

**Phase III. Native Hawaiian Access Rights Project**  
**Recommendations for SMA Rules and Process**

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To David W. Blane, April 22, 2002**

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## **Introduction**

This section briefly describes the goals and scope of work for each of the three phases of the Native Hawaiian Access Rights Project

## **Introduction**

In August of 1995, the Supreme Court of Hawai'i issued a decision in *Public Access Shoreline Hawai'i vs. County of Hawai'i County Planning Commission* which concluded, in part:

The CZMA [Coastal Zone Management Act] requires the HPC [Hawai'i Planning Commission] to give the cultural interests asserted by PASH [Public Access Shoreline Hawai'i] 'full consideration.' In addition, both the CZMA and article XII, section 7 of the Hawai'i Constitution (read in conjunction with HRS § 1-1), obligate the HPC to 'preserve and protect' native Hawaiian rights to the extent feasible when issuing a SMA permit.

The Office of Planning of the Department of Business, Economic Development and Tourism received a three-year grant from the National Oceanic and Atmospheric Administration to develop a process for the Hawai'i Coastal Management Program to comply with the Supreme Court ruling in the PASH decision. They contracted with the University of Hawai'i - Manoa for the services of a research team of professors including Dr. Davianna Pomaika'i McGregor of the Ethnic Studies Department, Dr. Luciano Minerbi of the Department of Urban and Regional Planning, and Dr. Jon Matsuoka of the School of Social Work to implement the project.

### **Phase I, 1998-1999**

In the first year of the project, the team developed an inventory of information and data available regarding cultural and natural resources utilized for traditional and customary practices and specific locations to which access has been commonly and traditionally sought.

### **Phase II, 1999-2000**

In Phase II the research team worked with the planning department of Kaua'i County as a pilot project to test the effectiveness of the data, maps and information gathered in Phase I. The team also worked with Native Hawaiian cultural practitioners, landowners and developers to derive specific recommendations on how improve the Special Management Area permit process in order to comply with the Supreme Court ruling in the PASH decision. The resulting report, "Phase II. Native Hawaiian Access Rights Project, Kaua'i Pilot Project" provides a comprehensive analysis of changes that could be made to both Chapter 205A and the SMA rules of the county of Kaua'i for congruency and maximum consistency with the PASH decision.

### **Phase III, 2001-2002**

The information gathered and the process developed in Phases 1 and 2 were reviewed with planners from the planning departments of the City and County of Honolulu, the County of Hawai'i, and the County of Maui. The Hilo planners questioned the need to amend Chapter 205A in order to amend the county SMA rules. They pointed out that the Supreme Court issued its ruling regarding Native Hawaiian Rights and the Coastal Zone Management Act based upon existing laws - HRS 205A, in combination with Article XII Section 7 of the Hawai'i State Constitution and HRS 1-1. The Hilo planners suggested that the team recommend changes to the SMA rules which could be made without amending Chapter 205A.

The Office of Planning discussed this approach with the Office of the State Attorney General and confirmed that changes can be made to the SMA rules to include consideration of traditional and customary Native Hawaiian rights without amending Chapter 205A. The letter of the Attorney General noted that section 205A-26(1)(A), HRS, requires that all developments in special management areas ensure, "Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles." It further noted that section 205A-2(b)(2)(A) which establishes the objectives and policies of the coastal zone management program provides that the objectives should, "Protect, preserve, and where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture." The letter also noted that there are no provisions in Chapter 205A which contradict the PASH decision. The Office of the Attorney General noted that adding language which specifically mentions the protected Hawaiian rights set forth in the PASH decision would be advisable so that all applicable mandates are written into the chapter. Finally, the letter reaffirmed that the Supreme Court decision in PASH, "pertains specifically to the counties and it is they who must consider Hawaiian rights when making decisions on the granting of shoreline management area permits." ( Letter of Deputy Attorney General, John W.K. Chang to David W. Blane, April 22, 2002.

The Office of the Attorney General also noted that the Land Use Commission (LUC) incorporated the PASH decision in their rules without amending the law governing the Land Use Commission. The LUC changed its rules to specifically address Hawaiian customary rights by requesting that the petitioner under §15-15-50 (c) (20) provide the following information: "A statement addressing Hawaiian customary and traditional rights under Article XII, section 7 of the Hawaii State Constitution."

Given this input, the team revised the recommendations in the Phase II Report related to the proposed amendments to Chapter 205A and the SMA rules. Proposed changes to Chapter 205A were deleted and proposed changes to the SMA rules were streamlined. The proposal to alter the application process to include a review by Native Hawaiian practitioners remained the same.

This revised proposal was presented to focus group meetings on the islands of Lana'i, Moloka'i, O'ahu, Maui, and Hawai'i with representatives of Native Hawaiian cultural practitioners, landowner and developer stakeholders, planners, the PASH Study Group, the Office of Hawaiian Affairs, the Maui Cultural Commission, and the Moloka'i Planning Commission.

The ruling of the Hawai'i State Supreme Court in the *Ka Pa'akai O Ka 'Aina v. Land use Commission, State of Hawai'i / 94 Haw. 31 (2000)* case also influenced the development of the recommendations in this report. In its overview of the case the Hawai'i State Supreme Court emphasized the importance the permitting agency to make an independent assessment when reviewing an application:

“In making its administrative findings, appellee failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected to the extent feasible. By failing to make such findings appellee abused its discretion in arbitrarily and capriciously delegating its authority to consider the effect of the proposed development on such rights to the party seeking the petition.”

The court also articulated an analytical framework for agencies to follow in conducting an independent assessment of the impact of their actions on traditional and customary practices of Native Hawaiians:

“In order for the rights of native Hawaiians to be meaningfully preserved and protected, an appropriate analytical framework for enforcement is needed. Such an analytical framework must endeavor to accommodate the competing interests of protecting native Hawaiian culture and rights on the one hand, and economic development and security, on the other . . . In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must - at a minimum - make specific findings and conclusions as to the following: (1) the identity and scope of 'valued cultural, historical, or natural resources' [n27] in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (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 LUC to reasonably protect native Hawaiian rights if they are found to exist. [n28]

This Phase III report includes the revised proposal which was discussed with stakeholder focus groups on the various islands; a summary of the feedback received from the focus group gatherings; a final set of recommended changes to the SMA rules and process, and recommended action to implement these changes. The responses of planners with the counties of Kaua'i, Hilo, Maui and Honolulu to the recommendations are also included.

## **Input From Focus Groups**

The following section provides a narrative overview and outlines a summary of the input received from focus groups held on Moloka'i, Lana'i, O'ahu, and Hawai'i and discussions with the Moloka'i Planning Commission, the Maui Cultural Commission, the PASH Study Group and the Office of Hawaiian Affairs.

## **Narrative Overview of Feedback From Focus Groups**

### **Moloka'i Focus Group**

The participants want a process that has teeth in it. They are interested in designating cultural use areas or zones to facilitate in the identification of areas that are sensitive to development. The group is interested in having the entire island of Moloka'i designated within the SMA. They also wanted to emphasize that the rights are rooted in fulfilling responsibilities and that it is not for commercial purposes. In the checklist they want to factor in access and trails to the cultural use areas.

### **O'ahu Focus Group**

The group expressed concern that the rights avoid challenges on the basis of racial exclusiveness. They are also working on developing ahupua'a councils who would provide review of projects, and see that this process could serve as a transition toward establishing these councils or be a parallel development. They want to offer incentives to reviewers – perhaps through contributions to a community group rather than to the individuals. In the check list they wanted to add native stream life, an assessment of the conditions of the resources, and a way to identify potential positive as well as negative impacts.

### **Lana'i Focus Group**

Generally supportive of the process. They will provide additional feedback. Commented on the issue of view planes, and the need to also protect cultural privacy.

### **Kona Community Focus Group**

The group felt that the current proposal waters down what was proposed in the Kaua'i Pilot Project and support a strong process. They were concerned that the review panel is only advisory to the Planning Commission. They are in strong support of the proposal and made editing suggestions to strengthen the language of the process. They also added features to the check list unique to Hawai'i, such as sub-terranean streams that flow into the ocean, and ko'a in the ocean.

### **Leeward Planning Council**

The group feels that the proposed process will not work. They feel that the PASH decision dealt narrowly with makai access for tenants which should result in narrow tenant-landowner agreements. They do not feel that PASH dealt with broader protection of cultural resources. Other laws deal with cultural resources and protection of those sites and resources. They questioned how the review panel would be set up, especially if it were to involve reviewers from outside of the project area. They felt that the process should not be required for minor permits.

### **Hilo Community Focus Group**

Initially the some members of the group were suspicious of the process as a means to co-opt Native Hawaiians. Upon discussion, the majority felt that they do not have a voice now, so this process is a start and they do support it. They feel that the CZM is not enforcing the SMA regulations. They feel that there is a need to re-certify the special management area for the shoreline after the eruptions on the island. They feel that Native Hawaiians should be in the Planning Department, on the Planning Commission and on the Hawai'i County Council.

### **Hilo Planner/Landowner Focus Group**

The group tended to extend the discussion from Native Hawaiian rights to the cultural practices of all ethnic groups by referring more to Act 50 than to the PASH Decision. They raised several questions on how the advisory group is to be selected and comprised. They are concerned that it would be made up of the same persons that the EIS consultants involve anyway. They would welcome an information system that would help consultants access information.

### **Moloka'i Planning Commission**

Felt that the process would be cumbersome for minor permits. Concerned about duplication with Act 50. Concerned about keeping within the time frame for approval of permits. Saw the potential benefit of such a process to protect precious cultural resources.

### **Maui Cultural Commission**

Raised concern about the process being cumbersome for minor permits. Asked about any overlap with Act 50. Concerned about how cultural practitioners will be identified.

### **PASH Study Group**

Pointed out inconsistencies which need to be corrected, e.g. whether we use native Hawaiian (legally refers to beneficiaries of the Hawaiian Homelands Program) or Native Hawaiian (which is inclusive of all with Native Hawaiian ancestry). Also made suggestions for language to be more consistent with the PASH ruling, as regards protection of the reasonable exercise of rights, rather than just the protection of the rights, so as to factor in the interests of the property owner. Asked if this was a process of consultation or if authority was being delegated to the review panel. Concerned about the mediation process, should the planning commission weigh in other factors and make a contradictory decision. Concerned that the process not stack up against developers, especially since it is usually one of the last permits to secure for a development. They discussed the benefit of putting the process up front in the permitting procedure. They noted that the City and County of Honolulu process is different from the process used by the neighbor island counties and wanted to be assured that the recommendations would take the distinctions into account. They were concerned that the overall permitting process not be prolonged by this additional process.

### **Office of Hawaiian Affairs**

The staff raised the issue of compensation for reviewers. The Hawaiian Rights staff stated that OHA could assist in holding meetings on each island to develop standards and requirements for practitioners and to review the checklist. OHA stated that it would support the process applying to both major and minor permits, and support amendments to the SMA rules to include the Native Hawaiian review of permits. They could envision legislation to support independent cultural reviews of permits. The Board took a position to continue to participate in the development of the process.

In a follow-up meeting with the Hawaiian Rights Division staff of the Office of Hawaiian Affairs they indicated that it would be inappropriate for OHA to develop and maintain the list of reviewers. It is the responsibility of the county agencies and to conduct guarantee the full consideration of Native Hawaiian rights. To maintain the list as part of the review process may restrict the ability of OHA to sue against inappropriate development. It also may place OHA in conflict with beneficiaries who had not been involved in the process and may have outstanding issues and concerns with an application. They felt that the process works best if the community maintains its independent voice from OHA. Sometimes OHA is required to enter into agreements separate from the community. OHA can provide communities with training on laws and rights. OHA can still refer applications that it is given to review to the appropriate cultural practitioners as part of its own internal review. Can employ multiple methods: Notify residents in proximity of the sites; post notice of applications in Ka Wai Ola; have applications for review at its island offices; have practitioners register voluntarily with OHA; OHA can send copies of SMA applications they receive to the list of volunteer reviewers to get their input for their comments. OHA may be able to work with the community to conduct cultural mapping and develop and maintain a confidential GIS mapping of cultural resources.

### **Maui Planning Consultants Focus Group**

They are interested in a user-friendly process. Would be interested in having a screening out of the minor permits that would not need a full review, as there are a lot of minor permits on Maui, given the size of the SMA especially in Kihei. Soil type could serve as a screen, e.g. dunes should always get a full review. They would support a mapping of culturally sensitive areas and also a mapping of areas that are considered fully developed and which are NOT culturally sensitive and would not require the full review. They would like guidelines on appropriate mitigation measures considering pedestrian v. vehicular access and buffers around sites, etc. Reviews by the SHPD and the Maui Cultural Commission should only be as applicable, not always. The check list is helpful as guide to know what to look for on a property.

### **Maui Community Focus Group**

Although we had only one participant, his input was insightful. For example, he suggested adding kupe'e and seasonal residence sites to the check list, important

resources formerly overlooked. Raised importance of how the kama'aina are selected and the need to recognize that sometimes the reviewers may have contradictory information or assessments. May also have pro-development kama'aina who might overlook some resources. Concerned that the reviewers not be used by the developers. Stressed importance of protecting the integrity of ancestral knowledge. Noted that the notification area should be broader where lot sizes are larger. Also the county should review the status of compliance with the shoreline management actions and designation every 5 years.

### **Leeward O'ahu Community Focus Group**

The group was concerned that any shoreline management permit application review be screened for impacts to burials. Burials have been the cultural sites most heavily impacted by shoreline development on O'ahu. The group recommended that application reviews be submitted to the Burial Commission staff which has a confidential map of burial areas as an intermediate step for the screening applications. The group was concerned that federal standards protecting religious and cultural resources and practices apply in the SMA process. There were concerned that contemporary cultural practices be recognized and that the definitions and roles of Hawaiians and non-Hawaiians in the process be clarified. The group noted that cultural organizations and umbrella groups might be appropriate to involve in the review as many 'ohana on O'ahu may have lost connection with the resource of their area and also recommended community workshops on the laws protecting cultural resources. With regard to the check list, they noted the need to provide a narrative question to solicit what might not be on the list and the need to factor in inconspicuous markers of burials such as upright stones, planted coconut trees and lilly plants.

### **Windward O'ahu Community Focus Group**

The group were concerned that the entire Punalu'u coastline and all of Kahana Valley which are in the SMA are very sensitive. Recent construction by the Board of Water Supply to install a larger pipeline have uncovered 'iwi and led to a layer of silt on the nearshore reefs. They suggested language to qualify what "feasible" means. Working within the framework of the City and County, they suggested that, for O'ahu, the review by Neighborhood Boards could involve a review by Native Hawaiian practitioners prior to the public hearing on an application. They added resources to the checklist appropriate to Kahana Valley such as taro terraces and aquatic streamlife. They suggested that Native Hawaiians develop a "card" with a statement of Native Hawaiian rights which could be utilized by practitioners and their descendants to assert their access rights with private property owners and enforcement personnel.

## **Proposed Process to Assess Impacts Upon Native Hawaiian Cultural Resources and Rights**

The following section presents a proposed process to give full consideration of Native Hawaiian rights. The original proposal developed for discussion with the focus groups was changed to incorporate the input from the focus group participants. The process was further refined with input received from county planners as to what they believed would be a workable process.

Rationale: The key elements of the process are: (1) the use of a check list to identify Native Hawaiian Cultural Resources in the coastal zone that could possibly be impacted by a proposed development (2) questions on the form related to the 3 points that the Hawai'i State Supreme Court said needs to be part of a cultural resources assessment; and (3) a review by neighbors, community organizations and knowledgeable practitioners of Native Hawaiian culture. The check list approach can assist applicants and planners in identifying resources that can be affected by development. The review by neighbors, community organizations, and cultural practitioners can assist the county planning staff in their independent assessment of the applications.

Response of County Planners: The county planners see the check list as a useful tool for applicants to identify resources and for planners to assess and evaluate permit applications relative to the three aspects of a cultural assessment outlined by the Hawai'i State Supreme Court.

The county planners felt that if such a process were to be included, it should be the applicants who conduct the assessment and seek a review from the neighbors, community organizations, and cultural practitioners.

They indicated a willingness to include the proposed "Form to Identify Native Hawaiian Cultural Resources in the Coastal Zone" as part of application form and/or instructions.

The key issue is which entity is best suited to undertake the task of maintaining a list of possible reviewers.

Another major concern is how to determine and indicate which minor permits may not need to undergo such a process.

## **Proposed Process to Assess Impacts Upon Native Hawaiian Cultural Resources and Rights**

A. When a major SMA permit is required, the applicant should conduct a cultural impact assessment as outlined in the “Guidelines for Assessing Cultural Impacts” adopted by the Environmental Council, State of Hawai‘i, 11-19-97. The “Form to Identify Native Hawaiian Cultural Resources in the Coastal Zone Area” can be utilized to conduct the Cultural Impact Assessment. The completed assessment should be reviewed by the State Historic Preservation Division (SHPD), the county or island historic or cultural commission where applicable, and by reviewers who are practitioners of Hawaiian culture (as defined below) who live in, have experience with, or have knowledge about the affected district.

B. For BOTH major and minor permits, the applicant shall provide information addressing the points outlined by the Hawai‘i State Supreme Court in the Ka Pa‘akai o Ka ‘Aina ruling: (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; (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 to reasonably protect native Hawaiian rights if they are found to exist.]. The form below, “Form to Identify Native Hawaiian Cultural Resources in the Coastal Zone Area” is designed to assist in this assessment. It should included as part of the application process and instructions for an SMA permit.

C. The “Form to Identify Native Hawaiian Cultural Resources in the Coastal Zone Area” should be filled out by the applicant. It should also be sent out with the notice of an application for an SMA permit to neighboring property owners, and community organizations, and individual Native Hawaiian cultural practitioners who have indicated a willingness to review such forms in the affected district.

D. Any discrepancies between the applicant’s assessment of Native Hawaiian cultural resources and those of the neighbors, community organizations, or cultural practitioners should be acknowledged, memorialized with the application and worked out into an agreement. Forms filled out by the applicant, the neighbors, community organizations and/or cultural practitioners, as well as agreements and outstanding issues should be included as part of the application.

E. Any agreed upon conditions for the permit will be memorialized, reported to the County/Island Planning department and Planning Commission, or in the case of Honolulu, with the City Council and filed with the Bureau of Conveyances with the property title.

