

Situational Analysis for the Foti/McKinley Subdivision:

Public Access and Historic Preservation Issues

Subdivision: 06-000435

SMA Minor: 07-000051

District: Kona Hema

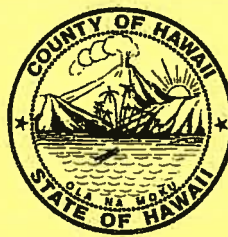
Ahupua'a: Ala'e I

TMK: Multiple

County of Hawai'i Planning Department



In Collaboration with the Public Access Partnership



Attachment D

PURPOSE

The purpose of this analysis is to help the Planning Department determine how it will address Public Access non-performance for the Foti Subdivision 06-435 and historic preservation violations for SMA-Minor Permit 07-51. The impetus for this analysis was a site visit performed on May 29, 2019 which included Jackson Bauer of Na Ala Hele (NAH), Rick Gmirkin of Ala Kahakai National Historic Trail (ALKA), Sean Naleimaile of the State Historic Preservation Department (SHPD), Kevin McCabe (Ala'e Farms representative), Maija Jackson and Kamuela Plunkett of the Hawai'i County Planning Department.

The organization of this analysis is important as public access non-performance and historic preservation violations occurring on the subject properties appear to be overlapping. While these issues are related by property, permitting, and easements, this analysis seeks to differentiate one path of resolution from the other while using the same body of research. Thus, this document is outlined as follows:

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Permitting History of Property (Adapted from Maija J.)

1. **August 17, 2006:** Application for 12-lot consolidation and re-subdivision submitted to the Planning Department by Foti Alae Properties LLC for 123 acres of land in the Alae 1st and 2nd ahupua'a. The subject property (Lots 5 & 6) were created as a result of this subdivision action, which was approved on May 9, 2012 as SUB-06-000435.
2. **March 19, 2007:** The Planning Department issued SMA Minor Permit No. 07-000051 (see Exhibit H of Application) for a 12-lot consolidation and re-subdivision on 123 acres of land, which included the subject property. Condition No. 3 required development of a Shoreline Public Access Plan to provide a continuous traversable vehicular mauka-makai public access, a 10-foot wide lateral shoreline pedestrian public access, and public parking along an existing coastal jeep trail or as otherwise mutually agreed upon by the County. Condition No. 3 of this permit was amended in 2008 (see Exhibit I of Application) to remove the requirement for vehicular public access and public parking due to the steepness of the pali and numerous archaeological sites in the area.
3. **May 31, 2012:** Shoreline/Coastal Public Access Plan (see Exhibit E of Application) is executed between the County, Suzanne Foti and Kiowai Hui, LLC to provide public access from Māmalahoa Highway to the sea over the properties covered by the 12-lot subdivision. This plan established public access easements PA-1 through PA-10. However, only PA-1, PA-3, PA-4, PA-5, and PA-10 exist on the ground because they are located over existing jeep roads and a coastal historic trail. This plan does not require the landowners to construct or improve any of these easements. Therefore, at this time there is not a continuous public access from the highway to the shoreline.
4. **December 23, 2015:** The Planning Department issued a pre-existing lot of record determination (PELOR) recognizing the historic trail (proposed Lot R-1) as an Old Government Road owned by the State of Hawai'i.
5. The subject lots were created as a result of this subdivision action, which was approved on May 9, 2012 as SUB-06-000435.
6. **January 11, 2016:** Mary K. Foti Trust submits to the Planning Department an application (Application No. SUB-16-001575) for a 4-lot consolidation and re-subdivision. This application has been deferred until issuance of an SMA Use Permit for the proposed subdivision.

Current Application

The applicant is requesting a SMA Use Permit to consolidate four existing lots and re-subdivide to create four new lots on approximately 30.804 acres of land. The four existing lots proposed to be consolidated are identified as Lot 5, which is bisected by a historic trail owned by the State (**subject historic preservation violation**), and Lot 6. Although Lot 5 appears to consist of only one lot, it actually consists of three lots: the historic trail (**Site 24136**), area within Lot 5 makai of

the historic trail, and area within Lot 5 mauka of the historic trail. The four proposed new lots of this application would be Lot 5-A (2.674 acres), Lot R-1 (5,829 sq. ft. road lot), Lot 6-A (14.339 acres) and Lot 6-B (13.740 acres). Should the subdivision be approved two buildable lots would be created (Lots 5-A and 6-A). Lot R-1 (historic trail owned by the State) and Lot 6-B (encumbered by Archaeological Site Preservation Easement ASP-1) would not be buildable.

The purpose of the proposed consolidation and re-subdivision is to create a clear delineation of the lots, preserve an existing historic trail, and create one lot (Lot 6-B) to be completely within the SMA and State Land Use Conservation District.

Easement Analysis Shoreline/ Coastal Public Access Agreement:

SMA Minor 07-51: Easements and other Conditions

1. Owners agree to provide public pedestrian access in perpetuity over the easements described below and as depicted on Exhibit A, attached hereto and incorporated by reference herein:
 - a) Easement" PA- 1" being a 10- foot wide public pedestrian access within the alignment of the state owned" King' s Trail" along the coastal portion of the southwest corner of the Property;
 - b) Easement" PA-2" being a 52- foot wide public pedestrian access along the Historic Trail traversing the Property from the north property line to the south property line approximately midway between Mamalahoa Highway and the shoreline;
 - c) Easements" PA-3", " PA-4" and" PA-5" comprising a 15- foot wide public pedestrian access within the existing meandering gravel road traversing Lots 6, 8 and 9 respectively, of the proposed SUB 06-435 from north to south;
 - d) "PA-6" being a 10- foot wide public pedestrian access within Access Easement A-3" extending from Mamalahoa Highway to the intersection of" PA-3" and PA-4;
 - e) "PA-7" and "PA-8" being 10- foot wide public pedestrian accesses extending along the south property line of the Property from the south terminus of "PA-5" to the south terminus of "PA- 1"; and
 - f) "PA-9" and "PA- 10" being a 10- foot wide public pedestrian access extending laterally along the coast from the north portion of "PA- 1" to the north property line of the Property.
2. At such time as the entire seaward portions of the existing mauka-makai access road (ranch road) referenced in the decision and order of the Third Circuit Court of the State of Hawaii in Civil No. 5473 are encumbered for public pedestrian access purposes, the public pedestrian access(PA-7 and PA-8) shall be extinguished.

3. Once the entire ranch road is encumbered as a public access easement over the other affected lands between the Property and the Mamalahoa Highway, the mauka-makai public pedestrian access easement (PA-6) shall be extinguished.

Easement PA-6: Mauka Most Access Beginning off of Mamalahoa Hwy.

