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HRD08/2394 G

February 22, 2008

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Molokai Properties Limited  
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Honolulu, HI 96813

**RE: Request for consultation on the Draft Environmental Impact Statement (EIS) for the proposed Lā'au Point, Lā'au, Moloka'i; TMKs: 5-1-002:030, 5-1-006:157, 5-1-008:004, 003, 006, 007, 013, 014, 015, 021 and 025**

Dear Peter Nicholas,

The Office of Hawaiian Affairs (OHA) is in receipt of your December 20, 2006, request for comments on the above project, which would allow for the reclassification of 875 acres from State Agriculture to Rural and the subsequent creation of 200, two-acre, rural-residential lots; an open-space buffer; roads and infrastructure; expansion of the Conservation District; creation of a cultural protection zone for archaeological sites; easements to protect subsistence gathering; and two public shoreline parks. OHA offers the following comments.

Please note that OHA takes guidance from Article XII, Section 7, of the Constitution of the State of Hawai'i, which states:

TRADITIONAL AND CUSTOMARY RIGHTS, Section 7. 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.

As noted by the Supreme Court of the State of Hawai'i, 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, to the Constitution, 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.

OHA also has statutory mandates to protect the cultural and natural resources of Hawai‘i for its beneficiaries – all Hawaiians, in part through educating and assessing public and private entities that impact upon Hawaiians. For example, the Hawaii Revised Statutes (HRS) mandate that OHA “[s]erve as the principal public agency in the State of Hawaii responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; . . . and [t]o assess the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians.” (HRS § 10-3)

Keeping these responsibilities in mind, OHA has a series of general comments and specific concerns with the applicant’s Draft EIS, which will be addressed below.

### **Coastal Zone Management Act Compliance**

Prior to issuing a Shoreline Management Area permit, the Maui Planning Department must make findings that the proposed development is consistent with the policies and objectives of the state Coastal Zone Management Act (CZMA). One of these objectives is to protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems. (HRS § 205A-2(b)(4)(a)). As such, OHA is pleased that the applicant intends to comply with federal, state and county water quality standards.

However, we wish to note that Table 11 should reflect that a Special Management Area major permit is required. Further, any project and its potential impacts to State waters must meet the following Clean Water Branch criteria:

- Anti-degradation policy (Hawaii Administrative Rules (HAR), Section 11-54-1.1), which requires that the existing uses and the level of water quality necessary to protect the existing uses of the receiving State water be maintained and protected.
- Designated uses (HAR, Section 11-54-3), as determined by the classification of the receiving State waters. (In this case AA.)
- Water quality criteria (HAR, Sections 11-54-4 through 11-54-8).

As such, OHA requests that these requirements be fully addressed in this environmental review.

### **Use of State and County lands**

OHA queries as to how state and county lands will be specifically affected by this proposed project. The proposed uses are a trigger for the EIS process and are relevant and need to be known so that they can be adequately commented on. If the proposed project is not planned or described enough to address all future instances of affecting these lands, then the environmental review process is not adequate. (See DEIS, page 3)

### **Ultimate size of the project**

The DEIS holds numerous times that, "This project will consist of no more than 200 rural-residential lots, each approximately 1.5 to 2+ acres in size." (DEIS, pages 4, 6, and 28). OHA finds these types of statements to be misleading at best. In reality, and as stated on page 243 of the DEIS, "the maximum potential dwellings that could ever be built in the subdivision are a total of 300." Therefore, we urge that the applicant remove all references of 200 residences and replace them with the truthful fact as finally disclosed in this latest DEIS.

### **Fencing**

OHA notes that a 382-acre open space "buffer area" is proposed that will surround the development. We are concerned because the "mauka area will be defined by a deer and livestock fence to minimize conflicts with adjacent subsistence hunting" and will "protect the open space and coastal conservation areas from degradation by livestock and deer." (DEIS, page 7) OHA finds it amusing that a fence will accomplish these two stated objectives. Surely, a fence may stop a deer, but not a bullet. If there is a potential for our beneficiaries to be practicing their constitutionally protected hunting and subsistence rights in close proximity to houses, something more substantial than what OHA imagines a 382-acre deer fence to look like will need to be arranged. As such, we inquire as to the nature of this fence and ask for elaboration. We also suggest that this fence and buffer space could be seen as being more about creating a feeling of exclusivity than stopping stray bullets from potentially killing people.

OHA also points out that the deer and livestock are now, and have been for some time, in the project area and these same areas seem to be doing just fine. There is no need for a fence to protect the area from what exists now. Otherwise, this fencing is really more about creating both a feeling of exclusivity and a physical manifestation of this feeling.

This also is in opposition to the statement made in this same section that, "Lā'au Point aims to attract people who respect the unique character of the site and Moloka'i". (DEIS, page 7) Most Moloka'i residents do not have a "buffer area" and a fence separating them from their

environment or local neighbors. Page 10 of the DEIS similarly states that, "An important objective of the Lā'au Point project is to retain Moloka'i's rural island lifestyle." Yet, all lots with frontage to the ocean will be required to have a fence that creates "a physical separation" between the lots and the public space in front of their houses. (DEIS, page 50)

OHA is also disturbed by the CC&R that allows homeowners only to have access through gates to the open space areas and public trust shoreline areas that are "being protected for subsistence gathering." (Ibid.) Further, in the Lā'au Point declaration of covenants section 5.12 it states that, "All residential Lots shall have a minimum building setback from its Oceanside boundary of fifty (50) feet. This **Section 5.12** is hereby designated to be a Master Plan Perpetual Covenant." This 50 foot setback contradicts the statements and very goal of the SAMP to preserve the rural character and coastal views of the area. It further is in direct opposition to the statement made on page 10 of the DEIS, which states, "To further mitigate visual impacts, lot lines and buildings will be set back at least 250 feet from the shoreline, creating a coastal conservation zone to act as a visual buffer." This contradiction needs to be rectified.

### **Re-opening of the Kaluako'i Hotel**

OHA recognizes the applicant's stated belief about the importance of re-opening the Kaluako'i Hotel as being "crucial for revitalizing the Moloka'i economy." (DEIS, page 5) However, OHA asks whether there is a guarantee that MPL will use the monies generated from the potential sale of Lā'au Point to re-open the Kaluako'i Hotel. Further, OHA notes that not only the re-opening of the hotel, but also the master plan, the land trust and many other things all hinge upon the revenue generated from the potential sale of homes at Lā'au Point. However, as everyone knows, real estate is a risk laden venture (especially in recent times) that is far from a sure thing. Therefore, we ask what happens if the potential revenue from this project is not realized, or is not fully realized and we seek to understand how this would effect this project in all of its elements.

### **Moloka'i Land Trust**

OHA is deeply concerned over the viability of this land trust. This DEIS "ensures" that the Land trust "is adequately funded for its administration costs." (DEIS page 38) However, OHA realizes that not only the source of the funding is unreliable (because it is based on a potential future share of the Lā'au Point lot sales – which is invalid legal consideration in and of itself) but that it is woefully inadequate. To fund a 49,000-acre Land Trust with \$250,000 and the kind of management plans that are proposed, including hiring wardens and staff, managing parking as well as access (DEIS, pages 53-54), and creating an exclusive subsistence fishing zone (DEIS page 53) is preposterous.

