

- o Improved beach access between Lae nani condominiums and Kaua'i Sands Hotel, with a spur around the heiau, terminating in a viewing platform facing Wailua Bay?

Further, in an April 13, 2004 letter from Thomas Oi, District Land Agent, Land Division, DNLR, Kaua'i to Dierdre Mamiya, Administrator, Land Division, DNLR, Mr. Oi stated that ***"the alignment fronting the Sea Shell Restaurant to Kukui Heiau along the ocean (e.g. Shore Path) should be deleted and the Papaloa Road alignment should be used. (Emphasis added). The alignment along the ocean (e.g. Shore Path) will affect the Kukui Heiau, which is a sensitive area among the community, and the different Cultural Groups."*** (Emphasis added).

- Given Mr. Oi's comments that the alignment along the ocean should be deleted, why does the EA at page 3-16 continue to list the following alternatives along the ocean?
 - o Continuation of a boardwalk for pedestrians only around the heiau?
 - o Continuation of a bike/pedestrian path around the heiau?
 - o Improved beach access between Lae nani condominiums and Kaua'i Sands Hotel, with a spur around the heiau, terminating in a viewing platform facing Wailua Bay?

Further, in an April 23, 2004 letter to Glen Kimura from Clyde W. Namu'o, Administrator, Office of Hawaiian Affairs, State of Hawai'i, Mr. Namu'o stated that "Because burials in sand deposits that extended inland from the coast were a traditional Hawaiian practice, and because the proposed project follows the

coastline, the possibility of encountering traditional Hawaiian burials and cultural deposits is large. Therefore, ***the environmental assessment should include an archeological inventory along all of the proposed alignments of the bike and pedestrian path to ensure that the chosen path does not disturb any historical and cultural sites.***

- Given Mr. Namu'o's position why does the Draft EA not include any archaeological inventory survey?

ARCHAEOLOGICAL INVENTORY SURVEY. The Draft EA does not contain an Archaeological Inventory Survey. It is the County Kaua'i's policy to preserve important and historic sites and provide a buffer between the site and adjacent uses. (See County of Kaua'i General Plan). Given the lack of an Archeological Inventory Survey and the County of Kaua'i's policy to preserve important and historic sites and provide a buffer between the site and adjacent uses why does the Draft EA at page 3-16 state the following options as being considered?

- Continuation of a boardwalk for pedestrians only around the heiau?
- Continuation of a bike/pedestrian path around the heiau?
- Improved beach access between Lae nani condominiums and Kaua'i Sands Hotel, with a spur around the heiau, terminating in a viewing platform facing Wailua Bay?

As set forth herein, adverse environmental impacts preclude a finding of no significant impact under HAR §11-200-12. Specifically, the first evaluation criterion in those requirements states:

"...an action shall be determined to have a significant effect on the environment if it: 1. Involves an irrevocable commitment to loss or destruction of any natural or cultural resources; . . ."

Because of the Shore Path, Alternative 1 as presented in the Draft EA will have significant effects on cultural resources in the project area. Consequently, at a minimum, a Draft Environmental Impact Statement (DEIS) should be prepared pursuant to HEPA and HAR § 11-200. Preparing a DEIS should provide for expanded detailed analyses of the cultural resource protection issues related to the proposed action, expanded consultation with the SHPD, and thorough consultation with the native Hawaiian community. (See attached Pacific Consulting Services, Inc. letter, dated June 18, 2004, page 1 of 4).

Of the three alternative paths being proposed, the Shore Path of Alternative 1 has a significantly greater potential to adversely impact existing surface cultural resources, including the Kukui Heiau (Site 50-30-08-108), as well as cultural resources that are likely present in subsurface proveniences along the shoreline, including Native Hawaiian burials and subsurface archaeological deposits (Sites 50-30-08-171, 1800, 1801, 1836). (See attached Pacific Consulting Services, Inc. letter, dated June 18, 2004, page 2).

THE HAWAII HISTORIC PRESERVATION ACT (H.R.S. CHAPTER 6E).

The Hawaii'i Historic Preservation Act at §6E-1 declares its intent as follows:

"Declaration of intent. The Constitution of the State of Hawaii'i recognizes the value of conserving and developing the historic and cultural property within the State for the public good. The legislature declares that the historic and cultural heritage of the State is among its important assets and that the rapid social and economic developments of

contemporary society threaten to destroy the remaining vestiges of this heritage. The legislature further declares that it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens. The legislature further declares that it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property. [L 1976, c 104, pt of §2]

The Hawaii'i Historic Preservation Act mandates the Department of Land and Natural Resources (DLNR) to administer a comprehensive historic preservation program. The lead agency for all aspects of historic preservation, archeology and burials is DLNR's SHPD. The County of Kaua'i has its local version namely the Kaua'i Historic Preservation Review Commission (KHPRC) whose members are appointed by the mayor. Hawaii'i Revised Statutes (H.R.S.) §6E-8, Review of effect of proposed state projects, provides at subsection (a) as follows:

"Before any agency or officer of the State or its political subdivisions (e.g. the County of Kaua'i) commences any project which may affect historic property, aviation artifact, or a burial site, the agency or officer shall advise the department and allow the department an opportunity for review of the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, especially those listed on the Hawaii'i register of historic places. The proposed project shall not be commenced, or in the event it has already begun, continued, until the department shall have given its written concurrence."

Therefore,

- In the preparation of the Draft EA has H.R.S. §6E-8 been complied with?
- If so, what steps have been taken and what were the results, if any, of such steps?
- Has the DLNR given its written concurrence to Alternative 1? If so, when and how? If not, when will written concurrence to Alternative 1 be sought from the DLNR?
- Have the Hawaii Administrative Rules, Title 13, Subtitle 13, Chapter 275-284, Rules Governing Procedures for Historic Preservation Review for Governmental Projects Covered Under Sections 6E-7 and 6E-8, HRS, been complied with? If so, how and when? If not, will compliance begin and when?
- Have the Hawaii Administrative Rules, Title 13, Subtitle 13, Chapter 300, Rules of Practice and Procedure Relating to Burial Sites and Human Remains, been complied with? If so, how and when? If not, will compliance begin and when?
- H.R.S. §205A-2 Coastal zone management program; objectives and policies. (b) Objectives provides, in part, as follows:
 - "(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."

- Will the Shore Path cause any primary and/or secondary impacts to natural and manmade historic and prehistoric resources? The response must include any primary and/or secondary affect to the Kukui Heiau, its environ and burial sites along the Shore Path. If so, do such primary and secondary impacts meet this legislative objective?

Do the Kukui Heiau mitigation measures meet this legislative objective? If so, how? Does the Shore Path affect burial sites along the shoreline? If so, does such affect meet this legislative objective?

It should be noted that, presumably, the end of the bike/pedestrian path at Lydgate Park was planned and constructed to avoid the potential problem raised by the Shore Path. The Lydgate Park path was terminated a substantial distance from the Heiau located there. Placing the Shore Path as planned in close proximity of the Kukui Heiau will increase the risk of damage, including vandalism, to the heiau.

Consistent with applicable law, state and local agencies must conduct an "Archaeological Inventory Survey" of each of the three alternative routes. The results of the survey must be included in an EIS. Adjacent areas that may be affected by the project (e.g. construction staging sites, comfort stations, etc.) must also be surveyed. This is especially true given the recommendations for beach hardening measures described at pages 3-13 and 3-14 of the Draft EA.

The Shore Path is quite substantial and the staging and construction effort to build these substantial structures on the shoreline will certainly devastate any cultural deposits along with the adverse and irreparable damage to the environment and ecology as further discussed herein.

The specific scope of the survey must be determined by KHPRC in consultation with SHPD. In general, the survey must include a review of historic uses of the bike/pedestrian routes, a discussion of previous archaeological studies in the areas, and an examination of all surface and select subsurface portions of each of the alternative routes.

It is imprudent to build the Shore Path. The Wailua Bay area, including its beach, was the ancestral home of Kaua'i's royalty in the 13th century and was also the home of Kaua'i's last reigning queen, Queen Debora Kapule, a wife of King Kaumuali'i, in the mid-1800s. Most ancient kings of Kaua'i were born and lived within the Wailua Bay environs. It is the CZM goal to protect, preserve, and where desirable, restore those natural and man made historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture. A thorough cultural impact review must be conducted to assure that if the Shore Path is to be constructed such construction will not interfere with or adversely affect ancient burial sites and other archeological treasures on the Shore Path.