SMA Condition 1(d):

"PA-6" being a 10- foot wide public pedestrian access within Access Easement A-3" extending from Mamalahoa Highway to the intersection of" PA-3" and PA-4;

Lot 11: From Hawaii Belt Road (Mamalahoa Highway)

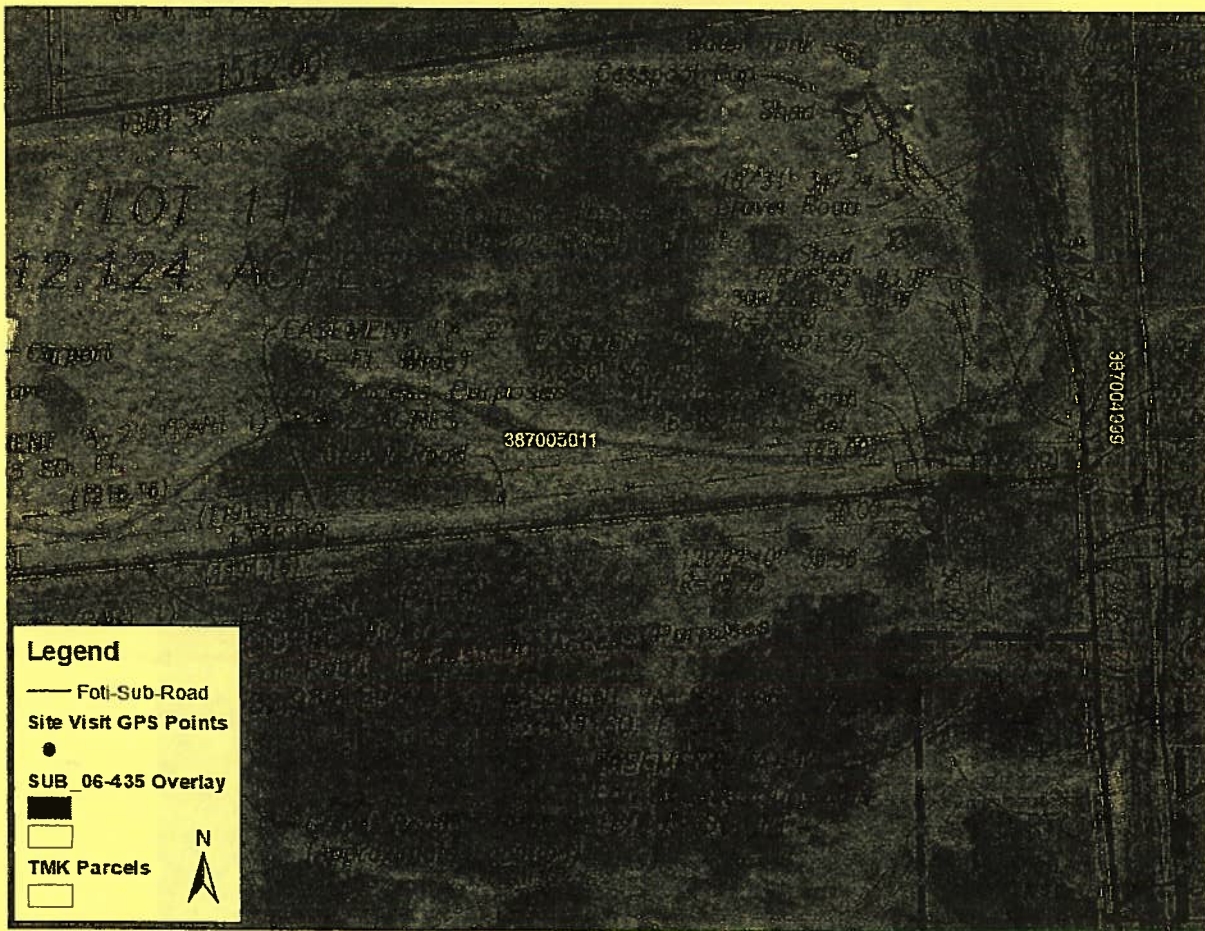


Figure 1. Public Pedestrian Access-6 (PA-6).

Properties:

Foti Side of Easement
TMK: 8-7-005:011
Lot: 11

McKinley Side of Easement
TMK: 8-7-005:012
Lot: 7

Other Easements

- Easement A-2 appears to serve as access to Lots 11, 2, 3, 4, and 5.
- Easement A-3 is a 50' wide easement with 25' being on either side of the property boundary between Foti and Mckinely (which doesn't account for PA-6 being a 10' Public Pedestrian Access).

Analysis with Site Visit Photos:



Figure 2. Mauka beginning of PA Easement 6.

The photo (Figure 2) is taken along Mamalahoa Highway from a point indicated on the GIS map above (Figure 1). The gate in this picture is the second gate entered after entering a short driveway and gate adjacent to Mamalahoa Highway a little further north from where this photo was taken. According to the Subdivision Map 06-435 and the GIS map above, this spot is the beginning of PA-6.

- PA-6 is on the border between Lots 11, 2, 3, 4, 5 and Lot 7 (McKinley property)
- No signage or established walking path was observed for PA-6
- No pedestrian walk thru observed at any gate along access road A-2