F. A list of "Practitioners of Native Hawaiian Culture" who are willing to review the applications should be maintained. The options as to who can maintain the list of reviewers are as follows:

- A. Individual County Planning Departments
- B. State Planning Office - State CZM Program
- C. State Historic Preservation Division - History office
- D. Compensate Community Associations to assist with the review and maintain list, such as the Hawaiian Civic Clubs or local units of the Queen Lili'uokalani Children's Center
- E. Office of Hawaiian Affairs - local offices
- F. University of Hawai'i Hawaiian Studies programs on the island campuses

**Form to Identify Native Hawaiian Cultural Resources in the Coastal Zone Area**

Project: \_\_\_\_\_  
 TMK #: \_\_\_\_\_  
 Reviewer: \_\_\_\_\_  
 Date: \_\_\_\_\_

1. Please place a check next to any of the following resources known or suspected to be present:

- |   |  |
|---|--|
| <input type="checkbox"/> streams                          | <input type="checkbox"/> ponds                           |
| <input type="checkbox"/> 'auwai (taro irrigation ditches) | <input type="checkbox"/> lo'i kalo (taro pond fields)    |
| <input type="checkbox"/> springs                          | <input type="checkbox"/> caves                           |
| <input type="checkbox"/> trails                           | <input type="checkbox"/> wahi pana (named places)        |
| <input type="checkbox"/> sacred places                    | <input type="checkbox"/> dunes                           |
| <input type="checkbox"/> landings                         | <input type="checkbox"/> bridges                         |
| <input type="checkbox"/> surfing sites                    | <input type="checkbox"/> sandy beach                     |
| <input type="checkbox"/> fishing area                     | <input type="checkbox"/> fishpond                        |
| <input type="checkbox"/> fish trap                        | <input type="checkbox"/> fish house                      |
| <input type="checkbox"/> hunting areas                    | <input type="checkbox"/> kilo i'a (fish sighting spot)   |
| <input type="checkbox"/> muliwai (brackish pond)          | <input type="checkbox"/> anchialine pond                 |
| <input type="checkbox"/> trails                           | <input type="checkbox"/> salt ponds                      |
| <input type="checkbox"/> wells                            | <input type="checkbox"/> turtle nesting area             |
| <input type="checkbox"/> historic walls                   | <input type="checkbox"/> basalt veins for tools          |
| <input type="checkbox"/> alae vein                        | <input type="checkbox"/> salt pans                       |
| <input type="checkbox"/> shrines                          | <input type="checkbox"/> salt gathering areas            |
| <input type="checkbox"/> ko'a (fishing shrines)           | <input type="checkbox"/> heiau (temples)                 |
| <input type="checkbox"/> historic sites                   | <input type="checkbox"/> cultural use areas              |
| <input type="checkbox"/> ho'ailona (natural signs)        | <input type="checkbox"/> sighting place                  |
| <input type="checkbox"/> lele (cliff jumping spots)       | <input type="checkbox"/> native plants                   |
| <input type="checkbox"/> pu'uhonua (places of refuge)     | <input type="checkbox"/> holua slides (slides for sleds) |
| <input type="checkbox"/> cultivation area                 | <input type="checkbox"/> leina (jumping off point        |
| <input type="checkbox"/> archaeological sites             | for souls to cross into the next world)                  |
| <input type="checkbox"/> burials                          | <input type="checkbox"/> kupe'e                          |
| <input type="checkbox"/> o'opu                            | <input type="checkbox"/> hihiwai/wi                      |
| <input type="checkbox"/> aholehole                        | <input type="checkbox"/> 'anae                           |
| <input type="checkbox"/> steam bath areas                 | <input type="checkbox"/> bathing pools                   |
| <input type="checkbox"/> limu gathering areas             | <input type="checkbox"/> lava tubes                      |
| <input type="checkbox"/> subterranean water course        | <input type="checkbox"/> petroglyphs                     |
| <input type="checkbox"/> kapu kai/hi'u wai areas          | <input type="checkbox"/> paddling areas                  |
| <input type="checkbox"/> artifacts                        | <input type="checkbox"/> view plane                      |
| <input type="checkbox"/> seasonal residential sites       | <input type="checkbox"/> burial markers                  |
| <input type="checkbox"/> water caves                      | <input type="checkbox"/> birthing stones                 |
| <input type="checkbox"/> phallic stones                   | <input type="checkbox"/> Pohaku Kane                     |
| <input type="checkbox"/> coral reef                       | <input type="checkbox"/> estuary                         |

- |                          |                                       |                          |                            |
|--------------------------|---------------------------------------|--------------------------|----------------------------|
| <input type="checkbox"/> | spawning grounds                      | <input type="checkbox"/> | nearshore marine resources |
| <input type="checkbox"/> | house sites                           | <input type="checkbox"/> | dams                       |
| <input type="checkbox"/> | 'aumakua (ancestral deities) domain   |                          |                            |
| <input type="checkbox"/> | po kane routes (night marcher routes) |                          |                            |

Please describe any additional cultural resources or practices known or suspected to be present within or near the project site.

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2. How will the proposed project impact the historic resources in or near the project area?

3. How will the proposed project impact Hawaiian cultural resources, usage, and rights in or near the project area?

4. Are there additional traditional and customary Hawaiian practices for subsistence, cultural, medicinal, or religious purposes that take place in or near the project area?

Yes                       No

If yes, please describe:

5. In your assessment, to what extent will valued cultural, historical and natural resources and the exercise of traditional and customary practices be affected or impaired by the proposed action?

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6. What feasible action can the county planning department take to reasonably protect Native Hawaiian rights in the affected area?

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### **Proposed Changes to Special Management Area Rules and Regulations**

The following changes to the Special Management Area Rules and Regulations are recommended to fulfill the mandate of the Hawai'i State Supreme Court in the PASH and Ka Pa'akai O Ka 'Aina rulings.

Rationale: According to these rulings, state and county agencies need to conduct an independent assessment of the extent to which Native Hawaiian cultural resources, and rights may be impacted by a proposed development for which a permit is required any feasible action that can be taken by the department to protect Native Hawaiian rights that are found to exist.

Responses of County Planners: Hilo County are making changes to their SMA Rules and Regulations that include the definitions for "cultural" and "Native Hawaiians Rights" that are proposed in the report. Kaua'i County has UH Law Professor John Van Dyke reviewing their rules and regulations and authorized the team to present the recommendations to Professor Van Dyke to consider. Honolulu City and County planners do see the need to make changes to the SMA Rules and Regulations but may be willing to include the definitions and excerpts of the Hawai'i State Supreme Court Rulings in the instructions provided to applicants. Maui County will consider the recommendations when they next conduct a review of their rules and regulation.

Planners would also like to see the Hawai'i State Supreme Court rulings implemented by all county and state agencies and not just in the SMA permit process.

**Definitions:**

**Recommend that the following definitions be added to the Special Management Area Rules and Regulations for each county:**

**Definition #1**

**“Cultural” pertains to traditional and customary practices and usage of resources to fulfill responsibilities and rights possessed and exercised by ahupua’a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778.**

Rationale: This definition is based upon the language of the Hawai'i State Constitution, Article XII, Section 7 and of the PASH/Pilago Supreme Court decision. This language is suggested to have the SMA process give full consideration to Native Hawaiian usage and rights as mandated under the law.

The scope of work for this project was to recommend changes to the SMA rules and regulations to assist the counties in implementing the PASH decision of the Hawai'i State Supreme Court. In 2000, after the project started, the Hawai'i State Legislature passed Act 50 as an amendment to HRS 343-2 in order to include the effects of economic development on cultural practices. Should the counties want to include the concept of Act 50 in the definition of “cultural” for the purposes of the SMA rules and regulation, then we recommend the following definition:

**“Cultural” pertains to the traditional and customary practices of Hawai'i's communities, in general, and in particular to the traditional and customary practices and usage of resources to fulfill responsibilities and rights possessed and exercised by ahupua’a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778.**

**Definition #2**

**“Native Hawaiian Rights” means those rights defined in and protected under HRS 1-1, HRS 7-1, HRS 174C-101, Article XII, Section 7, of the Hawaii State Constitution, and in rulings of Hawai'i case law.**

Rationale: The PASH/Pilago Supreme Court decision defines Native Hawaiian rights as those provided for in the Hawai'i Revised Statutes HRS 1-1 and HRS 7-1 and the Hawai'i State Constitution. HRS 174C-101 (pertaining to water rights) and the rulings of the courts continue to further define these rights.

Federal laws, such as the American Indian Religious Freedom Act [42 U.S.C. 1996, P.L. No. 95-341, 1978], and the National Historic Preservation Act[16 U.S.C. 470; 80 Stat. 915; P.L. No. 89-665] and its Section 106 Review process, Native American Graves Protection

and Repatriation Act [25 U.S. C. 3001-3013; P.L. 101-601 (1990)], also define and protect Native Hawaiian rights and should be factored into the review of federal projects.

### Definition #3

**“Practitioners of Hawaiian Culture” means Native Hawaiians or kama’āiana (native born persons) who are acknowledged by the community to have knowledge and experience pertaining to traditional and customary practices and usage of resources to fulfill responsibilities and rights possessed and exercised by ahupua’a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778**

Rationale: This definition is proposed if reviewers who are Native Hawaiian Cultural Practitioners are to be asked to review the assessment of Native Hawaiian cultural resources provided by the applicant. The definition is inclusive of non-Hawaiians who are knowledgeable and have been trained in Native Hawaiian cultural practices.

#### **Procedures / Objectives and Policies:**

**(1) Insert "cultural" into the objectives, procedures and rules wherever environmental and historical is stated and referred to.**

Rationale: While the rulings of the Hawai’i State Supreme Court acknowledge that cultural resources are part of historical resources, it would provide a clearer guideline to the applicant if “cultural” was explicitly included in the SMA rules.

**(2) Recommend that the following be part of the policy section of the SMA rules:**

**The department or the commission shall preserve and protect the reasonable exercise of Native Hawaiian rights to the extent feasible when reviewing an application for a permit. [79 Hawaii 425 (1995), “cert. denied, 517 U.S. 1163 (1996)” and 94 Hawaii. 31 (2000)] [fn] the state does not have the "unfettered discretion to regulate the rights of ahupua'a tenants out of existence."**

Rationale: This is based upon the conclusion reached by the Supreme Court in the PASH/Pilago decision. The U.S. Supreme Court denied certiorari review, thus affirming that PASH ruling. To qualify the term “feasible” it is recommended that footnote # from the decision be included as a notation.

**(3) Recommend that the following be part of the SMA assessment and determination procedure and SMA emergency permit procedure:**

**The County Planning Department and or Planning Commission provide a written independent assessment which shall include the following: (a) the identity and scope of ‘valued cultural, historical, or natural resources’ in the application area, including the extent to which traditional and customary native Hawaiian rights are exercised in that area; (b) the extent to which those resources - including traditional and customary native Hawaiian rights will be affected or impaired by the proposed action; and (c) the feasible action, if any,**

**to be taken by the department to reasonably protect native Hawaiian rights if they are found to exist. [94 Hawaii. 31 (2000)]**

Rationale: This is suggested to assist the county planning commissions and departments to fulfill the obligation defined by the PASH/Pilago decision to 'preserve and protect' Native Hawaiian rights to the extent feasible when issuing a SMA permit and to conform to the analytical framework for independent assessments required by the Hawai'i State Supreme Court in its Ka Pa'akai O Ka 'Aina ruling.

### **Recommendations Relating to Resources, Workshops and Coordination Among Agencies**

The following recommendations are made to assist the county planning staffs in their assessment and protection of Native Hawaiian Cultural Resources in the coastal zone. The rationale and the responses of the county planners are listed below with each recommendation.

## **Resources, Data Collection, and Education**

### **Recommendation #1**

State Survey Office Maps:

Scan and digitize maps in the State Survey Office for use in a GIS system compatible with topographic maps.

Rationale: The State Survey Maps are an excellent resource regarding recognized trails, government roads, and natural resources used for cultural, subsistence, and religious purposes.

Comments of County Planners: Access to digitized maps would be useful. Having maps for each island available to the county planning offices would be useful. Honolulu C&C utilizes the maps at the State Survey Office to clarify issues. It is a state responsibility. Copies of maps can be located in libraries accessible to the public. Security of the system is important if the public has access to the maps or to the computer system.

### **Recommendation #2**

Web site:

Develop a web site for posting data collected for this project and for additional data collected in the implementation of the process as appropriate and feasible.

Rationale: The data collected thus far for this project would be valuable to county planners, agencies that review SMA applications such as OHA and the State Historic Preservation Office, as well as communities.

Comments of County Planners: Suggest to use existing web sites of the Office of State Planning or the DLNR or OHA so that the information can be systematically updated by the agency and kept relevant. Counties can add information to their web site as appropriate.

### **Recommendation #3**

Plantation maps:

Acquire plantation maps.

Develop a repository of the plantation maps.

Eventually digitize information from these maps.

Include information from plantation maps into a GIS system.

Rationale: The plantations are phasing out and valuable resources regarding natural resources, trails, and roads could be lost if these maps are not placed into a repository and processed as the State Survey Maps consistent with Recommendation #1.

Comments of County Planners: Suggest that the University of Hawai'i be encouraged to provide a repository for the maps and make the island maps available through the community college libraries. Kekaha maps have been turned over to the Historical Society. A & B maps were turned over to the Sugar Museum. Bailey House may also have some maps.

#### **Recommendation #4**

Statement of Responsibilities and Rights of Practitioners of Hawaiian Culture:

Develop a statement of access responsibilities and rights for Practitioners of Hawaiian Culture to carry.

Circulate this statement to DLNR DOCARE and their agents; county police officers; landowners; property managers; title guaranty companies; and community organizations.

Educate the community through the DOE and private schools around this statement of responsibilities and rights.

Rationale: Community practitioners feel that such statement would assist them in fulfilling their traditional and customary responsibilities related to subsistence, cultural, and religious purposes and in the exercise of their rights, without harassment. It can also assist them passing on these responsibilities and rights to their children and grandchildren.

Comments of County Planners: This should be the responsibility of Office of Hawaiian Affairs or Native Hawaiian Legal Corporation. This issue is larger than the Coastal Zone Management Program, as such a statement would also apply to mountain areas and non-coastal resources and trails.

#### **Recommendation #5**

Education:

Educate the next generations about the responsibilities and rights of practitioners of Native Hawaiian culture

Rationale: Education of all of Hawai'i's children about the responsibility to protect the natural and cultural resources of Hawai'i is valuable. Respect of the rights of Native Hawaiians in fulfilling their traditional and customary responsibilities related to subsistence, cultural, and religious purposes can increase understanding and tolerance in a multicultural society.

Comments of County Planners: Responsibility of the Office of Hawaiian Affairs and the Dept. of Education. This goes beyond the Coastal Zone Management

Program and the Coastal Zone Management Program takes into account other sources - e.g. environmental.

## **Creating New Resources:**

### **Recommendation #6**

#### Mapping of Cultural Use Areas:

State and counties should develop mapping of cultural use areas as an overlay for use in initial screening of applications.

Communities should be encouraged to develop and maintain a map of their cultural use areas

Federal and private funds should be attracted to assist communities in the mapping of their cultural use areas

Rationale: County and private planners indicated that the mapping of cultural use areas would assist them in complying with Hawai'i laws, case law and Supreme Court Rulings related to Native Hawaiian Access Responsibilities and Rights, such as Act 50, PASH, and Ka Pa'akai O Ka 'Aina.

Comments of County Planners: Kaua'i planners noted that DLNR Sensitivity maps were developed and utilized in the 70's, but they were advised to discontinue use of the maps for permitting. The concern was that areas that were outside of the "sensitive" areas might still have important resources which should be assessed. Helpful, but once identified, fear that it will be hard to protect the resources. It's good to have the community identify the resources, but problem is that the community group has a difficult time to sustain the data beyond the institutional memory of particular members. Concern that the information be protected to protect the sites. The National Register Bulletin provides guidelines to identify a cultural resource area without having to reveal the nature of the site or the specific location. Note that OHA is conducting a pilot study of mapping cultural resources in a district on the island of Hawai'i. Counties need the information organized onto tax key maps.

## **Improve Existing Process:**

### **Recommendation #7**

#### Review for burials:

Have permit applications undergo review by Burial Council staff which maintains a map of the known areas where burials are located to screen for possible impacts upon burials. CZM office should meet with the State Historic Preservation Division to assure appropriate review by the Burial Council staff as part of the application review by the SHPD.

Rationale: As the Burial Councils on each island have continued to map burial sites and areas on each island, a review by the Burial Council staff of the SMA applications can assist in preventing impacts upon burials.

Comments of County Planners: The State Historic Preservation Division should refer it to the Burial Council staff as part of its review. Under Honolulu C&C process, application notices are simultaneously sent out to many affected agencies, including, when relevant, the Burial Council staff. Need to keep the time lines in mind.

### **Draw Upon County Planners For Best Practices:**

#### **Recommendation #8**

The Coastal Zone Management Program should convene workshops for county planning staffs as well as for the county directors to develop screening guidelines for minor permits such as the following:

1. if property abuts ocean, shoreline or stream must undergo process
2. if property abuts an endangered species habitat must undergo process
3. if involves the location or servicing of recreational craft must undergo process

Additional Issues Might Include:

1. What percent of the ground cover will be displaced?
2. Will drainage or pipes be part of the project?
3. Will a sea wall be part of the project?
4. Will a grading permit be sought?
5. How will the project alter view planes? In which direction - north, south, east, west?

Rationale: County planners indicate that most minor permits would not need to undergo the proposed process. However, a small percentage of minor permits should undergo such a review, such as in conditions that the County Planning Directors defined above. The consultants recommend that county planners be gathered to help further define a process for screening out minor permits that would NOT need to undergo the proposed process.

Comments of County Planners: It's a good idea to have more experienced planners share with less experienced planners to develop guidelines for use, however should not try to develop standardized criteria, as any screen can still overlook cultural resources that might be located in the application area. Moreover, if this is applied to minors, will there be a need for statutory authority or a rule? Need to allow planners to apply their own knowledge, experience, and evaluation. Should also be able to screen out some of the major permits where it is determined that cultural resources will not be affected. Staffs should meet separately from directors. Is endangered species a cultural or an environmental resource?

### **Recommendation #9**

The Coastal Zone Management Program should convene workshops of county planning staffs and also of planning directors to share best practices related to:

Defining cultural resources and impacts upon cultural resources.

Guidelines on appropriate mitigation measures:

- What is the appropriate access? Some/none/all?
- Are there any guidelines between pedestrian vs. vehicular access?
- Depends on area/what is available(parking, etc.)
- What are guidelines on buffers?
- Provide a list of successful mitigation measures
- What are incentives for mitigation?
- Develop models of different situations and how to handle it, when need a deeper level of analysis

Rationale: County planners have the most experience with the range of SMA permits that are submitted, potential impacts, and mitigation measures that have been successful. The planners should be gathered to share their best practices with regard to processing SMA applications in compliance with Hawai'i laws and court rulings protecting Native Hawaiian access rights.

Comments of County Planners: Staffs should meet together, separately from the directors. Should also discuss what is protection and how to protect cultural resources. Need thorough review by Na Ala Hele, Aquatic Resources, SHPD, Burial Council, Forestry, etc. to assist in assessment, so perhaps the staffs from these agencies can be part of some of the workshops. Maui staff is getting advice from Maui SHPD office to develop guidelines for assessing cultural resources. For mitigation, need to share actual examples of mitigation contexts and measures. Need to also share examples of "tight" conditions imposed upon permits to close off loopholes.

### **Implementation:**

#### **Recommendation #10**

Periodic Workshops

Implement the proposed process and hold workshops to share experience and best practices.

Rationale: Original recommendation was to review the process to make changes after a 2 year experimental period. However, changing rules is a long and complicated process. Therefore, rather than review the process with a view to making changes it is recommended that periodic workshops be held for planning staffs to share experience and best practices as a means to make the process more workable.

Comments of County Planners: An experimental period is a good idea, but the counties don't change rules every 2 years. Once the process is implemented, hard to change it.

### **Recommendation #11**

Other agencies:

Share process with all state and county agencies

Rationale: Hawai'i laws and court rulings apply to all state and county agencies. Sharing this process with other state and county agencies dealing with the issuance of land development permits can assist them. It can also ensure consistency in the implementation of the relevant laws and court rulings.

Comments of County Planners: Responsibility of the Coastal Zone Management Program to not only share the process with the other agencies, but to require agencies to critically review applications for SMA permits and encourage them to follow the Ka Pa'akai Supreme Court Ruling guidelines

### **Recommendation #12**

List of "Practitioners of Native Hawaiian Culture"

Identify and maintain list of "Practitioners of Native Hawaiian Culture" who are willing to review the applications:

The options are as follows:

- A. Individual County Planning Departments
- B. State Planning Office - State CZM Program
- C. State Historic Preservation Division - History office
- D. Compensate Community Associations to assist with the review and maintain list, such as the Hawaiian Civic Clubs or local units of the Queen Lili'uokalani Children's Center
- E. Office of Hawaiian Affairs - local offices
- F. University of Hawai'i Hawaiian Studies programs on the island campuses

Rationale: It is recommended that the applicants have "Practitioners of Native Hawaiian Culture" fill out a cultural resources check list as part of their application. The applicants would need guidance on how to get the form to such reviewers and the above are possible agencies who can assist.

Comments of County Planners: If applicants are required to do it, need clear guidelines. Especially for minor permits, it should be done simply, without necessarily hiring a professional. Can the average person go through the process without hiring people? Can it be simple enough that the common person can do it without great expense? Verification that the check lists submitted by the applicant and the reviewers are accurate should be done by either the County

staff or the State Historic Preservation Division. It could be part of the State Historic Preservation Division review. On the other hand, homerule is important and if the state provided resources to hire an additional staff member with cultural expertise, the review can be done by the county.

### **Recommendation #13**

#### Notice:

Send the reviewer form out with notice of application to neighboring residents and landowners

Send notice of SMA application and reviewer forms to the local offices of the Office of Hawaiian Affairs

Rationale: These recommendations are made to tailor the proposed process into the existing process.

Comments of County Planners: The applicant is required to send out the notice. They can be asked to include the check list in the notice that they mail out.

### **Recommendation #14**

Coastal Zone Management should meet with agencies that review applications for SMA permits to discuss importance of conducting a thorough and systematic assessment of cultural resources by their staffs. CZM application review protocol should be developed with State Historic Preservation Division, Aquatic Resources Division, Water Commission regarding streams, Burials Council Staff and Office of Hawaiian Affairs.

Rationale: The County Planning staffs rely upon state agencies with specialized expertise and data bases to review the applications for SMA permits. The reviews seem to be conducted unevenly, county to county. A protocol for agencies to assess impacts upon cultural resources would facilitate a thorough review of applications in a timely manner.

Comments of the County Planners: This suggestion arises from the discussion with Maui County Planners about the need for other agencies to share their expertise with the county staffs about the coastal zone cultural resources.