The fact that a cultural impact assessment may have been conducted for the unrelated proposed Kapa'a Relief Route by Cultural Surveys Hawai'i, Inc. (DSH) (Volumes I and II, 2004) (See Draft EA, page 4-81) is inadequate to address the

specific concerns of the Shore Path. (Also: see discussion on the Kukui Heiau above).

- Why does the Draft EA simply ignore reality and a lack of understanding when it makes the statement that "because the bike/pedestrian path corridor is fully contained within the highway corridor and both (the Kapa'a Relief Route and the Shore Path) are linear transportation projects (and) the findings of the CSH study were reviewed for this environmental assessment"? (Draft EA, page 4-81).

The CSH study has absolutely no relationship to the Shore Path to be constructed on the shoreline. The CSH study was mauka of Kuhio Highway and considerably mauka of the shoreline.

It is commonly known that burials were performed along the Wailua Bay shoreline. For example, four years ago the Kaua'i Planning Commission approved zoning permits for redevelopment of the shuttered Coco Pains resort, mauka of the highway at Wailua Bay, on the condition that archaeological features are preserved. Currently, Cultural Surveys Hawai'i, Inc. is performing an investigative search of the grounds to satisfy the archeological condition. The results of the investigation will be included in a CIS (cultural impact statement).

The Draft EA states on page 4-71 that while the length of Table 5 (Summary of Archaeological Sites that May be Affected by the Proposed Action) may appear to suggest a high level of potential impact, the list of sites is exaggerated by the pattern of giving separate site numbers for burials. The list is not exaggerated. Rather, it demonstrates that there are many locations along the

shoreline where burials are found, and that the potential for impacting those sites is high. (See attached Pacific Consulting Services, Inc. letter, dated June 18, 2004, page 3).

Although native Hawaiian concerns about ancestral burials are identified in the Draft EA, the level of analysis given to this issue in the Draft EA is inadequate, pursuant to HEPA, and Act 50 (2000), relating to cultural impact assessments. (See attached Pacific Consulting Services, Inc. letter, dated June 18, 2004, page 3). Act 50 (2000), Section 2, amended HEPA, Section 343-2, by amending the definitions of "environmental impact statement" or "statement" and "significant effect," to read as follows:

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

In the section of the Draft EA titled "Mitigation of Impacts to Historic Sites", the issue of impacting burials is addressed. However, it is not apparent that the archaeological monitoring program suggested is sufficient to mitigate adverse impacts to subsurface burial features that are likely to be disturbed by construction of the Shoreline Path (Alternative 1). Human burials are usually severely impacted when found during backhoe excavations. During such excavations, even the best archaeological monitors usually cannot prevent damage to burials. A program of subsurface testing is more appropriate in a

situation where known burials are present and the probability for additional burials is high. (See attached Pacific Consulting Services, Inc. letter, dated June 18, 2004, page 3).

SEGMENTATION

The Lydgate Park-Kapa'a bike/pedestrian is just a portion of a planned 23-mile bike/pedestrian path on the island of Kaua'i. Decision makers should initially determine, as a matter of law, whether the County of Kaua'i has used a flawed EA process. Applicable law may require the environmental impact of the proposed 23-mile path to be evaluated as a whole. NEPA requires an EIS for all major federal actions that significantly affect the environment. Major federal actions cannot be divided into smaller segments for purposes of environmental assessments, in the hopes of arriving at a FONSI for each segment.

The County of Kaua'i should explain why it is conducting a segmented environmental assessment of the planned 23-mile path. It recently issued a FONSI for the Kapa'a-Kealia segment, rather than assessing that segment, the present segment, and the rest of the 23-mile path in a single EA.

"Segmentation" or "piecemealing" is the forbidden practice of enabling an agency to reach a finding of no significant impact by dividing a major federal action into smaller component parts, each with less significant environmental effects than the project as a whole. NEPA regulations that govern the manner in which an agency is to determine the proper scope of an EIS provide guidance on determining the proper scope of an EA.

The NEPA regulations require closely related or "connected" actions to be discussed in the same impact statement. 40 CFR § 1508.25(a)(1). "Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts" also must be discussed in the same impact statement. 40 CFR § 1508.25(a)(2). "Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together" must be discussed in the same impact statement when that is the best way to adequately assess their combined impacts or reasonable alternatives. 40 CFR § 1508.25(a)(3). In deciding whether an agency should have prepared an environmental assessment of a proposed project as a whole rather than of its individual segments, courts apply these NEPA regulations and ask whether the segments have independent utility and logical end points.

NEPA regulations require federal agencies to establish their own procedures to identify actions that require an EIS. 40 CFR § 1500.3(a). The FHWA has complied with this directive, and has its own regulations governing segmentation of projects for purposes of conducting an environmental assessment. The FHWA regulation on evaluating environmental impacts requires that in order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or FONSI shall:

- Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

- Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 CFR § 771.111(f).

The development of a transportation project should take into consideration how the end points are determined, both for the improvement itself and for the scope of the environmental analysis. Whether the project has "logical termini" is relevant to both concerns. Logical termini for project development are defined as:

- rational end points for a transportation improvement, and
- rational end points for a review of the environmental impacts.

In developing a project concept which can be advanced through the stages of planning, environment, design, and construction, the project sponsor needs to consider a "whole" or integrated project. The project should satisfy an identified need, such as safety, rehabilitation, economic development, or capacity improvements, and should be considered in the context of the local area's socio-economics and topography, the future travel demand, and other infrastructure improvements in the area. Without framing a project in this way, proposed improvements may miss the mark by only peripherally satisfying the need or by causing unexpected side effects which require additional corrective action. A problem of "segmentation" may also occur where a transportation need extends

throughout an entire corridor but environmental issues and the transportation need are inappropriately discussed for only a segment of the corridor.

The County of Kaua'i should seek a legal opinion to determine whether conducting a separate environmental assessment for each of the segments of the 23-mile path constitutes illegal segmentation. Evaluated separately, some segments may pass the environmental assessment. However, when the segments are assessed as a whole, the entire bike/pedestrian path as currently built and proposed may violate basic environmental standards.

TRANSPORTATION ENHANCEMENT (TE) ACTIVITIES 23

U.S.C. AND TEA-21

If the Shore Path is not deleted from Alternative 1, how do the decision makers justify that the Shore Path relates primarily to surface transportation and not recreation. The Shore Path does not relate to transportation and federal funds should not be committed to the Shore Path. The Shore Path is primarily related to recreation and not transportation. Federal funding for the Lydgate Park-Kapa'a bike/pedestrian path may be in jeopardy since the Shore Path relates primarily to recreation and not surface transportation. The County of Kaua'i should seek a legal opinion to address this issue. Alternative 1 is particularly suspect, especially since there already exists public access to this entire shoreline without any change to the environment, archeology, ecology or additional cost.

In 1991, the United States Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA). One of the most significant means through

which ISTEA and its successor, the Transportation Equity Act for the 21st Century (TEA-21), promoted balanced, multi-modal transportation was through the creation of the "Transportation Enhancements (TE)" program. To comply with Federal guidelines for eligibility the decision makers must affirmatively answer the following two basic questions:

- First, is the proposed action one of the listed activities in the TE definition in 23 U.S.C. 101(a)(35)? Presumably, the answer is in the affirmative in that 23 U.S.C. 101(a)(35), Transportation Enhancement Activities, provides in relevant part as follows:

"The term "transportation enhancement activities" means, with respect to any project or the area to be served by the project, any of the following activities if such activity relates to surface transportation: provision of facilities for pedestrians and bicycles, . . ."

- Second, does the proposed action relate to surface transportation?

With regard to the Alternative 1 and the Shore Path the second question has yet to be answered. In accordance with federal regulations, all Transportation Enhancement projects MUST relate to surface transportation. (Emphasis added). Because of the Shore Path, Alternative 1 is marginal or weak in its transportation relationship; especially since Alternate 2 meets the requirements for TE, has no significant impact to the environment, archeology or ecology and is much less costly. Project applications that cannot meet the basic eligibility test cannot be funded.

The Shore Path is a portion of Alternative 1 which is part of the 23 mile bike/pedestrian path and, therefore, is classified as a TE activity. Consequently,

decision makers must illustrate the Shore Path's relationship to surface transportation. Presumably, the Hawai'i Department of Transportation is ultimately responsible for deciding whether the relationship has been substantiated. Legal counsel representing the State of Hawai'i and the County of Kaua'i should be consulted to answer these questions.