Lots 2, 3, 4, and 5

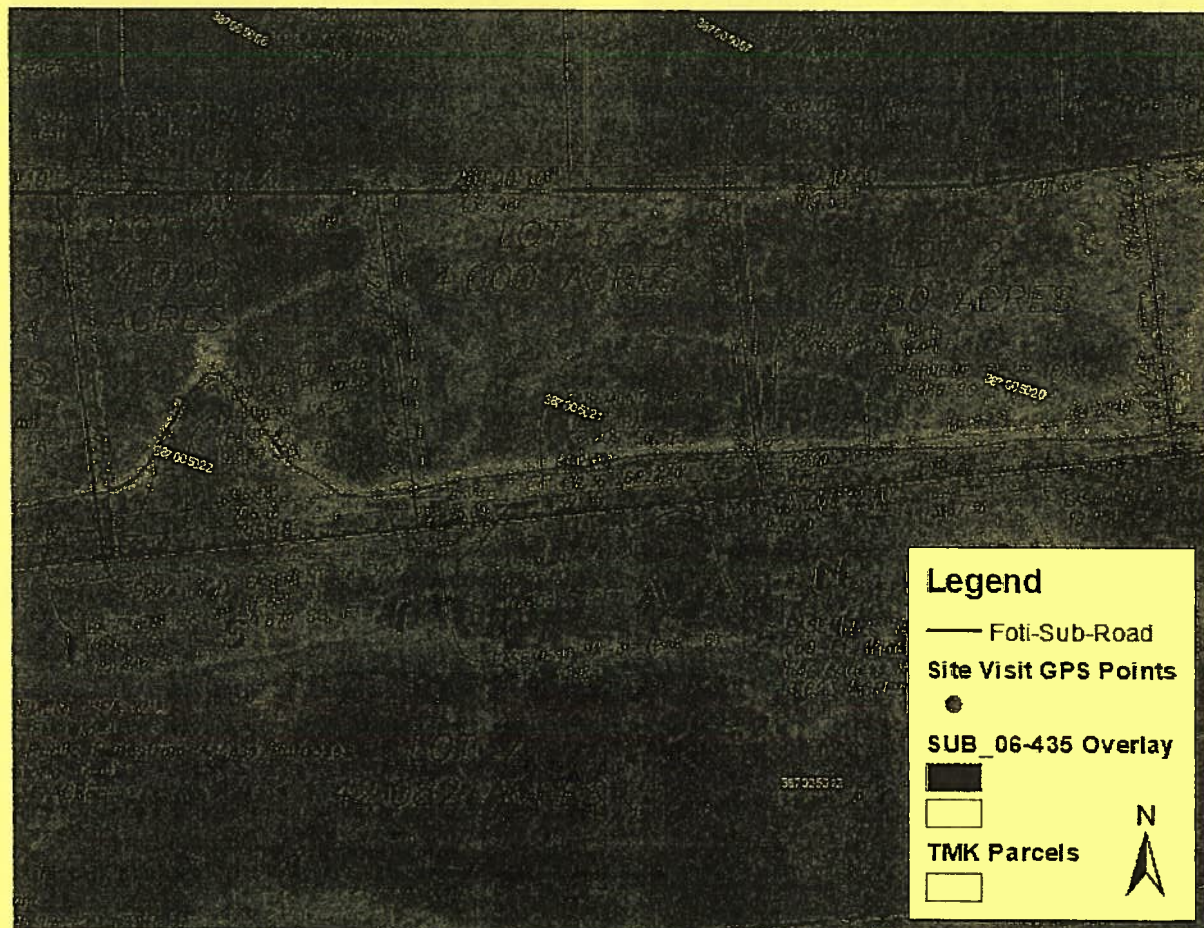


Figure 3. GIS Map showing Sub 06-435 Lots 2, 3, 4, and partially Lot 5 and 7.

Properties:

TMK: 8-7-005:020
Lot: 2

TMK: 8-7-005:021
Lot: 3

TMK: 8-7-005:022
Lot: 4

Analysis with Site Visit Photos:



Figure 4. From Left, Right, to Bottom: Gates from Lot 11 – Lot 2; From Lot 2 – Lot 3; and From Lot 3 – Lot 4.

The blue line on Figure 3 (GIS Map) was the road driven during the site visit. According to Figure 3 portions of this access road aligns with Easement A-2. Note that A-2 ends at the makai edge of Lot 4 implying its purpose to serve access for Lots 11 through 4. To the south of the traversable road, a fence line was observed which may or may not be the dividing line between Foti's and McKinley's property. To ensure or establish PA-6 on the ground its survey pins should be relocated to determine,

1. Whether or not the fence line has encroached on the PA easement; and
 - If the fence line is in the PA easement what can we enforce or negotiate for PA?
2. The feasibility of a contractor or community group clearing vegetation for a PA path

Easement PA-2: Historic Trail, SMA, and Violations

SMA Condition 1(b)

Easement" PA-2" being a 52- foot wide public pedestrian access along the Historic Trail traversing the Property from the north property line to the south property line approximately midway between Mamalahoa Highway and the shoreline;

Lot 5, 7 and Easement PA-2

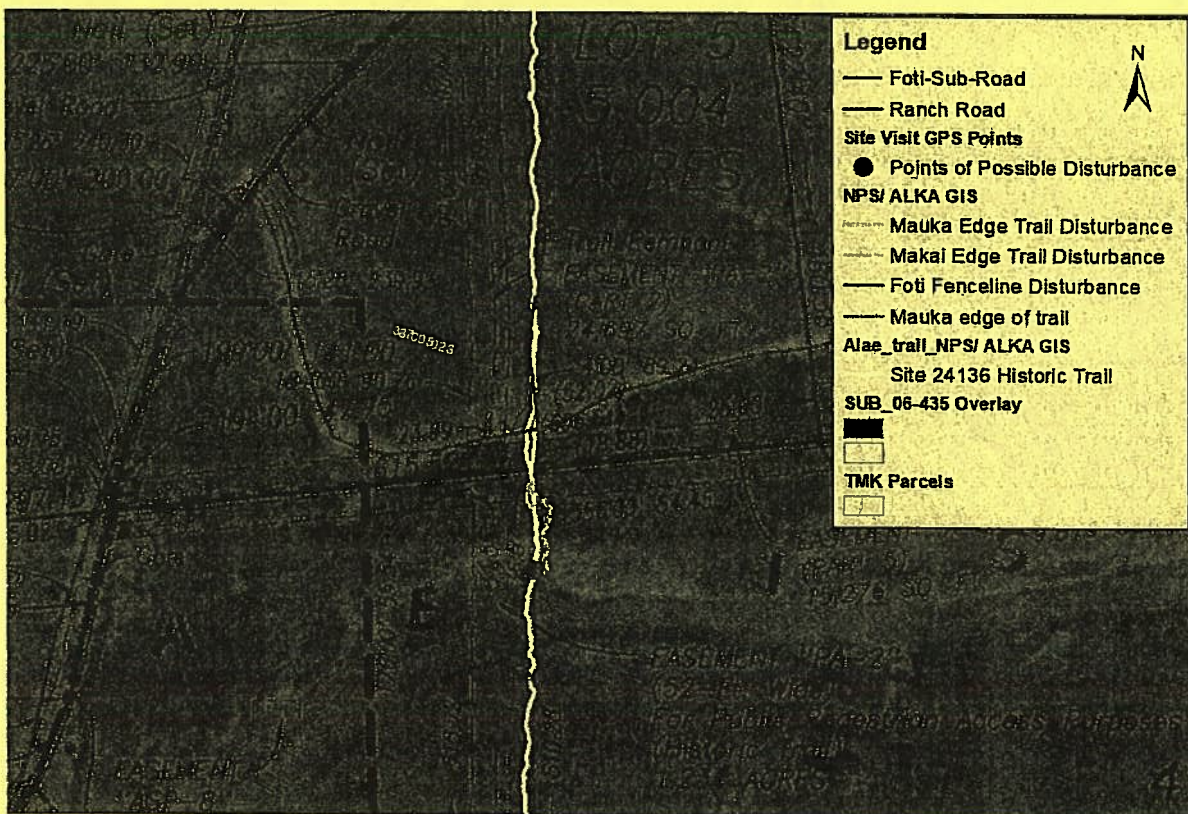


Figure 5. Intersection of PA-6 and Sub-road with PA-2. ALKA GIS files showing dozing and fence line disturbance.

