

# Malama pono Kealakekua

## Agenda—Cultural Committee

### Recommendations:

1) Down size project.

A.) Stop all plans on top of Pali.

2) Help finalize community plan.

A.) Napoopoo side

1) Refer to plan 1A.

2) Weed wack and clean pond areas up to great wall.  
(Immediate)

3) Establish original pond dimension.

4) Clean area mauka existing pavilion. (Immediate)

5) Make plans for halau and comfort station.

6) Prepare plans for dredging pond.

B.) Kaawaloa side.

1) Clear and clean land area.

2) Archeological inventory/data.

3) Identification of burial sites.

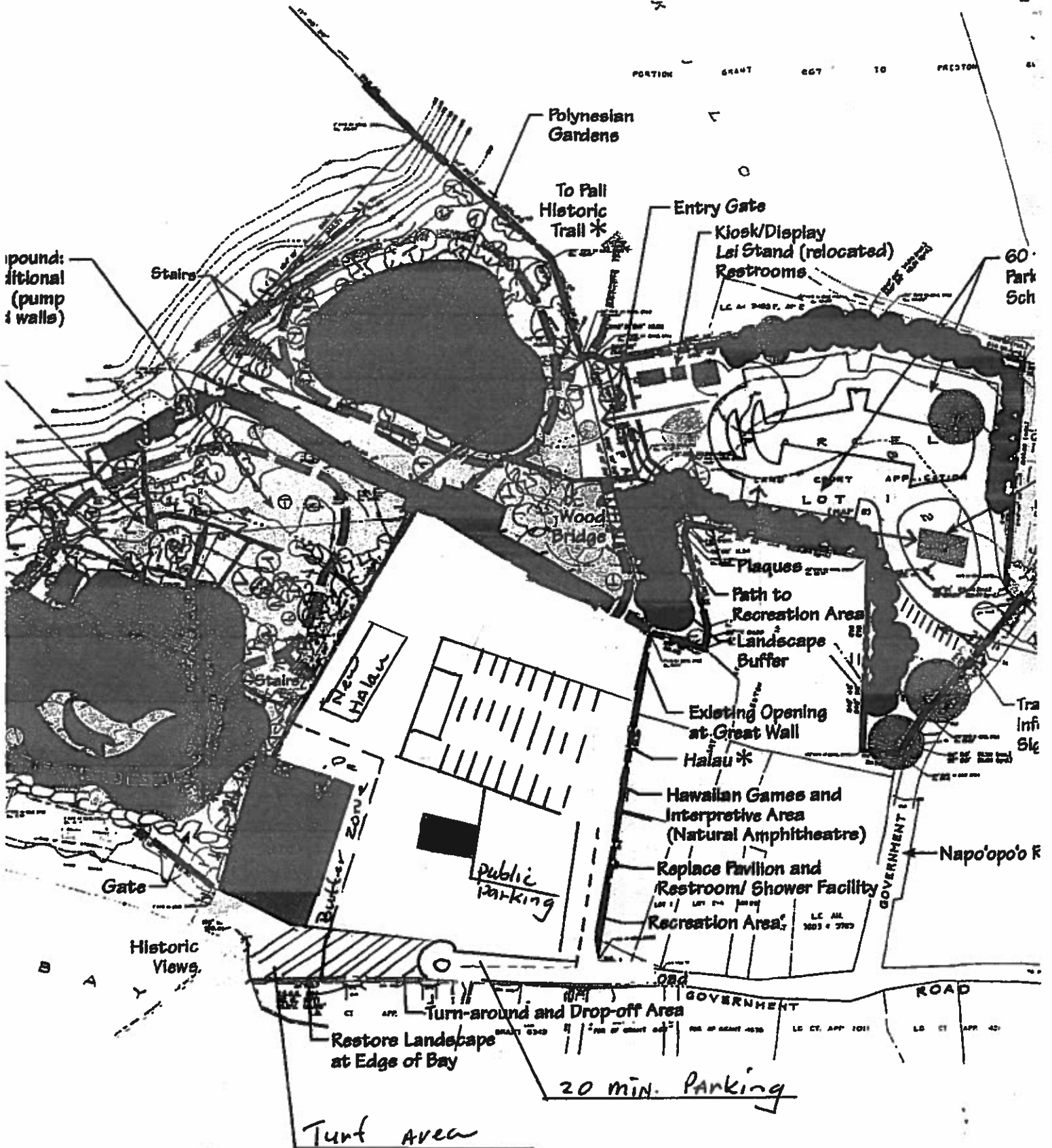
## Plans for Kealakekua

- 1) Stop all commercial use in Kealakekua Bay (Moratorium) 1 year
- 2) Organize grass roots group to represent ohana and community; and who will assist DLNR in their planning process.

ie!

- 3) Prepare plans
- 4) Prepare logistical plans.
- 5) Implement immediate plans.

PORTION GRANT 667 TO PRESTON 64



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September 22, 2000

Mr. Gary Gill  
Office of Environmental Quality Control  
State Office Tower  
235 S. Beretania Street, Room 702  
Honolulu, HI 96813-2437

RE: KEALAKEKUA BAY STATE HISTORICAL PARK  
ACTION: REQUEST FOR IMMEDIATE RULING ON COMPLIANCE  
WITH CHAPTER 343, HRS

Dear Mr. Gill:

I represent Malama Pono Kealakekua and am writing to you with the greatest urgency concerning (1) the DLNR's 1997 "Conceptual Plan" for the Kealakekua Bay State Historical Park, (2) the DLNR's 2000 "Phase One Development Plan" for the park, (3) the relationship between both documents, (4) the early-stage environmental assessment requirement for agency projects, including the early consultation and scoping procedure, and (5) the assessment of "cultural practices" and "cultural resources" under Act 50.