Applicable federal regulation clearly indicates that TE funds cannot be used to fund bike/pedestrian facilities that are solely for recreational use. According to the language under 23 USC 217(i):

"No bicycle project may be carried out under this section unless the Secretary has determined that such bicycle project will be *principally for transportation, rather than recreation purposes*". (Emphasis added).

It is doubtful that Alternative 1 is principally for transportation. The County of Kaua'i and the Draft EA suggest that the Shore Path is recreational in nature.

The Draft EA is clearly oriented toward recreation and not principally for transportation enhancement. For example, the Draft EA states as follows:

- "Increased opportunities for recreation and physical fitness." (Draft EA, Paragraph 2.2., Project Purpose and Need, page 2-2).
- "The proposed path is needed to provide increased opportunities for outdoor recreation and fitness. There is no other area in town that provides a safe, dedicated facility for people to walk, jog, and bicycle. Given recent reports that obesity and related chronic health problems have reached near-epidemic proportions, facilities that encourage greater physical activity are community assets that should not be undervalued or overlooked." (Draft EA, page 2-4).

- In discussing Alternative 3, the Draft EA states that "(L)ocating a transportation and recreation facility in conjunction with the canals is made all the more attractive because the waterways themselves are attractive and relatively clean." (Emphasis added) (Draft EA, page 4-43).
- In discussing the Wailua River, in close proximity to the Shore Path, the Draft EA states that "The Wailua River has one of the largest deep-water estuaries (in length and volume) in Hawai'i and has been long utilized for recreational and commercial tour boat activities. (Draft EA, page 4-63).
- The East side tourist market would also benefit from an attractive outdoor recreation amenity." (Draft EA, page 4-86).
- Seeking to allay fears that property values adjacent to the bike/pedestrian path (which is exacerbated by the close proximity of the Shore Path to occupied structures) will be reduced, the Draft EA compares the Burke-Gilman trail project in Seattle which is used 80% for recreational use.

The Draft EA states that "(T)he trail draws over 750,000 users per year of which 80% are bicyclists and 20% are pedestrians. 80% are recreationists and 20% are commuters." (Draft EA, page 4-86). (Emphasis added).

- It should be noted that the Burke Gilman Trail is a *popular recreational trail*. . . (Emphasis added). See City of Seattle web site: www.cityofseattle.net/parks/BurkeGilman/bgtrail.htm.
- "A tremendous feature of the overall path system is the linkage among a wide variety of parks, with different characteristics and serving different

purposes. The Lydgate Park to Kapa'a segment passes through an urbanized area, yet it is anchored by parks at both ends. *The cumulative impact of a path that stretches from Lydgate Park to Koala is to offer users unprecedented non-motorized access to a wealth of recreational and cultural experiences. The proposed path will require space with existing recreational areas (notably through Wailua Beach park). However, because the path also provides recreational services, it is replacing one type recreational use with another.*" (Draft EA, page 4-103).

Consistent with the Draft EA's apparent justification and analysis supporting recreational opportunities, public support for modifying the virgin pristine beach along the Shore Path with a concrete path or boardwalk is also primarily based on the public's misconception that the path will provide recreational opportunities. For example, in several articles in The Garden Island newspaper, Lester Chang reported as follows:

December 22, 2003:

"The entire project would greatly *enhance recreational needs* in the Kawaihau District, the largest population area on the island, *county officials have said.*" (*Emphasis added*).

March 6, 2004:

"The *entire project is intended to enhance recreational opportunities* in the Kawaihau District, which boasts the largest population of the island."
(*Emphasis added*).

June 24, 2004:

"*Baptiste's (Mayor of Kauai's) administration has pushed for the completion of the project (i.e. 23-mile bike/pedestrian path) to enhance recreational opportunities.*" (*Emphasis added*).

The State of Hawaii and the County of Kauai must justify the Shore Path solely on the basis of primarily enhancing transportation and not for recreational purposes. The County of Kauai, the Draft EA and the public all support Alternative 1 on the basis that *"the cumulative impact of (Alternative 1) that stretches from Lydgate Park to Koala is to offer users unprecedented non-motorized access to a wealth of recreational and cultural experiences . . ."* requiring *"space with existing recreational areas (notably through Wailua Beach park) . . . (b) because the path also provides recreational services, it is replacing one type recreational use with another"*. (Draft EA, page 4-103).

The Inland Roadways route (Alternative 2) and the Canal Path route (Alternative 3) more clearly satisfy the objective of enhancing transportation in that they have a closer relationship to Kuhio Highway and are more likely to serve a transportation purpose. As discussed, the Inland Roadways route (Alternative 2) and the Canal Path route (Alternative 3) also avoid potential significant environmental, archeological and ecological concerns.

- What justification(s) does the State of Hawaii and the County of Kauai have that supports the position that Alternative 1 and the Shore Path's primary purpose is to enhance transportation?

AMERICANS WITH DISABILITIES ACT (ADA) & TE

In July 1999, the U.S. Department of Transportation issued an Accessibility Policy Statement pledging a fully accessible multi-modal transportation system.

Accessibility in Federally assisted programs is governed by the USDOT regulations (49 CFR part 27) implementing Section 504 of the Rehabilitation Act (29 U.S.C. 794). The Federal Highway Administration has specific ADA policies for statewide planning in 23 CFR 450.220(a) (4), for metropolitan planning in 23 CFR 450.316(b) (3), and for the NEPA process in 23 CFR 771.105(f). These regulations require application of the ADA requirements to Federal-aid projects, including TE activities. Sponsors of TE projects must consider the potential uses of each project, consider what is reasonable and feasible, and provide for users in an appropriate manner.

The terrain and slope of the shoreline makai of the resorts along Papaloa Road provide significant and expensive obstacles to ADA accessibility, including adverse and potentially irreversible environmental, archeological and ecological consequences. It could be said that anything can be engineered at any cost to accommodate ADA accessibility. However, funding is not unlimited and careful attention must be made to accommodate ADA access in a reasonable and economically feasible manner. As set forth, *infra*, these costs must be included in any cost comparison. Alternatives 2 and 3 appear more likely to accommodate ADA accessibility without substantial expense, shoreline modification and adverse and potentially irreversible environmental, archeological and ecological consequences.

EMINENT DOMAIN/RIGHT OF WAY ACQUISITION

The Shore Path will require the acquisition of privately owned prime beachfront property by eminent domain. The Inland Roadways route (Alternative

2) avoids such eminent domain considerations. Lae nani Resort's property line extends makai to and beyond the mauka wall of the Kukui Heiau. The Shore Path would traverse across private property owned by the Lae nani Resort mauka of the Kukui Heiau. Assuming a successful and time consuming eminent domain proceeding, the expense of acquiring a prime beachfront property could prove cost prohibitive, thereby unnecessarily eroding funds required for the entire 23 mile bike/pedestrian path project. Of course, the Inland Roadways route (Alternative 2) avoids this matter entirely.

BEACH MAINTENANCE

Owners of condominium units on the Papaloa Road portion of Wailua Bay currently provide trash and debris pickup on and about the beach. With a bike/pedestrian path along this same area there will be additional trash and debris discarded along the beach. Who will provide sanitation services to pick up the trash and debris to eliminate fouling Wailua Bay and the resultant adverse consequences? For example, the current access to the beach between Hale Awapuhi and Kapa'a Sands is not maintained and is a constant eye sore. Funding for materials and manpower necessary for the maintenance of the entire bike/pedestrian and especially on the shoreline must be provided for. Continued citizen-provided maintenance is not an alternative.

PROJECT COSTS

Appendix C, Detailed Cost Breakdown by Project Alternatives, is incomplete, inaccurate and misleading to the public and the decision makers.

- The proposed \$200 per foot cost of either of the two proposed

construction choices (concrete path or board walk) for a total of \$340K for the stretch from Seashell to Kukui Heiau is totally unrealistic and must be substantiated. In addition, a cost difference between the two choices is not mentioned.

- Cost considerations are not given to necessary access improvements, to special cost-intensive modifications to satisfy ADA requirements, to the restoration of a damaged landscape by the building process, let alone the likely litigation and purchase expenses in connection with eminent domain proceedings or the financial impact on the condominium resorts during construction.

- While giving cost figures for comparative purposes, the Draft EA casually mentions that some costs are not included, such as site preparation, which in the case of Alternative 1 could be very substantial.