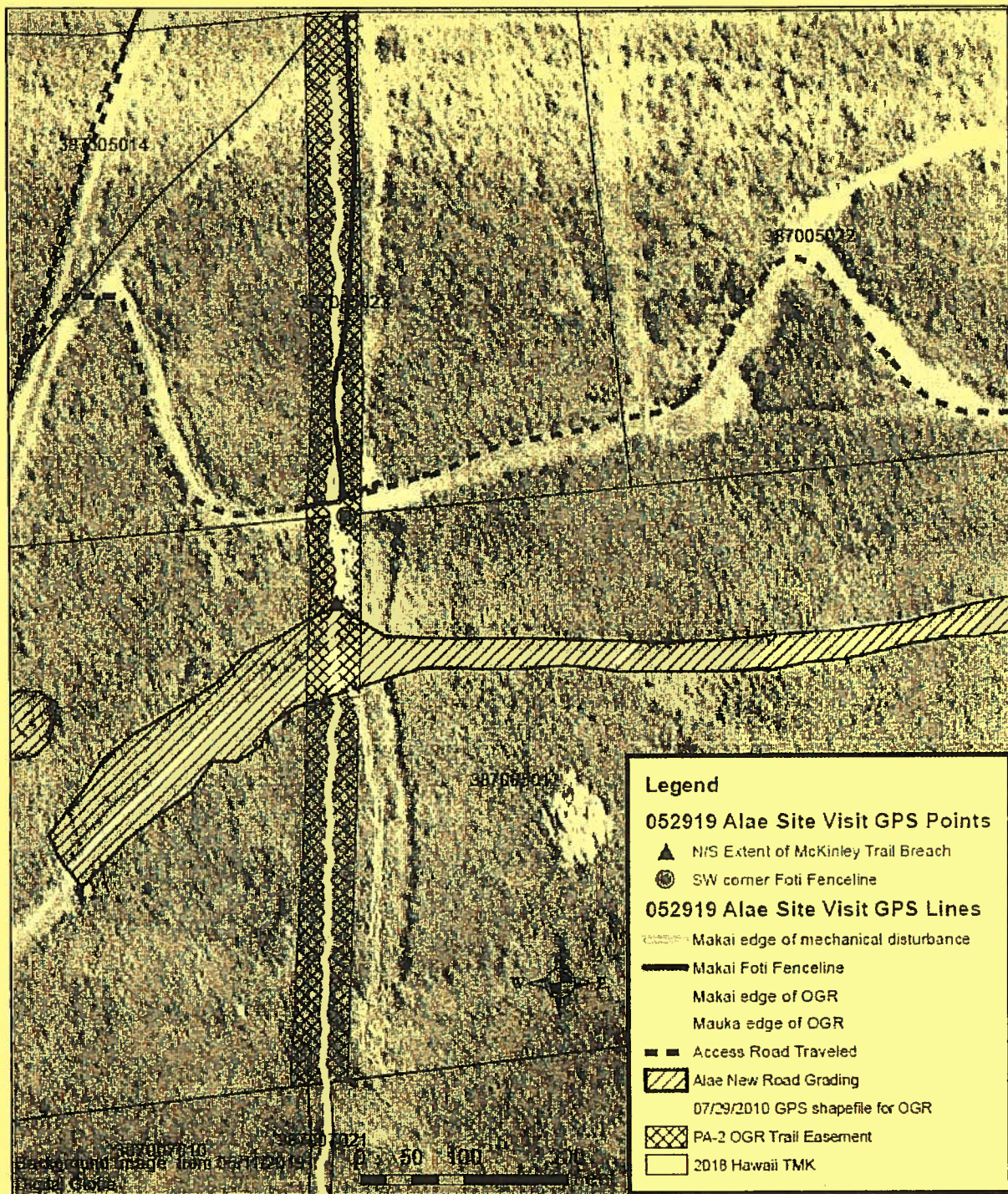


Figure 6. ALKA GIS Map from site visit report received June 6, 2019.

Properties:

Foti
TMK: 8-7-005:023
Lot: 5

McKinley
TMK: 8-7-005:012
Lot: 7

Analysis with Site Visit Photos:



Figure 7. From top, to bottom left, to right: Gate at intersection of road with PA-2; Dozing on Lot 7 from intersection looking south into McKinley's property; Fence line on Lot 5 from intersection looking north in Foti's property.

During this site visit ALKA staff (Rick Gmirkin) used a Trimble GPS unit to walk the edge a fence line on Lot 5 (Foti) and dozing on Lot 7 (McKinley). Portions of the historic trail were also georeferenced with GPS and cross referenced with ALKA 2010 data of the historic trail alignment of Site 24136 confirming the same historic property. Figures 5 and 6 depicts this historic trail in yellow. It appears from both on the ground observation during the site visit and from GIS analysis, that portions of the dozing and the fence line has encroached the PA-2 Easement and in certain areas damaged Site 24136.

Investigative and Enforcement Considerations

- ALKA recommended that these preliminary findings require further examination
- The State Division of Conservation and Resource Enforcement (DOCARE) should be notified and consulted for violation and enforcement guidance
- County should continue to correspond with NAH and SHPD to determine its role in interacting with DOCARE, or
- County may need to proceed with investigations into SMA and other permitting violations to determine its own measures for notice of violation (NOV), enforcement, and triggering involvement of DOCARE

Easements PA-3,4, 5, 7, 8, and 1

SMA Condition 1(c)

Easements" PA-3", " PA-4" and" PA-5" comprising a 15- foot wide public pedestrian access within the existing meandering gravel road traversing Lots 6, 8 and 9 respectively, of the proposed SUB 06-435 from north to south;