**Appendix I. Hawai'i and Federal Laws and Hawai'i State Supreme Court Rulings  
Related to Native Hawaiian Access Rights**

The following are excerpts of Hawai'i laws, a listing of federal laws and excerpts of Hawai'i State Supreme Court Rulings related to Native Hawaiian rights.

1846

**Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented To Them**

Aka, ina loa i ke konohiki mua kona 'aina ma ke 'ano alodio, ma ke ku'ai, a ma ka ha'awi wale ao ke Ali'i, ua mau no ke kuleana o na hoa'aina, a me na lopa, no ka mea, a'ole nele kekahi mea e a'e no ka ho'olilo ana o ka Mo'i i kona iho. Nolaila, o ke konohiki i ku'ai me ka Ali'i a loa kona 'aina ma ke 'ano alodio, ua hiki 'ole iaia ke pa'i i ka po'e malalo ona, e like me ka hiki 'ole i ke Ali'i i keia manawa ke pa'i i ke konohiki.

But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and sub-tenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties. The lord, therefore, who purchase the allodium, can no more seize upon the rights of the tenants and dispossess them.

1848

**Mahele Awards**

Certain Mahele awards and royal patents may have a statement reserving the rights of the tenants

koe wale no na kuleana o na kanaka e noho ana ma ua mau 'aina la

reserving only the right of the poeple who live on the aforementioned lands.

1850

**Section 7 of the Kuleana Act**

When the landlords have taken allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people shall also have a right to drinking water, and running water, and the right of way.

**The Privy Council Record states:**

The king was concerned that a "little bit of land even with allodial title, if they [the people] be cut off from all other privileges would be of very little value."

[The] proposition of he King, which he inserted as the seventh clause of the law, as a rule for the claims of common people to go to the mountains, and the seas attached to their own particular lands exclusively, is agreed . . .

1851

**Section 7 of the Kuleana Act Was Amended and is now HRS 7-1**

The requirement for tenants to obtain the permission of the landlords is deleted. Since 1851, the law has read as it now does in HRS 7-1

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

1892

**Section 1-1 Common Law & Hawaiian Usage**

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

1978

**Article XII. Section 7 of the Hawai'i State Constitution**

The State 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 inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

1987

**Section 174C-101 Native Hawaiian Water Rights.**

(c) Traditional and customary rights of ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, `o`opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

(d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.

**Federal Laws Relating to Native Hawaiian Rights**

**(1) National Historic Preservation Act of 1966, as amended [16 U.S. C. 470; 80 Stat. 915; Pub. L. No. 89-665 (1966), and amendments thereto].** Regulations: Protection of Historic Properties (Advisory Council on Historic Preservation) 36 CFR Part 800, as amended. Pertinent addition in the 1992 amendments include: Section 304 (a) - (b) on withholding from disclosure and Section 101 (d) (6) (A) - (C) on traditional cultural properties of religious significances; and on State consultation with Native Hawaiian groups during the Section 106 Review process.

**(2) National Historic Preservation Act of 1966, as amended [16 U.S.C. 470; 80 Stat. 915; P.L. No. 89-665 (1966), and amendments thereto].** Regulations: Protection of Historic Properties (Advisory Council on Historic Preservation) 36 CFR Part 800, as amended. Pertinent addition in the 1992 amendments include: Section 304(a) - (b) on withholding from disclosure and Section 101 (d)(6)(A) -(C) on traditional cultural properties of religious significance; and on State consultation with Native Hawaiian groups during the Section 106 Review process.

**(3) Native American Graves Protection and Repatriation Act of 1990 [25 U.S.C. 3001 - 3013; Pub. L. 101 - 601 (1990)].** NAGPRA Regulations; Proposed Rule (F.R. May 28, 1993), 43 C.F.R. 10. To provide direction on how Native American remains and burial

artifacts are to be treated. The statute deals with museum collections receiving federal funds and with ongoing archaeological investigations. NAGPRA encourages in situ preservation of archaeological sites that include burials and requires federal agencies to consult with affiliated, or potentially affiliated, Native Americans concerning the treatment and disposition of cultural remains. Native Hawaiian organizations and Native Hawaiian Home Lands are specifically cited.

**(4) H.R. 1995, Pub. L. No. 75-680, S 3, 52 Stat. 784, 784-85 (1938).** In 1938, the U.S. Congress passed the Kalapana Extension Act (52 Stat. 781 et seq.), which set an important precedent by including a provision to lease lands within the park extension to Native Hawaiians and to permit fishing in the area "only by native Hawaiian residents of said area or of adjacent villages and by visitors under their guidance." <sup>i</sup> Through this law, the special traditional subsistence lifestyle of the Hawaiians in Kalapana was acknowledged by the U.S Congress and measures were passed to protect it. This law provides further evidence that the U.S. Congress extended its policy for Native American Indians to Native Hawaiians while Hawai'i was a Territory of the United States.

## Hawai'i State Supreme Court Rulings

### Kalipi v. Hawaiian Trust Co. , Ltd., 66 Haw. 1 (1982)

The Hawai'i State Supreme Court first dealt with the subject of Native Hawaiian gathering rights in Kalipi v. Hawaiian Trust Co. In that case, the Supreme Court held that such gathering rights are derived from three sources - Chapters 7-1 and 1-1 of the Hawai'i Revised Statutes (1985) and Article XII, Section 7, of the state constitution. In Kalipi, the court held that lawful residents of an ahupua'a may, for the purposes of practicing Native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather the five items enumerated in HRS 7-1. The court also held that it is obligated "to preserve and enforce such traditional rights" under Article XII, Section 7. The Kalipi court further stated that HRS 1-1 ensures the continuation of other Native Hawaiian customs and traditions not specifically enumerated in HRS 7 - 1 that may have been practiced in certain ahupua'a "for so long as no actual harm is done thereby." It noted, "The retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."

Summary: In the Kalipi case the court ruled - (1) Hoa'aina could gather only in the ahupua'a in which they lived. (2) Hoa'aina could only gather the 5 items listed in HRS 7-1 - ki leaf, aho chord, thatch, firewood, house timber. (3) Hoa'aina could only gather on undeveloped lands. (4) The interests of the property owner and the hoa'aina had to be balanced. (5) The hoa'aina had to be reasonable in time, place and manner of access.

### Pele Defense Fund v. Paty 79 Haw. at 442 (1992)

The Supreme Court again ruled on Native Hawaiian gathering rights in the case of Pele Defense Fund v. Paty.. In this case, the court further expanded the rights established in Kalipi. In Pele, the court explained that, although in Kalipi it had recognized the gathering rights of Native Hawaiians under HRS 7 - 1, Kalipi allowed only the residents of an ahupua'a to exercise those rights on undeveloped lands within the ahupua'a. Based on the record of the 1978 constitutional convention which promulgated Article XII, Section 7, the court held in Pele that the provision should not be narrowly construed. Accordingly, in Pele the court held that "Native Hawaiian rights protected by Article XII, Section 7, may extend beyond the ahupua'a in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."

Summary: In the Pele case the court ruled - (1) Hoa'aina could gather beyond the ahupua'a in which they live where such rights have been customarily and traditionally exercised in this manner. (2) Hoa'aina could gather what is needed for traditional and customary Hawaiian subsistence, cultural, and religious purposes. (3) Hoa'aina could only gather on undeveloped lands (4) The interests of the property owner and the hoa'aina had to be balanced. (5) The hoa'aina had to be reasonable in time, place and manner of access.

**Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission**  
**79 Haw. at 442 (1995)**

On August 31, 1995, the Hawai'i State Supreme Court expanded upon its two earlier rulings in a sixty-one page opinion in Public Access Shoreline Hawai'i and Angel Pilago v. Hawai'i County Planning Commission and Nansay Hawaii, Inc. (Kohanaiki case). In this ruling, the court placed an obligation upon county and state agencies to "protect customary and traditional rights to the extent feasible under the Hawai'i Constitution and relevant statutes." In part it concluded:

"The CZMA [Coastal Zone Management Act] requires the HPC [Hawai'i Planning Commission] to give the cultural interests asserted by PASH [Public Access Shoreline Hawai'i] 'full consideration.' In addition, both the CZMA and article XII, section 7 of the Hawai'i Constitution (read in conjunction with HRS § 1-1), obligate the HPC to 'preserve and protect' native Hawaiian rights to the extent feasible when issuing a SMA permit."

In addition, the court clarified that no blood quantum is required of those who assert their valid customary and traditional rights but it expressly reserved or left open the question of the extent to which non-Hawaiian members of an 'ohana may claim the same rights.

Regarding the exercise of customary rights on developed and undeveloped lands, an issue addressed in the Kalipi case, the court stated:

"we choose not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed.' Nevertheless we refuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications. Such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i."

Moreover, the court ruled that access is only guaranteed in connection with undeveloped lands, and preservation of those lands is not required, however, the

state does not have the "unfettered discretion to regulate the rights of ahupua'a tenants out of existence."

One of the issues that has arisen in the exercise of traditional and customary gathering rights in a particular area is whether practitioners must prove that those rights have been continuously practiced. On this issue the court ruled that, "the right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest."

Summary: In the PASH case the court ruled - (1) Hoa'aina could gather anywhere that such rights have been customarily and traditionally exercised in this manner. (2) Hoa'aina could gather what is needed for traditional and customary Hawaiian subsistence, cultural, and religious purposes. (3) Hoa'aina could gather on less than fully developed lands (4) the government could deny permits to develop land if it would develop hoa'aina rights out of existence. (5) The interests of the property owner and the hoa'aina had to be balanced. (6) The hoa'aina had to be reasonable in time, place and manner of access.

**STATE OF HAWAII, Plaintiff-Appellee, vs. ALAPAI HANAPI, Defendant-Appellant (1998) NO. 19746 (1998)**

In order for a defendant to establish that his or her conduct is constitutionally protected as a native Hawaiian right, he or she must show, at minimum, the following three factors. First, he or she must qualify as a "native Hawaiian" within the guidelines set out in PASH. PASH acknowledged that the terms "native," "Hawaiian," or "native Hawaiian" are not defined in our statutes, or suggested in legislative history. PASH, 79 Hawai'i at 449, 903 P.2d at 1270. PASH further declined to endorse a fifty percent blood quantum requirement as urged by the plaintiffs. Id. At 448, 903 P.2d at 1269. Instead, PASH stated that "those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778,' and who assert otherwise valid customary and traditional Hawaiian rights are entitled to [constitutional] protection regardless of their blood quantum." Id. at 449, 903 P.2d at 1270 (quoting Haw. Const. art. XII, § 7) (emphasis added).(8)

Second, once a defendant qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. Some customary and traditional native Hawaiian rights are codified either in art. XII, section 7 of the Hawai'i Constitution or in HRS §§ 1-1 and 7-1 (1993).(9) The fact that the claimed right is not specifically enumerated in the Constitution or statutes, does not preclude

further inquiry concerning other traditional and customary practices that have existed. *Id.* at 438, 903 P.2d at 1259.

Finally, a defendant claiming his or her conduct is constitutionally protected must also prove that the exercise of the right occurred on undeveloped or "less than fully developed property." *Id.* at 450, 903 P.2d at 1271. In PASH, we reaffirmed the Kalipi court's nonstatutory "undeveloped land" requirement. *Id.* We noted that "the Kalipi court justified the imposition of . . . [such a requirement] by suggesting that the exercise of traditional gathering rights on fully developed property 'would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture.'" *Id.* (quoting Kalipi 66 Haw. at 9, 656 P.2d at 750 (emphasis in original)). We also acknowledged that "[d]epending on the circumstances of each case, once land has reached the point of 'full development' it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property." *Id.* (emphasis added). Our intention in PASH was to examine the degree of development of the property, including its current uses, to determine whether the exercise of constitutionally protected native Hawaiian rights on the site would be inconsistent with modern reality. To clarify PASH, we hold that if property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure,<sup>(10)</sup> it is always "inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property. In accordance with PASH, however, we reserve the question as to the status of native Hawaiian rights on property that is "less than fully developed." *Id.* at 450, 903 P.2d at 1271.

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

In this jurisdiction, we have also accepted kama`aina witness testimony as proof of ancient Hawaiian tradition, custom, and usage. See *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968) (holding that testimony from kama`aina witnesses were sufficient to find the existence of an ancient Hawaiian right of way); *Application of Ashford*, 50 Haw 314, 316, 440 P.2d 76, 78, reh'g denied, 50 Haw 452, 440 P.2d 76 (1968) (recognizing that Hawai'i "allow[s] reputation evidence by kama`aina witnesses in land disputes"); *In re Boundaries of Pulehunui*, 4 Haw

239 (1879) (permitting kama`aina witnesses to testify about the location of ancient Hawaiian land boundaries).

**Ka Pa`akai O Ka `Aina v. Land use Commission, State of Hawai`i / 94 Haw. 31 (2000)**

In its overview of the case the Hawai`i State Supreme Court stated:

“In making its administrative findings, appellee failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected to the extent feasible. By failing to make such findings appellee abused its discretion in arbitrarily and capriciously delegating its authority to consider the effect of the proposed development on such rights to the party seeking the petition.”

The court also articulated an analytical framework for agencies to follow in an independent assessment of the impact of their actions on traditional and customary practices of Native Hawaiians:

“In order for the rights of native Hawaiians to be meaningfully preserved and protected, an appropriate analytical framework for enforcement is needed. Such an analytical framework must endeavor to accommodate the competing interests of protecting native Hawaiian culture and rights on the one hand, and economic development and security, on the other . . . In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must – at a minimum – make specific findings and conclusions as to the following: (1) the identity and scope of ‘valued cultural, historical, or natural resources’ n27 in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (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 LUC to reasonably protect native Hawaiian rights if they are found to exist. n28

Summary: (1) The State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. (2) The agencies are obligated to make an assessment of impacts upon traditional and customary practices of Native Hawaiians that is independent of the applicant (3) The independent assessment must include the following: (a) 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 affected area; (b) the extent to which those resources – including traditional and customary native Hawaiian rights will be affected or impaired by the proposed action; and (c) the

feasible action, if any, to be taken by the agency to reasonably protect native Hawaiian rights if they are found to exist.

## **Appendix II. Revised Proposal**

The following section presents the packet of proposals which were distributed to the participants in the stakeholder focus groups for discussion and input. The proposal had been revised given feedback received from the county planners.

## **Explanation of Changes Proposed to Special Management Area Rules and Regulations**

### **Definitions:**

“Cultural” pertains to traditional and customary usage and rights of ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.

This definition is based upon the language of the Hawai'i State Constitution, Article XII, Section 7 and of the PASH/Pilago Supreme Court decision. This language is suggested to have the SMA process give full consideration to Native Hawaiian usage and rights as mandated under the law.

“Native Hawaiian Rights” means means those rights defined in HRS 1-1, HRS 7-1, Article XII, Section 7 of the Hawaii State Constitution, and in rulings of the Hawaii State Supreme Court.

The PASH/Pilago Supreme Court decision defines Native Hawaiian rights as those provided for in the Hawai'i Revised Statutes and the Hawai'i State Constitution. The rulings of the Hawai'i State Supreme Court have further defined these rights.

### **Procedures / Objectives and Policies:**

The department or the commission shall preserve and protect native Hawaiian rights to the extent feasible when issuing a permit. [PASH v County of Hawaii County Planning Commission, Civ. No. 90-239K.]

This is based upon the conclusion reached by the Supreme Court in the PASH/Pilago decision.

### **Assessment and determination procedures and Special management area emergency permit procedures:**

A written statement evaluating possible impacts and mitigation to Hawaiian cultural resources, responsibilities, usage and rights.

This is suggested to assist the county planning commissions and departments to fulfill the obligation defined by the PASH/Pilago decision to ‘preserve and protect’ Native Hawaiian rights to the extent feasible when issuing a SMA permit.

## **Explanation of Changes Proposed to SMA Application Process**

In the Kaua'i Pilot Project, there was widespread support from both the community and landowner/developer stakeholders for the involvement of long-time Hawaiian families and cultural practitioners in the information gathering and decision-making process.

An island-wide advisory council, similar to the island burials councils, was desired by many. However, informants, especially members of the Kaua'i Island Burial Council spoke to the logistical problems involved in sustaining an island-wide advisory council such as finding common monthly meeting times, getting a quorum to make decisions, making timely decisions, and the cost of staffing such a council.

In addition, concerns were raised about finding the right balance of "representativeness" among the various stakeholders and the districts of the island. It was noted that the interest, knowledge and diligence of members regarding particular issues varied according to whether or not it affected their home district. Members on the West end of the island would not be as knowledgeable about resources on the East end and vice versa.

Therefore, the recommended process attempts to generate community participation on a consistent basis by engaging those who are experienced and directly impacted--while avoiding the burden of sustaining an ongoing council.

The proposed process would involve volunteer Native Hawaiian cultural practitioners in the review of applications. This is similar to how, for example, the University of Hawai'i Environmental Center develops reviews of Environmental Impact Statements. They circulate the Statement to interested and concerned faculty to critique and then they develop the statement for the UH Environmental Center from the combined comments of the faculty. In the proposed process, the input of the volunteer panel of Native Hawaiian cultural practitioners would affect the assessment of each application.

**Proposed Special Management Area Permit Process to Include  
Native Hawaiian Review in Compliance with the State of Hawai'i Supreme Court  
PASH/Pilago Decision**

A. When a major SMA permit is required, the applicant should conduct a cultural impact assessment as outlined in the "Guidelines for Assessing Cultural Impacts" adopted by the Environmental Council, State of Hawai'i, 11-19-97. The completed assessment should be reviewed by the State Historic Preservation Division (SHPD), the county or island historic or cultural commission where applicable, and a review panel of Hawaiian cultural practitioners from the affected district as described below in the section on "Proposed Special Management Area Permit Process."

B. Include the following question with a check list in applications for both major and minor permits:

Are there \_\_\_\_\_ within or near the project site? (check those which are present)

- |   |  |
|---|--|
| <input type="checkbox"/> streams                                | <input type="checkbox"/> ponds                           |
| <input type="checkbox"/> 'auwai (taro irrigation ditches),      | <input type="checkbox"/> lo'i kalo (taro pond fields)    |
| <input type="checkbox"/> springs                                | <input type="checkbox"/> caves                           |
| <input type="checkbox"/> trails                                 | <input type="checkbox"/> wahi pana (named places)        |
| <input type="checkbox"/> sacred places                          | <input type="checkbox"/> dunes                           |
| <input type="checkbox"/> landings                               | <input type="checkbox"/> bridges,                        |
| <input type="checkbox"/> surfing sites                          | <input type="checkbox"/> sandy beach                     |
| <input type="checkbox"/> fishing area                           | <input type="checkbox"/> fishpond                        |
| <input type="checkbox"/> fish trap                              | <input type="checkbox"/> fish house                      |
| <input type="checkbox"/> hunting areas                          | <input type="checkbox"/> kilo i'a (fish sighting spot)   |
| <input type="checkbox"/> muliwai (brackish pond)                | <input type="checkbox"/> anchialine pond                 |
| <input type="checkbox"/> trails,                                | <input type="checkbox"/> salt ponds,                     |
| <input type="checkbox"/> wells                                  | <input type="checkbox"/> turtle nesting area             |
| <input type="checkbox"/> historic walls                         | <input type="checkbox"/> basalt veins for tools          |
| <input type="checkbox"/> alae vein                              | <input type="checkbox"/> salt pans                       |
| <input type="checkbox"/> po kane routes (night marcher routes), | <input type="checkbox"/> shrines,                        |
| <input type="checkbox"/> ko'a (fishing shrines),                | <input type="checkbox"/> heiau (temples),                |
| <input type="checkbox"/> historic sites,                        | <input type="checkbox"/> cultural use areas,             |
| <input type="checkbox"/> ho'ailona (natural signs)              | <input type="checkbox"/> sighting place,                 |
| <input type="checkbox"/> lele (cliff jumping spots),            | <input type="checkbox"/> native plants,                  |
| <input type="checkbox"/> pu'uhonua (places of refuge),          | <input type="checkbox"/> holua slides (slides for sleds) |
| <input type="checkbox"/> 'aumakua (ancestral deities)           | <input type="checkbox"/> leina (jumping off point        |
| <input type="checkbox"/> cultivation area                       | domain for souls to cross into the next world),          |

C. Include the following questions in the County/island SMA application form for both major and minor permits:

1. What percent of the ground cover will be displaced?
2. Will drainage or pipes be part of the project?
3. Will a sea wall be part of the project?
4. Will a grading permit be sought?
5. How will the project alter view planes? In which direction - north, south, east, west?

