘i Constitution and H.R.S. sections 1-1 and 7-1.

The right to use ancient trails running through public or private lands for access between ahupua‘a is critical to the meaningful exercise of traditional and customary rights.<sup>15</sup> One cannot gather if one cannot get to where the particular item may be found. Thus, among the “resources [that] are utilized for Hawaiian subsistence, religious, and cultural beliefs, customs, and practices” are “circulation networks including trails and roads for lateral access and for mauka-to-makai access and those affording access to the various resource zones within an ahupua‘a.”

These trails and roads facilitate access rights to sacred sites, mountain forests or shoreline areas, as well as entering or passing through private property in order to gather particular items for subsistence, religious or cultural purposes.<sup>16</sup>

Clearly we have an existing Ala Loa within the boundaries of the project area. The Hawai‘i Supreme Court has mandated that the Ka Pa‘akai Analysis needs to be done, not only by the County of Hawai‘i Planning Department, but arguably by the Hawai‘i County Council. This Council need only look to judicial precedent in the 3<sup>rd</sup> Circuit in the *Kelly, et al., v 1250 Oceanside Partners*, 111

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<sup>14</sup> Public Highways and Trails “All roads, alleys, streets, ways, lanes, bikeways, bridges, and all other real property related interests in the State, opened, laid out, subdivided, consolidated, and acquired and built by the government” or “built by private parties and dedicated or surrendered to the public use,” are public highways. H.R.S. §§ 264-1(a), (c). Trails and other non-vehicular rights-of-way that satisfy the requirements of a public trail are also included. H.R.S. § 264-1(b). The statute suggests that an ancient trail may become “public” if: (1) it was a public right-of-way at the time the Highways Act of 1892 was passed; (2) it was built by the government; or (3) it became a public right-of-way subsequent to the passage of either the 1892 Act, or H.R.S. section 264-1(b) in 1988. A trail became a public right-of-way under the Highways Act of 1892 if it was dedicated or surrendered to the government. H.R.S. § 264-1(c).

<sup>15</sup> As described above, practitioners can secure access to ancient trails based on historic or customary use under H.R.S. section 7-1. In *Palama v. Sheehan*, 50 Haw. 298, 301, 440 P.2d 95, 97-98(1968), the court held that the defendants established access rights under H.R.S. section 7-1 because the previous owners of their property historically used a trail running through plaintiffs’ property. The trails provided access between the defendants’ taro patches, which were located mauka (inland) of the plaintiffs’ property, and their kuleana parcels at the seashore. The court held that defendants were entitled to a right-of-way across plaintiffs’ land by reason of necessity, because access via a more indirect route was prevented by flooding when it rained. The court also rejected an attempt to limit the defendants’ access to horse and pedestrian use, noting that the previous owner of plaintiffs’ property had enlarged the path in 1910 for vehicular access and that the present width of the easement did not unreasonably burden the land.

<sup>16</sup> Ho‘ohana Aku, a Ho‘olā Aku: A Legal Primer for Traditional and Customary Rights in Hawai‘i, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, Forman and Serrano, 2012

Haw. 205, 140 P.3d 985 (2006) case regarding protection of the Ala Loa with similarities in factual assertions as well as allegations of breaches of duty.

The *Kelly* court ruled:

- “the stepping stone/Ala Loa trail is a public highway under the Highways Act of 1892 and therefore ownership is vested in the State;
- the right to use the stepping stone/Ala Loa trail as a right-of-way is a constitutionally-protected right under Article VII, Section 7, Hawaii State Constitution recognizing Native Hawaiian traditional and customary practices and that this is a native Hawaiian right;
- the rights to the stepping stone/Ala Loa trail were reserved for native tenants in the (Land Grants, Royal Patents, and Land Commission Awards) and therefore the ownership of the stepping stone/Ala Loa trail remains with the State;
- the stepping stone/Ala Loa trail is a historic site pursuant to Hawai’i Revised Statute 6-E;
- Department of Land and Natural Resources is required to take whatever action is necessary to protect and preserve the Ala Loa on the behalf of the public...”<sup>17</sup>

Again, clearly we have a parallel situation here in the disputed existence of the Ala Loa through a coastal development project and the government’s breach of public trust duties and responsibilities set forth to protect Native Hawaiian cultural practices and the cultural resources these practices inherently rely upon.