Lot 6, 8, 10, 9, and 12

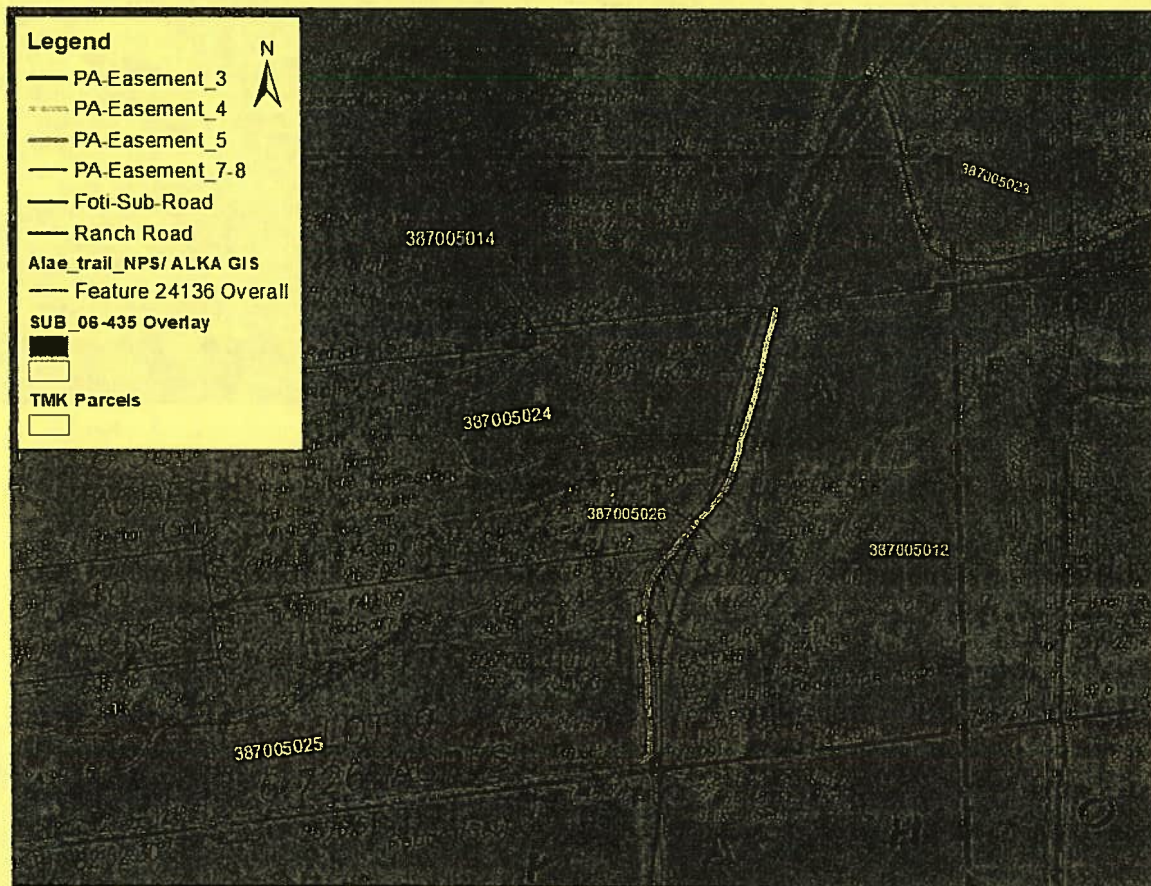


Figure 8. PA-3, 4, 5, and 7(green line) with Ranch Road and historic trail segments in red (feature 24136).

Properties:

TMK: 8-7-005:014
Lot: 6

TMK: 8-7-005:026
Lot: 10

TMK: 8-7-005:024
Lot: 8

TMK: 8-7-005:025
Lot: 9

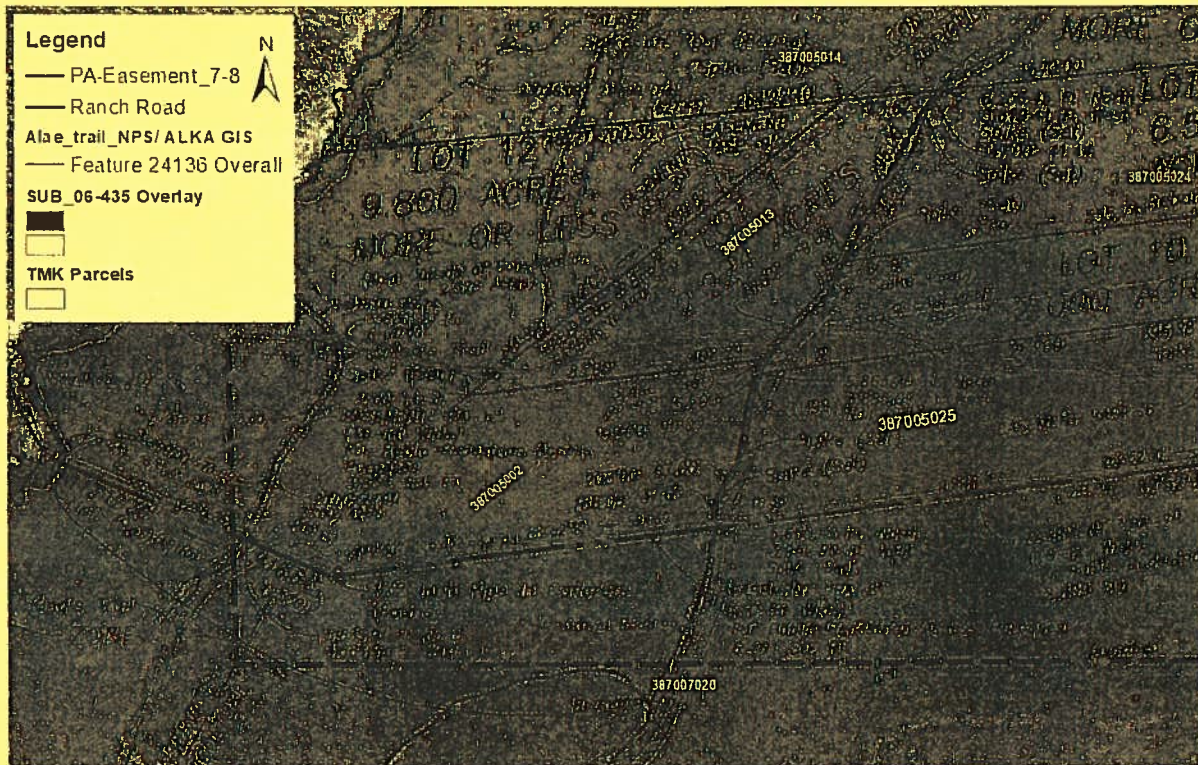


Figure 9. PA-8 meets PA-1 designated as the King's Train on the subdivision map and serves as the access to the shoreline.