D. Application and Review Process for Minor SMA permits (projects which will cost less than \$125,000.00):

1. Application is filed with the County Planning Office.
2. County Planning staff posts notice of filing in an island newspaper; and if readily available at no cost on a web site and on the community access TV station bulletin board.
3. A list of reviewers will be maintained for each district. A panel of at least 3 and no more than 5 of the reviewers from the district where the project is located will be mailed the application and a form to evaluate the application for thoroughness and accuracy. Evaluation forms should be returned to the Planning Department within 10 calendar days. Reviewers will be Hawaiian cultural practitioners identified through a community-based selection process. "Hawaiian Cultural Practitioner" means a kama'aina or native born person who is acknowledged by the community to have close ancestral ties and/or traditional knowledge passed on to them through training, education, and experience of Hawaiian natural and cultural resources, usage and rights;
4. The staff will compile the comments and present them to the applicant. If the applicant and/or the applicant's consultant disagree with the recommendations of the reviewers, a meeting of the reviewers with the applicant and/or the applicant's consultant(s) will be convened by the planning department staff to resolve outstanding issues and claims.

5. For issues that remain unresolved, the planning department staff may convene a meeting of the panel of reviewers with the applicant and/or the applicant's consultant(s) to resolve the conflict through a mediation process.
6. Any agreed upon conditions for the permit will be memorialized, reported to the County/Island Planning Commission and filed with the Bureau of Conveyances with the property title.
7. Any outstanding issues will be reported to County/Island Planning Commission for consideration in the deliberation on the SMA application.
8. At this point, the established SMA permit process is followed.

E. Recognition of Hawaiian cultural practitioners to serve on review panels

Hawaiian cultural practitioners will be recognized and asked to serve on review panels by the County/island Planning Department which will maintain a list of resource practitioners who can be called upon as part of the review process of the Planning Commission to review applications for SMA permits. The recommendations developed with the input of the Hawaiian cultural practitioners will be forwarded to the KHPRC to be submitted to the County/Island Planning Commission.

Proposed Reviewer Evaluation Form

Project Title and Number:

Date Mailed:

Date Due Back To Planning Department (within 10 calendar days of projected receipt):

Reviewer: \_\_\_\_\_

Date: \_\_\_\_\_

1. Has the applicant accurately identified the Hawaiian cultural resources in or near the project area?

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

If no, please check the cultural resources not identified:

- |   |   |
|---|---|
| <input type="checkbox"/> streams                                | <input type="checkbox"/> ponds                            |
| <input type="checkbox"/> 'auwai (taro irrigation ditches),      | <input type="checkbox"/> lo'i kalo (taro pond fields)     |
| <input type="checkbox"/> springs                                | <input type="checkbox"/> caves                            |
| <input type="checkbox"/> trails                                 | <input type="checkbox"/> wahi pana (named places)         |
| <input type="checkbox"/> sacred places                          | <input type="checkbox"/> dunes                            |
| <input type="checkbox"/> landings                               | <input type="checkbox"/> bridges,                         |
| <input type="checkbox"/> surfing sites                          | <input type="checkbox"/> sandy beach                      |
| <input type="checkbox"/> fishing area                           | <input type="checkbox"/> fishpond                         |
| <input type="checkbox"/> fish trap                              | <input type="checkbox"/> fish house                       |
| <input type="checkbox"/> hunting areas                          | <input type="checkbox"/> kilo i'a (fish sighting spot)    |
| <input type="checkbox"/> muliwai (brackish pond)                | <input type="checkbox"/> anchialine pond                  |
| <input type="checkbox"/> trails,                                | <input type="checkbox"/> salt ponds,                      |
| <input type="checkbox"/> wells                                  | <input type="checkbox"/> turtle nesting area              |
| <input type="checkbox"/> historic walls                         | <input type="checkbox"/> salt pans                        |
| <input type="checkbox"/> shrines,                               | <input type="checkbox"/> heiau (temples),                 |
| <input type="checkbox"/> ko'a (fishing shrines),                | <input type="checkbox"/> cultural use areas,              |
| <input type="checkbox"/> historic sites,                        | <input type="checkbox"/> sighting place,                  |
| <input type="checkbox"/> ho'ailona (natural signs)              | <input type="checkbox"/> native plants,                   |
| <input type="checkbox"/> lele (cliff jumping spots),            | <input type="checkbox"/> holua slides (slides for sleds)  |
| <input type="checkbox"/> pu'uhonua (places of refuge),          | <input type="checkbox"/> leina (jumping off point         |
| <input type="checkbox"/> 'aumakua (ancestral deities)           | <input type="checkbox"/> for souls to cross into the next |
| <input type="checkbox"/> domain                                 | <input type="checkbox"/> world),                          |
| <input type="checkbox"/> cultivation area                       | <input type="checkbox"/> _____ other?                     |
| <input type="checkbox"/> po kane routes (night marcher routes), |   |

2. How will the proposed project impact Hawaiian cultural resources, usage, and rights in or near the project area?





### **Appendix III. Notes of Meetings With County Planners**

Appendix I includes notes from discussions held with the planning department staffs for the City and County of Honolulu, the County of Hawai'i and the County of Maui.

**Notes Of Meeting With City and County of Honolulu Land Use Approvals Branch,  
Department of Planning and Permitting  
December 13, 2001 / Municipal Building**

Present: Eileen Mark, Ardis Shaw-Kim, Steve Tagawa, Christine Meller, Davianna McGregor, Luciano Minerbi

Follow Up:

1. The planning staff will review the changes we suggested, including the suggested process.
2. The planning staff will send us the most recent amendments to the SMA rules so that we can review these for any changes
3. Ardis Shaw-Kim will be the contact person
4. The planning staff will provide names of stakeholders

Discussion:

1. At present, the staff refers the applications to Office of Hawaiian Affairs and SHPD and relies upon the OEQC process to give consideration to Native Hawaiian access rights. A tool is needed to give consideration to cultural characteristics.
2. OEQC publishes notice of minor permits
3. Major permits require an EA and a mandatory public hearing at the City Council when it reviews the application to approve or disapprove it. Public notice of proposed major action to neighbors within a 300' radius is required. There is also an "all list" which includes islandwide groups such as Sierra Club and Life of the Land. The neighborhood board in the affected area is informed and notice of the public hearing is advertised in the neighborhood Midweek. Public input is received and noted in the public hearing before the City Council. As decisions are made directly by the County Council, the planning commission is only advisory and there is NO contested case process. For minor permits, there is an abbreviated review and they do not have a disclosure.
4. Questions about suggested process:
  - a. Who will retain the list of practitioners who are willing to review the applications
  - b. Checklist is good, the problem is validation of the information by the staff
  - c. Easier if develop a process for the major, with discretion for the minor permit
  - d. accumulate information for staff to use for reviews of the application
  - e. In the form, need to leave a space for comments, not just check off resources or provide yes/no answers

- f. Need to include how identified impacts can be mitigated.
- g. The whole process needs to be completed in 90 days

5. To the instruction sheet, suggest that applicants address cultural characteristics. State law for the EIS requires that the cultural characteristics be addressed

6. How many permits are processed annually?

100 major permits

??? minor permits

a pool of 18 planning staff is available to review the applications

Mr. Fujiki is the director. The staff also reviews zoning variances, land use amendments,

7. Stakeholders:

Landowners

The Kamehameha Schools, Land Use Research Foundation, land managers of major landowners such as Campbell Estate

Consultants

Group 70, Belt Collins, Gentry, Schuler,

Utilities

Verizon, HEI, Chevron, BHP

Office of Hawaiian Affairs

DHHL staff

Burial Council

Office of Council Services: Warren Senda, Nelson Armitage, Fujiki- Land Use Division

Warren Sende

Nelson Armitage

Damon Estate - 527-5349

8. Other experiences that the C&C have had with Native Hawaiian access issues are limited: Ka'iwi, Hanauma, Kawailoa

## Meeting With Hilo Planning Staff / December 20, 2001

Present: Roy Takemoto, Norman Hayashi, Phyllis Fujimoto  
Luciano Minerbi, Davianna McGregor, Christine Meller

### 1. Explanation of Project and purpose

Points:

#### 1. Will Chapter 205A be amended ?

Recommendations for amendments will be made if there is agreement.

Would have to amend the statute first.

Meller: not necessarily look at legislation changes. Project is meant to address the PASH decision. The statute, as interpreted under PASH already provides for access, so changes to the statute may not be necessary. Legislation is the most difficult to accomplish.

Can't make changes to SMA rules unless the law is changed, but can make adjustments in policy to conform with the Court Decision

Note: Should flag those recommended SMA amendments which can be made without changing the statute and those which will require a change in the statute.

#### 2. What has Hawai'i County done to implement PASH?

Directive from the Director for all SMA majors to include PASH rights in the conditions

#### 3. Hawai'i County has 3 levels:

State statute,

SMA rules,

policy guidelines – documented through staff memos

#### 4. Concern about \$\$ to get the legislation passed – if there is buy-in from the 4 counties.

#### 5. Application Process:

1. fees for participation?

2. term?

3. for majors – within 90 days, concern about the turn around period

4. Who would do selection? – State Historic Preservation Division

Majors – 90 days / OHA and State Historic Preservation Division  
Historic Hawai'i Foundation  
Process – 10 a year  
one assigned staff

Minors – 21 days – look in files regarding access  
Process – 15 a year  
one assigned staff

6. Scan the maps and can hot link to the GIS
7. County is in the process of mapping shoreline trails and roads – grant from OP to implement Chapter 46 – shoreline access statutory - Chapter 34 of the County Code – shoreline and mountain access and developing rules
8. Public access will be identified by the county – traditional and by permit
9. Have a preliminary map – not public information because it includes public, private and kupuna trails.
10. Know the access to be public.
11. County representative attends the Na Ala Hele Council meetings – this facilitates the reciprocal relationship
12. Introduced some changes in Rule 9 – also have to look at Rule 8 and the permit application – hard copy and PDF Files
13. Who to talk with:  
Kepa Malley, Rosendahl, Ross Cordy, Michelle Wong Wilson (Noenoe)

Shalon – Duane Kanuha; Leeward Planning Conference Group – John Reyes (Kona Landowners); Bishop Estate – Bob Lindsay [Jeff Melrose]; Parker Ranch – Mel Hewitt, Riley Smith, Kohala Coast Resort Assn.- Sharon Sakai

Kona:  
Mikahala Roy, Hannah Springer, Angel Pilago, Pai 'Ohana, Mahealani Pai

Mololi'i  
Pa'apono – Gilbert Kahele

Ka'u:  
Pele Hanoa,

Hilo:  
Patick Kawailehua, Edith Kanakaole Foundation

Kohala:  
local – preservation of the view plane, trails issue

Puna:  
Waimea:

Kona Office:  
Debbie Chang , Darin Arai,

14. Products developing with the county -  
2 different approaches - revise the statute? or PASH affirms that the statute conforms with the Constitution - and it's the implementation that is needed

Guidelines would be more useful - steps and resources to use

What would be required to add to the process?

Go through the list and how relate to the data sources -

How much more would it cost? How detailed does the application has to be?

Cultural Impact Assessment - \$30,000  
archaeologists - sub it out

15. Note:  
make information more readily available to all parties  
meet the needs of all the parties in the process  
identify issues early and try to deal with them  
identify problems early - that would ultimately be resolved through litigation rather than the planning process

Follow-Up

1. provide CD for maps
2. Point of Contact - Norman Hayashi
3. Provide Literature
4. Work on Process
5. mid-January meet with Maui Planning Department, Moloka'i, Lana'i
6. February and March - focus groups/interviews, including PASH study group  
Citizen Advisory Group (Sue Sakai)
7. April - meet with planners again
8. Received hard copy of the Most up-to-date SMA rules and Roy will also email us a PDF copy
10. Roy can schedule us to give a presentation and get feedback to the APA group of public and private planners in Hilo who are scheduling periodic session.

## **Meeting With Kona District Planner**

May 22, 2002

Luciano Minerbi and Panaewa Kelley

The reviewer's form should not ask the reviewer to recommend pro or against approval of the project because the project may meet the Native Hawaiian cultural concerns and fail other SMA requirements such as environmental impacts, sewage or sanitation criteria. Concern about the turn around time and time limitation that planners have to issue a determination.

### Meeting with Maui Planners / February 7, 2002

Ann Cua, Colleen Suyama, Julie Higa, Wil Spence, Robin Laudermilk, Daren Suzuki, Joe Alueta

Davianna McGregor, Luciano Minerbi, Jon Matsuoka

1. Feel language in 205A is broad enough to make changes to the SMA
2. Ka'upulehu ruling is the latest development in defining Native Hawaiian access rights
3. Sections from 205A quoted in the PASH ruling provide enough room for SMA changes, under 205A.
4. access requirements adopted by Kaua'i and Honolulu, apply only in subdivisions. Maui and Hawai'i only recently incorporated it. Would require an ordinance change.
5. Lana'i and Moloka'i more brief
6. definition of development - 205A
7. as provided in 205A - except / in addition
8. On Maui, a major permit doesn't trigger an EIS.

What triggers an EIS on Maui?

Kaupulehu required to do a resource management plan.

Problem of having the information available to the planners.

Monies to develop a resource base - give counties the ability to develop it.

If can access the data through the internet, would assist.

Way to get information out without destroying the resource?

Data base would require a code to access it.

Sensitive areas - hot spots - Get a list.

Map sensitive areas would assist in determining whether a review is needed.

Data will be shared with the counties.

MECO data – send them the HECO study /

Is it data that

Know generally a sensitive area – so send it for review / What will trigger it?

- State maps are also valuable
- Access issue – state survey office, archives, bureau of conveyances.
- digitize the state survey maps – to preserve

Access to the information is important

C. Brewer maps and deeds would be good to acquire / AmFac for a tax break.

Maui Historical Society and Bailey House –

.Importance of maintaining a list of community consultants. More refining, by ahupua'a

How to identify community resource persons?

volunteers – willing to review.

setting up community panel. why go to individuals than

informal / community liaison / contact with the community /

reviewer / list of reviewers –

OR ask the applicant to talk with people in the community.

Have a lot of coastal residential areas and dealing with 'ohana dwellings

Tools can be helpful – to check .

Planners can check

Planning Commission is final decision maker for the CZM

Maui and Lana'i – do administratively

Maui

1. do an assessment – can apply to an assessment process

SMA – hundreds – minors – 120 were down to 95 before Act 169..

80 in  
(in the report)

2. assessments for SMA – development or exempt? Because Act 169

3. Staff – 8 but only SMA’s – everything

4. \$50 / scale – fees / go into the general account

5. State and federal review input sent to Honolulu – OHA, DOT, DLNR

Stakeholders:

Maui:

A& B, Maui Land and Pine, Moloka’i Ranch, Smith Development, Dowling Company,  
Peter Martin (AmFAC), Am Fac

Cultural Resources Commission – 1<sup>st</sup> Thursday of the month

Burial Council

Isaac Hall, Na Kupuna O Maui, Hui Ala Nui O Makena,

Chris Hart, Munekiyo and Hiraga,

Homestead Assns.

Charlie Maxwell, Uluwehi Guerrero, Hokulani Holt Padilla, Kealii Reischel, Akoni,  
Kalani Keeaumoku Kapu, Richard Hoopii, Mendez, Nobriga, Boogie Luuwai, Changs,  
Rice, John Kaimikaua, Roy Figueroa (Makena Resort),

Moloka’i:

Lana’i: Sol Kaho’ohalahala, Uncle Kaopuiki,

Point of Contact – Robin Loudermilk

205A language is broad enough. When open it, not know what else will be ransacked.

John Chang is AG reviewing the decision.

Compliance -

PASH Study Group /

Get Directors to agree?? quarterly meetings.

Most require SHPD . If no effect, need to do survey??? If they make determination, after family came out.

We send to the Planning Department - Royce Maps from HECO; state survey maps data base; list of resources

306 - work for the CZM

309- initiatives

## Concerns of City and County of Honolulu Planners

Tuesday, July 2, 2002 / State Office of Planning

Ardis Shaw, Eileen Mark with Davianna McGregor and Panaewa Kelley and Christine Meller, Chris Chung, Marylou Kobayashi

Office of Planning clarified:

Final Product will be recommendations, suggestions, and guidelines. It won't be mandatory. Want a draft report by September 15. The draft report will be for all of the counties. The process for each county is unique, so it would have to be tailored to the needs of each of the counties once the report is accepted by the Office of Planning. Want to acknowledge the City and County concerns. Decision by counties needs to reflect the full consideration of Native Hawaiian rights.

Shaw and Mark pointed out:

City and County processes the permits differently than the other counties.

Taken by surprise when saw the rules which contained suggested changes.

Is PASH sufficiently addressed with the City and County process?

Preliminary conclusion - not sure that there is a need to make changes for the City:

(1) majors require disclosure, Chapter 343 process, OEQC posting, C&C only county that uses 343 process. 343 - indicates need to do cultural impact.

(2) Recent amendments to ordinances - require FONZ for formal acceptance.

(3) Also conduct mandatory public hearing in the community where it occurs.

(4) Once it goes to council, they have their own public meetings.

(5) City and County Gives full notice:

Neighborhood board, press, neighboring properties, regional newspapers, public hearing, Office of Hawaiian Affairs.

(6) City and County has a broader and deeper process than other counties.

(7) Preference - streamline. Not add another process. Have the existing process beefed out. Can send it to knowledgeable persons. Not create another review process. Have many to be concerned with - applicants. Must respond within the statutory time limit.

City has public requirements built in. Not sure what incorporating definition does to make things better. Is it necessary to formally define Native Hawaiian in the SMA ordinance. Doesn't make the resource issue better addressed. What is it that needs work?

Noted that problems with court cases may still come up.

County of Hawai'i doesn't use the Chapter 343 process.

Maui County handles it differently - it is done in-house, not formally published in OEQC. First time hear about potential loss of access is when Planning Commission has its public hearing.

C & C asked if OP will need to change the law to affect the county's procedures? . OP distributed the letter by the Attorney General clarifying that Chapter 205A won't need

to be amended for the counties to change the SMA rules. Pressure was from legislature for office of Planning to take more steps and do a study on PASH guidelines. Change in EIS in 2000 look more into cultural rights

PASH decision made, knowing that there was an EIS process.

The EIS process is for major permits.

Some minor permits may not be getting the same review.

Majors require some kind of environmental review /

Minors can be deemed to be a major.

C&C Comments on Process:

State Historic Preservation Office designated – areas for burials.

Compile map information will be useful

Regarding Hawaiian cultural practitioners, sometimes they are hired to prepare the environmental assessment, want to avoid a conflict if they also review it

Possibly using checklist for EIS would be helpful.

Concerned about changes to minor permits.

Follow-Up For O’ahu Meetings

If distribute the rules with changes ad. Add “for draft purposes only” on top of the page. Focus should be process, not the changes to the laws. Instead of distributing a draft with proposed changes noted, use the current rules with the packets. Send notice of meeting to Ardis and eileen. Give us a better understanding of the proposed amendments– tied to an outdated SMA rules. City and County provided Davianna with current rules to distribute at the meetings.

Letter Stating Concerns of City and County of Honolulu / August 12, 2002 / Randall Fujiki, AIA, Director of Planning and Permitting

1. Remain unconvinced that the proposed changes are necessary or appropriate:
  - A. current SMA process provides public notice and considers impacts on Native Hawaiian rights.
  - B. There appears to be no contradiction between Chapter 25, ROH and what we understand to be the PASH ruling.
  - C. AG’s Letter states that counties must consider Hawaiian rights when making decisions. We concur, but understand that PASH applies more broadly. PASH would apply to the State’s SMP processing. As the PASH decision relates to native land rights, legislation related to ensuring native rights might more properly be placed in state statutes related to native or land rights.

2. Checklist:

lists “alae vein”, “fishing area”, “trails” and “historic site” twice

3. SMP’s

A. Minor SMPs should not be subjected to additional review processes because these permits for the most part are issued for projects that are often small and relatively insignificant and are normally located on properties that are well-developed. The possibility for impacting Native Hawaiian rights, while remote, is generally evident from the application material and existing property information.

B. When concerns related to native rights arise in processing a minor SMP, additional information is sought from outside sources, such as the State Historic Preservation Division. We are not convinced that the recommended processes, particularly process "D" which requires publication of a notice in the newspaper, review by an expert panel and resolution of conflicts is warranted for minor permits. Act 169 of 2001 requires publication of Minor Special Management Area Use Permits in the Environmental Notice. This type of notice would be somewhat duplicated in process "D".

#### 4. Process "D"

Process "D" provides for public notice, application evaluation by Hawaiian cultural practitioners, includes a process for dispute resolution, requires conditions be filed with the Bureau of Conveyances with outstanding issues to be reported to the City Council. This process would precede SMA permit processing.