- Cost estimates are very low and not realistic. Low cost estimates make it appear that Alternative 1 and the Shore Path would not be cost prohibitive thus grossly misleading the public and the decision makers.

- The Draft EA is misleading in that major costs have not been included in the comparisons of the various alternatives. For example, Alternative 1 has an estimated cost of \$2,803,000. It is anticipated that Alternative 1 cannot be built unless and until private property is acquired by the exercise of the right of eminent domain. Since the dollar amount of federal and local funding for the bike/pedestrian is known, it is of

paramount importance that we know all costs associated with an alternative.

In order to make comparisons for funding purposes, an EIS must be prepared to include a more complete, accurate and non-misleading estimate of all costs, including, but not limited to, the additional costs to be incurred in the acquisition of private property. At a minimum, the Draft EA must include an estimate of the cost to be incurred to purchase the right to proceed with the Shore Path over private property owned by Lae nani, including possible legal and litigation costs?

STATE OF HAWAII AND COUNTY OF KAUAI LIABILITY FOR INJURY AND/OR PROPERTY DAMAGE/LOSS

The State has waived sovereign immunity for torts. H.R.S. §662-2 provides that the State "shall be liable in the same manner and to the same extent as a private individual under like circumstances . . ." [L 1957, c 312, pt of §1; Supp. §245A-2; H.R.S. §662-2; am L 1972, c 164, §2(a)]. Therefore, the state must exercise the same standard of care required of a private party. (51 H. 150).

- Consequently, if the Shore Path is selected and because the State DOT will lend its approval to the final EA or EIS, will the State be potentially liable in tort for personal injury or property damage occasioned by the location of the Shore Path immediately next to inhabited structures at certain points along the Shore Path?
- Should the County of Kauai ultimately prefer the Shore Path what consideration has been given to the County of Kauai's potential tort liability for personal injury and property damage/loss because the County of

Kaua'i has, arguably, placed persons and property at risk? In other words, if the Shore Path is selected, will the County of Kaua'i be liable in tort for personal injury or property damage occasioned by the location of the Shore Path in very close proximity to inhabited structures?

- Given the fact that the County of Kaua'i knows that the Shore Path will come extremely close to condominiums and that less risky alternatives were available would it not be prudent to select an alternative that would not place persons and property directly in harm's way?
- The Shore Path will be built on a 10 foot high seawall or an elevated boardwalk supported by pilings driven or drilled into the shoreline.
 - Have the decision makers considered the increased liability assumed by the State of Hawai'i or the County of Kaua'i? These elevated structures must be designed to withstand the forces of damaging high waves, high winds and water levels from storms, tsunami, and flooding sea heights? Maintenance of damaged structures must be sufficient to protect person and property including remedial design plans, etc.
 - By constructing elevated structures to support the Shore Path has the State of Hawai'i and the County of Kaua'i considered the potential liability for design of, or improvement to, these shore hardening structures?

The property lines of the resorts along Papalaoa Road have been surveyed. In an attempt to locate the Shore path as far as possible mauka of the sand on the

beach, the Shore Path is planned to be constructed at or near the property lines of the resorts along Papalaoa Road. The Shore Path will be built along the property line between County of Kaua'i property and private land owned by Lae nani, Lanikai, Kapa'a Sands and Hale Awapuhi. (See Page 4-14, Draft EA; Photo 10, page 4-18, etc.). The Shore Path will be as close as 5 feet from some of the condominium units affected. Some units are within 20 feet of the proposed Shore Path. For example, the lanais of Units #1 and #15/16 at Kapa'a Sands are extremely close to the planned line of the Shore Path.

- In planning for the Shore Path what consideration has been given to the physical safety of occupants of condominium units at or near the Shore Path and what consideration has been given to the increased risk of property crimes?

Legal counsel should be consulted before any consideration of the Shore Path as an alternative for the bike/pedestrian path route. The County of Kaua'i will also increase the liability of private owners along the Shore Path in that with the Shore Path is such close proximity to private property and given the basic rule of liability that a landowner owes a duty of reasonable care to any person coming onto private property, the Shore Path may provide more potential for private landowner liability to persons coming on the property.

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EMERGENCIES

Biking and pedestrian traffic may increase accidents and injuries.

- What consideration has been given to emergency services accessibility along the Shore Path, especially makai of the resorts along Papaloa Road?

- Why does the Draft EA not address the concerns of Dennis Furushima, Fire Chief, County of Kaua'i? As requested in his letter to Glenn T. Kimura, dated April 13, 2004, Chief Furushima states that:

"the remote location of the (Shore Path) does pose a challenge to responding emergency personnel. The (Shore Path) necessitates designated access points for emergency vehicles. These access points shall be illustrated on a map to supply quick and easy reference for the responding units and shall limit vehicular traffic to emergency and maintenance vehicles. . . . Emergency vehicles will need a minimum of twelve feet to maneuver safely along the path."

- Why did the Draft EA not include the requested access points and illustrate them on a map to supply quick and easy reference for the responding units?
- The Shore Path's shore hardening alternatives (e.g. the concrete path on a seawall and the boardwalk path on pilings) are designed as 5-10 foot paths.
 - (Draft EA, Figures 10 and 11; see discussion of Wailua Bay View, *supra*). How will emergency access be provided on the 5-foot wide

Shore Path when a minimum of 12 feet is required by Chief Furushima for emergency access?

- Will the boardwalk support vehicular traffic such as emergency vehicles?
- Will the Shore Path, including a boardwalk, limit vehicular traffic to emergency and maintenance vehicles?

TREE AND VEGETATION REMOVAL

The Shore Path will require the removal of a number of trees, including palm and ironwood trees, and vegetation along the shoreline.

- Removal would certainly cause erosion along the shoreline and onto the beach. What consideration has been given to the erosive effect of tree and vegetation removal for the Shore Path?
- What does local law say about tree removal and what variances will be needed to accomplish tree removal for the Shore Path?

ECONOMICS

Disruption of businesses during unnecessary construction of the Shore Path by noise and other construction activity, including equipment, etc., in close proximity to condominium units will likely reduce the occupancy rates of the condominiums along Papaloa Road.

- What consideration has been given to funding reimbursement to the condominium resorts affected by such construction effort and the economic losses likely to be incurred as a result of the County of Kaua'i's construction of structure and hard scape for the Shore Path in extremely close proximity to the resorts?

CONCLUSION

We appreciate the opportunity to comment on the Draft EA. For all the reasons set forth above we firmly believe that the County of Kaua'i will get it wrong if it concludes that Alternative 1 of the Lydgate Park – Kapa'a bike/pedestrian path continues to deserve a FONSI designation. With regard to the Shore Path we believe that the Draft EA has thwarted the legislative intent of TEA-21, NEPA, HEPA and other federal, state and local laws as discussed above.

The Lydgate Park – Kapa'a bike/pedestrian path may be a worthy undertaking, but not at the expense of so singular and valuable resource as the pristine shoreline makai of the condominium resorts along Papaloa Road. The undersigned therefore respectfully request that the Shore Path be deleted from the Draft EA, thereby removing the Shore Path from consideration as an alternative. In the alternative, the undersigned respectfully request that the FONSI be withdrawn and the County of Kaua'i prepare an EIS and/or CEIS. If there are questions about any of the matters herein, please call William K. Sweeney, Owner of Unit 8, Kapa'a Sands Resort Condominium, at (808) 634-6393.

Respectfully submitted,

LAE NANI RESORT CONDOMINIUM



LANIKAI RESORT CONDOMINIUM



KAPA'A SANDS RESORT CONDOMINIUM



HALE AWAPUHI RESORT CONDOMINIUMS



Attachments:

Letter from Pacific Consulting Services, Inc., dated June 18, 2004
Letter from Mr. Randal Ashley, K-A Associates, dated June 24, 2004

cc:

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TE Program Manager
Highway Planning Branch
Department of Transportation
869 Punchbowl St.
Honolulu, Hawai'i 96813

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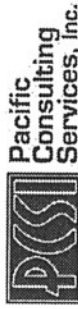
Kaua'i County Council:

Bill "Kaipo" Asing, Council Chair
James Kunane Tokioka, Council Vice-Chair
Jay Furfaro, Member
Maurice "Joe" Munechika, Member
Daryl W. Kaneshiro, Member
Mel Rapozo, Member
Joann A. Yukimura, Member

Bryan J. Baptiste
Mayor of Kaua'i
Mo'ikeha Building
4444 Rice Street, Suite 235
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Dennis Furushima, Fire Chief
County of Kaua'i
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Consulting
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Phone (808) 548-5557 • Fax (850) 548-5557

June 18, 2004

Lae nani, Lanikai
Kapa'a Sands, Hale Awapuhi

Attention: William K. Sweeney
6388 Puupilo Rd.
Kapa'a, HI 96746

Subject: Draft Environmental Assessment for the Lydgate Park – Kapa`a Bike/Pedestrian
Path (CMAQ-0700[49]).

