

Ka Pa'akai O Ka'Aina v. Land Use Com'n, State of Hawai'i
Hawai'i, 2000.

Supreme Court of Hawai'i.

KA PA'AKAI O KA'AINA, an association of Ka Lahui Hawai'i, a Hawaiian nation, Kona
Hawaiian Civic Club, a Hawai'i nonprofit corporation, and Protect Kohanaiki Ohana, a
Hawai'i nonprofit corporation, Ka Lahui Hawai'i, Kona Hawaiian Civic Club and Protect Ko-
hanaiki Ohana, Plaintiffs-Appellants/Appellants

v.

LAND USE COMMISSION, STATE OF HAWAII; Office of State Planning, State of
Hawai'i; County of Hawai'i Planning Department; Ka'Upulehu Developments, now known as
Hualalai Development Company, a Delaware Corporation, Appellees/Appellees,
and Plan To Protect, a Hawai'i nonprofit corporation, Appellees/
Cross-Appellants/Appellants/Appellants.
Plan To Protect, Appellant/Cross-Appellants,

v.

State of Hawai'i, Land Use Commission, Appellees/Appellees

No. 21124.

Sept. 11, 2000.

Native Hawaiian groups appealed state Land Use Commission's (LUC) grant of developer's petition to reclassify approximately 1,000 acres of land from state land use conservation district to a state land use urban district. The Third Circuit Court affirmed LUC's decision, and granted developer's petition for land use boundary reclassification. Native Hawaiian groups appealed. The Supreme Court, Ramil, J., consolidated appeals and held that: (1) native Hawaiian organizations were aggrieved parties with standing to appeal action of LUC; (2) LUC's findings of fact and conclusions of law were insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians; and (3) LUC improperly delegated to private developer its constitutional obligation to preserve and protect customary and traditional rights of native Hawaiians.

Vacated and remanded.

West Headnotes

[1] **Boundaries 59** ↪4

59 Boundaries

59I Description

59k4 k. Natural and Permanent Objects. Most Cited Cases

An "ahupua'a" is a land division usually extending from the mountains to the sea along rational lines, such as ridges or other natural characteristics.

[2] **Administrative Law and Procedure 15A** ↪749

the LUC's decision.^{FN22}

FN22. Accordingly, we note that KD's contention that Ka Pa'akai's and PTP's interests have been "served" is wholly immaterial to a determination of standing.

B. The Land Use Commission's obligations to preserve and protect customary and traditional practices of native Hawaiians

PTP asserts that the LUC failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected "to the extent feasible." Correlatively, Ka Pa'akai contends that the LUC abused its discretion in arbitrarily and capriciously delegating its authority to consider the effect of the proposed development on such rights to KD and its landlord. We agree with both contentions and, in vacating and remanding the LUC's order, take the opportunity to review the LUC's obligations when acting upon a petition for land use boundary reclassification.

1. The LUC's obligations to independently assess the impact of the proposed reclassification on traditional and customary practices of Hawaiians

Under HRS § 205-17(3)(B), "[i]n its review of any petition for reclassification of district boundaries pursuant to this chapter, the [Land Use C]ommission shall *specifically consider* the following: ... The *impact* of the proposed reclassification on the following areas of state concern: ... Maintenance of *valued cultural, historical, or natural resources* [.]” (Emphases added.) HRS § 205-4(h) mandates that “[n]o amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is ... consistent with the policies and criteria established pursuant to sections 205-16 and 205-17.”

In accordance with those statutory directives, Hawai'i Administrative Rule (HAR) § 15-15-77 provides that the LUC, “in its review of any petition for reclassification of district boundaries ... shall specifically consider the following; ... [t]he impact of the proposed reclassification on the following areas of state concern: ... [m]aintenance of valued cultural, historical, or natural resources.” HAR § 15-15-77 (1986). In order to comply with HRS § 205-4(h)'s mandate, the LUC is required to enter specific findings that, *inter alia*, the proposed reclassification is consistent with the policies and criteria of HRS § 205-17(3)(B). Such findings “are subsidiary findings of basic facts and are necessary to support the ultimate finding” that the criteria of HRS § 205-17 have been met. *See Kilauea Neighborhood Ass'n v. LUC*, 7 Haw.App. 227, 230, 751 P.2d 1031, 1034 (1988) (“Under [HRS] § 205-4(g), the LUC is required to file findings of fact and conclusions of law when acting upon a petition for reclassification.... [I]n order to allow [an appellate] court to track the steps by which the LUC reached its finding that a land use boundary amendment complies with the provisions of [HRS] § 205-16.1, ... it [is] necessary for the LUC to make findings on the pertinent criteria established there. Such findings are subsidiary findings of basic facts and are necessary to support the ultimate finding that the criteria of § 205-16.1**1082 *45 have been met.”).^{FN23} *See also Hui Alaloa v. Planning Commission of the County of Maui*, 68 Hawai'i 135, 136, 705 P.2d 1042, 1044 (1985) (“The planning commission, in order to comply with the CZMA mandate, is required to make findings that the proposed development projects are consistent with [the

CZMA's] policies and objectives.”)