Here, the DLNR proposes to use state land and state funds to develop the Kealakekua Bay State Historical Park. The project will take place in the state Conservation land use district and will affect the Kealakekua Bay Historic District and registered historical landmarks. Each of these activities "trigger" the Chapter 343, HRS review process.

The fact that Kealakekua Bay, its environs and cultural resources are of tremendous significance underscores my request for an immediate ruling from your office on the questions presented below.

In summary, the DLNR's proposal violates Chapter 343, HRS and the state's "public trust" obligation under Article XI, Section 1 of the state constitution to conserve and protect Kealakekua Bay, its environs and cultural resources of the area for present and future generations.

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The 1997 "Conceptual Plan" and Implementing "Phase One Development Plan" are Illegal

A. The "Conceptual Plan" is Illegal.

The DLNR, working with Belt-Collins, prepared the "Conceptual Plan" over a period of years. In this document, the DLNR states its intent is to "transform" Kealakekua Bay and several parcels of state-owned land into an historical park. (Pages 1-2, 31)

Alluding to this plan as being merely "conceptual" in nature, the DLNR proposes to acquire privately-owned land on the pali for a visitor center and describes its development plan as "concepts" and management "strategies." (Chapter 2)

However, stripped of its "conceptual" labels, the document contains all of the components of a definite proposal for state action, using state-owned lands and using state funds to develop the park.

The document commits the state to a plan of action for which no alternatives are proposed. Disguising this plan with terms like "concepts" or "strategies" for state action does not change the substance of the proposal. The document describes the proposal as being:

"[a] combination of physical facilities, interpretive programs, and resource management .... This plan is an important step towards park implementation and toward transforming Kealakekua Bay State Historical Park into one of the most important historical parks in Hawai'i." (Page 31)

The document continues:

The Conceptual Plan ... provides a guide for its future development.

....

Following the acceptance of the Conceptual Plan, park planners will ... produce a separate Development Plan and associated Environmental Impact Statement for each phase of park development. (Page 1)

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It is anticipated that park development will occur in three phases: Napo'opo'o, Ka'awaloa and Pali Kapu o Keoua. Specific issues such as the precise location and size of park facilities will be decided at that time. The timing of the development will depend on the availability of state funds. (Footnote 1)

- The action includes the use of state land.

It is undisputed that the DLNR intends to use state-owned land for the park.<sup>1</sup> This triggered an assessment for the project back in 1997. Section 343-5(a)(1), HRS. Calling the proposal a "conceptual plan" did not change the DLNR's obligation to conduct a Chapter 343, HRS review. It is my understanding that the DLNR did not conduct such a review for the "conceptual plan" in 1997.

- The action also proposes the use of state funds.

Although the "conceptual plan" does not disclose the specific financial requirements needed to develop and to maintain the park or a source of funding, the state proposes to use and will need substantial amounts of state funds. This triggered an assessment for the project back in 1997.

- The action includes other "triggers."

The project will include activity in the Conservation District, use of shoreline areas and use of an historically-registered landmark. These events each triggered an assessment for the project back in 1997.

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<sup>1</sup> "Use of state ... lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands." HAR 11-200-5(c)(c).

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The state supreme court has invalidated reliance on "conceptual plans" which are designed to avoid Chapter 343, HRS review.

According to Section 343-5(a)(1) and HAR 11-200-5(a), the DLNR was supposed to have started its Chapter 343, HRS assessment "at the earliest practicable time, i.e., at the time the DLNR started to prepare the "conceptual plan." This obligation is mandatory as the state supreme court held in Citizens of North Hawaii v. County of Hawaii Planning Commission, 91 Haw. 94, 103-105 (1999). A developer cannot avoid Chapter 343, HRS by calling its project a "conceptual plan."

In the Citizens case, the supreme court pointed out that the private developer's plan to use state-owned land as part of its development required the developer to undertake the Chapter 343, HRS assessment "early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." (emphasis added)

There, the developer tried to postpone its Chapter 343, HRS assessment until after it had obtained significant land use permits for its project and until it was ready to begin construction. The supreme court rejected the applicant's argument that the assessment could come later because the supreme court believed that the decision-maker had to know the "maximum range of options ... before project momentum becomes irresistible, before options are closed, and before agency commitments are set in concrete." (emphasis added)

The supreme court found that the substance of the developer's proposal to use state land in its project, not its "conceptualization," triggered Chapter 343, HRS.

"Decisions reflecting environmental considerations can most easily be made when other basic decisions are also being made, that is, during the early stages of project conceptualization and planning. Here, because the development and general dimension of the project have been known to Chalon from the start, there should be no difficulty in providing 'meaningful information' for HRS chapter 343 environmental review. Moreover, at this early stage, environmental review under HRS 343-5 would be an integral part of the decision-making process." (emphasis added)

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Otherwise, the supreme court noted, an untimely assessment, delayed to later stages of the project, "might call for a burdensome reconsideration of decisions already made and would risk becoming a 'post hoc rationalization to support action already taken.'"

Clearly, the "Conceptual Plan" in this case presents all of the dangers described by the supreme court. The DLNR's own papers reveal that it is now moving forward with a "Phase One Development Plan" which is based upon the "Conceptual Plan" which the DLNR presented to the Board of Land and Natural Resources for review and which the Board adopted in 1997.

In other words, the "Conceptual Plan" committed the DLNR to the actions proposed in the "Conceptual Plan" without a Chapter 343, HRS assessment and is now being used to rationalize, post hoc, all future actions relating to the park."<sup>2</sup>

The "Conceptual Plan" violates Chapter 343, HRS.