Dear Mr. Sweeney,

Via this letter, Pacific Consulting Services, Inc. (PCSI) is forwarding comments regarding the subject Draft Environmental Assessment (DEA) prepared for the County of Kauai, Department of Public Works by Kimura International. This review of the DEA was performed under contract with the Save Wailua Bay Coalition of Kapa'a, with the understanding that the comments would be forwarded to the County of Kauai as part of the public participation process established for review of environmental assessments. Our review was limited to evaluating the potential impacts of the proposed project on cultural resources.

These comments were prepared by Stephan Clark, the Manager of PCSI's Cultural Resources Group. Mr. Clark received a B.S. degree in Anthropology in 1972 from the University of California, Davis. He has been working as a professional archaeologist in Hawaii since 1973. During that period, he worked for the Bishop Museum's Department of Anthropology and the Applied Research Group for 18 years and for the City and County of Honolulu Department of Parks and Recreation for 5 years. Since 1996, Mr. Clark has been working as a consulting archaeologist on behalf of federal, municipal, and private-sector clients. He has been an active member of the Society for Hawaiian Archaeology since it was established in 1980.

DEA Review Comments

The DEA provided relevant information regarding the inventory of archaeological and historic resources found in and near the various optional corridors of the bike/pedestrian paths. However, serious potential impacts are evident upon even the most cursory examination of the DEA. Those impacts preclude a finding of no significant impact under HAR §11-200-12. Specifically, the first evaluation criterion in those requirements states:

"...an action shall be determined to have a significant effect on the environment if it: 1. Involves an irrevocable commitment to loss or destruction of any natural or cultural resource."

We find that Alternative 1 as presented in the DEA (the Shoreline Path) may have a significant effects on cultural resources in the project area. Consequently, a Draft Environmental Impact Statement (DEIS) should be prepared pursuant to Chapter 343, HRS and HAR § 11-200. Preparing a DEIS should provide for expanded detailed analyses of the cultural resource

protection issues related to the proposed action, expanded consultation with the State Historic Preservation Division (SHPD), and thorough consultation with the native Hawaiian community.

Of the three alternative paths being proposed, the Shoreline Path appears to have a significantly greater potential to adversely impact existing surface cultural resources, including Kukui Heiau (Site 50-30-08-108), as well as cultural resources that are likely present in subsurface proveniences along the shoreline, including Native Hawaiian burials and subsurface archaeological deposits (Sites 50-30-08-171, 1800, 1801, 1836).

The primary concern regarding the Shoreline Path is its potential adverse impact to Kukui Heiau (Site 108) if the construction of the preferred shoreline path occurs. Kukui Heiau is listed on both the Hawai'i and National Register of Historic Places. Sites with this status of cultural heritage must be afforded a high level of protection. It is the responsibility of the community members and their elected officials to support the preservation and physical integrity of such sites.

Kukui Heiau is, by all measures, an exemplary example of a Hawaiian cultural site that exists into modern times through diligent preservation and protection measures. The intent of placing sites on the State and National Registers has been to preserve a variety of cultural heritage sites for all of us, for our children, and for future generations. Across the U.S. mainland and its outlier states and territories, only the most significant, well preserved, and cherished sites, are listed on State, Territorial, and National Registers. These include indigenous sites (Native American, Native Hawaiian, Native Alaskan, Chamorro, etc.) as well as early Euro-American and American sites that have local, State, and/or National significance. In Hawaii, these sites stand out as exemplary types, and include those that are important in understanding, preserving, and maintaining the indigenous Hawaiian culture, and those that help us understand the transitions that occurred in Hawaii resulting from initial cultural contact with European, American, and Asian peoples.

The proposed action, as described in the DEA, has the potential to cause irrevocable damage to the integrity of Kukui Heiau. This was confirmed by SHPD in its letter to Kimura International, which is appended to the DEA (Paler Young, May 4, 2004). The significance of this concern was also noted by the author of the DEA on page 4-75:

"... a strip of the Lae Nani Condominiums parcel adjacent to the heiau would be needed. Without such acquisition of private land, it would be impossible to construct the shoreline path without adverse impact to Kukui Heiau."

The DEA identifies re-routing of the Shoreline Path around Kukui Heiau as a mitigation measure. However, for several reasons, this approach to addressing the issue does not resolve or eliminate the potentially serious impacts of the Shoreline Path on Kukui Heiau:

1. The alternative routing suggested in the DEA is not described in sufficient detail to determine what impact it would have on Kukui Heiau; and
2. Identifying a mitigation measure in a DEA does not constitute a binding commitment to implement the mitigation measure, hence it does not preclude routing the path through the heiau.

Further, there is serious concern that labeling this alternative route as a "mitigation measure" removes it from the environmental evaluation afforded to other routes.

A related concern not addressed in the DEA involves potential secondary impacts of routing a path next to a heiau. Even if the path is placed on adjacent property, it can be expected to increase the potential for visitors to Kukui Heiau. Such increased visitation can result in serious, cumulative damage to the site, both inadvertent and intentional. An assessment of such secondary impacts is needed to properly evaluate the Shoreline Path alternative. It is recommended that a Site Management Plan be developed for Kukui Heiau to address such impact concerns.

In summary, it is clear that the Shoreline Path as proposed in the DEA has a potentially significant impact on Kukui Heiau. This finding cannot be ignored by suggesting a potential alternative routing for which no comparable evaluation is performed.

A second significant area of concern identified in this review involves the adequacy of the archaeological survey work performed and the conclusions drawn from the work performed. Although the archaeological pedestrian survey of the three alternative paths was able to document three previously unrecorded cultural sites, this level of survey is inadequate for subsurface portions of the shoreline between the Coco Palms Hotel and *makai* of the Coconut Market Place that would be impacted by the widening of existing sidewalks and the construction of new sidewalks and boardwalks. The documented presence of Hawaiian burials and subsurface archaeological deposits present along the shoreline strongly suggest that a relatively high probability exists for encountering additional burials and cultural deposits during the construction of the Shoreline Path.

The DEA states on page 4-71 that while the length of Table 5 (Summary of Archaeological Sites that May be Affected by the Proposed Action) may appear to suggest a high level of potential impact, the list of sites is exaggerated by the pattern of giving separate site numbers for burials. The list is not exaggerated. Rather, it demonstrates that there are many locations along the shoreline where burials are found, and that the potential for impacting those sites is high. Although native Hawaiian concerns about ancestral burials are identified in the Cultural Impact Assessment of the DEA, the level of analysis given to this issue in the DEA is inadequate, pursuant to Chapter 343, HRS and Act 50, relating to cultural impact assessments.

In the section titled "Mitigation of Impacts to Historic Sites", the issue of impacting burials is addressed. However, it is not apparent that the archaeological monitoring program suggested is sufficient to mitigate adverse impacts to subsurface burial features that are likely to be disturbed by construction of the Shoreline Path (Alternative 1). Human burials are usually severely impacted when found during backhoe excavations. During such excavations, even the best archaeological monitors usually cannot prevent damage to burials. A program of subsurface testing is more appropriate in a situation where known burials are present and the probability for additional burials is high.

The DEA presents significant information regarding the archaeological, historical, and cultural sites in the vicinity of the three alternative paths. However, there is a serious lack of citations of original source materials used for archaeological site information within the paragraphs containing this information. Having citations of source materials is necessary to enable reviewers to visit the original sources to check the accuracy of the information provided, and to

K·A Associates
Environmental & Marine Consultants

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June 24, 2004

Lae nani
Lanikai
Kapa'a Sands
Hale Awapuhi
Attention: William K. Sweeney
6388 Puupilo Rd.
Kapa'a, HI 96746

Subject: Lydgate Park – Kapa'a Bike/Pedestrian Path
DRAFT Environmental Assessment

Dear Mr. Sweeney:

K·A Associates has reviewed the above referenced report prepared for the County of Kauai Department of Public Works by Kimura International. The following comments are related only to the physical conditions in the coastal zone that would be impacted by the proposed Alternative 1 route in Papaloa Bay north of the Wailua River between the Sea Shell Restaurant and Kukui Heiau.