Properties

TMK: 8-7-005:025

Lot: 9

TMK: 8-7-005:002

Lot: 12

Analysis with Site Visit Photos:

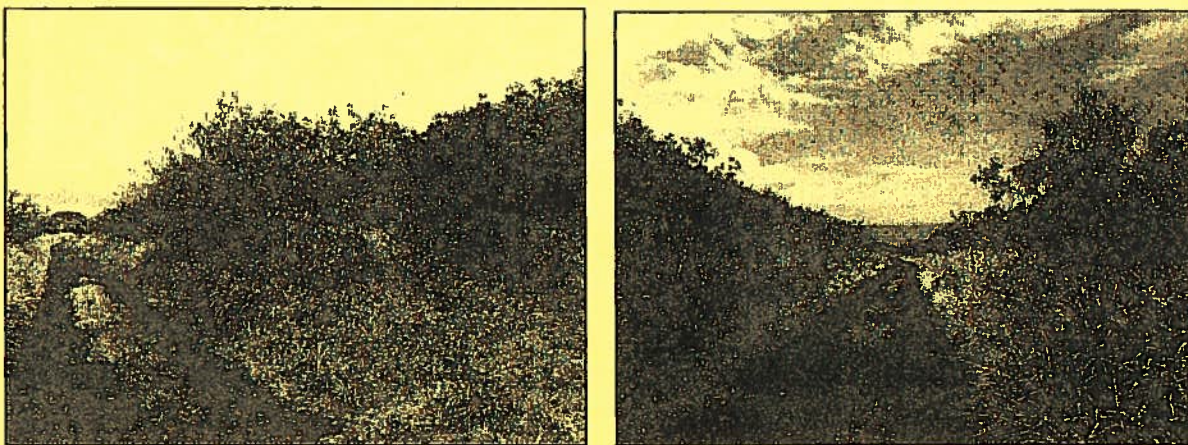


Figure 10. Left to Right. Chain gate at merge of Foti Sub-Road and Ranch Road looking north; Ranch Road looking South after merge representing a portion of PA-3, which becomes PA-4 and eventually PA-5.



Figure 11. Looking north along the pali that PA-7 would have to descend if path were to be established.

Supposing that PA-6 were open according to its placement on subdivision map 06-435, it would intersect with PA-3 but not traverse it. Instead pedestrians would take a left turn south onto PA-4 depicted in Figure 10 eventually becoming PA-5. PA-5 would then terminate at the southern border of Lot 7 (mauka) and Lot 9 (makai). At this juncture pedestrian access would turn right (makai) onto PA-7 which eventually becomes PA-8 along the southern border of Lot 12 before it reaches the lateral shoreline access labeled PA-1.

PA-7 poses a topographical challenge to establish, as it traverses a steep pali depicted in Figure 11. However, it is unknown if anyone from planning has investigated this easement's feasibility by site visit, locating its survey markers, and ground truthing the route.

GIS Map Figure 8 shows a portion of a mauka-makai historic trail approximately 300' (ArcMap Measuring Tool) makai of the lateral Ranch Road. In historic times it is likely that this trail scaled the full breadth of the pali.

Considerations

- PA-7 needs to be ground-truthed for feasibility
- Investigate feasibility of connecting PA-7 or PA-5 to historic trail depicted on Figure 8

BACKGROUND OF PUBLIC ACCESS AGREEMENTS

Correspondence/ Document	Document/Purpose/ Intent and Key Provisions	Present Planner's Notes
SMA Current – 6/21/12	Shoreline/ Coastal Public Access Agreement: Current SMA 07-51: <ul style="list-style-type: none"> Formalized non-vehicular access <ul style="list-style-type: none"> Element of the agreement follows applicant's letter to Director BJ dated 4/21/12 Formalized Easements PA-6,4,5,7,8. and 1 reflected in Sub-Map 06-435 Applicant not required to improve easements Easements meant to extinguish upon County encumbering Ranch Road 	<ul style="list-style-type: none"> Opening of Easement 6 and 7 require substantial resources Unlikely that County will encumber the Ranch Road
Email from applicant to Planning Dept. 4/21/12	Email to Director BJ with applicant's proposed agreements <ul style="list-style-type: none"> Applicant's suggested terms for Condition #3 of SMM 07-51 <ul style="list-style-type: none"> Conditions follow letter written from Director to Chrystal Thomas Yamasaki 	<ul style="list-style-type: none"> Deleted vehicular access and parking PA improvements not required for applicant
Not for public record letter 9/23/08 Director to Chrystal Thomas Yamasaki	<ul style="list-style-type: none"> Subdividers shall provide 10' pedestrian access from Hwy. to Ranch Road From Ranch Road Subdivider to choose where 10' pedestrian access will go over pali <ul style="list-style-type: none"> Need not be improved by subdivider When Ranch Road south and makai is encumbered access over the Pali can be extinguished When Ranch Road north and mauka is encumbered access through subdivision can be extinguished 	
Letter from Planning to applicant 1/10/08	Letter from Director Yuen intending to amend Condition #3 <ul style="list-style-type: none"> No longer required vehicular access <ul style="list-style-type: none"> Per steepness of pali and avoidance of disturbing archaeological properties Called for continuous pedestrian public access to the shoreline Noted access rights per claimants in Hawaii Civil Case No. 5473 	<ul style="list-style-type: none"> Letter notes a meeting held with applicant 4/24/19 in which archaeological sites were mentioned as rationale for eliminating vehicular public access Condition #3(a) says that pedestrian access is along the jeep road
Letter from Planning issuing original SMM 07-51 permit 3/19/07	Condition #3 <ul style="list-style-type: none"> Continuous vehicular mauka makai access 10' wide lateral pedestrian shoreline access Public Parking alongside the Jeep road Public access plan review and approval required before subdivision can be approved 	

HISTORIC PRESERVATION AND PUBLIC ACCESS CONSIDERATIONS

The following section list legislation that promotes the preservation of cultural/ historic resources and public access. Being that South Kona and other rural coastal areas contain overlapping significant cultural, historic, scenic, and recreational resources; this section provides a high-level glimpse of legislative language that the department should consider for this, and future permitting issues. Regarding the subdivision at hand, this overview is meant to review the intentions of the SMA program (although the permit is an SMM) and other State and County legislation pertaining to historic preservation and public access. Although the violation and enforcement language in this overview is sparse, the intention of this legislative language overview is to aide the Planning Department in issuing a NOV to Foti and McKinley for historic preservation infractions and/ or inform the drafting of a letter to the appropriate State agencies encouraging them to issue notice and subsequent enforcement.

HRS. 205A-2(b): SMA Objectives

- (1) Recreational resources;
 - (A) Provide coastal recreational opportunities accessible to the public.
- (2) Historic resources;
 - (A) Protect, preserve, and, where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture.
- (3) Scenic and open space resources;
 - (A) Protect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources.