FN23. Additionally, because the petition area lies in the special management area, the LUC was required to implement the objectives and policies of the Coastal Zone Management Act (CZMA). HRS § 205A-4 specifically requires that all agencies within their scope of authority “give ‘full consideration ... to cultural ... [and] historic ... values as well as to needs for economic development’ ” when implementing the objectives and policies of the Coastal Zone Management Program. *PASH*, 79 Hawai'i at 435, 903 P.2d at 1256 (citing HRS § 205A-4(a)) (emphasis deleted).

[18] In addition to its specific statutory obligations, the LUC is required under the Hawai'i Constitution to preserve and protect customary and traditional practices of native Hawaiians. Under Article XII, section 7 of the Hawai'i 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.

This provision places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies “the power to protect these rights and to prevent any interference with the exercise of these rights.” Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 639 (1980). See also *PASH*, 79 Hawai'i at 437, 903 P.2d at 1258; HRS §§ 1-1 FN24 and 7-1 FN25 (providing two additional sources from which gathering rights are derived). Article XII, section 7's mandate grew out of a desire to “preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights.” Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 640. The Committee on Hawaiian Affairs, in adding what is now article XII, section 7, also recognized that “[s]ustenance, religious and cultural practices of native Hawaiians are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems.” Comm. Whole Rep. No. 12, in 1 Proceedings of the Constitutional Convention of 1978, at 1016.

FN24. HRS § 1-1 provides:

The common law of England as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise 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 of the State.

FN25. HRS § 7-1 states:

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

provided that this shall not be applicable to well and watercourses, which individuals have made for their own use.

[19][20] In the judicial decisions following its enactment, this court reemphasized that “the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7.” *See PASH*, 79 Hawai'i at 442, 903 P.2d at 1263. *See also Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982) (recognizing Hawai'i's constitutional mandate to protect traditional and customary native Hawaiian rights); *Pele Defense Fund*, 73 Haw. at 620, 837 P.2d at 1272 (reaffirming the “rudiments of native Hawaiian rights protected by article XII, § 7” of the Hawai'i Constitution). In *PASH*, we stated that “[t]he State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights ... necessarily allows the State to permit development that interferes ****1083 *46** with such rights in certain circumstances.... Nevertheless, *the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.*” *PASH*, 79 Hawai'i at 450 n. 43, 903 P.2d at 1271 n. 43 (emphasis added). As such, state agencies such as the LUC may not act without independently considering the effect of their actions on Hawaiian traditions and practices. *See id.* at 437, 903 P.2d at 1258.

This court has also continued to recognize the powerful historical basis for ensuring the protection of traditional and customary Hawaiian rights. We have observed, for example, that the introduction of Western private property concepts profoundly limited native Hawaiians' traditional system of land tenure and subsistence. *See Kalipi*, 66 Haw. at 6-7, 656 P.2d at 749 (“In ancient times ... [t]he native people existed by a subsistence economy and the division of land ... enabled persons within it to obtain virtually all things necessary to survival.... With the coming of the influence of the west, the traditional system became increasingly less viable. A trading economy gradually replaced the subsistence economy and the land and its resources came to have a value apart from the labor of those who worked it.”). *See also Pele Defense Fund*, 73 Haw. at 618-621, 837 P.2d at 1270-72 (discussing historically exercised access and gathering rights for subsistence, cultural or religious purposes); *PASH*, 79 Hawai'i at 445-447, 903 P.2d at 1266-68 (describing relevant legal developments in Hawaiian history regarding land tenure).^{FN26}

FN26. *See also* Native Hawaiian Rights Handbook 223 (1991) (Melody Kapilialoha MacKenzie, ed.) (recognizing that “the tension between Western private property concepts and the exercise of native gathering rights has resulted in increasing limitations on those rights”); D. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. Haw. L.Rev. 321 (1998) (describing, among other things, the historical basis for traditional and customary practices).