A site reconnaissance of the area from Lydgate Park north to Kukui Heiau was performed on May 25, 2004 in order to observe the physical conditions and relative location of the proposed Alternative 1 path within the coastal zone. We have confirmed that the coastal zone physical conditions outlined in the report on pages 3-8 to 3-16, 4-2 to 4-3 and 4-9 to 4-22 are generally accurate.

We also agree, as noted on page 4-40 of the referenced report, that the area fronting the Lanikai Condominiums appears to be undergoing active beach erosion. Long-time condo owners along this stretch of Papaloa Bay support our observations, noting that the active beach zone appears to be retreating at a rate of about one-half foot per year for at least the last 10 years.

June 18, 2004
Page 4 of 4

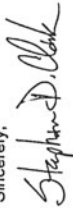
obtain further information if desired. The lack of such citations limited the ability of reviewers to fully evaluate the DEA.

Editorial Comments

1. 3rd paragraph on page 4-66. The meaning of the last sentence, beginning with "The designation of these properties for the National Register/National Historic Landmark listing is five circles..." is unclear. Is there a map reference missing?
2. 5th paragraph on page 4-66. The first sentence of this paragraph states "such an alignment is appropriate." The alignment being referred to as appropriate is difficult to identify. The previous paragraph twice refers to "All of the proposed alignments" and mentions a path that crosses the Wailua River in one of two places. With so many options, more clarity is needed to avoid confusion.

If you have questions or require clarification of these review comments, please do not hesitate to call me in Honolulu at 808-546-5557, extension 202.

Sincerely,

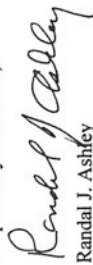


Stephen D. Clark
Manager, Cultural Resources Group
Pacific Consulting Services, Inc.

However, we are in disagreement in the conclusions regarding the coastal zone along this stretch of the shoreline stated on pages 6-1, 7-1 and 7-4 of the Draft EA. While the proposed Alternative 1 path is outside the current active beach zone, the path's presence would certainly impact the oceanographic and geological processes now creating the set of parameters that result in current beach stability. Beach equilibrium is a very delicate physical state. A slight change in physical parameters such as the potential bike path designs proposed for this area would upset existing conditions and likely result in erosion and retreat of the active beach zone. It is very possible that if the bike path were to be constructed through this area, beach instability would occur and protection of the adjacent coastal bluffs and properties would be required through artificial beach sand nourishment or construction of a revetment.

Therefore, we believe that a more detailed study of the coastal conditions and potential for changes in the current physical setting is warranted before the bike path as currently proposed is constructed along Alternative 1. It is clear that without such a detailed study, a finding of no significant impact (FONSI) should not be made at this time. Further, if, as appears likely, the study shows that construction of the proposed bike path will lead to increased erosion and retreat of the active beach zone, a FONSI cannot be made.

Respectfully submitted,


Randal J. Ashley

Mr. Ashley holds a Bachelor of Science and a Master of Science in Geology. He has over 30 years of worldwide experience in commercial applications of Marine Geology, Oceanography and Coastal Processes. He is a member of the Geological Society of America, Society of Exploration Geophysicists and the Marine Technology Society.



KIMURA INTERNATIONAL

August 30, 2004

Mr. William K. Sweeney
6388 Puupilo Road
Kapa'a, HI 96746

Dear Mr. Sweeney,

Proposed Bike/Pedestrian Path, Lydgate Park to Kapa'a
Public Review of the Draft Environmental Assessment

Thank you for comments on the proposed bike/pedestrian path submitted by the Lae Nani, Lanikai, Kapaa Sands, and Hale Awapuhi Condominiums. As planning consultant to the County Department of Public Works, we have been asked to address your questions and concerns. Comments are indicated by bullet points; responses are indented.

- Comments are primarily directed to the .25 mile portion of Alternative 1, beginning from the makai side of the Sea Shell Restaurant and proceeding along the makai side of Wailua Bay View condominium resort, Hale Awapuhi condominium resort, private property owned by Blair and Paula Gay, Kapaa Sands condominium resort, Lanikai condominium resort, Lae nani condominium resort and to and through the Kukui Heiau environ. This shoreline of Alternative 1 is hereinafter referred to as "Shore Path." (p. 4)
- Concern about "bureaucratic momentum that can heavily tilt decision-making toward a particular outcome."
Planning doesn't occur in a vacuum. All public initiatives have a historical context. Therefore, the planning team expanded on project ideas that were already being discussed in community circles, and also solicited new proposals through an open, proactive public involvement process. Once alternatives were identified, equally strenuous efforts were made to determine the viability of each. The pros and cons were disclosed as clearly as possible. Efforts to refute misconceptions or address concerns related to any of the alternatives were never intended as endorsements of that alternative.

- Claim that a FONSI is not warranted and that the County of Kaua'i must prepare an EIS and/or Cultural Environmental Impact Statement (CEIS) if the Shore Path section of Alternative 1 is selected as the preferred alignment.

Section 11-200-12 of the Hawai'i Administrative Rules establishes "significance criteria" that are used to determine a Finding of No Significant Impact (FONSI). Chapter 7 of the Draft Environmental Assessment (EA) includes a discussion of each of the thirteen criteria. A FONSI does not require that there be no adverse impacts, but rather, that impacts do not rise to the level of significance and substance, as indicated in EIS Rules. Based on the experts consulted and review comments from various regulatory agencies, we have determined that, with appropriate impact minimization and mitigation measures, the project will not generate significant impacts.

There is no such document as a "Cultural Environmental Impact Statement (CEIS)" in NEPA or Chapter 343, HRS. State law calls for a cultural impact assessment (CIA), and this requirement was met through findings of a study presented in the Draft EA. Although the original CIA was conducted for the Kapa'a Relief Route project, it was timely and both geographically and substantively relevant to the bike/pedestrian path project. During an early consultation meeting with Dr. Sara Collins of the State Historic Preservation Division, she concurred that a separate CIA for the bike/pedestrian path project was not necessary since the informants had discussed the significance of coastal resources. Furthermore, when a new informant was identified during the scoping process for the bike/pedestrian path project, the CIA was amended to include the additional interview. A good-faith effort was made so that the CIA would be as inclusive as possible. Others were given ample opportunity to participate in the CIA, but did not follow through.

Also, in terms of cultural resources, an archaeological assessment was conducted by Cultural Surveys Hawai'i and submitted to the State Historic Preservation Division (SHPD) for review on June 2, 2004. In a letter dated June 21, 2004, SHPD stated that "The background section and the boundary information were very informative and well written."

- "[T]he Shore Path offers significant obstacles, not the least of which are significant impacts on culture, the shoreline environment and its ecology." (p. 6)

Chapter 7 of the DEA discusses the reasons why a Finding of No Significant Impact is warranted. Determination of "significance" is based on criteria laid out in Hawai'i Administrative Rules, Section 11-200-12. The proposed actions, together with measures to mitigate adverse effects, led to the anticipated FONSI.

- "The Shore Path requires substantial alteration of the shoreline, shore slope, rocky headland and high bluff, including the construction and placement of a concrete path supported by a substantial sea wall or a boardwalk supported by substantial pilings driven or drilled into the shoreline." (p. 7)

According to the commenter's own measurement, the Shore Path is a quarter mile long. The island of Kaua'i has 90 miles of shoreline, so the affected shoreline is a relatively short stretch constituting 0.28% of the island's shoreline (Hawai'i Databook, 2002). The section of Shore Path that is characterized as "shore slope, rocky headland and high bluff" is an even smaller fraction. This section of the path would not involve a seawall. Two possible options are the mechanically stabilized earth (MSE) path or an elevated boardwalk. The resulting structure is not expected to be substantial, given the light loads of pedestrians and bicyclists.

The boardwalk design is preferred by the Office of Conservation and Coastal Lands, Department of Land and Natural Resources (memorandum dated July 1, 2004). The entire memo will be reproduced in the Final Environmental Assessment; relevant sections are shown below:

[4.] The OCCL recognizes the value of a common coastal thoroughfare (sic) and supports the effort to offer alternative transportation corridors for this area. In this regard we support Alternative 1 (in general concept) as illustrated on Figure 8 with some adjustments.

