

May 26, 2017

MEMO TO: PC-2 File

F R O M: Kelly T. King, Chair
Planning Committee

Kelly T. King

SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO
THE EAST END POLICY STATEMENT** (PC-2)

OFFICE OF THE
COUNTY COUNCIL

2017 MAY 26 AM 7:48

RECEIVED

The attached informational document pertains to Item 2 on the Committee's agenda.

pc:ltr:002afile03:kcw

Attachment

MOLOKA'I COMMUNITY PLAN -- REVIEW INDICATING CONFLICTS WITH 2016 DRAFT COMMUNITY PLAN AND AREAS OF REDUNDANCY

East End Policy Statement – 2016 edition

Responses to County Planning Department Comments

PAGE/ LINE #	REDUNDANCY/ CONFLICT WITH CP	COMMENTS
PG.ii	Conflict	<p>Appendices A, B, C, D, E, F, G & H – Do not belong in community plan. The community plan references many other documents, however the documents are not <i>included</i> in the plan as appendices.</p> <p>Response: We disagree. There is no real conflict here. The Maui County Code (MCC) Chapter 2.80B sets forth the criteria for the Maui County General Plan and the various Community Plans, including for Moloka'i. The appendices in the East End Policy Statement merely reference what is contained specifically within the policy statement, which is completely appropriate and within the parameters and criteria afforded within MCC 2.80B. The Appendices include the Traditional and Customary Practices Report for Mana'e, Moloka'i (February 2016) (Appendix A); A Framework for the 'Aha Moku System and Collaborative Governance (Appendix B); United Nations Declaration on the Rights of Indigenous Peoples (Appendix C); Advisory Council on Historic Preservation – Section 106 And the U.N. Declaration on the Rights of Indigenous Peoples: Intersections and Common Issues: Article 18 and Section 106 (Appendix D); Mana'e GIS Mapping Project (May 2008) (Appendix E); Table 5.1: Mana'e Subsistence & Ahupua'a Management Plan Framework & Table 5.3: Community Suggestions for East Slope Management Plan (Appendix F); University of Hawai'i Archaeological Training Project, Kamalō, Moloka'i, Hawai'i (December 2005) (Appendix G); Relevant Hawai'i State Constitutional Provisions (Art. XII, § 7 and XI, § 1) and Statutes (Haw. Rev. Stat § 1-1 and 7-1) (Appendix H). To state</p>

that the appendices are not included in the plan is a strange argument as they are appendices to the East End Policy Statement which in and of itself is part of the Moloka'i Community Plan. It is analagous to the several reports that are referenced in an Environmental Impact Statement (e.g., Cultural Impact Assessment, Archaeological Report, etc.) that are incorporated into the EIS as a whole as appendices.

Furthermore, the East End Policy Statement as incorporated into the Moloka'i Community Plan and its appendices directly reflect criteria set forth in the MCC 2.80B.070(E). For example, we included Appendices A, E, and F that speak directly to MCC 2.80B.070(E)(9) re: listing significant archaeological, historical, and scenic sites warranting protection. The East End Policy Statement and some of its appendices also touch upon additional criteria in MCC 2.80B.070(E)(9) on providing "planning standards and principles relating to land uses." Appendices A, B, C, D, E, and H provide standards of review that are based in international law constructs that have been adopted domestically by the U.S. and State constitutional and statutory provisions, as well as, jurisprudence respecting traditional and customary Hawaiian rights and the public trust. State and county government and agencies are required to follow these standards and therefore, their inclusion fulfills the mandate provided in MCC 2.80B.070(E)(9). Appendix E, the Mana'e GIS Mapping Project, documents a collaborative partnership between the Moloka'i East End community and the Maui County Planning Department which resulted in the identification of sites important to the perpetuation of traditional land uses within each ahupua'a of East Moloka'i. The Mana'e GIS Mapping Project also resulted in a strong recommendation for the creation of a "Traditional Land Use (TLU) Overlay Designation" within the community plan. This was timely introduced into the community plan update process and seeing its value not just for the East End, the Moloka'i Planning Commission adopted the TLU Overlay Designation for the entire island. This action is wholly consistent with MCC 2.80B.070(E)(9) criteria 16 which states that the community plan should also identify "regulations that need to be developed" for the specified planning period.