Under Chapter 343, HRS and the Citizens case, the DLNR's "Conceptual Plan" is illegal. The fact that the DLNR is the developer in this instance does not insulate the DLNR from Chapter 343, HRS or the supreme court's ruling. A state agency proposing a project must be held to the same standards as a private applicant proposing a project.<sup>3</sup>

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<sup>2</sup> In the "Phase One Development Plan" document, at page 1, the DLNR states that this current development plan is "a refinement of the Kealahou Bay State Historical Park Conceptual Plan" and that the development plan "should be used in conjunction with the Conceptual Plan." (emphasis added)

The DLNR's consultant has also advised the County of Hawaii Planning Department by letter dated August 11, 2000 (Exhibit 1 attached) that the development plan should be read in conjunction with the Conceptual Plan.

<sup>3</sup> As one example of the "conceptual plan's" shortcomings, you should note that the "conceptual plan" refers to various individuals who expressed their concerns and objections to the DLNR's consultant. The consultant then edited these concerns and objections, did not provide the individuals with copies of the final document, did not publish the document's availability, did



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The deception which Chapter 343, HRS and the supreme court seek to prevent is occurring right now before our eyes. In the "Phase One Development Plan" document, at page 37, the DLNR for the first time refers to the environmental review process under Chapter 343, HRS, but long after the "momentum" of the "approved ... conceptual plan" has been built up and is now driving the project forward post hoc.<sup>4</sup>

Furthermore, although the "Conceptual Plan" states at Page 1 that an "Environmental Impact Statement [will be produced] for each phase of park development," the DLNR strongly suggests that an EA alone might suffice for the first phase of the project at Napo'opo'o. (Exhibit 1)

As a direct result of this illegal "conceptual" approach to the project, numerous events are mushrooming. The DLNR's consultant has a large mailing list of persons it had previously contacted during the "conceptualization" process but few have been re-contacted to discuss the "Phase One Development Plan."

A substantial neighboring landowner has been requesting the right to be consulted and to be provided documents but is being ignored. (See enclosed Exhibits 2, 3, & 4.)

Word is spreading that a proposal for a state park at Kealakekua Bay is in a form which already commits the state to the "concept" outlined in the "Conceptual Plan."

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not seek further public input and then presented the "conceptual plan," which lacked the public's full participation, which lacked a statement of alternatives and which lacked a statement of financial costs and funding, to the Board of Land and Natural Resources for review and decision.

As a result, the Board may not have realized that the Board was actually committing itself, other state agencies and state resources to execute the three phases of the "Conceptual Plan."

<sup>4</sup> At page 11 of the "Phase One Development Plan," the DLNR refers to the "Conceptual Plan" as being the approved development plan which is now driving the DLNR's plan to develop the park.

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In the last few days, after it became known that the DLNR had submitted the "Phase One Development Plan" to the County of Hawaii Planning Department for review under Chapter 343, HRS (Exhibit 1), I have received numerous phone calls from individuals expressing their objections to what can best be described as a "stealth process," rather than the open process envisioned under Chapter 343, HRS. I believe many of these individuals wrote letters to the chairman of the Board of Land and Natural Resources to express their concerns.

- The "Conceptual Plan" is not "exempt" activity.

If the DLNR believed that it could exempt the "Conceptual Plan" from Chapter 343, HRS review, it was mistaken. Section 343-5(a)(1), HRS and HAR 11-200-5(d) exempt "planning" or "feasibility studies but only where the project in question "has not [been] approved, adopted or funded."

Here, the Board adopted the plan in 1997. I am advised that the DLNR paid \$250,000 to develop the plan and that the governor released \$500,000 to implement some of the action described for the Napo'opo'o phase. (See Exhibit 5.)

- State duty to "conserve and protect."

With the Waihole Ditch and Kaupulehu (North Kona) cases as a backdrop, which cases demand that the state "conserve and protect" our resources and follow the administrative processes established under law, I am sure that the community will do everything necessary to protect Kealakekua Bay, including going to court for relief.

My client, Malama Pono Kealakekua, is prepared to initiate court action to protect the important resources at Kealakekua Bay.

- B. The "Phase One Development Plan" is illegal.

As noted in footnote 2, supra, the "Phase One Development Plan" bootstraps itself into the illegal "Conceptual Plan." The document described itself to be a "refinement" of an illegal document.

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The fruits of an illegal document is no more legal than the tree on which it grows.

C. Request for Ruling of Illegality.

On behalf of my client, I request an immediate ruling on (1) whether the "Conceptual Plan" was subject to Chapter 343, HRS review back in 1997, (2) whether the "Conceptual Plan" is valid today, (3) whether the DLNR can incorporate the "Conceptual Plan" into the "Phase One Development Plan," and (4) whether the "Phase One Development Plan," as a mere extension or refinement of the "Conceptual Plan," is valid.

If the DLNR elects to proceed with its proposal, the DLNR must adhere to the following course of action.

If the DLNR elects to proceed with its proposal, the DLNR must proceed within the following constraints.

A. "Fresh Start." The DLNR must discard the "Conceptual Plan" and "Phase One Development Plan" in their entirety and must commence a new early review process that adheres to the "early assessment" provisions of HAR 11-200-5(a)-(d) and 11-200-9(a)(1).

If the "Phase One Development Plan" is not discarded, it will commit the state and public to an illegal development plan which forecloses alternatives. The "fresh start" will allow the public to participate in the development of a plan which is appropriate to this very important area.

B. "Public Trusteeship." The people adopted Article XI, Section 1 of the state constitution in 1978, declaring that:

"For the benefit of present and future generations, the state and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources ....