## **Agricultural Lands**

Page 15 of the DEIS states, "MPL has limited development to only eight percent of the 6,348-acre Lā'au parcel and 200 house lots proposed for a low density, rural residential development." OHA takes exception to this statement. It is not MPL who unilaterally decides whether or not to develop these lands. These lands are all zoned agriculture and cannot be developed in such a way. It is the county, state and community who decided to put these lands in agriculture use and not the applicant, which is why they have to apply to re-zone them.

In fact, according to the applicant's own DEIS, these lands have been used for agriculture purposes for some time (page 18) and continue to be so (page 25). Therefore, it is ridiculous for the applicant to both propose to take these lands out of agriculture use *and* to protect them for agricultural use. For example, the DEIS on page 25 states that the applicant's Master Plan is designed to do two things, one of which is to "Protect the current functional uses currently taking place on MPL property (open space and agriculture)."

The other goal of the master plan is also not met in that it seeks to ensure that "the environment and activities undertaken by the community that are important socially, culturally, and economically remain unhindered and unspoiled." (DEIS, page 25) The Moloka'i community has a history of opposition to development, as raised by Mr. Vanderbuilt and discussed in MPL's letter dated December 13, 2006, and mentioned in the Land Use Commission's comments to the November 2007 DEIS. This history was dramatically brought to life in the November 2007 LUC meeting for this proposed project, when hundreds of community members testified in opposition via words, song, dance and lei. OHA finds it awkward for this DEIS to not acknowledge this obvious fact and finds that the applicant's master plan fails in that it does not achieve its two stated goals.

Page 42 of the DEIS states that, "the objectives of the Lā'au Point project are rooted in MPL's desire to create a sustainable future for Moloka'i through implementation of the Master Plan." OHA notes that the very hotel that the applicant seeks to re-open (the Kaluako'i Hotel) was abandoned because it was not sustainable. The applicant has moved away from agriculture and is now operating at a loss of \$3.8 million annually (DEIS, page six) and doesn't even have enough money to fund the re-opening of the hotel and remain economically viable (DEIS, page four).

What has proven itself to be sustainable and viable on Moloka'i is agriculture. Moloka'i is known as the breadbasket of the state and is also called 'Āina Momona – the fat land. Of all the Hawaiian Islands, Moloka'i has a real chance of being a model for sustainable agriculture and becoming self sufficient. Agriculture on Moloka'i contributes the most to that island's economy. To remove such a large part of that area's land from agricultural zoning does not make sense.

HRS § 205-41 states;

It is declared that the people of Hawaii have a substantial interest in the health and sustainability of agriculture as an industry in the State. There is a compelling state interest in conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use to achieve the purposes of:

- (1) Conserving and protecting agricultural lands;
- (2) Promoting diversified agriculture;
- (3) Increasing agricultural self-sufficiency; and
- (4) Assuring the availability of agriculturally suitable lands pursuant to article XI, section 3, of the Hawaii state constitution.

In 1961, the Committee on Lands and Natural Resources remarked that its goal in creating the State Land Use Commission was primarily to "protect productive agricultural lands...through state zoning."<sup>1</sup> The high value assigned to agriculture lands was emphasized again by the 1976 legislature when they assigned Class A and B agricultural lands "additional protection...[against county approval of] agricultural subdivisions."<sup>2</sup>

Further, and as mentioned in HRS § 205-41, even our State Constitution emphasizes that:

The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.

Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.

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<sup>1</sup> S. Stand. Comm. Rep. 850, 1<sup>st</sup> Leg., Gen. Sess. (1961), reprinted in 1961 Haw. Sen. J. 883, 883. From *Avoiding the Next Hokuli'a*, Adrienne Suarez, 27 UH L. Rev. 441.

<sup>2</sup> S. Conf. Comm. Rep. 2-76, 8<sup>th</sup> Leg., Reg. Sess. (1976), reprinted in 1976 Haw. Sen. J. 836, 836. From *Avoiding the Next Hokuli'a*, Adrienne Suarez, 27 UH L. Rev. 441.

Agriculture makes sense on Moloka'i. Agriculture is supposed to be supported by a myriad of laws and legislation supporting a strong agricultural economic base and retention of those lands engaged primarily in agricultural pursuits such as Lā'au Point. "Re-districting" over 1100 acres from Agricultural District would violate these principles and laws. (DEIS pages 44, 45)

### **Creeds, Covenants, and Restrictions (CC&Rs)/Shoreline Access Management Plan (SAMP)**

OHA is concerned about some of the CC&Rs and the SAMP that this proposed project so heavily rely upon. Many of these CC&Rs and the SAMP directly touch and concern the interests that our agency is mandated to protect. For example, page seven of the DEIS states, "the CC&Rs will establish policies that permit subsistence gathering and cultural practices, as well as provide for the hiring of resource managers to protect the subsistence lifestyle." Also, page 29 of the DEIS states, "The Moloka'i community will always have access to the shoreline for subsistence gathering. To ensure this, Lā'au Point homeowners and Land Trust members will form a council to administer a Shoreline Access Management Plan."

OHA is shocked by the preposition of a council made up of homeowners administering plans and CC&Rs "establishing policies" and that are already constitutionally protected, part of every layer of law from state to county levels, part of the mandate of every agency, elaborated upon in the highest courts of our land, and part of the very reason OHA was established. These rights have existed since Hawai'i has existed. These CC&Rs do not create these rights – these rights have an independent existence and rights flow from them that are enforceable without these CC&Rs. Neither the SAMP, nor Moloka'i Properties Limited (MPL) for that matter, have the ability to protect what is already a fundamental right of our beneficiaries, and to claim to establish and enforce these rights (in perpetuity no less) is preposterous. These rights need only be recognized and appropriately addressed by MPL as well as the rest of Hawai'i.

As such, OHA is very concerned with how these CC&Rs will attempt to define and manipulate these rights. We are also concerned that these CC&Rs are essentially impotent. For example, they seek to, "provide for the hiring of resource managers to protect the subsistence lifestyle." OHA asks from where the long-term funding for these types of prepositions will come. We also wonder at the stability and reliability of the funding sources that are mentioned.

OHA seeks to understand how this document can propose to perpetually guarantee rights via these CC&Rs. OHA understands that intentions can differ and change as the landscape changes, and we note that some of these CC&Rs could be altered by a majority homeowner vote. Therefore, compliance becomes an immediate issue as does future viability of the claims that these unstable CC&Rs seek to promote.

OHA would have a different reaction if these CC&Rs addressed, and these councils were made up of, an established residential and localized population. OHA voices concerns over the

wisdom and efficacy of granting this kind of decision-making power and authority to a seasonal group of homeowners who are expected to live in the area part time and who need to be “educated” about the area and its values before even being allowed to buy a home in the first place. There seems the great possibility that the very values these CC&Rs and councils are established to protect could be eroded by the powers granted to this transitory, unfamiliar and unknown group of very wealthy individuals who have the means to change things as they see fit.