### **Conclusion**

The Office of Hawaiian Affairs had been contacted by numerous Native Hawaiian beneficiaries seeking intervention in an impending decision by the Hawai’i County Council to formally accept an easement from Kohala Kai, LLC, which in effect, seriously endangers an important segment of the Ala Loa in the Kohala area.

The advancement of Native Hawaiian Rights has been a long-standing struggle. Advances were often a result of legal decisions, which were a direct result of cultural practitioners stepping forward to ensure government fulfilled its obligations. These practitioners were committed to protect the last remaining vestiges of our beloved Native Hawaiian culture.

In *Citizens for the Protection of the North Kohala Coastline v. County of Hawai’i*, 91 Hawai’i 94, 979 P.2d 1120 (1999), the Hawai’i Supreme Court held—in a challenge to the issuance of an SMA permit for construction of a coastline resort with hotel and golf course—that the plaintiffs had shown personal and special interests sufficient to assert a claim under the declaratory judgment act, H.R.S. § 632-1, based upon the following assertions: its members reside “in close proximity” to the proposed [Mahukona Harbor project in North Kona] and are “long time and frequent users” of the Mahukona coastline, [and] injury to its members’ quality of life is threatened.

According to Citizens, Mahukona is a “community recreational resource,” used for “picnics, ...swimming and boating.... Fishermen also use shore areas along the length of the

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<sup>17</sup> Kelly, et al., v 1250 Oceanside Partners, 111 Haw. 205, 140 P.3d 985 (2006), Civil No. 00-1-0192K, Fourth Amended Final Judgment, March 14, 2006

project's ocean frontage." In addition, "Mahukona is ... the site of a major spiritual center," a "navigational key-way for islands to the south," and a locale for gathering Hawaiian plants and herbs. Citizens urges that the Mahukona project may cause irreversible changes to the North Kohala coastline, affecting vital fishing grounds and causing "degradation of the quality of the nearshore marine environment." It argues, therefore, that because its members use the shoreline area "within dozens of feet" of [the developer's] proposed structures, "such use is potentially harmed by the project." *Citizens*, 91 Hawai'i at 101, 979 P.2d at 1127. Under this standard, Native Hawaiian traditional and customary practitioners can establish standing to bring a declaratory judgment action under H.R.S. § 632-1 challenging development proposals that threaten their cultural practices. OHA maintains that we have the same situation here.

The Ala Loa is a critically important component of the practices of Native Hawaiians in the past, present, and in the future. The revitalization of the observance of Makahiki ceremonies, protocol, and rituals is growing throughout the Hawaiian Islands. The ability to traverse the Ala Loa circuits along the coastal regions is a critical component of this sacred practice.

The ability to access the coastal areas and gather for subsistence purposes is also critical and increasing in practice as more and more Native Hawaiian 'ohana turn to the sustainable practices of our kūpuna to provide for their families.

The ability to walk on the same path of the ancestors, to walk in the footsteps of Kamehameha in Kohala, as told in mo'olelo and history, is of paramount importance to our 'ōpio, our youth. We know that the departed ancestors continue to walk these same paths and alignments. This is the way of our culture.

The Office of Hawaiian Affairs wishes to avoid further litigation to force government to fulfill its constitutional and statutory responsibilities, as set forth, time and time again, by admonishing judicial decisions, many occurring right here in Hawai'i County.<sup>18</sup>

It is our sincere hope that this honorable Hawai'i County Council will ensure that the County of Hawai'i and its departments uphold the law. Thank you for the opportunity to provide information and context regarding this critical decision.

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<sup>18</sup> See Hawai'i County landmark Native Hawaiian Rights cases *Pele Defense Fund v. Paty* ("PDF"), 73 Haw. 578, 837 P.2d 1247 (1992), *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* ("PASH"), 79 Hawai'i 425, 903 P.2d 1246 (1995), and *Ka Pa'akai O Ka 'Aina v. Land Use Commission* (Ka Pa'akai), 94 Hawai'i 31, 7 P.3d 1068 (2000)