All public natural resources are held in trust by the state for the benefit of the people."

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The DLNR, to which the legislature assigned most of the responsibilities for administering this "public trust" (as well as other responsibilities as a line agency of the Executive Department) must be mindful of its dual role.

In the ordinary course, the DLNR performs routine proprietary and administrative functions. However, the DLNR must be careful to act in a manner that is consistent with the "public trust" where the public's natural resources are affected by its actions.

Since the DLNR's role and functions as administrator and trustee may be blurred at times, Chapter 343, HRS offers the people (the beneficiaries of the "public trust") a tool to assist the DLNR in executing the "public trust" and offer the public a safeguard against imprudent state actions. As the public trustee, the DLNR must use, not misuse, this important tool and safeguard.

C. New Events. Since the publication date of the "Conceptual Plan" (1997), a new development, "Lands of Keopuka," has been proposed on the ahupua'a of Keopuka adjoining Kaawaloa to the north. The proposed Mamalahoa Bypass Road has been realigned and will not pass through Kaawaloa to the south as originally contemplated. The legislature enacted Act 50 in 2000 and no rules have been published to implement Act 50 as of date.

Traffic has increased and will increase on Napo'opo'o Road, but the road's safety has yet to be studied. Two weeks ago, massive siltation of the pristine waters just north of Kaawaloa occurred as a direct result of man-made activity, bringing into question the adequacy of the environmental data presented for that project as well as its mitigation measures.

The DLNR, in its "fresh start" Chapter 343, HRS review, must vigorously examine these new events.

D. Early Review. Chapter 343, HRS discourages the reliance upon the statutorily mandated public review process as the "sole" means to identify or to address alternatives and project impacts. See HAR 11-200-15(a).

To ensure that the DLNR has faithfully adhered to this early review requirement, the DLNR must document the "written comments and responses to comments" which it obtained during "the early consultation" period, not just the comments received during "statutorily prescribed review periods." HAR 11-200-10(12).

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ATTORNEY AT LAW

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1. Direct the DLNR to suspend its ongoing assessment proceeding for the "Phase One Development Plan";

2. Direct the DLNR to satisfy the "fresh start" and "early assessment" requirement of Chapter 343, HRS, if the "plan" is to be reconsidered and as part of that process:

- a. develop a list of "affected" groups and persons for your review and comment;
- b. provide the "affected" groups and persons copies of all documents and papers for the "plan" (such as the "Conceptual Plan" and "Phase One Development Plan") which the DLNR has previously published or referred to public agencies and others for review, including papers, documents and material which the DLNR transmitted to public agencies, groups and individuals leading up to the "Conceptual Plan" and "Phase One Development Plan";
- c. request written comments from those "affected" groups and persons under HAR 11-200-10(12), respond in writing to those comments under HAR 11-200-10(12) and attach the comments and responses to any EA under HAR 11-200-10(12).

3. Direct the DLNR and its consultant to treat my client, Malama Pono Kealakekua, as an "affected citizen group."

Closing

As stated previously, this matter is one of great urgency. I, therefore, request that you respond to my requests for rulings and other relief before October 2, 2000. I will be available by phone at my residence (323-3072) as well. Thank you.

Yours truly,

Michael J. Matsukawa

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Encs.

# MALAMA PONO KEALAKEKUA

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## FACSIMILE TRANSMITTAL SHEET

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|                      |  |
|----------------------|--|
| TO:<br>Gordon Leslie | FROM:<br>Malama Pono Kealakekua          |
| COMPANY:             | DATE:<br>09/19/00                        |
| FAX NUMBER:<br>auto  | TOTAL NO. OF PAGES INCLUDING COVER:<br>5 |
| PHONE NUMBER:        | SENDER'S FAX NUMBER:<br>(505) 988-5360   |
| RE:                  | YOUR PHONE NUMBER:<br>(505) 988-1876     |

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URGENT  FOR REVIEW  FOR YOUR INFORMATION  PLEASE REPLY  PLEASE COMMENT

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Malama Pono Kealakekua was formed to serve as an educational organization. We are therefore most pleased that your ohana wishes to serve as the Hawaiian Cultural Advisory Committee of Malama Pono Kealakekua as there is much that we can all learn from you.

As an advisory committee, this will give your group full autonomy under our corporate umbrella.

I now include our latest material which you will also receive shortly in hard copy shortly.

This letter to the OEQC has been IMPROVED. I believe you can just copy and use it.

Please get us a copy to Shelley 937-9751 or P.O. Box 780, Nahalehu HI 96722. We are building a data base, and need proof of mailing.

Malama Kealakekua!

# Malama Pono Kealakekua

Malama Pono Kealakekua is a Hawaii non-profit corporation, formed to conserve and protect the natural beauty of the unique and historic environment of Kealakekua Bay, Pali Kapu o Keoua, Ka'awaloa and the lands and waters in their immediate proximity.

Malama Pono Kealakekua will further its goals by informing and educating the public of related environmental, regulatory and legal issues particularly the State of Hawaii's Constitutional obligations to conserve these resources for the benefit of present and future generations.

Most of this area is held by the State of Hawaii by and through its Department of Land and Natural Resources and its various divisions, particularly the division of State Parks. Malama Pono Kealakekua has formed at this time to prevent the irrevocable injury which could be visited on the lands surrounding Kealakekua Bay and the local community if State Parks moves forward with its present development plans for the Kealakekua Bay State Historical Park.

These development plans are set out in a document dated August 1997 prepared by Belt Collins as Development Consultants for the State Parks Division of the DLNR. State Parks through their Development Consultants recently signaled their intention to move forward with the implementation of this plan by letter addressed to the Hawaii County Planning Department Dated August 11, 2000 conveying a "Preliminary" Phase One Development Plan. Copies of both these plans may be viewed at the Kona and Hilo offices of the HI County Planning Department.