Further, the CC&Rs state that they seek to “perpetuate Moloka‘i’s rural lifestyle” (DEIS, page ten), yet page 14 of the DEIS states that it is “expected that community character of the region may change” and that “effects that cannot be avoided include changes to the land use character and visual appearance of the site, unquantifiable impacts to the overall spiritual quality of the area, changes to the experience of fishing in an isolated area, differences in values and lifestyles of new residents....” Lā‘au Point will even increase the tax base for the county. (DEIS, page 11)

OHA states that it is inconsistent for the applicant to propose something that is impossible by their own admission and yet seek for their CC&Rs to enforce them. This does not instill confidence in what the rest of the CC&Rs may hold for the future; yet, as we stated, the CC&Rs act as the hinge from which the enforcement of these impossible promises swing. These dreamlike promises require an awakened look. Equally, these visions need to be clearly, rationally and specifically detailed so that we can make substantial comments about them, because we are talking about very real consequences such as property values, taxes, loss of spirituality, and dramatic changes in lives and lifestyles.

At issue is the Lā‘au Wahi Pana. To the Moloka‘i community, the interdependency to Lā‘au wahi pana was established centuries ago. This establishment is demonstrated through a set of ancestral behaviors and is exhibited in Moloka‘i’s oral traditions, attitudes, customary beliefs and customs such as Moloka‘i’s spiritual, healing and subsistence practices.

If this established cultural attachment is removed from the “Lā‘au wahi pana”, then the traditional and unique culture of Moloka‘i will be lessened over time and eventually lost. This historical interdependency will be broken. The impact will further lead to the destruction of other related, cultural attachments associated with oral traditions such as language, story, song, and dance at the least.

Even the applicant realizes there is a potential for conflict because of this proposed project and seeks the “reduction of potential social conflicts between new homeowners and existing community members” via these CC&Rs. (DEIS page 48) It is wholly inconsistent for this applicant to create the potential for social conflicts, while also proposing to protect the existing character of the area no matter how they describe it (rural, subsistence, etc.).



These CC&Rs fundamentally cannot address the issues that present themselves by the nature of this project for Native Hawaiians. This was evident at the November 2007 LUC hearing held on Moloka'i. Trustee Haunani Apoliona, in the State of OHA and the Native Hawaiian Community Remarks made on Monday, December 17, 2007, said:

Our ancestors were experts in relationships with the universe. They knew how to balance man, nature and god. They understood that harmony and balance meant survival and well-being.

True to our nature, Native Hawaiians strive to live with deep regard and reverence to this concept, lōkahi, through which we seek to keep these major life forces in balance.

Our island lifestyle and respect for limited natural resources has been the legacy of our ancestors, generation to generation. We are experts in caring for the environment. Mālama 'āina goes to the core of who we are as a people. Our cultural practices and our values are all about caring for the 'āina, loving our motherland, not just to use, but to conserve and replenish.

Therefore, OHA is skeptical of the efforts to "educate" the "residents" of Lā'au Point about, "the environment and culture, and taught to mālama 'āina, care for the land and sea, through strict Covenants, Conditions, and Restrictions (CC&Rs) attached to the subdivision." (DEIS page 43)

### **Flora**

OHA notes that the project area is home to a number of native and rare plant species, one of which is endangered ('ihi'ihilauakea). OHA points out that the endangered population found within this project's footprint is expanding, as noted on page 67 of the DEIS. OHA is concerned that this federally listed endangered species, which exists in an area of foot traffic along the coast in the middle of the trail area proposed in the Shoreline Access Management Plan (SAMP), will be detrimentally affected. OHA takes exception to the fact that the applicant notes this and yet has not filed a habitat conservation plan or filed for a take permit under the Endangered Species Act (ESA). OHA also notes that critical habitat for this species has been established on other islands and queries as to whether or not this will be done for the Lā'au Point grouping.

The ESA contains provisions for issuing incidental take permits to nonfederal entities. Any proposed take must be incidental to otherwise lawful activities and cannot appreciably reduce the likelihood of survival and recovery of the species in the wild. The impacts of such take must also be minimized and mitigated to the maximum extent practicable.

To obtain an incidental take permit, an applicant must prepare a habitat conservation plan describing the impact that will likely result from the proposed taking, the measures for minimizing and mitigating the take, the funding available to implement such measures, alternatives to the taking, and the reason why such alternatives are not being implemented.

“Take” is defined under the ESA as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect listed animal species, or attempt to engage in such contact. “Harm” includes significant habitat modification or degradation, where it actually kills or injures listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering.

### **Monk Seals**

OHA notes that this area is heavily used by the federally protected Hawaiian monk seal. The National Oceanic and Atmospheric Administration (NOAA) is the foremost authority on this species. MPL states that they believe NOAA indicated that the development is not the “area of concern; but rather that it is the frequenting of the beach by humans and their pets that has a potential impact on Hawaiian monk seals.” (DEIS, page 69) OHA finds this hard to swallow, and we note that one is the direct result of the other and should not be segmented within this review.

MPL even states, “It is recognized that coastal development creates the potential for problems and concerns on Hawaiian monk seal health and population stability.” (DEIS, page 70) Also, according to NOAA, Lā‘au Point is especially good Hawaiian monk seal habitat. (DEIS, page 71) Therefore, a plan must be in place to protect these animals and mitigate all of the effects that this project brings to them – including the project’s proposed construction.

Typically, OHA would look for a habitat conservation plan, incidental take permits, and designation of critical habitat to achieve this necessary goal. However, OHA finds none of these things being proposed. Rather, the applicant seeks to skirt the Endangered Species Act and attempt enforcement via their SAMP.

Specifically, in Appendix B, page 12, it states, “The resource manager shall be responsible for reporting the monk seal citing to the NOAA and taking whatever actions are required by NOAA to ensure the safety of the seal.” OHA suggests that the Resource Manager be the one to implement action to ensure that the appropriate actions are done in a timely way.

Further, the Resource Manager’s duties are responsible for “enforcement of all Monk seal protection, rules, regulations and protocols.” OHA wonders whose rules and regulations this manager will be enforcing and by what authority. We already have entire federal acts dedicated toward this end, and OHA suggests that the applicant apply these laws rather than stray

dangerously from them. OHA also wonders about the qualifications needed for the various monitors, land trust stewards and resource managers: What are they?

Further, OHA is disturbed by the governance and control of the SAMP. We note that areas covered by the SAMP are held by MPL until they shall be transferred to the homeowner's association. This puts these critical areas in the hands of people who have no particular skill, training or experience to deal with these types of issues. They are not even familiar with the area – they have merely bought a house there.

Additionally, the council members for the SAMP can vote, which means these rules and penalties can be altered, whereas federal, state and county laws cannot be altered by this council. This is another reason why OHA is skeptical about not only the wisdom of this plan but also its long-term effectiveness.

OHA also is concerned about the short-term and long-term funding of this program. The proposed actions in this SAMP are very costly, requiring training, education of the homeowners, monitoring and enforcement, to name a few. Without the proper funding, this SAMP is useless.