Generally, we find this process duplicates many of our existing practices. The requirement to record conditions at the Bureau of Conveyances should be left as an option, as conditions can be memorialized in city records where they are more easily modified.

Major SMPs currently undergo public notice and review under the assessment and public hearing procedures established in our Ordinance and Rules.

Notices of Major SMPs are currently published in the Environmental Notice during the assessment process. The Environmental Notices is available on the OEQC web site. Notices of the departmental public hearings are published in the daily paper and are sent to our community mailing list and property owners within 300 feet of the project. Once the application is forwarded to the City Council and placed on the agenda of the appropriate committee and the Council of the Whole, public notice is again provided.

Review and comments on project Draft EAs are solicited from agencies, including the Office of Hawaiian Affairs and the SHPD and community groups such as Neighborhood Boards and Community Associations. Applicants are required to respond in writing with comments and responses attached to the Final EA.

The notice and review steps recommended in process D have merit. As noted above, these processes are already incorporated into our SMA process for Major Permits.

As you are aware, notice of minor SMP are published in the Environmental Notice. When processing minor permits, planners review the project information, including application material, and city resources to evaluate the project. In the truly rare case where cultural practices are potentially impacted, staff addresses these concerns during the permit process.

Differing opinions regarding all issues are evident in the public record. Staff will formulate recommendations to the City Council regarding needed conditions it's consideration. Ultimately, the City Council "resolves outstanding issues and claims". Accordingly, the activities identified in steps 4 and 5 of "Process D" are accomplished in this way.

#### 5. List of Reviewers/Recognition of Hawaiian Cultural Practitioners

The concept of identifying "Hawaiian cultural practitioners" has merit, since our office does not currently have the expertise to evaluate claims related to access for cultural practices.

We feel that soliciting review and comments by these experts during the review phase of our permit process could help identify and verify information related to native access rights.

We wish to point out that conflicts of interest could occur in the event that the individual preparing the cultural assessment is the same or related to an individual evaluating the assessment.

## Meeting with County Planning Directors / July 8, 2002

State Office of Planning: 12:30pm

Norman Hayashi, Phyllis Fujimoto, Dee Crowell, Randall Fujiki, Eileen Mark, Linden Joesting (AG), Chris Yuen, John Min, Ardis Shaw-Kim, Chris Chung, Marylou Kobayashi

Given Presentation by Dawn Chang, should include the relevant laws, and the PASH, Ewa Marina, Hanapi, and Ka'upulehu cases in the appendix of the report.

Note that the Ewa Marina Case posed 3 questions that need to be asked to assess if there are Native Hawaiian rights issues:

- (1) Identify and scope of natural and cultural resources and extent to which native custom and practice is exercised
- (2) Extent resources and reasonable exercise will be impaired
- (3) Feasible action to reasonable protect Native Hawaiian rights

Note that the Hanapi case said that the exercise of Native Rights can be a defense to criminal trespass, also that the burden of proof is with the practitioner and that if the property is zoned residential and has dwellings and infrastructure it is always inconsistent for the gathering rights to be exercised.

Note that Ka'upulehu reaffirmed that it is the duty of the agency to assess and preserve the reasonable exercise of native rights and that the responsibility cannot be delegated to the developer. The agency must do the analysis **before** a permit is issued

Suggest that there be an Intermediate Step:

We need to factor in an initial screening or step that will review the minor permits, so that NOT all of the permits need to be referred on to undergo this process. Dee Crowell says we need to eliminate about 95% of the minor permits.

Cultural Overlay maps for each county as a screen would be useful as part of an intermediate step

Chris Yuen noted that if there are shoreline or streams or cultural sites or known archaeological features and trails then the full process needs to be conducted. These might be triggers to build into the intermediate step.

It would be useful to digitize the State Survey Office Maps for the cultural overlay map

Dawn noted that the 3 questions from the 'Ewa Marina Case need to be incorporated into the process for the counties to exercise due diligence.

Want the map data to be in more useable/updated software. It should be more broadly available, perhaps on a web site. Perhaps work on it with SHPD.



#### **Appendix IV. Focus Group Notes**

This section includes the input received from focus groups held on Moloka'i, O'ahu, Hawai'i, and Maui and discussions with the Moloka'i Planning Commission, the Maui Cultural Commission, the PASH Study Group and the Office of Hawaiian Affairs. The input has been organized into categories of Concerns, and in sequential order of response to the proposal which was circulated.

## Questions, Concerns and Issues Raised by Focus Groups

### **Put Teeth Into the Process:**

This process may be good but it needs teeth. Will this process have teeth?

Don't want to go through a whole process again so that we can be shut down again.

More of an impact needed with this project so that it is not all for nothing.

If developer comes in, should keep in mind that this is Hawai'i, not New Jersey and there is a need to respect the ancestors of the land

There is no enforcement when it comes to the federal level.

### **Methodology:**

Where did pilot project take place?

[met with folks all over the island, to come up with these proposals]

Who are the people we have consulted with?

Did Kaua'i put these conditions into work yet? Not yet, waiting for everyone else

Review should be based on not only cost.

What was the form based on? In Phase II?

The maps are organized in what way?

Get a list of the standard references that the planner has to look at and from there, move on.

What happens if something in the final draft report is rejected, but is very significant?

Is it possible to send out to the community along with the accepted draft, the rejected items of the draft.

If there are going to be community meetings with this process, it should be held in the country, not downtown. ex. neighborhood boards

### **Chapter 205A**

Why would it be so hard to change 205-A if it is relevant?

If we change 205, maybe we will have more stabilization.

AG clarified that Chapter 205A does not have to be amended in order to incorporate the PASH ruling into the SMA rules.

**Planning Commission / Department:**

Where is the Planning Commission on this project?

Is this something the planning commission has to do or likes to do?

Who is the chief person on CZM?

Planning commission should always have a seat for culture commissioner

Is there a cultural Native Hawaiian that is knowledgeable enough in the county office yet?

There should be a representative from every district on the Planning Commission.

The mayor should make it mandatory to have Hawaiians on the Planning Commission.

The problem with the county, when they appoint commissioners, they always put developers on the council instead of Hawaiians and practitioners who live in that ahupua'a.

**Major vs Minor Permits and the Process:**

Major permits should require a cultural impact assessment

Money shouldn't be the basis on how we decide who does the SMA permit everybody should be involved(minor or major)

Make a list of actions that do require this process

\$125,000-Where is it included in the cost? What is an allowable cost for the developer? Does it include their building process, permit process?

**Existing Process:**

A lot of SMA processes do not have to do with race so you don't have to do a culture impact assessment.

Common Language is needed because the burden is on NH and practitioners

Lots of people won't come to meetings because it is not understandable.

Does SMA cover public lands?

What are exempt lands?

Situation on Oahu is different from other islands—like Planning Council, , it's really important to have even more detailed process on Oahu because of the already existing damages.

Private lands owners need to get permits also to develop (there might be streams, banks, etc on their land which they DO NOT own)

What have the counties been doing in regard to Ka Pa'akai and PASH decisions? Act 50 was the result of the Ka Pa'akai and PASH rulings.

The process we have now can allow the developers to around many holes in the process.

The process should be simplified in a way where it shouldn't have to go through so many offices.

Who is responsible for Shoreline certification?

We need shoreline certification to show things like how to determine high water marks.

Need to rectify high water marks because of eruptions  
Hawaii island especially needs to be watched because of the constant change in land

This process could work in conjunction with the general plan, but the problem is that the process existed prior to PASH.

Does this apply to Hawaiian Homes?

[The county does not have jurisdiction over HHL]

In Kapoho, how can these rich people own beach land and build a wall into the ocean and make their own ocean pool? Why is there nothing being enforced by CZM?

County should warn property owners about putting up no trespassing signs on areas where there should be access.

Office of Planning is mandated by law to boundary assessments every 5 years, there has been not been one since 1994. This shows that they are no enforcement of laws and regulations that already exist.

The CZM is on thin ice in terms of funding, participation from community might not be affordable.

Workshops or manuals may be needed for commissioners so they can understand the process better. There is a constant turnover of commissioners so periodic training is important.

The lines drawn for sma area on Maui are very different(300 ft Kauai vs. 1 mile Maui)

OEQC Bulletin is on-line

When you talk about coastal, there are a lot of things that are covered with that term.

Is the 500 ft buffer sufficient for notification? Should it vary according to the land parcel sizes in the area? This notification is more at that major level then the minor level.

A continuous issue in this county is determining a dollar amount on the major/minor permit. Problem with doing project in increments to keep under the dollar amount.

Need to keep up with status of compliance maybe every 5 years. Assessment for each proposed action is required.

Does SMA permit go through shoreline management for burials? Is there anyway in this process work with the burial council? Example: Kaka'ako has a lot of burials that the burial council knows about, but there are also a lot of building that is being planned. A good example to tell planners is the Waikiki project where they had to shut down the project and put it on hold.

Does this process apply to things like reefs?  
Does it apply to ecological impacts?

When does a developer have to get a grading permit?

Clean green waste recycling areas of more than 5 acres should be under **major** SMA permitting.

### **Relation to Federal Laws and Reviews**

CZM is a federal project. Does NAPGPRRA and NHPA apply in OPs review for consistency of federal projects with SMA?

106-consultation regarding what the impact would be. There really is no way to enforce 106. website clarifies a lot of questions about 106.

Who does review for grading permit?

309 monies for next 5 years go to: (1) ahupua'a project that targeted Wai'anae with the ahupua'a council that John Kaimikaua is working on with people who have ties to the land and the ocean. (2) Ocean Resources Management Plan (3) Coastal hazards

The three questions required to ask ties into a 106 review.

What about erosion control? Clean Water Act deals with erosion issues

Include military testing of sound devices under water.

### **Homerule:**

Is it possible that there will be 4 different definitions for each county?

Not fly on O'ahu. May work on neighbor islands. On O'ahu, if meet criteria of law not supposed to be denied the permit. O'ahu publishes in the OEQC bulletin so it's okay - everyone gets notice, very few actually comment.

City need to meet with neighborhood boards - front loaded process. Been accepted to create incentive so doesn't blow up.

Problems with C & C possibly

Recognize that different procedures are used in the various counties. In the City and County of Honolulu, the SMA is handled legislatively by the City Council, while on the Neighbor Islands the matter is handled administratively by the counties' respective planning commissions. The different procedures have different legal requirements and standards for applicants. See, e.g. Sandy Beach Defense Fund v. City Council, 70 Haw. 351, 773 P.2d 250(1989).

**Liability and Access:**

DLNR say preserve and protect Hawaiian rights translate into-“yeah you can get there but it doesn't necessarily have to be safe”

**Single Households vs Subdivisions:**

Most of the shoreline problems come from single person households who restrict access

**Resources:**

Are we able to get the State survey maps on CD-ROM?

It would be good to create a website with all of our information.

How practical would our database be for private resources? Would it be easily accessible?

Maps don't have all original Hawaiian names.

- 1932 Plantation Maps have good maps. Acquire plantation maps. Critical now, as plantations are phasing out.

- Also Kahuku Railroad maps.

**Designation of Cultural Use Areas:**

One way to facilitate the cultural review process is to designate sensitive cultural use areas

How can the Coastal Zone Management Program protect Cultural Use Areas.

One of the goals of the Empowerment Zone is to designate the entire island of Moloka'i as a Shoreline Management Area.

Mapping and designation by CZM is very important to pointing out SMA areas

GPIS is important for identifying cultural sites

Should interview cultural practitioners to identify important cultural resources. Audio tapes from interviews who show practitioners is important.

Should also identify young practitioners

Should we refer to commercial activities in the plan? Would want to limit commercial activities in culturally sensitive areas.

e.g. - No Commercial activities at Puko'o on East End

Can ordinances be added to this project

Do inventory on lands to identify cultural resources, but it takes so long and so much money

May not be able to catch up on everything

How do we catch up?

How do we stop the development while we catch up?

designate agricultural zones

Every cultural site has a kahu, access is tied to fulfilling responsibilities

**Cultural Overlay:**

Maui Cultural Resource Commission has tried to get culture overlay without much success. Cultural overlays would facilitate the process of conducting a cultural review by already designating culturally sensitive areas.

CZM - grant to OHA to do a study of cultural resources in the coastal area - to identify and document the cultural resources in 3 coastal areas and document with cultural resources with oral history. Part of the clearinghouse function of OHA.

**Prevent Abuse:**

Private Property owners are legit when they talk about misused access rights there are more programs like Moomomi to help educate, to take responsibility, practice values, etc. of cultural practices and about access rights

State could help pay for this education

**Role of Community:**

Having more empowered communities, the community would be more demanding and more involved. - example: Makua

We should change discussion to "how can we make it better"

Have the community manage the lands and areas

Community Education is a good way to use funds that we could possibly have. The Native American Freedom of Religion act is one act that the community should know about.

How does a practitioner keep from getting hurt/arrested trying to save the land. How does this info come back to the community.

**Cultural Process:**

Cultural protocol also needed for clean up like Kaho'olawe gives more focus and also protection

1977- identified methodology for determining Ahupua'a system, also required oral history be taken – mapping of resources also.

Testimonials from actual land users should be gathered

'Ohana was not even considered an issue for assessment.

How do you do a good CIS? What if you can't find practitioners?

On terms of if there are no current activity on property, but there are historical ties to it, what do you do?

Has the CIS been kicked in yet?

- Not all SMA permits go through EIS.
- Some projects do not require an EIS or EIA.

Cultural Impact statements have no standards, no agency set up to review the standards.

**Mauka:**

What about mauka practitioners?

Environment Impact for mauka? What about mauka?

Are these only for shoreline areas?

Will there be other work from this project to expand to other areas?

**Acquisition for Preservation:**

Maui Coastal Trust Fund is trying to acquire Coastal properties to protect cultural resources

**Access Blockage:**

Article in paper said BOH are digitizing birth certificates that says they are deleting races from certificates.

Also, original palapala will not be accessible. Therefore, this process and the PASH case is useless. Hanapi Case- court didn't say you have to be NH to access. References to the statutes recognize hanai cases dealing with customary and traditionally rights.

Turtle Bay: new owners have a problem with people fishing and other customs on their property.

- Don't allow shoreline fishing, surfing, diving, etc.

- Also, they have been grading the sand without a permit.

No recognition of rights at Kualoa by John Morgan.

Some Konohiki rights were acknowledged and some were not

Clash of cultures. Need to let transplants know that when they buy a property it comes with relationships to neighbors

**Problematic Shoreline Development:**

The whole shoreline of Punalu'u is sensitive.

- Just doing the water line along the shoreline, they found a bunch of iwi and sites. There is a layer of silt in the ocean.

- Fixing up the highway, they are finding a lot of burials.

Lately, the culture monitor has not been at the neighborhood meetings or at construction sites.

The whole area of Kahana is under the SMA

EPA for Scholfield Barracks are bringing in their own archaeologists for their military developing.

What about the siting of the Kapa'a Waste Facility?

Gravity fed cesspools and septic tanks with their leech fields are failing. Unprocessed waste effluent are polluting the environment. Many areas (including Punalu'u ) are below sea level. Kamehameha Hwy had created a berm which makes the escape of natural and man made flow of 'auwai to the ocean impassable. Effluent from leech fields have been fouling our 'auwai and aquifers for years. In most cases - as in Punalu'u and BYU Laie the stink smell is very noticeable where these streams and 'auwai flowed into the ocean. When C&C opens these sand filled 'auwai and ditches after high tides have clogged them, the fouled water is emptied into nearby ocean and can be smelled for days.

My four fishing and diving areas are absent of seasonal fish runs due to silt released from runoffs from Board of Water and road construction.

**Feedback On Definitions:**

**Hawaiian Access and Public Access:**

What about non Native Hawaiians?

What about non-Hawaiians who have married into or are hanai by Native Hawaiian 'ohana and descendants of the Kingdom of Hawai'i who did not inhabit the Hawaiian Island prior to 1778? See PASH, 79 Hawai'i 425, 449 n.41, 903 P.2d 1246, 1270n.41 ("We do not decide the question whether descendants of citizens of the Kingdom of Hawai'i who did not inhabit the Hawaiian islands prior to 1778 may also assert customary and traditional rights under the "ancient Hawaiian usage' exception of HRS 1-1. Furthermore, we expressly reserve comment on the question whether non-Hawaiian members of an 'ohana . . . may legitimately claim rights protected by article XII, section 7 of the constitution and HRS 1-1)

Should state ahupua'a tenants and their guests have responsibilities and rights.

How do you protect the practitioners vs. people who want to come that are not Hawaiian

Under this plan the county would recognize practitioner access and not public access

How do the SMA rules protect other groups besides NH?

"Cultural" might cause some problems with this definition.

Some might say it violates the U.S. constitution.

Depends on what you mean by Native Hawaiian.

What about Japanese, Chinese, etc.?

Not just access but the protection of the quality of resources is important

How do we pass on NH rights to the kids without them being harassed?  
Should we laminate cards stating PASH law. Is there one statement that can clarify all of our rights that we can carry?

**Commercial Activities:**

Emphasize this is NOT a commercial right.

**Fulfilling Stewardship Responsibility Gives Right:**

Need to emphasize that the right is tied to fulfilling responsibilities.

Emphasize responsibilities for resources

**Define Impact:**

Impact – can mean beneficial or degrading

**Relation to Act 50:**

If use narrow language defining “cultural” as Native Hawaiian may eliminate other requirements in the SMA to consider other “cultural” impacts. Safer to use the language of Act 50 for cultural.

Use Language from Act 50 for “Cultural Practice” to come into play for this SMA process. It is a better definition than Native Hawaiian so as to avoid racial exclusiveness issues.

-why hide the definition?

What are the Cultural Practices referred to in ACT 50?

- All cultural practices of the multi-ethnic people of Hawai'i
- If you have contending ethnic groups which one prevails?

This process may also be good for cultural impact assessments required under Act 50

Why would we not want a rule that protects all cultural groups? The intent of Act 50 is to protect all cultures. Say Micronesians migrated here and they start using a certain area consistently for the past 50 years, do they qualify as a “culture”?

“cultural” – how broad? what about the symphony? Act 50 has a broad definition of cultural

**OHA should support amendments to the SMA rules and regulations.**

The SMA process requires by the Counties is similar to, but not the same as the Chapter 343 HRS process which calls for an environmental assessment and/or impact statement. In other words, the current SMA process may, but does not always, trigger the Chapter 343 requirements, one of which is the relatively new cultural impact assessment procedure. Therefore, amending the SMA process to require a cultural impact assessment appears to insure consideration of Native Hawaiian rights even when an EIS process is not triggered.

**Cultural**

are the (cultural) definitions going to be clear to others who are not familiar with this process?

Footnotes should be used to all our definitions that refers back to the law where the developer could not argue. Where would the term “cultural” appear?

We need to make it more clear what we mean by cultural.

Take out ahupua’a tenants and put in people.

Need to state that ahupua’a tenants’ rights does not only apply to their ahupua’a. (Traditionally, the forest is where anyone went to gather. Also, fishing areas were not limited to the ahupua’a) . Add language from other decisions broadening it beyond ahupua’a.

It feels like “traditionally” and “customarily” limits us to a date and stops the culture for growing,

### **Native Hawaiian**

Is it native Hawaiian or Native Hawaiian? Document needs to be consistent.

“Native Hawaiian”, even for a Hawaiian, the definition might be too narrow.

### **Developed vs Undeveloped**

Some parcels of land where it appears to be urbanized to the max shouldn’t have to go through the whole process all over again.

Assumption is that the reefs and shore in the shoreline management area are undeveloped and should be accessible if there are traditional practices and responsibilities that have occurred there.

Undeveloped vs. Developed needs to be defined. Failed to define “fully developed” What is development?

### **Consistency**

Make sure the language on all papers are consistent

### **Native Hawaiian Rights**

Should read – “Native Hawaiian Rights” means those rights defined in HRS1-1, HRS 7-1, Article XII, Section 7 of the Hawaii State Constitution and rulings of the courts.

Other courts of competent jurisdiction could make rulings regarding the scope and existence of Native Hawaiian courts in a specific instance. These would include the state Intermediate Court of Appeals, the state Circuit Courts, and the federal courts.

Perhaps can change rulings of the Hawai'i State Supreme Court to "Hawaii Case Law" or "Rulings of Hawaii Case Law," as not all relevant cases get appealed to the State Supreme Court.

Maybe we should include water code - 174-C,  
Check public trust doctrine - resources that no one owns, but it's been interpreted certain ways - standpoint of biodiversity

Shouldn't be watering down the process, wording should be stronger. Sounds like we have too much concern with what the politicians think.