[5.] The second alternative (post-supported elevated boardwalk, Figure 11) for the boardwalk design is preferred by the OCCL for slope conditions. It is suggested this be constructed in a modular fashion so that threatened/eroded sections could be replaced or relocated in a relatively easy manner.

- "The Shore Path creates... potential irreversible adverse effects on the cultural practices of the community and the State, including irreparable and irretrievable damage to a State and nationally registered historic site; namely the Kukui Heiau and its surrounding area." (p. 7)

The County of Kaua'i has consulted with a wide range of Native Hawaiian organizations, archaeologists, cultural practitioners, and other stakeholders about Kukui Heiau. There is widespread agreement that current conditions at the heiau are unsatisfactory. However, there are clear differences about how to resolve this situation. The discussions are ongoing. The shoreline path alternative is part of the discussion because it offers one approach to resolving existing problems in the area. The problem is a lack of lateral beach access for the public except to go through the sacred site or to trespass on private property. The shoreline path would give the public a different option. Any adverse effect on Kukui Heiau

must be evaluated in light of current conditions and prospects for using the project to improve what many people feel is an unacceptable situation.

- "The Shore Path irrevocably commits a natural resource, curtails the range of beneficial uses of the environment and is contrary to Federal and State environmental policies and long-term environmental goals." (p. 7)

As discussed on pages 7-1 and 7-2 of the Draft EA, the path is expected to be a community asset by enhancing coastal access and circulation. There is already a steady flow of people traversing the beach and the path will make it easier to get around, especially for those who would otherwise find it difficult to walk over sand and rocks. It will not eliminate or displace any activity that currently occurs in the vicinity of the path.

- "The Shore Path does not enhance or relate to transportation as required by applicable law, is not economically sound and is not ADA accessible without substantial additional expense." (p. 7)

Actual funds for this project may come from any of several federal sources, of which the Transportation Enhancements (TE) fund is most well-known. There are two requirements for funding eligibility: (1) a project must be one of 12 designated TE activities and (2) relate to surface transportation. (The program language does not state that the project must be "primarily for transportation purposes.") Pedestrian and bicycle facilities are at the top of the TE activities list. Depending on the preferred route and how it is packaged, the project is likely to qualify under other categories of TE activities.

The relationship between the project and surface transportation is an easy one to make. The path is an extension of the roadway system. In the case of the shoreline path, it would allow people to get to the beach and spots for swimming, surfing and fishing—places where cars and trucks are much less desirable. The path will meet ADA design guidelines.

National Environmental Policy Act (NEPA)

- NEPA has been violated because it fails to meet NEPA requirement to analyze impacts at the earliest possible point in the decision process. (p. 8)

Most environmental impacts are location specific. Project limits must be delimited; what is sometimes called an "area of potential effect." A meaningful environmental assessment of the bike/pedestrian path could not be conducted until alternative alignments had been identified.

Public Trust Doctrine

- Adverse cultural, environmental and ecological impact caused by the Shore Path would be a violation of the Public Trust Doctrine. (p. 17)

As noted by the commenter, the Public Trust Doctrine is rooted in Roman law and English common law (p. 15). From Roman law comes the concept of "common property"—for common use by everybody. English common law contributed the "trust" concept, where navigable rivers, the ocean, and the seashore were held by the King "in trust" for the benefit of the King's subjects.

In terms of managing and regulating the public trust, the recent State Supreme Court case of *In Re Water Use Permit Applications 94 Hawaii 97 (2000)* (referred to as the "Waihole" decision) provides additional guidance. The State is obligated to regulate the use of public trust resources consistent with the dual mandate of (1) protecting the resource and (2) promoting reasonable maximum and beneficial use of the resource. In other words, the State must find a reasonable balance between protection and use.

The Waihole majority also recognized "enduring public rights in trust resources separate and apart from, and superior to, the prevailing private interests in the resources at any time." (Id. at 138, emphasis added) The bike/pedestrian path is a public use and satisfies a public purpose. It is fully consistent with the objective to "promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people." (Hawai'i Constitution, Article XI, Section 1)

- Among many adverse impacts caused by the Shore Path, *erosion and beach loss is guaranteed* and in violation of the Public Trust Doctrine. (p. 17, emphasis added)

There is no evidence that the shoreline path would cause erosion and beach loss. If the shoreline option is selected, the path would be built outside the active beach zone. Beach erosion and accretion—occurring at present—will continue to occur with or without the path. Although detailed engineering plans have not been developed yet, the path would be designed so that it would not obstruct or interfere with natural processes. The boardwalk design is favored for this reason.

Hawai'i Environmental Policy Act (HEPA), HRS Chapter 343

- Draft EA fails to provide an environmental assessment of the adverse impacts of Alternative 1 and specifically the Shore Path. (p. 18)
- The positive and negative impacts of the three alternatives on physical, biological, socio-cultural, and other resources are disclosed in Chapter 4.
- It fails to meet the HEPA requirement to analyze impacts at the earliest possible point in the decision process. (p. 18)
- The decision maker must cease from taking any steps towards the implementation of Alternative 1, with its Shore Path, until the County of Kaua'i provides necessary consideration of all significant environmental, cultural, and ecological effects in compliance with the HEPA. (p. 18)

The environmental assessment was conducted once the alternative alignments were identified. Since most environmental impacts are location specific, a meaningful environmental assessment could not be conducted any earlier. The Draft EA evaluated all the alternatives and the findings are now being used to inform and help decide the preferred alignment.

Coastline and Shoreline Protection; Coastal Zone Management Program Goals

- The Shore Path is in direct contradiction to and violates the policy of the State of Hawai'i under HRS Chapter 205A to discourage all shoreline hardening that may affect access to, or the configuration of, our island beaches. (p. 19)
- The proposed action does not involve shoreline hardening, where hardening refers to seawalls, groins, revetments, and other artificial, erosion-protection structures.
- Lack of historical shoreline analysis of coastal erosion and accretion rates, beach profiles, coastal hazard history, waves and currents, sediment movement, erosion hazard, photographs. (p. 19-21)
- Information about coastal resources and project-related impacts can be found in pages 4-6 to 4-41. The coastal assessment was performed by Sea Engineering, Inc. The table below summarizes the erosion/accretion rates and 30-year projected shoreline positions calculated at transects along the proposed bike path, as reported in the Aerial Photographic Analysis of Coastal Erosion on the Islands

of Kaua'i, Moloka'i, Lāna'i, Maui, and Hawai'i (1991). This atlas represents the only existing analysis of historical erosion along the proposed route. The 30-year projected shoreline position is calculated relative to the 1988 shoreline. The erosion rate between transects may vary. The study indicated a maximum erosion rate of 0.5 ft/yr and accretion rate of 2 ft/yr, yielding a projected 30-year shoreline position (relative to 1988) 15 feet landward and 64 feet seaward, respectively. This information is useful to evaluate general shoreline change trends that may be occurring along the proposed shoreline route. However, the transects are spaced approx. 300 to 1300 feet apart, the location of the 1988 shoreline with respect to the present day shoreline is not known, and a detailed survey showing the present shoreline, vegetation line, and proposed route has not been conducted yet.

Transect (1991)	Description of Area	Accretion Rate (average) (ft/yr)	30-Year Extension Relative to 1988	
			Year 2018 (ft)	Std. Dev. (ft)
21	Waiaha Beach, approx. 1000 ft N Waiaha River. Accreting; dynamic beach. Path just makai of stone wall.	0.79	24	7
22	Waiaha Beach, approx. 300 ft S of Seashell Restaurant. Accreting; dynamic beach. Path along road.	1.05	32	5
23	Fronting Lanikai Condos. Stable; beach rock at water line. Between Kauai Sands Hotel and Aston Islander on the Beach.	-0.26	-8	8
24	Stable; intermittent erosion. Proposed path would replace existing private path. Between Kauai Coast Resort at Beachboy and vacant lot at Waipouli Beach.	-0.18	-6	6
25	Stable; intermittent erosion. Property line is 48 feet inland of 2004 vegetation line.	0.21	6	3
26	Fronting vacant lot at Waipouli Beach. Stable; intermittent erosion. Proposed path is landward of trees.	0.21	6	4
27	Fronting vacant lot north of Kauai Coconut Beach Resort. Stable.	0.05	2	4
28	Fronting vacant lot, approx 300 feet south of Mokihana. Eroding.	-0.50	-15	4
29	Severe erosion; shore protection built.	--	--	--
30	Fronting vacant lot (Singleton development). Minor erosion.	-0.24	-7	5
32	Across revetment at Moanakai Road. Severe erosion.	-0.32	-10	4
33	Approx 500 feet south of Waikaea Canal. Accreting.	1.05	32	9
34	Approx 150 feet south of Waikaea Canal. Accreting	2.08	64	2

* The counterpart to the National Environmental Policy Act (NEPA) is typically called Chapter 343, Hawai'i Revised Statutes (HRS).