### **Best Management Practices**

OHA is concerned by the lack of management plans and best management practices (BMPs), as described in this environmental review document. This proposed project is huge, and is located in an untouched area of the state. As such, it has the potential to do great harm and, therefore, elaborate BMPs and management plans are a vital part of this document. The cost of improperly maintained BMPs can be devastating to a community. Improperly maintained BMPs not only decrease the efficiency of removing pollutants, they also create environmental hazards (such as flooding and contamination), placing an owner at risk for liability.

BMPs require skillful installation, application and maintenance to be effective. Once implemented, they require monitoring to ensure that they are achieving the objectives for which they were selected.

BMP monitoring also involves scheduling of inspections to ensure that the outcomes of BMPs meet expectations. At the heart of BMP effectiveness monitoring is a listing of each BMP, its expected performance and an assessment of whether the controlled value (noise, dust, water quality, etc.) is within targeted limits.

A BMP plan should be prepared and implemented to minimize the impacts on water quality. Long term operational impacts such as increased pollutant loads in storm discharges should similarly be controlled and treated to the best degree possible prior to discharge to conform with the law.

Without these types of specific plans to comment on, OHA is unable to fulfill our agency mandates and we are unsure of what the applicant proposes to do, can mitigate or what the potential effects may be.

For example, page 11 of the DEIS states, "A solid waste management plan will be prepared to address waste generated by construction." Reference to a non-existing future plan does not meet the requirements or the spirit of the environmental review process. Further, OHA wishes to foster excellent action and better decisions via our environmental review process, and this document does not allow us to assist in this process.

### **Native Hawaiian Customary and Traditional Rights**

Native Hawaiian gathering practices are recognized as protected traditional and customary rights under Hawai'i Constitution, Article XII, section 7. See e.g., Pele Defense Fund v. Paty, 73 Haw. 578 (1992) and Public Access Shoreline Hawaii v. Hawaii Planning Commission, 79 Haw. 425 (1995) (PASH).

Further, the Hawai'i Constitution, article XII, section 7 "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." Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Haw. 31, 42 (2000).

"[T]he LUC (Land Use Commission) is required under the Hawaii Constitution to preserve and protect customary and traditional practices of Native Hawaiians." Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Haw. 31, 45 (2000) (Ka Pa'akai). To carry out this affirmative duty, the LUC was directed in Ka Pa'akai to determine:

- (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 by the LUC to reasonably protect native Hawaiian rights if they are found to exist. 94 Haw. at 47.

## **Archaeological Resources**

OHA maintains that the additional archaeological work conducted to “re-survey” all proposed road-corridors and residential lots within the project area must be done pursuant to Chapter 13-276, Hawaii Administrative Rules “Governing Standard for Archaeological Inventory Surveys and Reports.” When combined with the previous survey work done by the Bishop Museum in 1993, the information generated by the “re-survey” work could provide a comprehensive overview of the archaeological resources situated within the project area. A comprehensive archaeological inventory survey conducted using all appropriate current standards and methods is not only important in meeting all the requirements set forth by the State Historic Preservation Division (SHPD), it also provides those with familial connections to these lands the opportunity to participate in determining the significance of all identified sites and appropriate treatments of the sites

In the event the land classification is approved, OHA requests that an archaeological monitor be on site during all excavations and ground disturbances for this project. The Archaeological Monitoring Plan for the project should be revised to specifically state that an archaeological monitor will present during any ground disturbance related to construction activity. Past experience has shown that the presence of an archaeological monitor not only prevents damage to previously identified sites, but provides an expeditious implementation of the appropriate process required by applicable laws should an inadvertent discovery of cultural sites, items, or burials occur.

OHA is appreciative of the applicant’s willingness allow “cultural monitors” to be present during ground disturbance. The absence of formal qualifications or statutory authority and guidelines for cultural monitoring results in some concern regarding the qualifications and selection process for cultural monitors. The applicant has indicated that those selected for cultural monitoring will have an ancestral relationship with the sites and resources situated within the project area, and will be knowledgeable in customs, practices and protocol related to the sites and resources. OHA seeks assurances that those given the tremendous responsibility of cultural monitoring be selected from a wide and diverse list of qualified individuals with familial connections to the project area.

In a November 1, 2007 letter to OHA (Nicholas to Namu’o), the applicant indicated that “Should a possible burial be encountered that cannot be planned around, SHPD and OHA will be consulted prior to any testing of the burial.” While it is certainly appropriate that the SHPD and OHA be consulted, it is implied that the applicant will rely on the SHPD and OHA to conduct the necessary consultations with the cultural and lineal descendants regarding an appropriate final disposition for any iwi kūpuna within the project area. While the SHPD and OHA do have certain responsibilities to consult with or advocate for the

kama'āina of Moloka'i, the applicant should demonstrate a good faith effort and be willing to engage in consultations regarding iwi kūpuna with the community directly.

OHA appreciates the applicant's creation of 1,000 acres of cultural protection zones and the archaeological preserve in Kamāka'ipō Gulch. This shows a strong awareness of the cultural importance of the area, but OHA does not agree that these proposals go far enough. In fact, because Lā'au is more of a cultural property than a property containing cultural sites, OHA believes that this project, if it is approved, would represent an outstanding opportunity to formally and proactively assess and document the area of potential effect and its surrounding context according to the "traditional cultural property" (TCP) model, as defined in the National Register Bulletin 38 ("Guidelines for Evaluating and Documenting Traditional Cultural Properties," Parker and King 1990, rev.1998, see <http://www.cr.nps.gov/nr/publications/bulletins/nrb38>), National Park Service National Register of Historic Places.

Page 19 of the Cultural Impact Assessment (CIA) discusses the use of covenants, conditions and restrictions (CC&Rs) to help protect traditional and customary practices and the natural and cultural resources they inherently rely upon. The impressive list of proposed CC&Rs comes with assurances that "measures will be taken to assure that these CC&Rs cannot be changed in the future." The applicant has clarified that certain provisions will be designated "Master Plan Covenants," which will not be capable of being amended or repealed. OHA appreciates these efforts to ensure that the communities' interests, the rights of cultural practitioners, and cultural resources are afforded perpetual protection, but would appreciate further detailed provisions than are included in the CCRs.

Cultural practitioners of the area should be provided stewardship opportunities for the cultural properties, perhaps through a Stewardship Agreement with the Homeowners' Association. In this regard the applicant believes that the primary cultural practitioners of the project area are current and former employees of Moloka'i Ranch. OHA urges the applicant to acknowledge that there are individuals with a familial connection to the lands of the project area who were never employed by Moloka'i Ranch, and may have never been provided access and wish to continue traditional cultural practices. The constitutionally protected rights of these individuals must be given consideration as well.

### **Cultural Concerns and Historic Properties**

OHA has particular concerns with the term "meaningful" in regards to "data" obtained from data recovery efforts or no action which both mean the same thing ultimately, destruction and loss of the cultural resource. What may not be meaningful to a western trained archaeologist in terms of information and data on site form, function and actual use may not be the same qualities of a site which a Native Hawaiian may find meaningful. This is an important distinction in historic preservation law. And, this is why, per §13-284-6, HAR, OHA must be consulted regarding all

significance assessments for all significant historic properties deemed significant under criterion "e," if they are traditional Hawaiian sites.