Malama Pono Kealakekua questions the validity of the Conceptual Plan and its legal efficacy. While such plan was adopted by the Board of Land and Natural Resources, it certainly has not been "approved" by the community, nor has the Conceptual Plan been submitted to the scrutiny of an EIS. In the period from 1994 through 1997 a series of "presentations" and community participation opportunities was engineered by Belt Collins. A thorough reading of the Conceptual Plan shows that these meetings included a substantial amount of community dissent and that dissenting members of the community left these meetings when they saw how the outcome was being manipulated by Belt Collins and its 'facilitators'. A more indicative expression of the Community's support for the DLNR's plan came at the last community meeting held by Belt Collins at Yano Hall April 28, 1998 where a vote was taken on support for the DLNR's plans: 52 Against, and NONE in Favor!

Malama Pono Kealakekua believes that the Conceptual Plan was formulated on the false premise that the Kealakekua Bay State Historical Park should be developed as a "visitor attraction", with a Visitor Center to accommodate large busses, a high degree of "interpretive materials" and "theme park" like displays such as recreations of ancient Hawaiian villages. Malama Pono believes that this whole "High Impact Park" concept is inappropriate and that if it is allowed to go forward it will ruin this very special environment in a way which will be regretted by future generations. Kealakekua must not be allowed to become another Hanauma Bay!

Malama Pono Kealakekua supports the establishment of a Low Impact Park which protects and preserves the present natural environment of Kealakekua Bay. A Low Impact Park should encourage visitors to discover this area on foot and should discourage vehicle traffic, particularly large tour busses.

Malama Pono Kealakekua intends to focus its attention on the legal process which the State must go through when it takes on the role of a "Developer". Since the State approves its own development process, the impediments to approval are much less stringent than those imposed on private developers. Malama Pono intends to first concentrate on the requirements of the environmental review process under chapter 343 of Hawaii Revised Statutes (the EIS law).

Malama Pono Kealakekua is particularly interested in focusing on particular legal issues which could, if appealed to the Supreme Court, make new law in the area of the State's environmental responsibilities, and its obligations to protect cultural resources, particularly the State's Constitutional obligation to conserve and protect Hawaii's natural beauty, land, air and water as "Trustee" for the people. Malama Pono will cooperate with other plaintiffs in any such suits by sharing legal research, but will not provide direct legal representation to others.

Malama Pono Kealakekua takes notice of the proposed private development at Keopuka and the potential impacts of such development on Ka'awaloa and Kealakekua Bay. Malama Pono is fully informed of the substantial public controversy which has been raised by this proposal. In respect to the differing views of its supporters regarding Keopuka, and in order to effectively concentrate on achieving its goals, Malama Pono will limit the scope of its efforts to matters which pertain to the State's lands and the State's actions in and around Kealakekua Bay.

Malama Pono Kealakekua has retained Michael J. Matsukawa Esq. as its attorney. Mr. Matsukawa also serves as Malama Pono Kealakekua's President.

To play a part in this process and support our efforts, please:

- 1) Sign and fill in the attached letter to the DLNR and OEQC
- 2) Send it back to us at P.O. Box 780, Na'alehu, HI 96772

We will make copies and mail them to the DLNR and OEQC

If you decide to make your own copies and send it in yourself,  
Please send us a copy as well !

**Mahalo! and Malama Kealakekua !**

For further information please e-mail: [MalamaKealakekua@Aol.Com](mailto:MalamaKealakekua@Aol.Com)  
To become a Contributing Member of Malama Pono Kealakekua, Please provide us with your  
Name and address and telephone number by e-mail or to P.O. Box 780, Na'alehu, HI 96772



## Regarding the Proposed Development of Kealakekua Bay State Park, Malama Pono Kealakekua:

- 1) Believes that Napo'opo'o Rd. and Middle Ke'ei Rd. are substandard and dangerous roads, and that any development which has the effect of attracting a greater visitor count, especially large busses, would be hazardous to the public unless such roads were first substantially widened, straightened, and otherwise made safe;
- 2) Believes that the primary access to the State Park should be reconsidered in light of the anticipated construction of the Mamalahoa Bypass road, and that the actual construction of the Bypass Road should be a pre-condition to any further development;
- 3) Supports only site stabilization and minimum development in the vicinity of Hikiau Heiau at Napo'opo'o, by way of plan approved by the local Napo'opo'o community and opposes the State's "High Level of Interpretive Facilities" (including the recreated Hawaiian village), as this would become a tourist attraction and could be viewed as being "culturally insensitive;"
- 4) Opposes the establishment of any State Park Visitor Center and particularly opposes a Visitor Center located above Pali Kapu o Keoua, with its proposed access road irrevocably scarring the southern slope of the Pali, its proposed 70 car parking lot, accommodation of large tourist busses, "concession stands", museum and headquarters which would irrevocably ravage the environment of Pali Kapu o Keoua and permanently destroy its natural beauty for future generations.
- 5) Supports the preservation of Ka'awaloa Rd. (the State's oldest and most historic road) as a walking and riding trail and the formulation of management plan for the archeological mitigation, stabilization and opening of the ancient Hawaiian trail crossing above Pali Kaupu o Keoua, which trail is the source of the name Kealakekua: the "Pathway of the Gods";
- 6) Opposes the use of lower Ka'awaloa Road and/or the "Pathway of the Gods" by any vehicle, including State Park vehicles, as being dangerous and culturally insensitive;
- 7) Supports the establishment of reasonably sized parking lots and basic improvements to facilitate access to the Park and to the trailheads and supports the recreational use of the area in ways which do not have a negative impact on the environment such as swimming and hiking.
- 8) Is extremely concerned by the lack of financial responsibility on the part of the State in the formulation of its park plans which take no account of the enormous costs necessary to implement them, the State's refusal to consider reasonable alternatives, and the fact that such funding is simply not available in the present budgetary environment or in the foreseeable future;
- 9) Believes that when the State acts as a "Developer" that the State should be held to the same standards of public review and scrutiny as private Developers, including a demonstration of the financial ability to complete projects for which the State seeks permits;
- 10) Questions the prudence of spending at least \$250,000.00 in taxpayer funds in hiring a "Developer's Consultant" to devise such a hazardous, environmentally destructive, culturally insensitive, and financially unachievable plan, and to attempt to impose this "Conceptual Plan" on the community against its will.