In *PASH*, this court had occasion to address, *inter alia*, whether the Hawai'i Planning Commission was required to protect the traditional and customary practices of the nature asserted by *PASH*. *Id.* at 439, 903 P.2d at 1260. In this case, the LUC's duty to protect the traditional and customary practices asserted by the native Hawaiian members of Ka Pa'akai and PTP is undisputed. We are therefore called on to determine whether the LUC discharged that duty.

2. Analytical framework

Article XII, section 7 of the Hawai'i Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians *to the extent feasible* when granting a petition for reclassification of district boundaries. *See PASH*, 79 Hawai'i at 450 n. 43, 903 P.2d at 1271 n. 43 (emphasis added). In order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable. In order for native Hawaiian rights to be enforceable, 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. *See PASH*, 79 Hawai'i at 447, 903 P.2d at 1268 ("A community development proposing to integrate cultural education and recreation with tourism and community living represents a promising opportunity to demonstrate the continued viability of Hawaiian land tenure ideals in the modern world."); *Kalipi*, 66 Haw. at 7, 656 P.2d at 749 ("Our task is thus to conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title."); Comm. Whole Rep. No. 12, in 1 Proceedings of the Constitutional Convention of 1978, at 1016 (1980) ("it is possible, with work, to both protect the rights of private landowners and allow for the preservation of an aboriginal people").

[21] We therefore provide this analytical framework in an effort to effectuate the State's obligation to protect native Hawaiian ****1084 *47** customary and traditional practices while reasonably accommodating competing private interests: 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" ^{FN27} 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.FN28

FN27. We decline to define the term, "cultural resources." "Cultural resources" is a broad category, of which native Hawaiian rights is only one subset. In other words, we do not suggest that the statutory term, "cultural resources" is synonymous with the constitutional term, customary and traditional native Hawaiian rights.

FN28. Importantly, we note that the 2000 Hawai'i State legislature passed H.B. No. 2895, H.D. 1, entitled, "A Bill for an Act Relating to Environmental Impact Statements." It amends HRS § 343-2 to include the effects of economic development on *cultural practices*:

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and *cultural practices* of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

....
“Significant effect” means the sum of effects on the quality of the environment, including actions that ... adversely affect the economic welfare, social welfare, or cultural practices of the community and State.

In enacting the provision, the legislature found that “there is a need to clarify that the preparation of environmental assessments or environmental impact statements should identify and address effects on Hawai‘i’s culture, and *traditional and customary rights*.” (Emphasis added.) It recognized that “the native Hawaiian culture plays a vital role” in the preservation of Hawai‘i’s “aloha spirit” and that “Articles IX and XII of the state constitution, other state law, and the courts of the State impose on government agencies a duty to promote and protect cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups.” Most importantly, it observed that

the past failure to require native Hawaiian cultural impact assessments has *resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture*. The legislature further finds that due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.

(Emphasis added.) See also Stand. Comm. Rep. No. 3298 (observing that, “although the Hawai‘i State Constitution and other state laws mandate the protection and preservation of the traditional and customary rights of native Hawaiians, the failure to require environmental impact statements to disclose the effect of a proposed action on cultural practices has resulted in the loss of important cultural resources. Your Committee believes that this measure will result in a *more thorough consideration of an action’s potential adverse impact on Hawaiian culture and tradition, ensuring the culture’s protection and preservation*.”) (Emphasis added.) The bill was subsequently signed into law by Governor Benjamin Cayetano as Act 50.

We note that, while H.B. 2895 does not apply retroactively to the case at hand, its requirements and purposes provide strong support for the framework we have articulated herein.

3. *The LUC’s findings and conclusions are insufficient to allow a determination as to whether it fulfilled its constitutional obligation to preserve and protect customary and traditional rights of native Hawaiians.*

[22] In this case, the LUC entered a handful of findings potentially implicating native Hawaiian rights. In FOF No. 48, the LUC found that KD will, in the future, establish its RMP to, among other things, balance KD’s interest with the “traditional needs” of Hawaiians:

48. As part of the proposed Project, Petitioner *will develop* and implement a Resource Management Plan (“RMP”) which *would coordinate* development with native Hawaiian rights to coastal access for the purpose of traditional cultural practice, West Hawai‘i’s demand for new coastal recreational opportunities, and the creation ****1085 *48** of a buffer for Kona Village Resort. Under Petitioner’s *concept of the RMP*, the goals of the RMP are to provide for resource management and ensure public access to the coastal area which balances Petitioner’s needs with the traditional needs of native Hawaiians and the recreational needs of the public.