To further explain, the State of Hawai'i Historic Preservation Program sets forth criteria based upon the above-referenced National Park Service standards with a very critical criterion added to address the concerns of the Native Hawaiian population. HAR § 13-284-6 sets forth the criteria for significance evaluations as follows:

- (a) Once a historic property is identified, then an assessment of significance shall occur. The agency shall make this initial assessment or delegate this assessment, in writing, to the SHPD. This information shall be submitted concurrently with the survey report, if historic properties were found in the survey.
- (b) To be significant, a historic property shall possess integrity of location, design, setting, materials, workmanship, feeling, and association and shall meet one or more of the following criteria:

\* \* \*

- (5) Criterion "e". Have an important value to the native Hawaiian people or to another ethnic group of the state due to associations with cultural practices once carried out, or still carried out, at the property or due to associations with traditional beliefs, events or oral accounts – these associations being important to the group's history and cultural identity.

A group of sites can be collectively argued to be significant under any of the criteria.

Furthermore, HAR § 13-284-6 (c) states:

- (c) Prior to submission of significance evaluations for properties other than architectural properties, the agency shall consult with ethnic organizations or members of the ethnic group for whom some of the historic properties may have significance under criterion "e", to seek their views on the significance evaluations. For native Hawaiian properties which may have significance under criterion "e", the Office of Hawaiian Affairs also shall be consulted.

The State of Hawai'i's addition of criterion "e" pertaining to an additional significance of an evaluated cultural site as having an "important value to the native Hawaiian people" and the duty to consult with OHA regarding these significance assessments appears to have been wholly lacking in this project's historic preservation review process. Neither the developer's paid archaeological consultant nor SHPD independently possess the capacity to determine whether any historical site found and evaluated, meets the criteria for having an "important value to the native Hawaiian people." Thus, the rules obligate meaningful consultation with OHA so that the Hawaiian people can determine what is valuable to them, in accordance with the rules.

To see so many discovered cultural resources meeting only one or two criteria and designated for destruction via "no action" or "data recovery," further magnifies the harm of the failure to adhere to the spirit and intent of HRS Chapter 6E. What little cultural, natural and historical resources left become increasingly important and crucial to the traditional and customary Native Hawaiian practices that exist there due to the catastrophic loss of these resources in the larger areas throughout the island and the rest of the State of Hawai'i.

### **Cultural Resources**

In reviewing the Cultural Impact Assessment (CIA) portion of the Lā'au Point Draft EIS, OHA notes that the cultural assessment is of high quality, and the breadth and depth of information as well as acknowledgment of the cultural importance of the Lā'au area is to be commended. This CIA contains major and significant community concerns that, based on their sheer number and import, are sufficient to raise serious concerns regarding the project. This is a testament to the earned reputation and credentials of the person who produced this CIA, especially considering that the principal investigator for cultural impacts was both an integral component in the creation and establishment of the Molokai Land Trust (MLT) and is a sitting Director of the MLT.

The CIA states quite clearly that Lā'au is an extremely sacred place, that should not be desecrated. Much of the CIA is a strong statement against the project and is incorporated well into the Draft EIS. As the Draft EIS states, the traditional cultural significance of the project area is that "it is raw and untouched." (p. 54) "This factor gives Lā'au an almost mythical quality. Lā'au Point has become an icon of what Moloka'i represents – a rural stronghold and reserve of Native Hawaiian culture, a cultural kipuka. If Moloka'i is 'The Last Hawaiian Island' then Lā'au is one of the last untouched Hawaiian places on 'The Last Hawaiian Island.'" (p. 54) These are powerful statements.

### **Culturally Related Social Impacts**

The CIA further acknowledges that "the Lā'au area is generally regarded as a special place of spiritual mana and power." The CIA further acknowledges that "the overall quality of the Lā'au area as a wahi pana and wahi kapu cannot be quantified and deserves recognition and respect."



Another paramount concern in the CIA was that “the community expressed concern that 200 new millionaires will change the make up of the Moloka‘i community and lead to changes in the Hawaiian way of life...and lead to irreversible cultural change.” The CIA notes on page 23 that the “southwest shoreline from Kaupoa to Hale O Lono will be ringed by luxury residential homes.”

The CIA further states that “in balance” to these concerns, the Maunaloa kūpuna shared that “no matter what happens, the population will increase and the land will be limited” and that “progress can not be stopped, but can be controlled.” It is unclear as to whether the term “progress” is truly the intended term in this explanation, or if “change” or “development” would be more accurate because many Hawaiians view protection and preservation of cultural and natural resources as “progress” – not necessarily the word “development” in the Western sense.

This is especially true with regards to the amount of mana‘o in the CIA from individuals who seemed to possess a more fatalistic view that the “development” was going to occur, no matter what. For example:

- “Nobody in this room wants to see Lā‘au developed, but if it is developed, we should do it our way.” (CIA, page 80);
- “I am against the project, period. But if going through, may as well say something.” (CIA, page 93);
- “In the long run, it will go through, you cannot fight people with money.” (CIA, page 103);
- “For me, I’m not for development, but will it stop because I don’t like it...it’s all in the process of development.” (CIA, page 104)
- “They taking away what makes Moloka‘i, Moloka‘i. I don’t think you can stop – too much money over here.”
- “You go downtown and sit in the car and look at the market and you don’t know anyone going into the market. That’s progress.”

Again, the distinction between the words “progress” and “development” is blurred in these documents, which raises the question of whether there has been a true understanding among community members and the applicant. This lack of true listening and comprehension, or hearing and application, is unfortunately all too common. The amount of development in Hawai‘i that steadily moves forward, despite opposition and protest, causes some participants to drop out of the process altogether or not fully understand viable options and alternatives. Neither the CIA nor SIA address this pessimism, which we find to be too common in a Hawaiian population oppressed for generations. This pessimism and fatalism effects the overall participation in the “community” plans and input into these studies and documents, as the more mana‘o, the better the final product.

Indeed, the CIA on page 16 paints a bleak predictive model of concern by informants regarding the destruction of cultural sites and burials, conservation zone violations and beach exclusion issues, with the example of the Pāpōhaku subdivision being used as a possible precursor to the Lā'au project. On page 21 of the CIA, regarding "Feasible Action by the LUC to Reasonably Protect Native Hawaiian Rights," the CIA recommends applying "relevant recommendations from the Pāpōhaku Dunes Cultural and Natural Resource Preservation Plan" study to Lā'au. The specific recommendations to be utilized should be stated in light of the aforementioned concerns regarding ongoing issues with the Pāpōhaku subdivision.

### **Spiritual Impacts**

There appear to be unmitigated spiritual impacts, as the CIA acknowledges on page 124, that there may be "no way to mitigate the impact upon the solitude that can now be enjoyed at Lā'au. It offers the opportunity to experience ho'ailona spiritual signs and the overall mana of Lā'au as a wahi kapu." The CIA also acknowledges through mana'o that 'ohana gather and pray in the area for many purposes, and others experience a replenishment of their 'uhane, an integral component of the Hawaiian psyche and overall well-being.