# Malama Pono Kealakekua

Timothy E. Johns, Chairperson  
Board of Land and Natural Resources  
P.O. Box 62, Honolulu HI 96809

Fax: 808-587-0390

Mr. Gary Gill  
Deputy Director of Environmental Health Administration  
P.O. Box 3378, Honolulu HI 96801

Fax: 808-586-4368

## Re: H.R.S. Chapter 343 in relation to Kealakekua Bay State Park

Dear Sirs:

Date: \_\_\_\_\_, 2000

I am a member of the South Kona Community or otherwise have an active and direct connection to Kealakekua Bay and I hereby inform the DLNR that I am an "affected individual" within the meaning of HAR 11-200-9(a)(1). I believe that I am not being properly consulted regarding the preparation of an EA for the Kealakekua Bay State Park. I have not been properly notified or informed of developments or provided with materials by State Parks. A plan has been sent by Belt Collins to agencies for their consultation prior to the issuance of an EA, but State Parks refuses to make such materials available or otherwise consult with me or other members our community.

\* I wish to be individually consulted before the preparation of any Environmental Assessment for the Kealakekua Bay Historical Park and after such consultation, I wish to be given the opportunity to make a written comment to be published as part of the draft EA.

\* I wish to be provided with a copy each of the Conceptual Plan and the Phase One Development Plan in adequate time prior to such consultation so that I can be properly informed particularly as to the preparation of my written comment to be published as part of the draft EA.

\* I wish to be specifically informed by mail of any meetings that are to be held by your State Parks Department, the Land Board or Belt Collins regarding the Kealakekua Bay State Historical Park.

\* I wish to be sent, immediately on publication, a copy of any Environmental Assessment or Notice of Preparation of an Environmental Impact Statement. I also want to be a "Consulted Party" in any ongoing process before the OEQC pursuant to H.R.S. chapter 343.

Sincerely,

Print Name and Address below.

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**Participants:** Please send us a copy your signed letter to: P.O. Box 780, Na'alehu, HI 96772.  
Please include your telephone number and contact us by e-mail at: [MalamaKealakekua@Aol.Com](mailto:MalamaKealakekua@Aol.Com)

Michael J. Matsukawa  
Attorney at Law  
75-5751 Kuakini Highway, No. 201  
Telephone 329-1385

## **Additional Requests for Ruling**

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I AM ALSO REQUESTING A RULING ON THE FOLLOWING TOPICS. However, the requests contained in the body of my letter have greater urgency than the requests set forth below.

The requests set forth below are relevant to any future "early assessments" which the DLNR may make if the DLNR elects to take a "fresh start" on the assessments for the Kealakekua Bay State Historical Park proposal.

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### **PART ONE: Consultation and Scoping**

- Assume that the "Conceptual Plan" is invalid or that the "Conceptual Plan" and "Phase One Development Plan" are two parts of a single document being circulated to public agencies for comment prior to the preparation of an EA.

#### ***Early Assessment Requirement (Pre-EA Period)***

HAR 11-200-5 & 9 require the proposing agency (DLNR) to assess the effects of its proposal "at the earliest practicable time."

HAR 11-200-7 requires the proposing agency to assess the entire proposal, not just separate phases, in a single document.

HAR 11-200-9(a)(1) requires the proposing agency to begin its assessment "at the earliest practicable time" AND to consult with citizen groups and individuals that the

proposing agency believes will be affected by the proposal and to obtain the advice and input from county agencies which are responsible to implement the county General Plan.

HAR 11-200-10(12) requires the proposing agency to include in its written assessment all "written comments and responses to the comments [made] under the early consultation provisions of sections 11-200-9(a)(1) ...."

Requests for Ruling

1. What is the extent of the proposing agency's discretion to determine which individuals and groups are "affected" and, therefore, must be consulted?
  - a. What criteria must the proposing agency use?
  - b. Who develops the criteria?
  - c. How are disagreements over the criteria resolved?
2. Are the names of persons and groups contained in the proposing agency's mailing list as well as the names of persons and groups contained in the consultant's (Belt-Collins') mailing list included in the list of "affected" groups and individuals?
3. Are the names of persons and groups who ask in writing to be consulted included in the list of "affected" groups and individuals? Are elected officials who represent citizens in the affected project area deemed to be "affected" individuals?
4. May the proposing agency refuse to treat persons and groups who ask to be consulted as being "affected" groups and individuals?
5. May any group or individual whom the proposing agency believes to be affected and with whom the proposing agency consults have his, her or its comments included in the proposing agency's assessment draft and final assessment documents?
  - a. Since HAR 11-200-10(12) requires a proposing agency to include written comments and responses made during the early consultation period described in HAR 11-200-9(a)(1), i.e., during the early pre-EA assessment period, is it mandatory that the proposing agency not only consult with such group or individual but also solicit their response to and publish their comments?
  - b. Since a proposing agency normally consults with public agencies and solicits their written comments during this early pre-EA period, should there be any difference in procedure when the consulted party is a citizen group or private individual?
  - c. Shouldn't all parties consulted during this early pre-EA period have the equal right to submit written comments, to obtain written responses and to have their comments and responses published?

