

**Malama Pono Kealakekua**  
**October 16, 2000**  
**Enclosure #1**

**Kealakekua Bay Historic District (portion)**  
**"Napoopoo State Park"**

State Land Use District: Conservation  
County SMA District: Yes  
County Zoning District: Open  
State Historic Site: Yes, No. 10-47-7000

**1 Chapter 343, HRS (EIS law)**

Three "triggers" are present: (1) use of state lands/funds; (2) use in a Conservation District and (3) use within a registered historic site. These "triggers" invoke coverage of Chapter 343, HRS. Limited exemptions are available under HAR 11-200-8 to remove a proposal from Chapter 343, HRS. For example, "preliminary studies" and "replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height and dimensions as the structure replaced" are exempt under HAR 11-200-8. Where an exemption is claimed, the proposing agency must maintain records and "shall produce the records for review upon request."

Nevertheless, the exemption is NOT available if the proposal is part of a series of "planned successive actions" or where the area in question is "a particularly sensitive environment" or where the activity will result in a cumulative impact of significance.

In this instance, the State developer is currently conducting an environmental review of what it describes as "Phase One Development Plan" and the restroom, pavilion and parking facilities in question are part of that development plan. In other words, the State developer realizes that the activity described in "Phase One" (which includes the restroom, pavilion and parking facilities) is subject to the environmental review process but intends to construction the restroom, pavilion and parking components of that "Phase One" plan before that review is even completed.

Questions:

Did the State developer claim an exemption for the restroom, pavilion and parking facilities in question and on what basis?  
What records are available on this point?

On what basis may the State developer begin construction of a project-within-a-larger-project undergoing environmental review before that review is completed?

*Summary  
by Gordon  
Jesic*

Re'd on <u>10/29/01</u>	mtg by <u>SG</u>
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## 2 Chapter 183C, HRS (Conservation District)

HAR 13-5-1, et seq. tie the provisions of Chapter 343, HRS to the Conservation District permit regulations. If the activity qualifies for an exemption under HAR 11-200-8 as a "replacement of existing structures or facilities," the activity does NOT require a CDUP. It is considered to be an A-1 type of use.

However, if the activity is NOT exempt under HAR 11-200-8, the State developer must obtain a D-1 board permit (CDUP). This requires a public hearing and is subject to the contested case procedure of Chapter 91, HRS.

## 3 Chapter 6E, HRS (Historic Preservation Law)

The Kealahou Bay Historic District covers a substantial area, including the restroom-pavilion site. Section 6E-8, HRS requires the State developer to obtain the "concurrence" of the DLNR. "Any person" may appeal that determination to the state historic review board. In this instance, the State developer and the DLNR happen to be one and the same entity.

Questions: Did the DLNR issue "concurrence" or "non-concurrence" determination?

Did any person appeal that determination to the state historic review board? If so, when and with what result?

## 4 Chapter 205A, HRS (Special Management Area)

Chapter 205A, HRS does NOT exempt replacement or reconstruction activity. Further, the State developer must submit an assessment to the county of Hawaii under Rule 9-10 to obtain a ruling as to whether the activity is a "development" and subject to the SMA permit requirements. Since the cost of the facilities will exceed \$125,000, a major SMA use permit is required for the facilities.

Questions: Did the State developer submit the SMA assessment to the county? If so, when and with what results?

If the State developer did not submit the SMA assessment to the county, when does the State developer intend to submit the assessment?

## **5 Act 328 (1997) and Board Action on the Conceptual Plan**

Chapter 2 of the Conceptual Plan describes the State's current maintenance and management demands as "interim management strategies." Including within these "strategies" are "new restroom and shower facilities." (Page 27) These facilities were first proposed in 1989 and are now in deplorable condition.

For unknown reasons, the State developer did not construct new facilities in 1989 or anytime between 1989 and 1997. Instead, the State developer pursued an ambitious park visitor-oriented plan that deviated from the constitutional mandate of Article XI, Section 1 (conserve and protect). As a result, the State's ordinary proprietary functions (repairs, maintenance, control, management) which were then redesignated as "interim management strategies," became part and parcel of the larger, ambitious park plan.

The practical result of this situation is that the specific projects or subprojects described in the Conceptual Plan become hostage to the Conceptual Plan's compliance with Chapter 343, HRS, other regulatory approvals and state funding.

In what appears to be an attempt to "break out" the Napoopoo subproject for restroom, pavilion and parking facilities, i.e., "unlink" the subproject from the Conceptual Plan, the State developer obtained a legislative appropriation for "Phase I Development." under Act 328 (1997). The appropriation was for \$550,000. However, because the Conceptual Plan was already published and the Board was already in process of approving and adopting the Conceptual Plan at the same time, the "break out" effort failed.

In 1997, the State developer had actually "approved, adopted and funded" a project that used state lands and state funds to construct facilities that were part of a series of successive actions (as described in the Conceptual Plan) in the Conservation District and SMA District. This fact notwithstanding, the State developer did not submit this project to the environmental review process in 1997, 1998 or 1999. (See Items 1,2 and 4, above regarding required permits and available exemptions) Nor did the State developer inform the legislature or the public that it had "bundled" or "linked" the restroom, pavilion and parking facilities at Napoopoo into the larger Conceptual Plan.

In February 2000, the State developer then published a "Phase One Development Plan" document. This document incorporated the Conceptual Plan and emphasized again that the restroom, pavilion and parking facilities at Napoopoo were components of Phase One and the Conceptual Plan. (The source of funding for this additional document is not clear. Act 296 (1991) covered "plans" for the park. Act 328 (1997) covered "design" and "construction" of "Phase I Development" for the park.)

Within the past two months, the State developer, by its consultant, notified the county of Hawaii planning department that the State developer was consulting on the "Phase One Development Plan," but had already approved the construction plans for the restroom, pavilion and parking facilities at Napoopoo in May 2000 and had let a construction contract. In short, the State developer is currently prepared to construct the subproject or project-within-a-greater-plan at this very moment, even though the "Phase One Development Plan" portion of the greater plan is still undergoing environmental review at this time.

Question

Did the State developer seek the advice of the OEQC as to whether the State developer could proceed with a project-within-a-greater-plan undergoing environmental review before the review is finished? If yes, when and with what results?

**6 Article XI, Section 1 (Public Trust)**

In 1978, citizens required the State and its agencies, including the State developer, to manage the public's resources under a public trust with a simple mandate -- to conserve and to protect the resources. The State developer, however, restates this mandate and suggests that the State should exploit the resources at Kealakekua Bay (under its so-called mandate to educate the public) through visitor-oriented facilities and plans.

Instead of controlling access and preserving the area, the State developer contends its mandate requires the State to open up the area through "interpretive" facilities. The State developer argues that this approach will lead to the preservation of the resources for future generations and, therefore, is in keeping with its trust obligations under Article XI, Section 1.

One of the critical reasons for the early consultation provisions of Chapter 343, HRS is to analyze all alternative actions available to the State developer. The Conceptual Plan forecloses many of the alternatives without the vigorous public review process envisioned by Chapter 343, HRS.

Questions:

Did the State developer's consultant review the constitutional mandate of Article XI, Section 1? Did the State developer review the constitutional mandate of Article XI, Section 1?

What efforts did the State developer and its consultant make to ensure that any plan would be consistent with the constitutional mandate to conserve and to protect?

In what manner does the Conceptual Plan fulfill the constitutional mandate to conserve and to protect?