In traditional Hawaiian thinking, there is interconnectivity between all natural and cultural resources from the skies and highest mountain peaks, through the valleys and lava plains, to the shoreline and into the depths of the ocean. Hawaiian genealogical accounts detail the creation of the land by ākua (deities), who are also the parents of the first man, Hāloalaukapalili, from whom the Hawaiian people descend. It is in this context that Hawaiians view their relationship to their environment and it is the foundation of traditional Hawaiian land use.

The kinolau (physical manifestations) of many traditional Hawaiian ākua are found throughout a wahi pana (sacred place) such as Lā'au Point. Furthermore, it is believed the spirits of deceased kūpuna (ancestors) can remain in the living world as 'aumakua (family or personal gods) who can take the shape of plants, animals, winds, rain, or clouds. Thus, from a traditional Hawaiian perspective, when one views the landscape, he or she is surrounded by the kinolau of both ākua and 'aumakua. It is in this context that the overall impact of this proposed development must be considered.

### **Subsistence Impacts**

There is also good discussion in the CIA regarding the critical importance of "subsistence" and the statistics of how many Hawaiian families rely upon subsistence and an acknowledgment of its critical component for improving Hawaiian health. Furthermore, the CIA also outstandingly recognizes that "subsistence has also contributed to the persistence of traditional Hawaiian cultural values, customs and practices." This is a commendable observation. Regrettably, no analysis exists of the potential deleterious effects of a reduction in subsistence activities in an

acknowledged “spiritual” and “mythical” area on either Native Hawaiian health or perpetuation of related endangered cultural practices.

Furthermore, the CIA contained testimony regarding the existence of a spring in the area. This should be clearly addressed in the Draft EIS, as well as the potential impacts to such a spring and its relation to nearshore percolating fresh or brackish water, fishery nurseries, and the irreplaceability of such an ecosystem and habitat.

The 1993 Subsistence Sites map referenced on page 40 of the CIA indicates “intensive fishing and ocean gathering in the area where the Lā‘au Point Development is proposed.” There doesn’t appear to be any extensive analysis of the likely adverse impacts to subsistence gathering in this area outside of the reliance upon existing practitioners.

The applicant’s belief that the proposed project is not expected to reduce subsistence activities in the project area does not take into account that for many years individuals may have been prevented access to the area, and thus, a true sense of the types of subsistence activities these lands could truly support has never been achieved.

### **Fishery Concerns**

The CIA, on page 15, does a good job of outlining serious concerns regarding subsistence fishing and gathering activities and the dismal expectations of cultural practitioners who utilize these resources for subsistence of the potential adverse impacts of the proposed development. As noted on page 15 of the CIA: “Most informants felt that the new residents will probably not directly damage the fishing grounds because they don’t know how to fish. The real impact on the fishing resources is from the Honolulu boaters.” This assertion is noted on page 46 of the Draft EIS as well: “The Cultural Impact Assessment (see Section 4.2) indicated that Moloka‘i subsistence fisherman felt the new Lā‘au Point residents would probably not directly damage the fishing grounds because they would not know how to fish.”

While the common perception may be that the prospective purchasers of the high end residential lots will be malahini from outside of Hawai‘i, in looking at comparable luxury projects throughout the islands, a portion of the purchases go to financially secure local residents who not only are familiar with local fishing opportunities but who also provide ingress for friends and family seeking abundant fishing opportunities. This fact combined with the publicity of the fishing resources created by the DEIS may have untoward additional impacts on the coastal ocean resources.

Another area of concern is the statement on page 11 of the CIA, which states: “The southwest shore also factors into the life cycle of the mullet, serving as a hatchery area from which they move east to Mana‘e or East Moloka‘i.” Page 16 of the CIA further reads:

Some informants from the East End felt that the development would impact the mullet run and thus impact the resources on their end of the island. However, longtime fisherman who have regularly fished the south shore as members of the Ranch families noted that the mullet spawn at Hale O Lono, Halena and Kolo, rather than close to Lā'au.

Later, on page 85 of the CIA, it is noted that intervenor Vanda Hanakahi and William Kalipi, Sr. both assert Lā'au as being integral to the mullet life cycle. There are no identifying factors of the "longtime fisherman" that seem to contradict these views of Hanakahi and Kalipi. It is difficult to assess veracity, perception and accuracy in these conflicting statements. They should be clarified.

It is unclear as to whether any studies or other evidence regarding the important component of potential fishery impacts is available, other than competing claims by different practitioners regarding what area is or is not either a hatchery or a portion of a "mullet run." This should be clarified further and backed up by independent studies or more detailed evidence, because it has the potential to be a significant impact not only on Lā'au but also in other areas.

### **Cultural and Traditional Access**

Equally, Native Hawaiians should be afforded reasonable access for cultural and traditional purposes. We note that consideration must be given to applicable cultural gathering and access rights during and after construction activities, should construction be permitted. Such access should be fully described, including community members' concerns as to how welcome they anticipate feeling in the new, developed environment. In the meantime, OHA appreciates the applicant's assurances that recognized Native Hawaiian traditional gathering rights and access should not be restricted, even during construction, except as necessary to ensure safety, and that if such safety-related restrictions are put in place, alternative public access routes will be provided.

### **Nearshore Environment**

OHA finds it ridiculous that "A marine assessment report concludes that it is likely that sediment discharge from runoff to the ocean will be significantly less with the Lā'au Point project compared to the existing conditions." (DEIS, page 8) It is unfathomable that 300 homes with the accompanying construction, landscaping, roads, infrastructure, water treatment systems and irrigation systems will actually improve the discharge from an untouched, virgin and pristine environment that has the highest water quality grading assigned to it that this state has to offer.

The State of Hawai'i identified the waters around Lā'au Point as class AA, which is the most protective classification for marine waters. This means that the water quality off of Lā'au Point "shall be maintained and protected." (HAR § 11-54-1)

Additionally, HAR § 11-54-3 (c)(1) states:

It is the objective of class AA waters that these waters remain in their natural pristine state as nearly as possible with an absolute minimum of pollution or alteration of water quality from any human-caused source or actions. To the extent practicable, the wilderness character of these areas shall be protected.

To say that these waters will be *improved* by this project flies in the face of every other developed area in the state where water quality ultimately declined due to development and land use in the area. OHA seeks models to support the statement that water conditions will improve and wishes to see the data.

We point out the fact that the applicant intends to use the existing drainageways and actually expand culverts to accommodate increased sheetflow. (DEIS, page 11) This already indicates that the water quality will deteriorate as a direct result of the development in terms of turbidity to the nearshore environment, not to mention the pollutants that this water will contain.

As stormwater travels down the drainage system, it accumulates industrial waste, pesticides, oils, and chemicals. These pollutants quickly settle into the sediments and are re-suspended into the water column when disturbed.

Persistent organic pollutants (POPs) are organic compounds that linger in the environment, travel through the food web, and pose risks to human health and the environment. Organic hydrocarbons, including petroleum products, are examples of POPs. POPs are most commonly introduced to marine systems via discharged sewage and stormwater effluent, terrestrial runoff, and oil spills. POPs can also bioaccumulate in the nearshore species that inhabit these areas. The proposed development at Lā'au Point represents a large source of such pollutants into our nearshore waters.