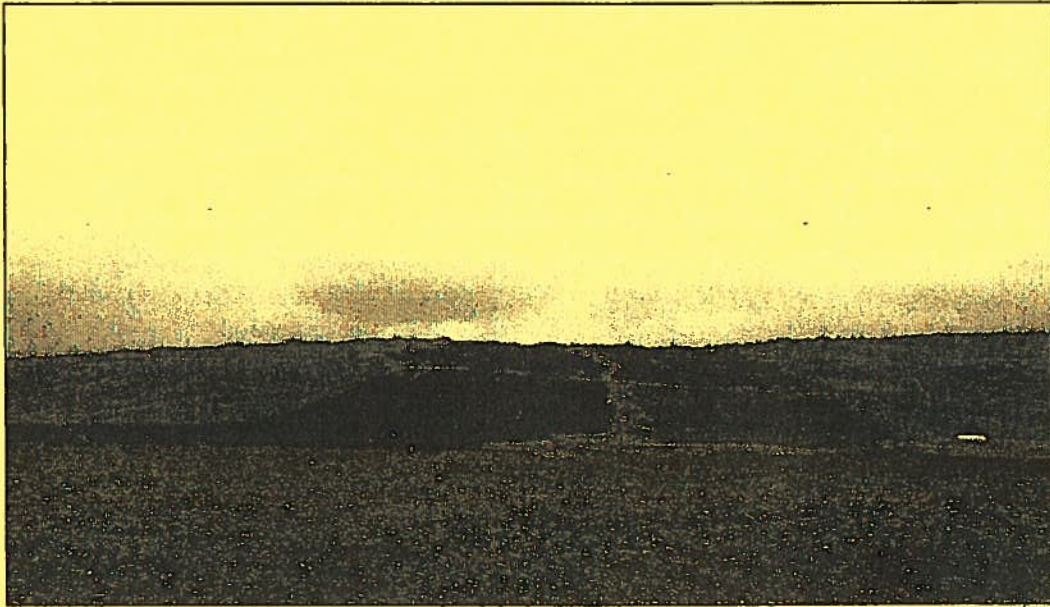


Figure 12. Unique view from the coast looking mauka from the ranch road that runs through Ala'e.

HRS. 205A-2(c) SMA Policies

- (a) Recreational resources;
 - (A) Improve coordination and funding of coastal recreational planning and management; and
 - (B) Provide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by:
 - i. Protecting coastal resources uniquely suited for recreational activities that cannot be provided in other areas;
 - ii. Requiring replacement of coastal resources having significant recreational value including, but not limited to, surfing sites, fishponds, and sand beaches, when such resources will be unavoidably damaged by development; or requiring reasonable monetary compensation to the State for recreation when replacement is not feasible or desirable;
 - iii. Providing and managing adequate public access, consistent with conservation of natural resources, to and along shorelines with recreational value;
 - iv. Providing an adequate supply of shoreline parks and other recreational facilities suitable for public recreation;
 - v. Ensuring public recreational uses of county, state, and federally owned or controlled shoreline lands and waters having recreational value consistent with public safety standards and conservation of natural resources;

- vi. Adopting water quality standards and regulating point and nonpoint sources of pollution to protect, and where feasible, restore the recreational value of coastal waters;
 - vii. Developing new shoreline recreational opportunities, where appropriate, such as artificial lagoons, artificial beaches, and artificial reefs for surfing and fishing; and
 - viii. Encouraging reasonable dedication of shoreline areas with recreational value for public use as part of discretionary approvals or permits by the land use commission, board of land and natural resources, and county authorities; and crediting such dedication against the requirements of section
- (b) Historic resources;
- (A) Identify and analyze significant archaeological resources;
 - (B) Maximize information retention through preservation of remains and artifacts or salvage operations; and
 - (C) Support state goals for protection, restoration, interpretation, and display of historic resources.
- (c) Scenic and open space resources;
- (A) Identify valued scenic resources in the coastal zone management area;
 - (B) Ensure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;
 - (C) Preserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources; and
 - (D) Encourage those developments that are not coastal dependent to locate in inland areas.

Historic Preservation 6E

§6E-11 Penalties

(c) Any person who violates this section shall be fined not more than \$10,000 for each separate offense. If the violator directly or indirectly has caused the loss of, or damage to, historic property or burial site, the violator shall be fined an additional amount determined by the court to be equivalent to the value of the lost or damaged historic property or burial site. Each day of continued violation of this provision shall constitute a distinct and separate offense for which the offender may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of historic property or a burial site, or for the transportation of the violator to or from the historic property or a burial site, shall be subject to seizure and disposition by the State without compensation to its owner or owners.

Hawai'i County Charter

Section 13-29

Conservation of Natural and Cultural Resources. For the benefit of present and future generations, the county shall conserve and protect Hawai'i's natural beauty and all natural and cultural resources, including but not limited to land, water, air, minerals, energy sources, wahi pana, surf spots, historic sites, and historic structures, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the county. All public natural and cultural resources are held in trust by the county for the benefit of the people. (2010, Prop. 6, sec. 1.)

County of Hawai'i Planning Commission Rules Of Practice And Procedure

9-10 Assessment

(h) Criteria of Substantial Adverse Effect

In considering the significance of potential environmental effects, the Director shall consider the sum of those effects that adversely affect the quality of the environment and shall evaluate the overall and cumulative effects of the action.

A 'substantial adverse effect' is determined by the specific circumstances of the proposed use, activity or operation. In determining whether a proposal may have a substantial adverse effect on the environment, the Director shall consider every phase of a proposed action and expected consequences, either primary or secondary, or the cumulative as well as the short or long-term effect of the proposal. The Director should bear in mind that in most instances, the following factors of a proposal, although not limited to same, may constitute a substantial adverse effect on the environment when the proposed use, activity or operation:

- (1) involves an irrevocable commitment to loss or destruction of any natural or cultural resource, including but not limited to, historic sites and view planes outlined in the General Plan or other adopted plans;
- (2) curtails the range of beneficial uses of the environment;
- (3) conflicts with the long-term environmental policies or goals of the General Plan or the State Plan;
- (4) substantially affects the economic or social welfare and activities of the community, County or State;
- (5) involves substantial secondary impacts, such as population changes and effects on public facilities;

- (6) in itself has no substantial adverse effect but cumulatively has considerable adverse effect upon the environment or involves a commitment for larger actions;
- (7) substantially affects a rare, threatened, or endangered species of animal or plant, or its habitat;
- (8) detrimentally affects air or water quality or ambient noise levels;
- (9) affects an environmentally sensitive area, such as flood plain, tsunami
- (10) zone, erosion-prone area, geologically hazardous land, estuary, fresh water or coastal water; or
- (11) is contrary to the objectives and policies of the Coastal Zone Management Program and the Special Management Area Guidelines of Chapter 205A, HRS

9-11 Special Management Area Use Permit Procedures

(e) Grounds for Approval of Special Management Area Use Permits: The Commission may permit the proposed development only upon finding that:

- (1) The development will not have any substantial adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and is clearly outweighed by public health, safety, or compelling public interest;
- (2) The development is consistent with the objectives and policies and the Special Management Area guidelines as provided by Chapter 205A, HRS; and
- (3) The development is consistent with the General Plan, Zoning Code and other applicable ordinances.
- (4) The development will, to the extent feasible, reasonably protect native Hawaiian rights if they are found to exist, including specific factual findings regarding:
 - (A) The identity and scope of valued cultural, historical or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
 - (B) The extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action; and
 - (C) The feasible action, if any, to be taken by the Authority to reasonably protect any valued cultural, historical or natural resources, including any existing traditional and customary native Hawaiian rights. Any development permitted shall be subject to reasonable terms and conditions set by the Authority in accordance with the Special Management Area guidelines as contained in Section 9-7.