Changes in the definition are very minimal, why would there be controversy? Why can't we make the definitions more specific? It seemed like we had more teeth with the Kaua'i project. It's better to come off strong then let the planners take it apart.

Water code might wanted to be add to definition of applicable laws.

Any policy or process with the definition that states "NH Rights" might be considered racist

nH- 50%

NH-any quantity, All wording should be referred to as NH to include any blood quantum.

D. 3: it defines Hawaiian Cultural Practitioner. This should be moved to the definition page. Also, name should be changed to Cultural Practitioner of Hawaiian culture because Hawaiian Cultural Practitioner refers to someone who is Hawaiian. *Reviewers will be Hawaiian- cultural practitioners...*

Federal laws should be included also.

Certain Federal laws allow oral history(NAGPRA law)

You don't have to prove history from palapala.

Section 106 law has review process

### **Feedback On Procedures/Objectives and Policies**

What it is to "protect" could be better defined

The review guidelines should read:

**The reasonable exercise of native Hawaiian rights is protected to the extent feasible [PASH v. County of Hawaii County Planning Commission. Civ.No. 90-239K]**

Cite PASH Decision as: 79 Hawaii 425 (1995); and include “cert. denied, 517 U.S. 1163 (1996)”

PASH, 79 Hawai’i at 451 states:

To the extent feasible, we hold that the HPC [Hawaii Planning Commission] must protect the reasonable exercise of customary or traditional rights that are established by PASH on remand.

“Feasible” - who determines what is feasible.

The intent is if it can be done it should be done, if can be protected it should be protected.

\*Include language that can’t develop rights out of existence, to help qualify “feasible”

Change to "The department or the commission shall preserve and protect Native Hawaiian rights to the extent feasible when reviewing an application for a permit." So that cultural impacts could serve as a basis for denying an SMA permit, and are not limited to consideration when a permit is being issued. See Ka Pa'akai O Ka 'Aina v. Land Use Commission 94 Hawai'i 31, 7 P.3d 1068 (2000) (state agencies such as the LUC may not act without independently considering the effect of their actions on Hawaiian traditions and practices)

In Hanapi, a criminal trespass action, the Hawaii Supreme Court similarly indicated that only the reasonable exercise of Hawaiian rights that would be recognized: “[O]ne limitation would be that constitutionally protected native Hawaiian rights, reasonable exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes.” 89 Hawai’i at 184.

Likewise, in Pa’akai the court stated that to comply with PASH, the Land Use Commission had to make specific findings and conclusions as to “the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.” 94 Hawai’i at 47 (emphasis added)

The original language fails to take into account the rationale of PASH that Article XII Section 7 of the Hawai’i Constitution only protects the reasonable exercise of traditional and customary rights. In addressing the concern in its earlier Kalipi decision that there would be no standard to prevent conflict between western use rights and traditional and customary rights on land that was less than fully developed, the Court stated that:

Contrary to the suggestion in Kalipi that there would be nothing to prevent the unreasonable exercise of these rights, article XII, section 7 accords an ample legal basis for regulatory efforts by the State.

79 Hawai'i at 450-51 (emphasis in original). As later stated by the Court in Pa'akai:

Pursuant to our decision in PASH, the petitioner's obligation to allow access for traditional and customary practices continues to the extent that these practices can reasonably co-exist with the development of the property. 94 Hawai'i at 51 (emphasis added).

The problem with the original formulation in the Proposed Changes is that it does not recognize that traditional and customary native Hawaiian rights must be balanced with the property owner's use of its property, and will only be protected to the extent that they are reasonable exercised.

Finally, although I not believe that this needs to be expressly mentioned because it is subsumed in the Hawaii Supreme Court opinions, not every claimed right is entitled to protection. The Hawaii Supreme Court has clarified that the claimed right must be "connect[ed] to a firmly rooted traditional or customary native Hawaiian practice." Hanapi, 89 Hawai'i at 187. The Court indicated that this may be able to be proven either by expert witness testimony or by the testimony of a "kama'aina" witness. Id. at n. 12.

What does it mean when we say "...to the extent feasible"?

For stylistic reasons, we believe the original language of the Proposed Changes should be reworded as follows:

A written statement evaluating possible impacts to Hawaiian cultural resources, responsibilities, usage and rights, **and the possible mitigation of such impacts.**

What is adequate public and cultural access? What is adequate access?

This process just doesn't fit with the PASH decision.

PASH decision is a different decision from a cultural decision.

What defines feasible? Economics, time? You take away discretion with this kind of wording.

Add **perpetuate**: The department or the commission shall preserve, **perpetuate**, and protect native Hawaiian rights.... Planners don't have an awareness that Hawaiians still practice their culture. Their thinking is that Hawaiians DID do it, as in past tense.

Add a section making clear that if an SMA permit is issued, the department or commission "must - at a minimum - make specific findings and conclusions as to the following (1) the identity and scope of valued cultural, historical, or natural resources in the SMA or affected areas, including the extent to which traditional and customary Native Hawaiian rights are exercised in the SMA and affected areas; (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 department or commission to reasonably protect Native Hawaiian rights if they are found to exist." See *Ka Pa'akai O Ka 'Aina*, 94 Hawai'i at 47, 52-53, 7 P.3d at 1084, 1089-90.

## Feedback On Process:

### Section A.

OHA should support a cultural assessment for both major and minor SMA permit applications and supports including activities beyond cost that would trigger the cultural impact assessment.

The trigger for the review should include other elements besides cost. Consideration of cultural impact should be given to any permit that requires displacement of ground cover, the inclusion of a sea wall or similar types of displacement activities.

Review process that occurs at minor project is not necessary. It would take a lot to get people to go through this at this level.

The county members might think that this is too much to go through with everything else going on.

**A.** When a major SMA permit is required, the applicant ~~should~~ shall conduct a cultural impact assessment...The completed assessment ~~should~~**shall** be reviewed by the Historic Preservation Division(SHPD) **and county divisions**, the county or island historic or cultural commission **or those with cultural and lineal descendants of the affected ahupua'a...**

### **Screening as an Intermediate Step:**

Screen major, not all, need a CIS. Need a screening mechanism for both majors and minors as to whether or not a full assessment would be needed. Should chart where sites are likely. Should also chart where sites are UNlikely. Should chart areas that are fully developed.

Should chart culturally sensitive areas or should chart exception areas

Screen major and minor permits if they need a full review:

Some permits range from a small addition to a condo or a tent to a whole cottage. Use a judgement call depending on what case or project you are dealing with.

GIS information maps and locations are vague, so maybe we should show where areas that are very developed to add to the screening tools.

Show areas where they are sensitive where you know a reviewer have to look at it, and areas where you don't have to look to into it.

Soil type could serve as criteria if a minor permit would need a full review. e.g. sand dunes always need to have a full review.

City and County needs to assess for burials before issuing permits  
Kahana and Punalu'u are sensitive areas – the whole coastline, and of Kahana

Planning department has an itemized list of sites/historical/artifacts within 500 feet of development and also the list of neighbors in that 500 foot buffer to factor into a project.

If there are easier, friendlier documents, it will be easier on the commission.

A. Add “where applicable” for statement on necessary review. Review by SHPD, county, cultural commission, etc. where applicable.

Require review by SHPD

Need a user-friendly process

Cultural mapping with overlays would be helpful

As an intermediate process, the Burial council staff which already has maps of burial areas should review the application. The maps are confidential, but the staff maintains it. It maps out every islands' sensitive areas for burials.

If it will involve recreation craft – should be reviewed

Avoid segmenting the permits, each under the limit for a minor permit

### **Section B Checklist:**

Change “(check those which are present **and/or suspected or known**)”

#### **Review of Checklist:**

OHA's Community Resource Coordinators (CRC) and our Cultural Affairs staff could assist with the island-by-island review of Section B. Section B covers many of the most common, and even uncommon cultural archetypes for which “rights” and “access” by be attached. The list needs to be reviewed on an island-by-island basis to make sure the unique archetypes are identified.

#### **Method:**

Maybe a survey isn't the best way to consult.

How many items would it take for an SMA permit not be approved?

Have to guarantee access to people who have to assess the property so they could check land thoroughly

Rights from this process are already under Historical Preservation 106.

How does the reviewer know everything to identify?

Is the reviewer taking the checklist to the actual area?

There are a lot of laws that overlay with PASH now that this is not needed. Like cave laws, etc.

May not be most effective way of getting the right information.

Kupuna would not fill it out. Would need to have another person do it.

**Provide Access:**

We have to check for trails, we need to be able to access sites in a safe way

Add access to resources

Community meeting- shoreline access is not enough, need trail to access shoreline

Does access refer to roads also?

should have access to water, streams, public trust lands

**Streams and Streamlife:**

Need to add streams and streamlife to include areas such as Waipi'o and Kahana which are in the SMA

add native stream animals - like o'opu, hihiwai, aholehole, 'anae  
Hiuwai/kapukai access

allow for life cycle of the stream life - which spawn in the salt water and then go upstream and live in fresh water.

**Assessment of Resources:**

list should show historical resources and potential resources, damaged resources

developers have to prove that there will be no more damage to areas

make 2 lists-show positive and negative aspects

protect condition of the resources

If the stream is unusable is it still a cultural resource?

There might be some fundamental problems if we don't clear up and define better. Can we really use polluted streams, etc.

Kaho'olawe and Makua – damaged but still seen as cultural resources.

Kanewai lo'i comes from a polluted stream but we still use it culturally.

How about cumulative impacts?

If it is zoned urban then it is fully developed

maybe there should be something above the checklist that states right off the back if it is fully developed.

Shows an easy way to check for different items on a property. usual form is very foreign to those who don't deal with it everyday.

Should also chart where sites are UNlikely.

Should chart areas that are fully developed.

How do you prove a burial site without digging?

Use what our Kupuna taught us about recognizing.

**Add to List:**

Add wai 'opae(alkaline ponds)

o'opu

hihiwai/wi

aholehole

'anae

Add \_\_\_other to "B"

Muliwai-where the river meets the ocean

Kona has field systems mostly mauka

kapu kai / hi'uwai areas

steam bath areas

bathing pools

turtle nesting areas

historic walls

wells

alae veins

surfing sites

sandy beaches

fishing areas

Lava tubes(burial and non burial)

--also, if there are lava tubes there will be little bubbles called puzzle rocks

Sub-teranean water courses – fresh water that goes out to the ocean that leads to the ko'a

Ahu

Ko'a (2)-the ones in the ocean, not just on land

Petroglyphs

Paddling Areas-

Burials-not mentioned in any permits at the county level

Artifacts

View planes are important, but should also factor in cultural privacy

kupe'e

seasonal residence sites (as for salt gathering, fishing, tapa)

Sometimes trees(ex. coconut trees), pile of rocks, and boulders are markers(ex. ko'a, burials).

Add surf sites and burials.

Add "other" to checklist. Write as a narrative question, Are there other additional resources?

If planner has an untrained eye for identifying items on the checklist, who is going to be there with the applicant to check the "other" box if there is something there that is not already listed on checklist.

Practitioners have different views of the usage of the land depending on what time frame they are from.

Add "water caves", "ahu", birthing stones, phallic stones, Pohaku Kane, markers for burials

Add a question somewhat in the context referring to the checklist **but not limited to the checklist.**

Lilly plants were being pulled, but those were markers for burials. Point is that you really don't know what all the items on a plot of land mean.

Add "coral reefs," "estuaries," "limu purposes" or "nearshore marine resources" "spawning areas"

Add "dams," "streams," aquatic life

Add "house sites" archaeology sites

Add "lava tubes"

\*\*If all of Kahana and Waipi'o are in SMA need to add terraces, o'opu, hihiwai/wi, 'opae,

what may increase natural erosion process

**Take Off List:**

Lo'i kalo should not be on the list

NH gathering rights is very different from agricultural.

Irrigation ditches should not be on the list

It is not necessarily something that everybody could use

'Auwai should not be on the list

These kind of resources have to be dealt in other ways.

Majority of items listed is not practices and will get to be confusing

PASH just restated rules that already existed.

**Consistency:**

why does the reviewer list have resources that the applicant doesn't?

[Based on the Kaua'i form which includes identification of historic resources on their application already, so it would need to be put on the applicant form for the other counties]

Rather than KHPRC, needs to be something generic relevant to each county

Check for consistency

**Section C.**

How does this relate to PASH decision?

Not see where "C" fits in

**Section D.**

Change: D. Application and Review Process for Minor **and Major** SMA permits...

D. 3...~~A panel of at least 3 and no more than 5~~ **A panel of no less than 5 and no more than 9**...Evaluation forms should be returned to the Planning Department within ~~10~~ **30** days...

D. 3: it defines Hawaiian Cultural Practitioner. This should be moved to the definition page. Also, name should be changed to Cultural Practitioner of Hawaiian culture because Hawaiian Cultural Practitioner refers to someone who is Hawaiian.

*Reviewers will be ~~Hawaiian~~ cultural practitioners...*

Would families of Ahupua'a have access to this land for assessment?

What is the mediation process? More specific wording for process.)

D. 4&5-sounds redundant

D.5. . . , the planning department staff may [convene] **facilitate** a meeting of the panel of reviewers with the applicant . . .

D. 7.---despite what is said from D. #1-6, #7 implies that Planning Department can change decision.

May also want to ask what are the positive and negatives)

**Kahu:**

Historically, cultural sites have a kahu. This is a facet to recognize.

Every place needs a kahu. The users of the area should be able to say if that kahu is doing a good job

**Incentives:**

Offer incentives to community groups to participate in the process

- offer fees to volunteers for helping with process
- donate to certain groups' restoration projects or clubs
- reward system
- examples – give computer with gis maps to groups participating in the process
- assist in collecting oral history from kupunas

OHA could contribute to the process by providing incentives for groups who participate in the process

If it has been done before, then you don't have to do it again. Could an incentive for the applicant to conduct the consultation with the community before the application is submitted to the planning department be provided to accelerate the approval process? The applicant does everything required and then submits the application.

Can provide incentive for consultation up front, yet need to maintain the independence of the reviewer.

How intense is the reviewer's job going to be, how many hours, days is the process going to take? Is there compensation?

Will we be providing a ride? Don't want to drain out the Kupuna's.

Should provide compensation to help the community.

Recommend cultural resources training with community leaders – 106 review process and in cultural resources management. Need to build community capacity regarding the laws as it applies in protecting cultural resources – 106, NAGPRA, AIRFA, 6E,

Need to provide immunity from litigation

**Validation:**

Who validates this project? Process? How much will this whole permit cost to someone who wants to build something small?

Who's the reviewing body?

Who reviews the proposal?

Is this consultation or delegation of an authority

Sources from applicants needed about how they got their info

**Mediation:**

The burden of proof should be on the developer and not on the practitioner

This plan/process should not back fire and be used against us. Wording should not be on the side of the developer.

What would there reference be to agree or disagree with applicant?

Should work out the issues before coming to the Planning Commission. However, mediation could make the process too lengthy.

Mediation process assumes that the outcome would be the decision, but the Planning Commission makes the decision. The Planning Commission cannot delegate the authority to make the decision. Have to also consider other items. But there would be hard feelings if the Planning Commission doesn't adopt it as a condition. Dialog is important.

If county doesn't agree with review panel then county and review panel should go through it together to justify judgement

**Need guidelines on mitigation measures.**

What is the appropriate access? Some/none/all?

- Are there any guidelines between pedestrian vs. vehicular access?
- Depends on area/what is available(parking, etc.)
- What are guidelines on buffers?

- Provide a list of successful mitigation measures
- What are incentives for mitigation?
- Develop models of different situations and how to handle it, when need a deeper level of analysis

**Panel Process:**

Suggest that you solicit comments from everyone on the panel but then have a smaller group to make final decision.

Minor permit is an administrative process not planning commission decision.

**Oversight:**

If process goes through who will oversee this process?

Who is going to be the one to push everything through?

What if review panel is challenged?

person who would be advisor need s to look at process/application  
need planning staff to oversee process

This process shows that the Planning Director has the power and final decision.

**Timing and Cost:**

Developers and NH could get it right at the front end so that you don't have to fight about it politically. Do up front, so that an application would not be deemed complete without a review.

SMA permit is a backend permit (you already have you land usage permit, etc), it's usually the last permit. How do you put it in an ordinance so that you are not putting more years in the process? However, sometimes its the first occasion for the community to learn of the changes, so it's important to involve the community at this point.

Applicant has to do the report the agency would mail it out - a developer could set it up in advance and early.

If the applicant solicits the community review, have to have some way to assure that it is an independent review

Educate developer-why this is important? or it may create hard feelings

Should bring practitioners in earlier in the planning because SMA is one of the last things in process. Late in game to get approval if can go or not.

Excellent for anyone who is going to be a developer---concerned about the fact that it is going to be used for a minor permit. Can be cumbersome.

Do we want everyone getting a permit for every little thing

Aren't all these things already involved with a cultural impact system under Chapter 343?

Not all SMA permits are under Chapt 343 which requires a cultural impact statement

Act 50 requires a Cultural Impact Statement. Is this a duplication?

How will this overlap with the 343 and Act 50 process?

If both the State Historic Preservation Office and the Council reviews the application, the process would take too long

Don't want to have another layer of bureaucracy for the developers.

Don't make the SMA process more onerous for the practitioner, like the fishpond permitting process.

2 to 3 years worse case on the permitting process

How much will this whole permit cost to someone who wants to build something small?

Need to assess if process is needed for all of the minor permits

How would the process affect the time limit for the granting of permits?

If there is an appeal how would the time limit for the granting of permits be affected?

By the time you get to the major permit stage, all these things should be covered already and nothing is exempt.

By the time you get to the major permit stage, all these things should be covered already and nothing is exempt.

What is the feasibility of the reviewers doing the review in the given time?

It is a good idea to have a group of reviewers. Reviewers would even have the knowledge on who to ask in the community if they have any questions. If you have a reviewer then a public hearing where people can confirm or disagree would be good.

For O'ahu, have the Review done prior to the Public Hearing. At the Public Hearing, the reviews can be considered as part of the process.

Is there a structure for this review panel?

Volunteers would probably be best because you are dedicated to the project and not the money.

would timing be extended to facilitate the Native Hawaiian review?  
Public comment period would need to be extended.

**Record:**

#6 record in Bureau. Zoning or SMS will already be recorded, may not want to superceded zoning/SMA

**Politics:**

How would you choose the kamaaina from the district? Sometimes can have pro-development members.

One problem was that we had all these cultural experts with the same goals, but different variations were still present.

There are some common things, but also some colliding ideas.

Fear-it might get stacked up against the developer all the time. How do you guarantee that the persons selected are not always going to say no and oppose a development?

If there were a disapproval this is late in the game could be perceived as an ambush if there is disagreement.

Developer can initiate consultation in advance and if not done, then the county can do it or the county can do it if the project changed.

Who has the power to amend the rules?

Reviewers won't falsely report something to stop development, but if they don't feel content with the development because of what is on the land, then they don't.

Do reviewers have a stand in the planning commission? IF not they are JUST advisors - - there seems to be no accountability for all the information provided. What would prevent Planning Commission from throwing out all the work done?

**Ahupua'a or Kupuna Councils:**

Ahupua'a councils/ Moku councils Waianae/Lualualei wants Kupuna council

Perhaps could start with Kupuna council, then have a makua council read all the information and get back to the kupuna council for cultural validation. Makua would review the work and projects but kupuna would make the decisions. This process could be part of the transition toward setting up the Kupuna and Makua councils. This process could provide experience in  
empowers community and kupuna

Ahupua'a council is not necessarily a good source for notifying practitioners. Certain councils are made up of people not from that ahupua'a and are new comers.

**Benefit of Process:**

In part, PASH was over the issue of whether cultural practitioners have standing in a process. This process gives standing to cultural practitioners in the application process.

Special places and areas should be preserved and cherished with the help of this SMA process.

**Notification:**

Perhaps should provide check list to neighbors as part of their notification notice. The radius for notification of neighbors should be relative to the parcel and lot sizes in the district.

Is it possible to recommend that the burial council be on the neighborhood mailing list for reviews?

If naming only certain people in the community to come forward to do reviews, it might cause division in the area among the community members.

It might be good to just notify the community and have whatever ohana that wants to do the review to do it.

Add notice in OHA newspaper and Windward paper is a good source to put notifications in besides the Advertiser/Bulletin.

**Enforcement:**

Who will enforce these policies? Planning department will have to follow up.

There has to be a fine to go along with the process.

Will enforcement be part of the rules?

Violators should have a heavier penalty.