In fact, the DEIS on page 75 "anticipates an increase in surface water runoff" yet cryptically reveals on page 11 that the current runoff from the area is estimated to be 512 cubic feet per second (cfs) in a heavy storm event as compared to 623 cfs after development. This is a substantial increase of 111 cfs and another reason why OHA finds it impossible to believe that "the effects of deer and livestock transiting and foraging" (DEIS, page 74) have more of an impact on "turbidity, suspended soils, and nutrient concentrations" (Ibid) than the largest coastal development in the history of the State and quite probably the nation in the form of up to 300 mansions, the "penta-millionaires" and all their accessories that this project seeks to attract.

This record-breaking development will have an effect on the nearshore environment, which will impact flora and fauna as well as water quality and our beneficiaries' traditional and customary practices in the area.

### **Moloka'i's Water Resources are from a sole source**

OHA is disturbed by the way that this document talks about water on Moloka'i. From the very beginning of the water section of the DEIS (4.9), there is a fundamental misstatement about the water situation on Moloka'i.

The DEIS on page 116 begins by elaborating upon three types of groundwater resources on Moloka'i and how the island is divided by the State Commission on Water Resource Management (CWRM) into 16 management areas or "aquifer systems," each with its "own sustainable yield."

This is a misrepresentation, because it creates the false impression that Moloka'i is not, in fact, a Sole Source Aquifer (59 FR 23063) under Section 1424(e) of the Safe Drinking Water Act. This is very important, because it acts like a single aquifer, and Moloka'i's water supply is inherently limited. In addition, water use and withdrawals in one part of the aquifer affect water quality and discharge in other areas. (See, USGS Scientific Investigations Report 2006-5177, which establishes: "If water is pumped from one well, it will affect salinity of nearby wells. Also, it will affect discharge of fresh water to stream mouths and fishponds, upon which fish rely.") OHA is disappointed that this DEIS did not include this vital information from the very beginning and does not ever give it its full weight; to not do so is unfair, creates a biased review and opens a window into the delusions of the applicant.

OHA further notes that when the DEIS eventually discusses the Sole Source designation, it states that a Sole Source aquifer "does not necessarily denote a hydrological determination." (DEIS, page 119) The applicant then continues to wiggle away from this designation by trying to define an aquifer. However, as the applicant states, "An aquifer system may be designated a 'sole source aquifer' if all aquifers in the system are hydrogeologically connected." (Ibid.) Specifically in Moloka'i's case of Sole Source designation, it was generally understood that "a broad-brush agreement that there is basically only one hydrogeologically-linked aquifer underlying Moloka'i" was made. (Ibid.)

Yet the applicant continues in the very next sentence to again state that "it is clear that ground water in West Moloka'i is relatively isolated..." and again to offer us the vision that CWRM has divided the island into 16 aquifer systems. OHA notes that this was done, however, by CWRM for regulatory purposes only.

The fact that Moloka'i's water resources should be discussed as related parts rather than as distinct units was further emphasized in 1992, when, based on threats to water sources there, CWRM designated the entire island a Ground Water Management Area (GWMA). Moloka'i is the only GWMA in Hawai'i that encompasses an entire island. To introduce and think of Moloka'i's water resources as 16 divided parts of the island without providing enough information to determine the extent of how these aquifers are not connected is wrong.

The fact that Moloka'i is a functional Sole Source aquifer was illustrated clearly in 2006, when the Maui County Board of Water Supply was forced to consider drilling more wells to increase municipal water supply and better distribute pumping. In addition to shortages in the County system, a moratorium was placed on new water meters for agricultural users serviced by the Molokai Irrigation System (MIS). Evidently, there is not enough water in MIS system to service its users, so no more meters will be allowed. However, the applicant remains oblivious to all of this information and states, "There is no indication that current withdrawals are threatening the health of any of the aquifers." (DEIS, page 120) MPL even asserts that there is enough water to meet future needs (DEIS, page 125), despite the above evidence and USGS reports of rising salinity in area wells. (DEIS, page 127)

If this false assumption by MPL were indeed true, then the Maui City Council would not have passed Ordinance 3502, otherwise known as the "Show Me the Water" bill. This bill requires developers to substantiate a reliable long-term water supply before receiving zoning or subdivision approvals. MPL is now required to provide verification of a long-term water supply via a paid water meter if MPL proposes to use a municipal source, while projects intending to utilize a private, non-county source are required to provide evidence through a water supply and quality assessment that would support the projected demand associated with the proposed development. This controversial bill passed unanimously, which clearly shows the seriousness of the water shortage issue for Maui County and the need for new measures to curb what has been called the ongoing water crisis.

Because Moloka'i is a Sole Source aquifer and because of CWRM's designation of Moloka'i as a GWMA, it is more appropriate to think of Moloka'i's water resources as a whole. Further, the USGS's 2006 report, MIS's moratorium on water meters, and the "Show Me the Water" bill all raise serious questions about whether there is enough water on Moloka'i now to supply current uses, let alone future expansion as is proposed by Lā'au Point. It also shows just how far off the applicant is in their assumptions, and OHA points this out so that the applicant can avoid needless stress while fulfilling the requirements of this bill and the requirements of this environmental disclosure document.

**MPL's conclusion that Kākahale Well is isolated from the Kualapu'u Aquifer is unfounded**

On page 117 of the DEIS, the applicant states, "there is empirical evidence to conclude that the Kākahale Well site is hydro geologically isolated from existing and proposed well sites in the Kualapu'u aquifer." This statement is unsupported and flies in the face of the USGS 2006 report which clearly states the opposite: the designation of Moloka'i as a Sole Source aquifer and the CWRM designation of the entire island as a consolidated GWMA. All of these designations and studies indicate that drawing water from the Kākahale Well site will indeed have direct and cumulative effects on other wells and aquifers on Moloka'i. OHA does not believe the Kualapu'u aquifer to be "geologically isolated," and if the applicant has evidence to the contrary it needs to be presented, rather than merely stated repeatedly (See also DEIS, page 129) so that we can review and comment on it.

**DHHL Reservation**

OHA appreciates that the applicant correctly acknowledges on page 122 of the DEIS that the Department of Hawaiian Homelands (DHHL) has a prior right to two-thirds of the water in the Moloka'i Irrigation System (MIS) and that the MIS itself was built for agricultural purposes only. Using the MIS space for the transmission of potable water is a new development in the history of this system.

In 2006, the USGS conducted a ground water modeling study in which it concluded that DHHL would be effectively barred from developing their reservation. (See DEIS, page 138) OHA recognizes that water is wealth; water is life; and in island communities like Hawai'i, water is the source of all life. Water is also a foundation of our indigenous culture, and is a kinolau (embodiment) of the Ākua Kāne (one of Hawai'i's principal gods). Due in no small part to this sacred origin, water in Hawai'i is a public trust resource, which means that it is held in trust for present and future generations. Despite this important designation, for many years, water in Hawai'i has been, and often continues to be, managed as a commodity, to the detriment of Native Hawaiian rights and interests. We stress that under no scenario should our beneficiaries be cut off from, or even faced with the possibility that they might become severed from, their constitutionally protected right to this water and to life.