6. Must the proposing agency respond to the comments of the "affected" groups and individuals?

7. Must the proposing agency respond to the comments of any group or individual who submits comments, regardless of the proposing agency's belief as to whether the group or individual is affected by the proposal?

8. In the case of the proposed Kealahou Bay State Historic Park, which will be located in a place of statewide, national and international significance, what categories of groups and individuals qualify as "affected" groups and individuals and with whom the proposing agency must consult? Would the categories include:

- (1) Adjacent property owners?
- (2) Native Hawaiians and associations?
- (3) Current users of the area's resources?
- (4) Owners of businesses who use the area for their business activities?
- (5) Persons with "associations" with, in and around the area?
- (6) Historical societies?
- (7) Church and religious organizations?
- (8) Residents of the "affected" community?
- (9) Elected representatives of the community?
- (10) Community service organizations?
- (11) Federal, state and county government agencies?
- (12) Users of Napoopoo road?
- (13) Users of Middle Keei road?
- (14) Users of other roads and corridors that may be affected?
- (15) Persons and groups previously in contact with the agency and/or its consultant over the years regarding the park?
- (16) Others?

9. Who ultimately determines what groups or individuals should be consulted?

10. What criteria is used to determine whether any group or individual is an "affected" group or individual who must be consulted?

11. What remedy does any group or individual have if the proposing agency refuses to treat him, her or it as an "affected" group or individual?

### *Scoping*

12. Must the proposing agency conduct scoping meetings in the early pre-EA period?

13. Must any scoping meeting be conducted in a manner in which the participants are advised in writing and before the meeting that the scoping meeting is a consultation with a community citizens group under Chapter 343, HRS?

14. When the area which is the subject of proposed action has such great importance to the state, nation and world communities, may the proposing agency be required to conduct scoping meetings in the early pre-EA period?

15. Can any group or individual request a scoping meeting to take place at the earliest practicable time?

16. At what time can any group or individual request a scoping meeting?

17. What remedy does any group or individual have if the proposing agency refuses to respond to a request for a scoping meeting?

*Advance Acknowledgment that  
Full Environmental Impact Statement Required*

18. In the event that a proposing agency acknowledges in its early assessment and early documents that an Environmental Impact Statement is required and will be prepared for any one or more phases of the proposal (which is the case here),

a. Is the proposing agency required to perform its early pre-EA assessment in the same manner required for a draft EIS, which includes mandatory consultation with requesting parties, written comments, written response and publication of the comments and responses?

b. Is the proposing agency required to conduct early scoping meetings at the earliest practicable date?

**PART TWO: Cultural Impacts, Act 50, Session Laws (2000)**  
**House Bill 2895, S.D. 1 (eff. 4/26/2000)**

The state legislature recently enacted Act 50 dealing with "cultural practices" and "cultural resources." Assessments made under chapter 343, HRS must now include these subjects. Presently, the Environmental Council's rules do not have provisions dealing with the subjects described in Act 50.

*Requests for Ruling*

1. When will the Environmental Council publish rules governing the subject of "cultural practices" and "cultural resources?"

2. Must the proposing agency (DLNR) cease any of its assessment activity until such time as the Environmental Council publishes such rules?

3. In the case at hand, where the proposing agency acknowledges, without dispute, that the resources of the affected area are of tremendous importance and have been left "intact" to a large degree over time (including the trail over the pali, i.e., "ke ala ke akua," and the cliff-side burials of Pali Kapu o Keoua), must the proposing agency conduct extensive special consultations and special and extensive scoping meetings to discuss, among other things, appropriate methods and criteria for the entire assessment process?

4. Further, in light of the recent Hawaii Supreme Court decision in *Kapaakai o ka Aina v. Land Use Commission*, \_\_ Haw. \_\_, No. 21124 (Sept. 11, 2000) relating to the protection of cultural resources and the *Waihole Ditch* case, \_\_ Haw. \_\_, No. 21309 (Aug. 22, 2000) relating to the public trust obligations of state agencies under Article XI, Section 1 of the state constitution, must the proposing agency suspend all activity concerning the development of the Kealakekua Bay State Historical Park until the Executive Department of the State of Hawaii prepares and adopts an appropriate management policy to "conserve and protect" our natural resources?

5. Would a proposing agency be in breach of its obligations described under these two recent cases if it did not suspend its activity?

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September 26, 2000

Mr. Timothy E. Johns  
Chairperson  
Department of Land and Natural Resources  
P.O. Box 621  
Honolulu, HI 96809

RE: KEALAKEKUA BAY STATE HISTORICAL PARK  
1997 "CONCEPTUAL PLAN" AND 2000 "PHASE  
ONE DEVELOPMENT PLAN"

Dear Chairperson Johns:

I represent Malama Pono Kealakekua and am writing to you about the "Phase One Development Plan" for the Kealakekua Bay State Historical Park and its underlying "Conceptual Plan."

As I informed the Office of Environmental Quality and Control (see enclosed letter), the Hawaii Supreme Court has already ruled that a "conceptual" plan, despite its label, must be referred to the Chapter 343, HRS review process. Citizens of North Kohala v. Hawaii County Planning Commission, 91 Haw. 94 (1999). If it isn't it is invalid. Any ensuing development plan based thereon is likewise invalid.