The LUC then identified some of the “resources” found within the petition area and observed, in particular, that Hannah Springer and her family have traditionally gathered salt in the Kalaemano area:⁷³ The shoreline portion of the Property is used for fishing and gathering of limu, [‘]opihi, and other resources, and for camping. The area closest to Kalaeman[o] was

traditionally used for salt gathering. Hannah Springer, a kama'aina of the mauka portion of Ka'upulehu, and her 'ohana have traditionally gathered salt in this area on an occasional basis.

The LUC found that these resources would be preserved as part of KD's 235-acre RMP. This RMP, according to the LUC's findings, would be consistent with KS/BE's ahupua'a plan, which would, in the future, involve native Hawaiians in its implementation:⁷⁴ The areas for fishing, limu, [']opihi, and salt gathering, and general recreation are to be preserved and managed as part of Petitioner's RMP, thus perpetuating these activities on and makai of the Property.

....
88. The proposed Project will reasonably preserve and perpetuate cultural resources such as archaeological sites, the coastal trail, areas of fishing, [']opihi, and limu gathering, salt gathering, and general recreation in the proposed areas within Petitioner's RMP. Petitioner's RMP area totals approximately 235 acres.

89. KS/BE has formulated a plan to manage and protect cultural resources within the entire ahupua'a of Ka'upulehu. *Petitioner's RMP will be consistent with* and further the objective of the ahupua'a plan. KSBE's ahupua'a plan includes designated geographic zones that define the natural, cultural, and historic resources of Ka'upulehu from the mountain to the sea. The ahupua'a plan *will involve native Hawaiians*, particularly the 'ohana who are kama'aina to the subject Property, to relink the traditions and practices that are rooted in that Property. KSBE will form a non-profit entity in perpetuity to oversee the formulation and implementation of the Ka'upulehu ahupua'a plan.

Condition No. 18 of the boundary amendment provided that "Petitioner shall preserve and protect any gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural and religious practices on the subject property." The LUC also noted that KD "will develop and implement its RMP which would in the future coordinate development with native Hawaiian rights, recreational opportunities, and the creation of a buffer for Kona Village Resort."

A review of the record and the LUC's decision leads us to the inescapable conclusion that the LUC's findings and conclusions are insufficient to determine whether it discharged its duty to protect customary and traditional practices of native Hawaiians to the extent feasible. The LUC, therefore, must be deemed, as a matter of law, to have failed to satisfy its statutory and constitutional obligations.

First, apart from its finding that "Hannah Springer, a kama'aina of the mauka portion of Ka'upulehu, and her 'ohana have traditionally gathered salt in this area on an occasional basis," the LUC failed to enter any definitive findings or conclusions as to the extent of the native Hawaiian practitioners' exercise of customary and traditional practices in the subject area.^{FN29} Instead, as discussed further ****1086 *49** below, the LUC charged KD with blanket authority to "preserve and protect any gathering and access rights of native Hawaiians" without identifying those rights or providing any specificity as to the locations on which native Hawaiians could be expected to exercise them. *See infra* section III.B.4.

FN29. Although the LUC found that "[t]he shoreline portion of the Property is used for fishing and gathering of limu, [']opihi, and other resources, and for camping[.]" it did not indicate whether any of these uses were customarily and/or traditionally exercised

by Hawaiians on the subject property.

Some group members also testified that they gathered h 'uke, k pe'e and Pele's tears, and knew families who "[took] care of the resources in practicing their traditional culture" in the proposed project area. The LUC made no findings or conclusions whatsoever regarding these uses.

Moreover, none of the LUC's findings or conclusions addressed possible native Hawaiian rights or cultural resources *outside* of KD's 235-acre RMP, such as Ka Pa'akai's members' use of the mauka-makai trails to reach salt-gathering areas, the religious significance of the 1800-1801 lava flow, or the gathering of Pele's Tears. At the hearing, Hannah Springer testified that she and her family "utilize the mauka/makai trails as well as the lateral coastline trails" to reach the coastline, where they gather salt. She averred that "[t]hese trails are important to us to substantiate the continuity with the ancestors ... [and that she and her family] have a sincere appreciation for having the opportunity to literally walk the trails of the ancestors." FN30 She also asserted that she, as part of Pua Kanahale's hula halau, gathered both k pe'e and Pele's Tears within the petition area. FN31 The LUC did not articulate whether the area lying outside of the RMP *lacked* cultural resources or that the resources present *lacked* *significance* warranting protection or management. These omissions are of particular significance because these activities fall outside the "protection" of KD's conceptual RMP area.