Need cultural monitors

**Section E.**

**OHA could provide the forum for discussions centering on defining the standards and requirements of Hawaiian Cultural Practitioners and a method to assist counties and districts in identifying the practitioners.**

Section E indicates that the county planning department is responsible for recognizing Hawaiian Cultural Practitioners but it is unclear what agency will be responsible for assisting a community or district to develop a process to identify the practitioners. OHA and other Hawaiian organizations could fulfill this role. A meeting should be held on each neighbor island and on O'ahu with the support of our CRC's and cultural staff. Island burial council, historic review and historic preservation staff and other interested individuals should be invited to participate.

**How are we proposing who sits on the review panel?**

Planning dept? historical commission?

OHA could assist in a review panel

Does it only have to be Hawaiian?

ex: Japanese are good fishermen, Filipinos take care the land.

Practitioners should be chosen carefully(what if that practitioner is the father of someone who is a developer?)

List of practitioners needed for potential developers. How will the list be developed and maintained? How selected? Open notice? No stated standards.

Make sure there is a good balance

Really no effort in identifying who practitioners are in the boundaries.

Getting people who can prove that their families have been doing it for generations is important

Would registration be a good thing to prove practitioner status?

Keep choosing of practitioners to a community level

Knowing who has been coming around traditionally is necessary

Is the community choosing the practitioners?

How to protect and involve most responsible practitioners?

How would the district break up of the islands be for the different councils?

Would the people who wanted to access these areas involve fishermen, hula members, etc?

Review Council-it's an ok idea where people feel they have more of a right to be on because they are more tied to it and more akamai on the topic  
Whoever takes on the responsibility of steward or kahu should also take care of the area

Should distinguish people to take care of the different levels of the process.  
Consider that some people are dual in what they can share. Some kupuna have been able to keep a lot of information from different areas.

Need to identify who is willing

NHHPC-they could help out to identify cultural practitioners

Maui and Kaua'i both have cultural commission-

City and County should have a cultural council that calls upon practitioners that have been nominated by the community members to go through process.

Maybe OHA can assist in identifying Hawaiian families and practitioners to conduct voluntary reviews.

Changes look very modest and reasonable basically just restating what the law is issue is not with definitions but who reviews the consultation for permitting

The use of "Hawaiian cultural practitioners" as "reviewers" of applications is problematic. The proposal is quite vague on how such persons will be determined and chosen. Further, for specific applications, how will a particular reviewer be determined to be knowledgeable regarding the area?

What protections will be put in place to assure that the reviewer is impartial in his or her review and does not possess a conflict of interest?

Will the applicant have the right to challenge the participation of a specific reviewer if the applicant believes the reviewer is not qualified or for other reasons is not appropriate to review the application? This is important to meet due process requirements.

The Land Use Commission has created a Resource Management Committee to review this issue on a per project basis. The committee is composed of two members and approved by the LUC and the developer. These committee members are paid for their work.

Applicant should hire someone to culturally assess land

Elected vs. appointed council members

PASH decision is related to the ahupua'a tenant, how do you link the reviewer and the tenant to the PASH decision? How do you qualify a review panel not from that particular ahupua'a?

How did we come up with a community-based review panel?

There is a whole range of Hawaiian cultural groups, how would we choose to be on the review panel?

What if the project expands from 1-3 ahupua'a? How will we choose the reviewers then?

How do we qualify people to become practitioners? What is a practitioner?

Don't necessarily think we should register or appoint practitioners, instead just find a way to identify them

Various OHA offices are suppose to identify for you the names of recognized culture areas?

Hawaiians are so territorial that it is hard for them to come up and identify themselves as expert to the land.

Those who don't talk much are the ones that know the most, those who are the loudest are the ones who really don't know much.

They rather let the knowledge die than share it.

You should have at least one member of the burial council on the review panel.

3-5 reviewers seem too much and overwhelming.

Do we have everything go to the reviewers or have commission decide what they do?

How would you choose the kama'aina from the district? Sometimes can have pro-development members.

One problem was that we had all these cultural experts with the same goals, but different variations were still present.

There are some common things, but also some colliding ideas.

Who is lead agency to solicit input from reviewers?

One option is to have the State CZM be the lead agency.

We should check if the "kama'aina" list could be kept confidential and not available to the developers. Don't contaminate the list. But it might be considered a public document.. Need to update the list every 2 to 3 years

How do we protect integrity of ancestral knowledge?

On O'ahu refer to umbrella organizations rather than to 'ohana or people in the district. A lot of ancestral knowledge has been lost, and organizations have arisen to perpetuate the knowledge.

Can refer it to a Neighborhood Board who could refer it to a Hawaiian Cultural Practitioner

The counties to recognize neighborhood boards and civil clubs. Therefore, those boards can be responsible for looking at these permits. Neighborhood boards are staffed with one county person and have finance. (O'ahu is the only island that have neighborhood boards). Major permits go through the neighborhood boards.

Will districts for reviewers be like Ko'olauloa and Ko'olaupoko?

**OHA could draft legislation for the 2003 legislative session establishing a State and/or county funded independent cultural review program**

Some potential problems could arise in that cultural experts are now in demand to work as hired sub-contractors for applicants and their involvement in cultural reviews could pose conflicts of interest. One option is that the applicant provides funding for independent cultural review experts but they are contracted through the State or County governments.

**Evaluation Form:**

- 1. How will the proposed project impact Hawaiian cultural resources, usage and rights in or near the project area? - should be the first question**
- 2. Has the applicant accurately identified the Hawaiian cultural resources in or near the project area? - should be the 2<sup>nd</sup> question**
4. How will the proposed impact **help/improve** the historic resources in or near the project area? This question should indicate the kind of impact - quality, integrity, etc.

What was the form based on? In Phase II?

Form shows that PASH impact is like a cultural impact, but that's not necessarily true.

Why do we separate Historic resources and Cultural resources?

**Follow-Up:**

Can you set up an experimental procedure before this is implemented? Provide a 2 years test period? Perhaps try Kaua'i first, then add others.

Ask the Maui planning dept if there is any plan to have SMA rules permitting come under county council rather than the Planning Commission.

Send out summaries for different phases

CD-ROM of map survey databases

Send out packets as they become completed

Make a database and hard copy maps for each office

Bibliographies from Nancy Morris would be helpful

### **Role of OHA**

Maintain a list?

Agencies have been asking for the list, but resisting. Not OHA's job to do so.

Make it easier for the agencies to comply. It's their job, not OHA's

If developers get a hold of it ?

If do this, OHA's responsibility that an adequate review has been done.

Not ever OHA's responsibility to do this.

Not set up to do it. Can't sue if OHA is a part of the process.

Remain independent

Liability - suit

What if everybody agrees and then someone is overlooked?

Can do as part of an internal review - through the Cultural Preservation Committee

Currently, as part of OHA review of any SMA application they are referred, the call people they know through the CRC on each island. Process works best if community group comes forward on their own and they have different viewpoints from OHA. They talk directly to the county.

Maybe it's not for OHA to come up with a list - but to do training on rights. Do education, to co-sponsor. Not always talk to OHA.

Can put it in Ka Wai Ola - to come forward and identify themselves.

106 -- List in Ka Wai Ola -

Multiple Methods:

- get people that live in close proximity of the site
- County can advertise in Ka Wai Ola to respond to the SMA - call a ##
- Practitioners - voluntarily register - OHA can keep name
- Have copy of SMA sent to the practitioners
- can have copies accessible in OHA offices

**Appendix V. Responses of County Planners to Recommendations in the Phase III Working Draft, September 15, 2002.**

**General Questions/Comments:**

Maui

What will be the stages of Implementation? Will the suggested changes be implemented before or after all of the necessary data is available such as the digitized maps and cultural resource mapping? Right now there is a limited amount of data to base assessments upon.

Have a notification process. The burden to indicate sensitivity is upon those who care about the sites.. It is difficult to ask kupuna, those who know, to reveal location of sites, resources. They have to feel it's necessary

Right now the planning department has pending: 681 assessments and 25 major permits  
What does protect mean? For whom?

C&C

p. 5 - Clarify that it was the Hilo planners who suggested that the team recommend changes

p.8 - not generalize, clarify that the study group noted that the distinctions in the process between C&C and neighbor islands should be taken account in making final recommendations, current wording implies that there was a concern about the Honolulu C&C process.

Hilo

The Appendices were not included in what was mailed. Would appreciate seeing the appendices, upon which the recommendations were based.

Kaua'i

Kaua'i County agrees with development of resources, but not if it will divert resources away from the counties to accomplish this.

**Recommendation #1**

**State Survey Office Maps:**

**Scan and digitize maps in the State Survey Office for use in a GIS system compatible with topographic maps.**

Maui

There are efforts to develop a virtual library at the legislature by Senator Kubota. There would be a corporate tax write-off for Hawaiian cultural initiatives, through Na Kupuna. Want kupuna to note important resources - virtual computer library - contact Blossom Feteira. They have purchased portable computers for inputting the information. Information should remain with the reviewers.

Known areas have been degraded so there's nothing left.

Would it be publicly accessible? May be a problem for the information to be available to the public. What is considered general? What do by identifying the area? What kind of use are we allowing - travel and guide books.

State take lead, state GIS is on web site. County system is compatible? Would need to determine where it is. Can download State Land Use Commission maps. As a starting point, can do it.

#### C&C

C & C does utilize the State Survey Maps when there is a question. More often than not, ask the planners ask the applicant to gather the information . Planners may go to the maps to clarify discrepancies.

C&C does have GIS layers for archaeology, perennial streams, endangered species and utilize it in the assessment of the applications.

#### Hilo

This would be a useful resource. It is a state responsibility. County doesn't have the resources to undertake the digitizing of these maps.

#### Kaua'i

Kaua'i at ground level for a GIS system. Could utilize it if it is developed by the State. Would be helpful to have the maps on Kaua'i. Can locate the maps in the State Historic Preservation Office, Planning Dept. in County, KCC, State Library, Historic Society, or Museum. Computer designated for general public use might be better located at KCC or State Library. Working on providing the Cultural Commission computer access, but would be difficult to have a computer for general public access. Security to the system is important consideration if have a part of it accessible to the public.

#### **Recommendation #2**

##### **Web site:**

**Develop a web site for posting data collected for this project and for additional data collected in the implementation of the process as appropriate and feasible.**

#### Maui

Putting information on web site is a good idea, main issue is who to give it to. Asked SHPD when had problems with SMA minors falling through, thinking there's no impact and discovering that there is impact. Possible to have a "hot spot" map from SHPD? Need to get info out for more awareness, but also to public which can hurt the sites trying to protect.

Note: Such a map would need to be available for the independent review, but perhaps not to the public.

Perhaps have OHA be the keeper of such information. Have it with OHA to maintain the information.

Developer may want to know what's on the site before purchasing it. They can go in before. Who will develop and maintain the site? Who will take the lead? Will they have the information up front before start to implement?

\*\*\*\*Agreed a good thing, but with later recommendations, implementation process, how will it be implemented, when still in the data base phase????

Should data base development guide the implementation of the process?

Were kupuna involved in this project?

C&C

would it possible for these resources to be accommodated in existing web sites, e.g. DLNR. Creating and maintaining a web site is expensive and daunting. Want the site to be relevant. If it is incorporated into existing agency web sites could be maintained and updated.

Hilo

Would be useful. The State Office of Planning should do the web site

Kaua'i

Web site would be good. DLNR has a web site. County has a web site for Planning Commission agenda and public notices. General Plan and Comprehensive Zoning Ordinance. **Working with Professor Van Dyke to update the rules** and may consider placing the rules on the web site.

### **Recommendation #3**

#### **Plantation maps:**

**Acquire plantation maps. Develop a repository of the plantation maps. Eventually digitize information from these maps. Include information from plantation maps into a GIS system.**

Maui

Puunene Sugar Museum has maps. Bailey House have maps.

If centralized by UH - problem is how to keep it on the islands.

Gaylord Kubota has the A & B maps. 871-8058

Ranches also source

C&C

Encourage plantations to turn over maps to the UH. On O'ahu, the HSPA turned over records to the UH- Hamilton Library. The University can be asked to make island maps available through the community college network of libraries.

Hilo

Having the plantation maps would be useful. This is something for University of Hawai'i to develop.

Kaua'i

Plantations have kept the maps. Kekaha maps have been turned over to the historical society. Explore if UH centralizes the repository for the maps, how to have it available on each island, perhaps through the community colleges.

#### **Recommendation #4**

##### **Statement of Responsibilities and Rights of Practitioners of Hawaiian Culture:**

**Develop a statement of access responsibilities and rights for Practitioners of Hawaiian Culture to carry.**

**Circulate this statement to DLNR DOCARE and their agents; county police officers; landowners; property managers; title guaranty companies; and community organizations.**

**Educate the community through the DOE and private schools around this statement of responsibilities and rights.**

Maui – no comments

C&C

This goes beyond the purview of the CZM. . Look at how the permitting doesn't ignore Native Hawaiian access rights. Basis of 205A is protection and enhancement of coastal resources. NH access is only one aspect. They are all equally important. Too big a bite for a 205A study – involves legal and cultural issues. Consider in context of another study group. It also applies to mountains and trails

Hilo

Office of Hawaiian Affairs or Native Hawaiian Legal Corporation could most appropriately develop such a statement. This is similar to the ACLU statement of rights that was developed for the Miranda rights.

Kaua'i

Educational tool is okay. Not a county planning department responsibility. There is potential for on the ground conflict.

#### **Recommendation #5**

##### **Education:**

**Educate the next generations about the responsibilities and rights of practitioners of Native Hawaiian culture**

Maui – no comments

C&C

Same as #4

Distinguish the recommendations addressing the coast management law from the broader recommendations. Sift through the issues raised from the public as it applies to the coastal zone

Hilo

The DOE should undertake such education.- OHA should be asked to help develop such Hawaiian curriculum.

Kaua'i

Responsibility of DOE and OHA

### **Creating New Resources:**

#### **Recommendation #6**

##### **Mapping of Cultural Use Areas:**

**State and counties should develop mapping of cultural use areas as an overlay for use in initial screening of applications.**

**Communities should be encouraged to develop and maintain a map of their cultural use areas**

**Federal and private funds should be attracted to assist communities in the mapping of their cultural use areas**

Maui

helpful

once identified as protected, responsibility on the landowner.

Where not public knowledge, afraid of destruction on purpose.

Have the cultural use maps remain with the community. In doing the review can refer to the maps, but can use the resource to identify the resources to be impacted.

C&C

Cultural sensitivity maps were utilized at one time

Maybe yes, maybe no. Hearing when ready to make a decision. Sometimes it the first time the community hears of the plan. They realize that a secret spot is in danger. At that point they may take steps to protect their "secret spot." However it is questionable if they would be willing to share their secret spots for a cultural mapping project?

Practically speaking, how would we develop it.

When Honolulu C&C conducted sustainable studies the DLNR reluctant to share the information.

If these maps are developed how would the information be protected?

Note that the guidelines in the National Bulletin state that cultural areas can be identified without revealing the specific location of the site or type of sites.

When SHPD does review of permits they utilize their data base of information. Can coordinate with SHPD to maintain mapped information and to utilize the information in their review.

Especially when determining mitigation, information is necessary.

What are cultural use areas? Not a physical feature. May be a way to get to something.

Communities can be encouraged to develop the map? - however people burn out, availability only as good as the institutional memory of the active participants.

Practically speaking, difficult for the community to maintain. Differences between organizations, personality of the organization can change. Would need education and means of maintaining the information. Again, issue of maintaining the information would need to be considered.

Would be valuable for community to know where the maps are, not creating another set of maps?

OHA indicates that they will test the method of doing cultural mapping. OHA should also consider assisting the communities in maintaining the information.

Positive to have oral histories and maps as part of the application, e.g. such as have been submitted on North Shore. Such resources can add to the mapping

#### Hilo

Finding the resources to develop cultural use area maps is a problem. Such maps would be helpful in reviewing SMA applications. Designating a cultural use area would not be a prohibition on development. It would be a resource for information in doing an assessment. If such a map would prohibit development in designated areas it would require a rule change to be developed. However, if it is part of the assessment process, it can be added into the process.

Is this a county or state function?

Would need to develop a definition of a cultural use area.

Should the applicant do this? or would it be part of the assessment by the county?

#### Kaua'i

Did have this in early 70's. DLNR informed planning department to stop using them. Their concern was that areas designated as "not sensitive" didn't mean that there was nothing there. What role will the maps play in permit assessment.

All planning commission level permits go to DLNR State Historic Preservation Division for a specific determination. If cane field, not required. If gully, required. State information at DLNR not necessarily with tax map keys, but USGS. County need information with tax map keys. Should have the state files of arch sites and burials onto tax map keys. What would the state accept? How to use it? Take it for what it's worth.

#### **Recommendation #7**

##### **Review for burials:**

**Have permit applications undergo review by Burial Council staff which maintains a map of the known areas where burials are located to screen for**

**possible impacts upon burials. CZM office should meet with the State Historic Preservation Division to assure appropriate review by the Burial Council staff as part of the application review by the SHPD.**

Maui - no comments

C&C

This is carried out by SHPD in their review.

The county can circulate it to the Burial Council if wanted to. It's easy to do. Have already red-flagged sand-dune areas, for additional review. It is already part of their process. Can send it to the Burial Council, as well as SHPD simultaneously.

Regularly consult with the Burial Council and staff.

Hilo

Hilo sends the major permits to the State Historic Preservation Division. The State Historic Preservation Division should refer it to the Burial Council as part of its review. Would it be part of the application or part of the review? Concern is that there is a 21 day limit for county comments. If the applicant submits the application to the Burial Council staff for review it would not count against the 21 day limit for county review.

Kaua'i

SMA majors are sent to DLNR, how the archaeologist shares it with the Burial Council, is her responsibility. If there is a survey, and burials are found, then it's referred to the Burial Council. DLNR has responsibility for comprehensive plan for protection of cultural resources, burials, and sites. Have to keep the permit time lines in mind when add additional reviews. Each review adds more time and cost. How to accomplish without complicating much further.

**Draw Upon County Planners For Best Practices:**

**Recommendation #8**

**The Coastal Zone Management Program should convene workshops for county planning staffs as well as for the county directors to develop screening guidelines for minor permits such as the following:**

- 1. if property abuts ocean, shoreline or stream must undergo process**
- 2. if property abuts an endangered species habitat must undergo process**
- 3. if involves the location or servicing of recreational craft must undergo process**

Maui

Maui County is going through screening process with Melissa Kirkendahl. Identified certain types which can be eliminated. Part of it is soils types. Trying to screen for the 6E review now. Have .5 of one percent that can screen out.

If doing any kind of ground disturbance, how do you exclude?

Gave example, that at Olinda, said nothing – then found graves, tilled land even. Assumptions are changing. In terms of SMA – nothing to do with access rights, archaeological or burials.

Add known gathering areas for subsistence food.

## C&C

From C&C standpoint, minors are very minor. Do screen them. If anything minor can have major impact, will take it to the major

Starts with EA, with requisite public review through OEQC Bulletin, and public hearing.

Don't think can say more strongly that specialized process should be put in place for minor permits.

There is already a screen. What is the criteria?

Apply a screen for cultural impacts, same as other resources – damage to wetland, block shoreline access, block a major view. Money is arbitrary screen. Chain link fence – maybe yes or no.

Permits, variances, everyone is different – not spit out sausages, difficult to set parameter. Even if a screen applies, may still have an exception for given reasons.

Planners do screen – may look at an area abutting ocean,

Does it significantly negatively impact resources?– list of resources, including traditional cultural practices.

What would help to incorporate cultural component? - mapping, input from SHPD, consultation with community groups.

If get application, even if under \$\$ figure, will call group that has an interest

Also, fish and wildlife.

Have 30 years of experience. Can share experience – share best practices – C&C does have a list of resources / could develop a check list.

Eileen did develop a check list – for state dped – an environmental check list. There are resources available – existing set up for this to occur. Try to get the directors together or the CZM advisory groups or the Subcommittees on coastal erosion and generalized advisory groups. Paper on check list under the name of Eileen Yee may be in the DURP library.

Somewhere can build in with the CZM interest groups.

HCPO conferences – when Kathy in charge, have loco moco for county planners to share.

Office of Planning can call for such meetings.

Should develop guidelines or a checklist that can be flexible in application. With checklist – if have certain number of checks – would lead to more consideration. But still should remain flexible in application.

Planners have mental check list – would be good to have written check list.

## Hilo

Good idea to share experiences. Should have the directors meet at one level, staff meet at another level. Have separate meetings for the staffs and the directors. Used to have 2 day workshops which were useful. Such workshops can be organized again. State Office of Planning and the Coastal Zone Management Program is in best position to organize this.