By its own terms, the "Phase One Development Plan" is built upon the "Conceptual Plan," reflects the "Conceptual Plan's" development "strategy" and is a "refinement" of the "Conceptual Plan." Since the "Conceptual Plan" and "Phase One Development Plan" are actually just one plan, both documents must be rewritten, resubmitted and reviewed under Chapter 343, HRS. Neither plan standing alone satisfies the requirements of Chapter 343, HRS or the Citizens of North Kohala decision.

Since the Department of Land and Natural Resources has already started to "consult" with public agencies on the "Phase One Development Plan," can you please answer the following questions:

|                   |               |         |              |            |   |
|-------------------|---------------|---------|--------------|------------|---|
| Post-It® Fax Note | 7671          | Date    | 9/26/00      | # of pages | 5 |
| To                | GORDON LESLIE | From    | M. MATSUKAWA |            |   |
| Co./Dept.         |               | Co.     |              |            |   |
| Phone #           |               | Phone # |              |            |   |
| Fax #             | 938-9662      | Fax #   |              |            |   |



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The "Conceptual Plan"

1. Was the "Conceptual Plan" reviewed in any way under Chapter 343, HRS? If yes, please refer me to all supporting documentation.

2. Did the Department adopt the "Conceptual Plan" and if yes, when did the Department or Board take such action?

3. On what information did the Department or Board base its decision and is that information available for public inspection?

4. Did the Department or Board believe that it was committed to implementing the development "concepts" and "strategies" outlined in the "Conceptual Plan" document when it adopted the same?

5. Who were the "affected" individuals and groups that were consulted in the formulation of the "Conceptual Plan" document or who provided any input or comment to the Department or the Board at any time during the preparation of the "Conceptual Plan" and during the Department or Board's deliberations toward adopting the "Conceptual Plan?"

6. Is a list of those individuals and groups available for public inspection?

7. Since the proposal contemplates the use of the State funds,

a. Did the Department or Board prepare a cost analysis for the entire project?

b. What monies have the Department or Board spent to date on planning for the project?

c. Have any other funds been appropriated or released for the implementation of any part of this project? If yes, what amounts and for what work?

d. Have any portion of the funds so appropriated and released been spent on planning instead of the purpose for which they were appropriated and released?

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The Assessment Process

Assume that the "Conceptual Plan" document is invalid for lack of a proper assessment or that the Board sets the "Conceptual Plan" aside (with prejudice) and assume further that the Department intends to put forward a new proposal for the park,

1. What groups and individuals will qualify as the "affected" groups and individuals who will be consulted in the assessment of any such proposal?

2. Will the Department or Board respond to comments and include the comments and responses thereto in the assessment document, together with and on the same basis as comments which are made by public agencies?

3. Will groups or individuals who believe they are "affected" be entitled to submit their comments even if they are not specifically consulted by the Department? (Please note the several letters on this subject addressed to you in recent days.)

4. What actions will the Department or Board take to identify and to consult with "affected" groups and individuals?

5. What scoping meetings will the Department or Board hold in the community during the early assessment period?

6. Will the Department or Board deliver draft and final copies of the proposal documents to each "affected" group and individual? If not, why not?

Project Funding

1. Please provide me with information concerning the short-term and long-term budget for the project and the source of funds for all phases or components of the project outlined in the "Conceptual Plan" and "Phase One Development Plan."

2. Will the Department or Board provide the "affected" groups and individuals and the public at large financial information relating to the cost of the park's development and maintenance? If yes, when?

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3. According to an article in the West Hawaii Today dated March 7, 2000 (enclosed), the Governor released funds to replace the Restroom and the Pavilion at Napo'opo'o. Why does the "Conceptual Plan" and preliminary "Phase One Development Plan" include an ambitious plan to develop the park when the Restroom and Pavilion facilities remain unbuilt?

4. Since the state lacks funds to build the park, why does the "Conceptual Plan" and "Phase One Development Plan" contain provision for the acquisition of land, construction of roads and the re-creation of an ancient "Hawaiian Village"?

Request for Ruling

Can you please let me know the answers to the questions set forth above as soon as possible.

Furthermore, because the preliminary "Phase One Development Plan" document is now being circulated for consultation at this time, please advise me:

- Whether the Department or Board will substantially revise this document or is currently revising this document substantially,
- Whether the Department or Board will withdraw the request for consultation for the preliminary "Phase One Development Plan" that is now being circulated to the Hawaii County Planning Department per the letter of Belt Collins dated August 11, 2000,
- Whether, in light of the issues raised in this letter and letter to the OEQC (enclosed), you will bring the matter to the Board for action and recommend that both the "Conceptual Plan" and preliminary "Phase One Development Plan" be withdrawn and that any future or continued planning for a historical park at Kealahou Bay be started anew.

MICHAEL J. MATSUKAWA  
ATTORNEY AT LAW

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Closing

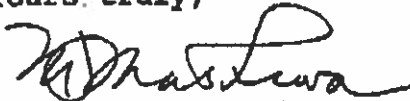
Please be informed hereby that Malama Pono Kealakekua is an "affected citizens group" within the meaning of HAR 11-200-9(a)(1) and that Malama Pono Kealakekua wants to be informed through my office of any and all actions and/or hearings which in any way relate to Kealakekua Bay or the proposed park.

My client also wants to be notified in sufficient time.

So that you may better understand the aims of Malama Pono Kealakekua, I include our statement of purpose and platform.

Thank you for your attention in this matter.

Yours truly,

  
Michael J. Matsukawa

MJM:jff\malama\johns.lt1

Encs.: Letter to OEQC  
WHT Article  
MPK Statement of Purpose  
MPK Platform

xc: Russell Kokubun, Big Island Land  
Board member (w/encs.)