FN30. Springer also testified that "[w]e have particular examples with reference to this project as described being a part of Kalaeman[o], it is known that people from Mahai'ula, from Makalawena, from Kukio would travel down the coastline from their home ahupua'a to Kalaeman[o] to gather salt."

FN31. Pua Kanahale likewise testified to the gathering of k pe'e.

Equally important, the LUC made no specific findings or conclusions regarding the *effects* on or the *impairment* of any Article XII, section 7 uses, or the *feasibility of the protection* of those uses. Instead, as mentioned, the LUC delegated unqualified authority to KD, by way of Condition No. 18, to assess what methods, if any, to employ to protect native Hawaiian rights. At the hearing, Springer testified that, "[b]ecause of the quality of the salt for which Kalaemano is renowned is based upon the water quality, it becomes a water quality issue. If indeed a great amount of topsoil is imported and dry wells are utilized to accommodate runoff, we might assume that the quality of the waters off of Kalaeman[o] may be subject to ... degradation ... and that would certainly have a detrimental impact upon the salt." FN32 She further averred that, "particularly because members of our family and through [sic] our family friends utilize [the salt] for religious purposes, and because of the high quality with regard to cleanliness of that salt, anything that would tarnish or degrade the quality of that salt would degrade the quality of our religious practice."

FN32. Springer further testified that "in particular, if we are going to gather, say, salt, say, to give to the teachers who will be using it for ceremonial purposes, ease of access is not necessarily critical to the performance of the practice. What is critical to the performance of the practice is that the body, and thus the spirit, becomes imbued with the character of the land; that by moving at a pace other than the pace of our workaday world, we are allowed to experience and be imbued with the characteristics of the land, the quiet, as well as what we see on our walk, all of which is setting the tone for the

gathering that might occur.”

Moreover, Leimana Damate, of KHCC, testified that “[t]he area in question, if developed, will adversely affect the gathering activities and impact the access rights of Hawaiians, particularly in the area known as Kalaeman[o]....” She further asserted that “[t]he area of Kalaeman[o] was a source of gathering for the whole area of Kekaha and continues to be used by Hawaiians today. The development will compromise these gathering practices significantly.” Finally, she submitted that she and others “embrace the practice of using the ahupua‘a as a model for integrated planning. This planning includes the protection and conservation of all waters and other resources, embracing the ahupua‘a custom and tradition from the mountains to the sea, including forest reserves, streams, anchialine ponds and coastal waters. This practice ... would be curtailed by the Ka‘upulehu Development.” *See also* **1087 *50 Section III.A. (describing group members' testimony as to various cultural resources within the petition area). In rendering its findings and conclusions, the LUC failed to assess any of this potentially relevant testimony regarding possible effects on or impairment of Ka Pa‘akai's members' traditional and customary practices. FN33

FN33. Aside from a finding on scientifically-identified archeological sites in the petition area, *see* FOF No. 78, the LUC's findings are, at best, ambivalent as to what the potential impact on valued cultural resources might be.

If the practice of native Hawaiian rights being exercised will be curtailed to some extent by the land use reclassification and the resulting development, the LUC is obligated to address this. Indeed, the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection. Requiring these minimal prerequisites facilitates precisely what the 1978 Constitutional Convention delegates sought: “badly needed judicial guidance” and the “enforcement by the courts of these rights[.]” *See* Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 640. *See also Pele Defense Fund*, 73 Haw. at 619-20, 837 P.2d at 1271 (“[I]n reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.”) (Quoting Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 640.)

4. *The LUC improperly delegated its duty to KD.*

[23] KD argues, however, that Hawaiian rights are adequately protected because the LUC's Condition No. 18 requires KD to “preserve and protect any gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural and religious practices on the subject property.” KD further maintains that its conceptual RMP will adequately protect any such rights. This wholesale delegation of responsibility for the preservation and protection of native Hawaiian rights to KD, a private entity, however, was improper and misses the point. These issues must be addressed *before* the land is reclassified.

In *Hui Alaloa*, this court held that, contrary to statutory mandates, the Maui Planning Commission impermissibly delegated its authority to determine whether a development complied with the policies and objectives of the CZMA to the applicants for a special management