OHA's concerns are heightened due to an article in the Honolulu Star-Bulletin dated Thursday February 21 entitled, "State taken to task over irrigation on Molokai." The article reported that the two-thirds reservation to DHHL was not reflected in the Department of Agriculture's planning, which led to non-homestead users consuming 80 percent of the system's available water. OHA now queries as to the availability of water for the users of this system. If DHHL realizes its reservation, then a huge percent of users will be cut off from this source and seek alternatives which will cumulatively impact this project.



MPL has not proven that they will not affect the DHHL reservation. In fact, MPL states on page 137 of the DEIS, "MPL will be able to show that withdrawing 1.0 mgd from the Kākahale Well will not impact DHHL's ability to its 2.905 reservation amount from the Kualapu'u aquifer." If this is the case, then OHA wonders why the applicant did not represent this.

### **MPL has no potable water**

As noted in section 4.9.7.1 of the DEIS, "MPL does not currently have a permit for the Kākahale brackish well." Once again, OHA feels that the applicant is not revealing all of the details. In truth, the day after last Christmas (December 26, 2007), the Hawai'i Supreme Court vacated the entirety of MPL's permits for Well # 17. As such, MPL has no source of potable water, which is an obvious deficiency in an environmental review for a proposed project of this magnitude.

Again, OHA cannot comment on what is not presented (or even proposed) and, therefore, the environmental review process is not complete. OHA can guess that MPL will look toward the Mountain Water System to fulfill their needs; however, there is not enough yield in this system (especially during the dry months – See DEIS, page 124), to quench MPL's thirst. OHA notes that whatever source they do eventually propose must not interfere with the DHHL reservation to water.

Further, OHA notes that even if the applicant has a source for their water, they have no way to transmit it. MPL will no longer rent space in the MIS system, which means it has no other way to get the water to the West End. MPL "indicates" on page 144 of the DEIS that it will seek to use pipeline easements across DHHL lands. In Section 4.9.18.6 (which is less than a page long) the applicant uses the word "alternative(s)" eight times, and three times in one sentence, without ever describing what one may be. The applicant then states that "more study will be undertaken." It is overwhelmingly clear that the applicant has no answer for this vital question. Furthermore, OHA is unsure how to comment on wisps of plans that are hinted at but not definite, and we again state that this is insufficient for the standards of an environmental disclosure document.

Even Section 4.9.19.2, titled "Options for Transmission" states that MPL "as yet does not have a preferred and set option as the final decision on the transmission methods relies heavily on the (undefined) easement agreement between MPL and DHHL." OHA stresses that there is not now a lack of discussion of options for alternative transmission for water conveyance; rather, there is no viable option presented.

OHA recognizes that the majority of the existing pipelines are already at or near capacity and in use for transmission purposes; and secondly, the limited lines that are available for transmission are six-inch lines, which are incapable of transporting the amount of water in question. Further,

some of these lines cannot accommodate brackish water. This is an issue which must be clarified to proceed. We require details quantifying how the applicant's water goals will be met, not just what they intend to or propose to alternatively do.

OHA additionally queries whether or not MPL is continuing to take water from the MIS system and if they are in any way now transferring, or planning to transfer, this water from one project to another in the future. OHA also seeks greater clarification as to the current MPL uses of water so that we can determine their management style and usage history and better formulate our comments regarding this proposed use.

### **Water use at Lā'au Point and Kaluako'i Subdivisions**

How does MPL arrive at an estimate for water use at Lā'au Point? OHA queries what the relationship is between seasonal residency and actual water use rate at Lā'au Point. OHA is concerned by the very likely scenario that more than 35 percent of the houses will be occupied. Further, we notice that the 35 percent is taken from a total of 200 homes, not 300 as stated on page 243 of the DEIS. This needs to be recalculated to reflect the actual and potential size and occupancy of the project at full build out.

OHA also questions how the applicant can state that MPL's water plan can accommodate all 200 lots at Lā'au Point at 600 gallons per day when they cannot reveal in the DEIS neither the source of their potable water (DEIS, page 124) or how it will be transmitted? Also, OHA asks whether or not the water plan could accommodate 300 houses at 600 gallons per day.

Further, we ask if there are any projections or accounting for the potential that more than one lot owner in Kaluako'i will subdivide. It seems likely that if property taxes are expected to rise, then so too will land values and with up to 300 millionaires and their families at Lā'au Point there is the potential for a good market and buyer. This of course will affect water use and projected water allocation.

### **Water Use Permit**

OHA notes that this applicant for a water use permit must show that proposed use of water:

- a) can be accommodated with the available water source
- b) is a reasonable-beneficial use
- c) will not interfere with any existing legal use
- d) is consistent with the public interest
- e) is consistent with state and county general plans and land use designations
- f) is consistent with county land use plans and general policies
- g) will not interfere with the rights on the Department of Hawaiian Home Lands

As such, OHA voices our concerns for the applicant regarding a number of these requirements, in particular letters a, c and g.

### **Water during construction**

OHA queries from where the high use of water during construction will come. OHA understands that even at an extraordinarily low build rate at one percent per year of an underestimated 200 homes construction will still require 50,000 to 1,500,00 gpd. Erosion protection and control measures will require an estimated additional 50,000 to 100,000 gpd. Construction is slated to last for years while erosion control lasting nearly a decade. OHA asks where this water will come from and wants to know of analysis relating to potential or cumulative impacts on natural and cultural resources due to the source, transmission and use of this water.

### **Water for the parks**

OHA also asks where the water for the public parks will come from. While the DEIS's Water Plan acknowledges that the public parks at Lā'au Point will require both potable and non-potable water, it neglects to identify the source of such water. Again, please identify the source of this water, how it is transmitted and any effects that may result by its transmission and use.

### **Cumulative effects**

Since MPL has made Lā'au Point a part of Moloka'i's master planning effort, any final EIS must necessarily examine all cumulative impacts of the master plan, including future developments such as the re-opening of the Kaluako'i hotel or projected growth. For example, what are the impacts of additional tourists on Moloka'i?

### **Conclusion**

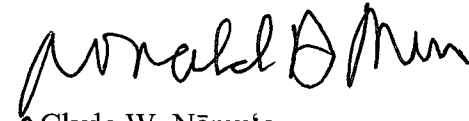
Thank you for the opportunity to comment on specific issues that have been brought to us by our beneficiaries. Thank you also for the care and effort that has gone into the project. This latest version of the Draft EIS is much improved over the previous version, but several important questions remain unanswered. We look forward to receiving the information necessary for good, constitutional decision-making.

Additionally, OHA hopes that the comments, concerns and questions elicited from the public about the current Draft EIS, which is a springboard for public comment, will be fully considered before the publication of the Final EIS.

Peter Nicholas  
Molokai Properties Limited  
February 22, 2008  
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If you have further questions or require more information regarding OHA's comments, please contact Grant Arnold at (808) 594-0263 or e-mail him at [granta@oha.org](mailto:granta@oha.org).

Sincerely,



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