Kaua'i

Should definitely be explored. Whole SMA permit process is plagued with discretionary authority. Most Kaua'i County litigation is over SMA because of discretionary authority. If creating discretionary authority for minors, assess if it should be statutory or a rule. Will enabling statute or rule be necessary? Can it also apply to majors? Can majors be eliminated? Need rules about when can bypass and when cannot bypass. Best to have it laid out, defined. Is endangered species a cultural resource, or is it environmental. Does this go beyond PASH consideration? Worth it to develop triggers, but should see how it applies in practice. As a guide, good, but still applied case by case.

#### **Recommendation #9**

**The Coastal Zone Management Program should convene workshops of county planning staffs and also of planning directors to share best practices related to:**

**Defining cultural resources and impacts upon cultural resources.**

**Guidelines on appropriate mitigation measures:**

- **What is the appropriate access? Some/none/all?**
- **Are there any guidelines between pedestrian vs. vehicular access?**
- **Depends on area/what is available(parking, etc.)**
- **What are guidelines on buffers?**
- **Provide a list of successful mitigation measures**
- **What are incentives for mitigation?**
- **Develop models of different situations and how to handle it, when need a deeper level of analysis**

Maui

What is protect? Is there a hierarchy for protection? Unique situations where protect lateral access ways. Public policy decision.

With trails, Na Ala Hele used to be proactive with Mike Baker and Bob Hubdy.

Included in the review. Now not. With the other agencies, what responsibility do they feel they have.

Need to have thorough review by State Historic Preservation Division and Na Ala Hele, and Burials Council.

How make the other agencies responsible for that activity respond, to have teeth?

How are other agencies affected?

Know were culturally important – commission on cultural resources – spring in Maliko Gulch. Need to get support from the stream guys. Stream assessment survey. Other agencies need to support planners.  
Appropriate to ask for support data – bring it to their attention. Their authority. Unable to question. E.G. Skippy Hao Will this have an impact? Address this in a letter. Let applicant hunt down DLNR for comment.  
Mandate needs to be far reaching. Will it be through the rules?  
Not have same service that used to get from Na Ala Hele.  
Focus is 6 C – Kathy Daeger in Maui/ Sarah Collins – Moloka’i and Lana’i / Melissa does Maui.

#### C&C

For mitigation, need to have actual examples. Can share examples – examples of conditions on the permit.  
City Council is the major decision maker - ultimately decision-making is in a political forum.  
Examples of tightly worded condition statements that don’t have loop holes can also be shared. This is important to share.

#### Hilo

Agree it would be a good idea. State Office of Planning is in the best position to organize this.

#### Kaua’i

same as above.

#### **Implementation:**

##### **Recommendation #10**

##### **Periodic Workshops**

**Implement the proposed process and hold workshops to share experience and best practices.**

#### Maui

Two year period – where fall in relation to data being compiled. Will it be implemented before the data is in place?  
Review the process when it gets implemented - important

#### C&C

Question: do we need a new process? Can address concerns within existing process. To extent that we can expand the process to re-educate, would be better.

#### Hilo

Have problems with process – timing and establishment of the group.

Kaua'i

Good idea, but how to get it into rules. once process going how do you change it? Hard to implement.

### **Recommendation #11**

#### **Other agencies:**

**Share process with all state and county agencies**

Maui

Not just share information, but require agencies to critically review and follow the Ka Pa'akai guidelines.

Not issue SMA before construction. Can't allow construction before the SMA is issued.

Now, redflagging issuing for shoreline property. but areas out of coastline, but in SMA is constructing before gets SMA. Waiver - I certify that I have all my other permits.

Use Kahakuloa Case - in Hawaiian - it Documented how drilling will affect the taro farmers.

In SMA - include cultural impacts, not to level that we are talking about.

Now it's sent out to OHA. Include a summary from applicant - send to OHA and SHPD, and only for the majors.

Look at the proposed forms - want burden on the applicant - how get the information for the form? Is county supposed to verify? Accountability and Liability?

C&C

no comments

Hilo

State in the best position to share the process with the other agencies.

Kaua'i

State responsibility.

### **Recommendation #12**

#### **List of "Practitioners of Native Hawaiian Culture"**

**Identify and maintain list of "Practitioners of Native Hawaiian Culture" who are willing to review the applications:**

**The options are as follows:**

**A. Individual County Planning Departments**

**B. State Planning Office - State CZM Program**

**C. State Historic Preservation Division - History office**

**D. Compensate Community Associations to assist with the review and maintain list, such as the Hawaiian Civic Clubs or local units of the Queen Lili'uokalani Children's Center**

**E. Office of Hawaiian Affairs - local offices**

**F. University of Hawai'i Hawaiian Studies programs on the island campuses**

Maui

Going to have to provide additional information. Will have to hire someone to assess the area? Take at face value?? Where get information from?

Data base needs to be established, so that when it's implemented, have something to go back to

Agree with Hilo Planners that have the applicant fill out the form and get the reviewers to fill out the form.

Cultural Commission – doesn't have the cultural expertise

Perhaps the University and Immersion program can be asked to assist?

C&C

no comments

Hilo

The State Office of Planning should work with OHA and Hawaiian Civic Groups and UH-Hilo (Ke'elikolani College) to develop the list of cultural experts. County planners not familiar with who the cultural practitioners are.

There are no community councils which are officially part of the process except that by ordinance, major permits get referred to the Kailua Village Design Commission – for applications within the boundary of Kailua, so they can look at the design of buildings. This includes the Industrial area, Queen Ka'ahumanu extension, and Linapuni Street. Waimea has a volunteer design group for design within a certain boundary.

Ka'u Community Council gives input via public meeting

Regarding the reviewers, what would be the source of their authorization? Would they have enforcement capacity? Is there an enforcement goal? If there is a conflict how would it be resolved?

The courts give a mandate, but there is no structure to enforce the mandate.

No need of staff to develop the list and update. Need staff to refer the applications to the reviewers, not to maintain the list.

Kaua'i

If applicant required to do it, need clear guidelines. Should be clear enough, that not have to hire professionals. Not every applicant will spend a lot of money doing the application. Can he go through the process without hiring people? Can it be simple enough that the common person can do it without great expense.

End up with either State Historic Preservation Division or with County Planning Department.

Seems most appropriate for the Historic Preservation Division. When send it to the state, it can be part of their review process.

On the other hand, homerule is important and if have the resources to hire an additional staff member then maybe it will be desirable. Question of review and size of the County. It is still a county permit, yet have state and county review agencies. Minors = 30 days; majors = 60 days. Have to say, not accept application yet, so when accept the application, have to process within 30 days. For minors, don't go to DLNR first. If tell them to go to DLNR first, for the application to be complete, then it would not be part of the 30 day period.

Who is the expert agency in cultural resources and practices that can comment on the recommendations? Who do we believe about impacts, if use reviewers??? Who can make decision about impacts?

Historic Buildings – State Historic Preservation Division

Burials – State Historic Preservation Division.

### **Recommendation #13**

#### **Notice:**

**Send the reviewer form out with notice of application to neighboring residents and landowners**

**Send notice of SMA application and reviewer forms to the local offices of the Office of Hawaiian Affairs**

#### Maui

Agree that notice should be sent out to neighbors, but also need to involve others.

SMA – should the fact that property is in the SMA be a disclosure requirement ?

Subject to rights of ahupua'a tenants is on the property.

By referring to OHA, SHPD, notice of application in the paper – public hearing notice to neighbors.

500 feet public hearing notice. How notify Native Hawaiian organizations? Have leaders on mailing list to be notified about major development – e.g. Dana, Na Kupuna, or applicant present to them.

In some areas, do a cultural study for a region, then provides base line for review.

Ask kupuna familiar with resources to review, but not being compensated, but they care. – otherwise, bulldoze and bring on the condo.

UH – how to centralize, develop information.

Have cultural monitor on the site?

#### C&C

no comments

#### Hilo

Minors

Only notice is in report every two weeks to the Office of Planning and then published in the OEQC.

Timing issue:

This information should be gathered by the application before they submit the application. Not responsibility of the County to send out to the reviewers. Incorporate the review as part of the application. Have as many comments as possible.

#### Majors

There are instructions as to how to send out the notice and must show proof of mailing. The applicant is responsible to provide notice to the neighboring residents, following guidelines provided by the county and must show proof of mailing. At what step to provide this information?

#### Kaua'i

For SMA Majors – applicant sends out notice. Gets sent to the person listed on the real property tax map. If it's just a couple of sheets, not a big thing. Should not overshadow the purpose, which is to notify about a public hearing coming up.

#### Definition #1

**“Cultural” pertains to traditional and customary practices and usage of resources to fulfill responsibilities and rights possessed and exercised by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778.**

#### Maui

Addressed racial issue??  
Could be hanai or marry into the family and still practice or exercise Hawaiian practices.  
What are cultural resources? Need a definition for cultural resources.  
Define the word restore.

#### C&C

Honolulu C&C SMA law quotes, verbatim, the Chapter 205A. Not see need to amend CZM ordinance to include culture. If state law does not need to be amended, then don't see need to amend the ordinance.  
Process, check list, is useful – list of cultural resources and practices.  
Question need to adopt definition/amendments as part of the ordinance. Ordinance can stand if state law can stand. Basis for Chapter 205 is for coastal resources. Definitions take it in another direction. Need to protect cultural resources equally to other coastal resources.  
Define “cultural” in state law. If not need to be defined in state law, no need to define in the rules.

#### Hilo

In process of revising the rules and will incorporate the definition into the rules. see draft

Kaua'i

should follow the definition of the Constitution. prefer one versus 2.

Can give to Professor John Van Dyke and inform him that the Kaua'i County is considering it and he should consider it too.

### **Definition #2**

**"Native Hawaiian Rights" means those rights defined in and protected under HRS 1-1, HRS 7-1, HRS 174C-101, Article XII, Section 7, of the Hawaii State Constitution, and in rulings of Hawai'i case law.**

Maui

Does this over-regulate the practitioner on the land? Will it limit what the practitioner can do?

Definitions of tenants - ahupua'a - see case law -

C&C

no comments

Hilo

In process of revising the rules and will incorporate the definition into the rules. see draft

Kaua'i

Can give to Professor John Van Dyke that the Kaua'i County is considering it and he should consider it too.

### **Definition #3**

**"Practitioners of Hawaiian Culture" means Native Hawaiians or kama'aiana (native born persons) who are acknowledged by the community to have knowledge and experience pertaining to traditional and customary practices and usage of resources to fulfill responsibilities and rights possessed and exercised by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778**

Maui - no comments

C&C

no comments

Hilo

have problems with process, so not included

Kaua'i

do we need to define Native Hawaiian or kama'aina? is (native born persons enough for kama'aina?)

How do we prove they are acknowledged by the community to have knowledge?

Note: the virtual taro patch has a list of experts by district and by skill.

Even if process is part of application, it still needs to be defined.

#### **Procedures / Objectives and Policies:**

**(1) Insert "cultural" into the objectives, procedures and rules wherever environmental and historical is stated and referred to.**

**(2) Recommend that the following be part of the policy section of the SMA rules:**

**The department or the commission shall preserve and protect the reasonable exercise of Native Hawaiian rights to the extent feasible when reviewing an application for a permit. [79 Hawaii 425 (1995), "cert. denied, 517 U.S. 1163 (1996)" and 94 Hawaii. 31 (2000)] [fn] the state does not have the "unfettered discretion to regulate the rights of ahupua'a tenants out of existence."**

**(3) Recommend that the following be part of the SMA assessment and determination procedure and SMA emergency permit procedure:**

**The County Planning Department and or Planning Commission provide a written independent assessment which shall include the following: (a) the identity and scope of 'valued cultural, historical, or natural resources' in the application area, including the extent to which traditional and customary native Hawaiian rights are exercised in that area; (b) the extent to which those resources - including traditional and customary native Hawaiian rights will be affected or impaired by the proposed action; and (c) the feasible action, if any, to be taken by the department to reasonably protect native Hawaiian rights if they are found to exist. [94 Hawaii. 31 (2000)]**

Maui - no comments

C&C

no comments

Hilo

(1) Have included "cultural" where appropriate in the draft of SMA rules changes Act 169 - addresses cultural in relation to historical - enacted in 2001

(2) Questioned why the footnote is included. Explained that it was to clarify "reasonable" and "feasible". Planners noted that reasonable was defined in an federal an Indian Law Case out of Washington state. Easement was provided because of a treaty - However it stated that Indians can fish but not camp and that access does not allow criminal activity on the property

(3) The ruling referred to the State, does it really apply to the counties?  
If go to a hearing, there is an independent assessment, be in an advisory capacity  
What is the bar? standard?

Can't defer

Land Use Commission has used this to expand its areas of responsibility -

Kaua'i

#1 - Can give to Professor John Van Dyke and inform him that the Kaua'i County is considering it and he should consider it too.

#2 Can't we quote the constitution rather than the court case?

#3 Can we be provided a model of how this has been implemented? by the Land Use Commission or another county?

perhaps take out "written"

need to have all of the archaeological surveys and information to do an assessment.

Need to expand and make more clear to the applicant.

Need to ask questions about impacts and mitigation on the applicant form.

Make it easier to do the assessment, so it's in a clear form so that the county can do the assessment.

Role of reviewers needs to be consistent by each county. If all of the counties agree, no problem with consistency. If inconsistent, may need statutory change.

### **Form/Check List**

Maui

Need to send to other agencies to see if it is accurate.

One SHPD person for the entire island, is not sufficient.

Think it should be filed with the Bureau of Conveyance. Information stays with the property. Recommend recording. Permits get lost. Conditions get lost.

\*\* Are there other County rules that need to conform to Chapter 205 A?

Issues refer outside of SMA - Kaupulehu was not SMA but land use related. Any land use decision - needs to incorporate.

\*\*\*\*Other than SHPD, should send to other agencies, e.g. Na Ala Hele, Aquatic Division if a stream, wildlife and forestry. Assumptions of who have the information. Know who to refer it to. If abutting a stream, should go to Aquatic Resources and Water Commission.

Every action at state and county, should be consistent with objectives and policies of 205A. Only federal actions are excluded:

Shoreline Setback Variances.

Aside from 205A - areas where Native Hawaiian issues are involved.

Should incorporate into other permits:

Grading and Grubbing, building permits, subdivisions,

Other areas that both state and county implement that guide us in the rule making arena.

\*\*\*Legislatively - all land related permits needs to comply with the Coastal Zone Management Act. All county ordinances and rules need to comply with the Coastal Zone Management Act. It's implicit, but it should be explicit

\*\*\*\*Have SMA enforcement, not CZM enforcement - e.g. grading, grubbing, which affects drainage impacts coastal zone.

\$100,000 fines for SMA

C&C  
useful

Hilo  
no comments

Kaua'i

Have applicant address the 3 areas from the Ka Pa'akai Ruling.

For reviewer, 10 days is short. If put the process before the application is submitted/accepted can extend the review period.

If not submit in 10 days, does that waive their right to review?

Can we change to 15 days?

**Process:**

Maui

no comments

C&C

Feel that have elements of the process incorporated into the rules.

How to address cultural resources specifically? LUO has certain regulations for county zoning. There are many court decisions that say how to administer county zoning.

Don't amend law every time get a ruling on zoning.

Feel that these already exist in the process.

Short of Making Amendments:

Can easily distribute among the planners. Have a check list that use now, might incorporate it.

p. 20 already have internal and external review for the 5 points raised on p. 20 - referred to engineering section. Is more finely tuned. Look at possibility of excess run off - resulting in degradation of coastal waters. Will there be excess drainage damaging the resources on that property?

Hilo

1. lumping in major and minor permits, from a timing standpoint is problematic.

2. Instructions would apply to all majors and minors that don't get screened out

3. Instructions can list the screening qualities and characteristics such that the applicant would not have to do a more thorough review

Good idea to have the applicant provide the information.

For the majors, have a more detailed report / majority of minors say don't know if it's feasible.

Problem is how to review the application. time consuming. outsource to an archaeologist.

Go to NSF to get a grant proposal to develop a cultural resources mapping.

State public disclosure case - not make information available, so

Have the review done prior to the submission, because of the time factor.

If there is a conflict - have the applicant and the reviewer work it out prior to submittal.

If can't come to an agreement, can submit application, and will be sending it out to OHA and SHPD for review.

\*\*\* Include OHA review on the majors

Facilitation to be provided between the applicant and the reviewer.

"C." too detailed. doesn't appear to relate to the issue. utilize as a screen for minor permits. It is included in the major application

D. Major and minor don't get screened out

Have the review process up front, before the application is submitted, especially the burial council. Review by the community reviewers.

OHA should affirm that it gets a review. Doesn't mean that have endorsed it.

Suggest Revised Process:

B. Qualify that this should only apply to the minor permits that are not screened out.

Delete C.

1. Have applicant assess if the minor permit should undergo a full review, based on a list of screening criteria to be developed by the county planners.

2. Have the applicant conduct an assessment of the resources.

3. Have the applicant submit the assessment to the community practitioner reviewers and neighbors for input and consultation.

4. Applicant submit the initial assessment, the reviewer and neighbor input, and any agreements or outstanding issues as part of the application. (and mitigation)

5. Department will review application and make an independent assessment and determination of impacts and mitigation measures.

Legal challenge to the reviewers

Question who are reviewers - not just anti-development reviewers and potential for legal challenges.

\*\*\*\*\*Provide reference to laws that frame SMA Rules and Regulations

Statement:

Effort to encourage neighborly relations; consideration of longtime residents and users of cultural resources

Office of Planning needs to take lead. Want to encourage voluntary cooperation and at the same time provide a process in the event that it may end up in court.

\*\* What is the Smithsonian criteria for a living treasure/expert

Kaua'i

Look 18 - resources, impact, mitigation

a. identify b. extend of impact c. what propose to mitigate.

Existing C. can be helpful, could be in another part of the form. Can expand on the project assessment. May be more environmental. Maybe the form needs to be updated?

All of this should apply to all of the permits.

Would we need to apply to all of the permits????

D. #2 delete. departure, costs money

Issues that remain unresolved, who resolves it prior to the permit? reviewers need to understand that the Planning Commission

#6 memorialize in the application record.

Skip to #7 - not able to do mediation.

Cultural mapping has limitations.

p. 20-21 - Committee of Reviewers - don't know if they will be subject to sunshine law.

If don't meet together as a group, probably not. If want to meet, run into sunshine law.

Would require minutes, posting notices, etc. Not sure if it would apply. Rather than a panel, individual reviewers.

Have reviewers as voluntary. Encourage OHA to assist in evaluation.

Will increase notice to 85% of the abutting property owners.

If reviewers are mandatory, would have to put it in the rules.

Would best fit under OHA. Would not be a limitation to sue.

OHA can assist in the permitting process by helping to put the reviewers in touch with the applicants, with the counties.

If we can the applicant do all of the assessment, whether they can consult with OHA, using the reviewers. Then don't have to worry about sunshine law. Just getting input from another resource group to help with the assessment.

Alternative, if bypass the community, is to expand the assessment form. Would meet the minimum.

Bigger projects will get the attention - take to KHPRC which is staffed by the Kaua'i Planning Department.

Policy side is good, but implementation side is difficult.

### **Short of Formal Process:**

Might be able to look at application instructions. Application instructions can provide guidelines on what are cultural resources.

Court cases apply to all permits, not just SMA.

Many of the applicants are already aware of the need to incorporate cultural assessment as part of the Environmental Assessment.

Review panel - encourage a process that works within the current review processes.

Start out with assessment, notice in OEQC Bulletin, 30 days for draft EA, incorporate public hearing in locality before City Council. Letter of notice goes to - 300 foot radius and community groups

County sends out letter of notice. To landowners - property tax information. 300 foot radius, or larger. Notice of the application being accepted for processing and of the

hearing date/location. Copies of the application are sent to libraries and Satellite City Hall. Council Hearing, with 'Olelo broadcast

If OHA has list, can easily include them on the list for review and comment.

There is follow up a lot of the time. Not want to see a specialized process that gets tacked on and adds time and confusion to the permitting process.

Have many different clients – applicants and the public. Can't tie up. Need decision in timely manner.

Possibility of disagreement with review panel, would tie up the process.

If can incorporate review within existing process, would work best.

City Council resolves issues where there are conflicts. Planners take to Council and disclose disagreement and nature of the disagreement.

Neighbor Islands don't have as full public disclosure as C&C

Since looking at all resources, would need to develop one for other resources too.

For further information applicant can be referred to the Office of Environmental Quality – Cultural assessment guidelines.

Instructions could reference Coastal Zone Management Program for guidelines on what kinds of resources need to include.

Section C. of the Instructions refers to “cultural” and can be expanded.

Changing the Instruction sheet is easier than changing the ordinance. Can expand the instructions to include definition of “cultural” and refer to guidelines regarding listing of the resources.

Planners can keep this report in mind in any future review and amendment of the rules.

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