Other Public Access Considerations

Hawai'i State Constitution Article XII(7) 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. [Add Const Con 1978 and election Nov 7, 1978]

Pash Law In Pash V. Hawai'i County Planning 1993 Ocean And Coastal Law Journal [Vol. 3:293]

The court reasoned that the Hawaiian usage exception was comparable to the common law doctrine of custom. The PASH court agreed with the Kalipi court that "all the requisite elements of the doctrine of custom law and were [not] necessarily incorporated" into Hawaii and proceeded to suggest its own requirements for establishing these rights through custom. First, the court confirmed the Pele decision that "rights normally associated with tenancy in an ahupua'a may also apply to the exercise of rights beyond the physical boundaries of that particular ahupua'a." Second, the court found that the term "native Hawaiian" was not a limiting factor, and that protection of these rights is not determined by a specific blood quantum but extends to "descendants of native Hawaiians... who assert otherwise valid customary and traditional" rights. The court also commented on the "continuous" element of customary practice and held that "the right to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site.

RECOMMENDATIONS AND SUMMARY

Historic Preservation and SMA Permitting

From the site visit it was evident that Easement PA-2 was encroached upon by dozing with at least one section of the historic trail (Site 24136) breached on the McKinley side of the border between Lot 5 and Lot 7 (refer to Figures 5-6). Observations from the site visit highly suggests that a fence line on Lot 5 has encroached into PA-2 and likely has impacted portions of Site 24136. Please refer to Cor-19-125957 for a more detailed description from ALKA concerning these infractions.

It is recommended that the County on its own, or in coordination with the proper State Agencies further investigate the infractions in order to confirm and record the extent of encroachment (lineal) into PA-2, and confirm and record the encroachment and damages incurred on Site 24136 within PA-2. This investigation should be for Lot 5 (TMK: 8-7-005:023) and Lot 7 (TMK: 8-7-005:012). Upon confirming and recording the extent of the encroachment and impact, these infractions should be considered violations of HRS 6E and HRS 205a and issued the appropriate fines, penalties, and orders to remediate damages as the landowners should have

known to avoid the site as it was labeled "Trail Remnant" on the final subdivision map and labeled "Historic Trail" on Plat Map 8-7-05.

Furthermore, Condition 6 of SMM 07-51 states that "Any further subdivision or consolidation and resubdivision" of these lots will constitute a cumulative impact requiring the applicant to obtain a SMA Major permit. Currently on hold is a SMA application (SMA 19-000071) for Mary Foti to consolidate and re-subdivide four lots, one of which is Lot 5 - TMK: 8-7-005:023. It is recommended that this application continue to be put on hold until the above violations and enforcement has been resolved.

Public Access

As for public access, the Shoreline/Coastal Public Access Agreement (State Bureau of Conveyance doc.# A-45550731) states in agreement 4(a) that the "Owners are not required to construct or improve any of the public pedestrian access easements. Agreement 4(d) stipulates that the County is responsible for signage in consultation with the affected landowners, ALKA and NAH. Therefore, current non-performance of public access is liable to the County. Encumbrance of the Ranch Road, as was suggested by the Access Agreement, is unpredictable and therefore unlikely. As such, in order for the County to move forward in opening the easements from Mamalahoa Highway, makai to the shoreline, the following steps are recommended:

1. Ground truth alignment of PA-6 by relocating survey pins or resurvey
2. If fence line between Foti and McKinley is in the PA-6 Easement, consider issuing a violation based on agreement 4(b) and 4(c) regarding obstruction of easements in order to negotiate landowners' partnership in opening the access
 - Perhaps as a result of violation landowners may be open to allowing access along their dirt road?
3. If Step 2 is not an Option,
 - After ground-truthing the alignment of PA-6, explore options for opening the access in partnership with ALKA, DLNR, landowners, and community stewards
4. PA-4 and PA-5 are open as they run along the existing Ranch Road
5. Ground truth alignment of PA-7 by relocating survey pins or resurvey
 - Determine if opening up easement is feasible (safe)
 - If not feasible investigate feasibility of connecting PA-7 or PA-5 to historic trail depicted on Figure 8, as historic trail likely scaled the mauka-makai breadth of the pali
6. If PA-6 and PA-7 are not feasible to open, the County shall investigate other options

Summary

In conversation with the County's public access partners and community advocates, it has been repeatedly mentioned that the region of South Kona has been problematic for historic preservation and public access. It must be brought to the forefront of County land-use practices that at least three elements are converging in South Kona that will continue to require our diligence, these are,

1. Large landholders of agricultural and rural sense of place lands are looking to diversify their economic portfolio
2. Subdivisions and change of land-use has and will most likely continue to be more frequent for this region
3. This region is rich with cultural, historic, scenic, and recreational resources

The Foti and McKinley subdivision in Ala'e, dozing by Rhinoceros Capital in Ka'ohe, and the Waikaku'u Ranch subdivision has caused much angst between the community and the County relating to protection of natural and cultural resources, public access, and South Kona's unique sense of place. This angst is far reaching and includes public mistrust concerning County Planning. Public mistrust can still be felt from the PUD case for Waikaku'u Ranch in the real time efforts to amend the Kona CDP.

The key of this summary is not about placing blame for past land-use decisions, instead it is to learn from past decisions in order to make our practices better today. Being that the three elements above are real and on-going, the planning department should not let these historic preservation violations go un-addressed but should either issue its own violation and enforcement action or initiate and collaborate with the proper State agency for enforcement.

Finally, the Planning Department can set a better trend and precedent by applying the lessons learned from this Subdivision and SMA. We can remember that Site 24136 runs through multiple ahupua'a and large mauka-makai land holdings, we know the coastal trail does the same. We know that securing continuous access for subdivisions can be complicated if mauka-makai land holdings are not all subdivided at the same time and therefore require foresight to ensuring access will be maintained between initial and subsequent actions. This call to avoid repeating past mistakes, and to set a new precedent is not just about trying to regain community trust, it is equally about fulfilling the spirit behind the legislative language that encourages us the regulators and planners to do our professional part to protect and sustain the elements that make our Island and State special. Therefore, may the Planning Department and respective divisions sincerely consider the recommendations contained in this document.

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