- Why does the Draft EA not include the required technical plans for the shoreline hardening structures? (p. 22)

There are no "shoreline hardening structures" along any of the alternative alignments. Detailed technical plans will be prepared after the final alignment is selected. Site conditions along that route will determine the facility design needs, including slab on grade, boardwalks, and bridges.

Special Management Area Permit

- "In addition, substantial shore hardening structures for a distance of at least several hundred yards will be required to support the Shore Path." (p. 24)

The Draft EA suggests two structural options—mechanically stabilized earth (MSE) fill (Figure 10) and boardwalk (Figure 11)—to illustrate different ways of constructing the path along the sloped section. This area is well inland of the shoreline and characterizing them as "shore hardening structures" is inaccurate.

- "Adverse consequences of such cutting and grading and shore hardening structures will cause the irreversible modification of natural forces that formed and currently affect the shoreline makai of the resorts along Papaloa Road." (p. 25)

The MSE design (Figure 10) involves cut and fill. The boardwalk option is much less dependent on grading.

- "...substantial modification of the shoreline makai of the Hale Awapuhi and Kapaa Sands condominiums, including the removal of ironwood trees, would likely be required." (p. 26)

Where possible, efforts would be made to preserve trees along the route of the bike/pedestrian path. Where this is not possible, trees may be relocated or new trees planted. Landscaping for the project will involve low-maintenance plants and utilize native species to the extent possible.

Your comments are important to the County of Kaua'i and the environmental review process. Mahalo for your interest in this project.

Sincerely,
KIMURA INTERNATIONAL, INC.



Glenn T. Kimura
President

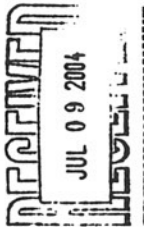
Cc:

Doug Meller, TE Program Manager, Department of Transportation
Jonathan Young, TE Program Contact, FHWA
Abraham Young, Division Administrator, FHWA
Rodney Haraga, Director, Department of Transportation
Peter Young, State Historic Preservation Officer
Genevieve Salmonson, Executive Director, Office of Environmental Quality Control
Dierdre Mamiya, Administrator, Land Division, Department of Land and Natural Resources
Daniel Quinn, Administrator, Division of State Parks, Department of Land and Natural Resources
Samuel Lemmo, Administrator, Office of Conservation and Coastal Lands, Department of Land and Natural Resources
Thomas Oi, Kaua'i Land Agent, Department of Land and Natural Resources
Clyde Namuo, Administrator, Office of Hawaiian Affairs
Bill "Kaipo" Asing, Chair, Kaua'i County Council
James Kunane Tokioka, Vice Chair, Kaua'i County Council
Jay Furfaro, Member, Kaua'i County Council
Maurice "Joe" Munechika, Member, Kaua'i County Council
Daryl W. Kameshiro, Member, Kaua'i County Council
Mel Rapozo, Member, Kaua'i County Council
Joann A. Yukimura, Member, Kaua'i County Council
Bryan J. Baptiste, Mayor, County of Kaua'i
Dennis Furushima, Fire Chief, County of Kaua'i
Ladye Martin, Department of Public Works, County of Kaua'i
Douglas Haigh, Department of Public Works, County of Kaua'i



July 6, 2004

Kimura International
1600 Kapiolani Blvd, Ste. 1610
Honolulu, HI 96814



Re: Lydgate Park - Kapa'a Multi-Use Path

Aloha,


Mahalo for seeking public input regarding the route selection for the Lydgate Park - Kapa'a Multi Use Path. We have attended several meetings held at the Kapea Middle School and have voiced our concerns and suggestions regarding several points of discussion for it's development. They are as follows:

- * Please ensure that the culturally sensitive areas and artifacts (Kukui and Hikina Akala Heiau; Pohaku petroglyphs along Waihua River, coastal burial sites and iwi kahiko) are protected and free of destructive development. Work closely with stakeholders (Native Hawaiian groups, government entities and NGO's) to ensure that appropriate management plans enhance the preservation, maintenance and access of our cultural resources and assets.
 - * Please ensure that the environmental impacts be minimized on all routes selected. Safeguarding and protecting our natural resources should be of the highest priorities for the project.
 - * Maximize the potential of the coastal routes and utilize the spectacular scenic panorama of the proposed project location but not at the expense of the cultural and environmental resources of the area.
 - * Connect with the neighborhood areas (Waihua Houselots and Kawaihau) to maximize the potential for local resident use. Please ensure that neighborhood routes and highway crossings are developed with a 'safety first' approach to route selection.
 - * Utilize signs and information boards to facilitate public education regarding safe and appropriate use, risk management and user safety and enjoyment.
- Once again thank you for seeking the public's thoughts on the route selection. Your thorough and engaging community presentations were appreciated by many. Congratulations on a job well done and mahalo for your consideration.

Sincerely,

James G Trujillo

PO Box 33 Kapa'a,
HI 96746


Maria Walker

August 11, 2004

Mr. James G. Trujillo
Ms. Maria Walker
P.O. Box 33
Kapaa, HI 96746

Dear Mr. Trujillo and Ms. Walker,

Proposed Bike/Pedestrian Path, Lydgate Park to Kapa'a
Public Review of the Draft Environmental Assessment

Thank you for your comments on the proposed bike/pedestrian path dated July 6, 2004. We want to acknowledge your interest in maximizing the scenic potential of the coastal route, but not at the expense of cultural and environmental resources. We also note your interest in providing safe bicycle and pedestrian connections to residential areas.

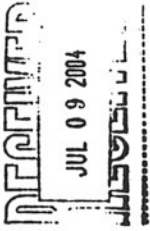
Your comments are important to the County of Kaua'i and the environmental review process. Mahalo for your interest in this project.

Sincerely,
KIMURA INTERNATIONAL, INC.



Glenn T. Kimura
President

Cc: Douglas Haigh, County of Kauai, Department of Public Works



Lydgate Park-Kapa'a Bike/Pedestrian Path

Public Meeting #3
Thursday, July 1, 2004



Name: Julie & Greg Wirtz
Address: 320 Papaloa Rd #10 Kapa'a, HI 96746

Comments:

- * There is already "lateral access" to the beach in front of Wailua Bay View Condominiums, because the County beach extends in front of that property and the undeveloped property next door. There is no reason to create a shoreline path above that beach, since beachgoers have open access to that beach already.
- * Routing the path along Papaloa Rd makes more sense and would benefit the local businesses there.
- * Closing off automobile access from the south, keeping Papaloa 2-way, and banning parking on one or both sides would be good.
- * The parking lot for the beach and/or Kini Pono could be expanded to accommodate the over flow parking.

Thank you. Please leave comments in the reception area, or take an addressed stamped envelope and mail by (postmark) July 8, 2004.

Kimura International, Inc. 1600 Kapiolani Boulevard, Suite 1610 Honolulu, HI 96814

August 11, 2004

Julie and Greg Wirtz
320 Papaloa Road, #210
Kapa'a, HI 96746

Dear Mr. and Mrs. Wirtz,

Proposed Bike/Pedestrian Path, Lydgate Park to Kapa'a
Public Review of the Draft Environmental Assessment

Thank you for your comments sent by mail. We want to acknowledge your opposition to the bike/pedestrian path along the shoreline and support for a path along Papaloa Road. We also note your preference for eliminating access to Papaloa Road from Kuhio Highway, with Papaloa Road itself kept open to two-way traffic and restrictions on on-street parking.

In response to your comment that "there is already 'lateral access' to the beach," one of the County's considerations in proposing the shoreline path was the opportunity to provide access for people in wheelchairs or with strollers, as well as those with physical impairments who find it difficult to walk on sand or rocks, but can walk on a firm surface.

Your comments are important to the County of Kaua'i and the environmental review process. Mahalo for your interest in this project.

Sincerely,
KIMURA INTERNATIONAL, INC.

Glenn T. Kimura
President

Cc: Douglas Haigh, County of Kauai, Department of Public Works