The Maui County Planning Department fails to provide any explanation as to why it would deem the inclusion of the East End Policy Statement and its appendices in the Moloka'i Community Plan to be a conflict and redundant. More importantly, as stated above, the Maui County Code itself supports these efforts at the grassroots level to include language that is provided in the East End Policy Statement and its appendices. It is also good practice to include appendices when one references them in a document. They are properly referenced as appendices so that the reader doesn't lose the big picture in the main policy document. At the same time, the appendices are important in

achieving the purpose of serving as references that provide greater guidance, detail, and context for the policies outlined within the East End Policy Statement.

The East End Policy Statement itself also provides an extra layer of protection to the community as well as increases the understanding of Moloka'i Planning Commission members when they review land use permitting proposals. The East End Policy Statement provides a clear intent of the community on land use issues that affect them the most. If anything, the policy statement serves as greater insurance that good and well-informed decision-making will take place in the future. The East End Policy Statement and its appendices complements, guides, and informs the goals and action steps described in the main body of the Moloka'i Community Plan.

PG. 4

redundant

A.1. Already covered in CP CH 9, pg. 9-6, issue #1; pg. 9-7, policy #1; pg. 9-8, Action 9.2.5; pg. 9-11 Action 9.3.3.

conflict

Response: Section II.A.1. in the East End Policy Statement and the Community Plan Chapter 9 provisions are complementary. The East End Policy Statement also adds and enhances the Community Plan in that it identifies the critical need for medical and ambulance emergency services, whereas the Community Plan only identifies police response capabilities and increasing the capacity of the Puko'o firestation to address fire service needs.

A.3. Already addressed in CH 3 Cultural Resources.

Response: Section II. A.3. in the East End Policy Statement which identifies the need for the maintenance of archaeological and cultural resources within an East End Community Service Center provides greater specificity than what is afforded in the main body of the Moloka'i Community Plan in Chapter 3.2 titled "Heritage Resources." In Chapter 3.2, the plan addresses a broader need to "increase community awareness and stewardship of Moloka'i's historic and cultural resources." There is no redundancy here. Rather, the East End Policy Statement would provide greater guidance on how the Mana'e community would like to preserve and curate cultural artifacts rather than have them removed off the island into the possession of other repositories/museums.

"Recommendations" not appropriate in sub area plan. Additionally, already covered in CH 9

Response: There is no conflict with the Moloka'i Community Plan to recommend in the East End Policy Statement that a medical/dental/health service installation and hybrid library/cultural center be established in Mana'e. Rather this recommendation encompasses several sections in the Community Plan and provides greater specificity as it relates to Mana'e.

Global Response:

The wording between the main body of the Moloka'i Community Plan and the East End Policy Statement are not identical. The sections described here in the East End Policy Statement are complementary and provide greater specificity and detail as justification for goals and policy actions described within the main body of the Moloka'i Community Plan. Furthermore, the Maui County Code provisions 2.80B.030 and 2.80B.070(E) do not prohibit these types of inclusions in the East End Policy Statement and Community Plan overall.

The language of so-called "redundancies" is a literary "sleight of hand" on the part of the Maui County Planning Department. The truth is that language in the East End Policy Statement is complementary, not redundant. The East End Policy Statement as a whole provides the broader strokes, big picture vision for the Mana'e (East End) community. The East End Policy Statement helps to inform the goals and action steps provided within the main body of the Moloka'i Community Plan. They are supposed to complement each other. This is very much akin to the passage of laws and ordinances. Whenever an agency or a judicial body interprets laws, they will look to the legislative intent behind the adoption of those laws. They will review legislative committee and hearing reports. The same goes for the community planning process. When the Moloka'i Planning Commission reviews a permit application, its members will first consult the Moloka'i Community Plan and zoning designations for allowable land uses, then it will look to the Community Policy Statement to determine the community's overall vision for the character of their place and what they perceive to be acceptable land uses.

If we give credence to the County Planning Department's claims of "redundancy" and as a result decide to excise the East End Policy Statement as a whole or in part, we essentially defeat the purpose of the planning process. These so-called "redundancies" are actually safeguards that demonstrate how the main body of the Moloka'i Community Plan is and SHOULD BE aligned with the Policy Statement of the East End community. To ensure that the East End Policy Statement would be consistent with the Moloka'i Community Plan, we testified and successfully offered motions before

the Moloka'i Planning Commission for inclusion of specific goals and action steps within the main body of the Moloka'i Community Plan. The Planning Commission exercised good faith and due diligence in supporting these motions and formally adopting the recommended goals and action steps into the Community Plan. The Moloka'i Planning Commission serves as the eyes and ears of the island community and is a proper check and balance to the Community Plan Advisory Committee (CPAC). Oftentimes, community members expressed frustration with the CPAC and the heavy-handedness taken by the County Planning Department in its proposed changes to the Moloka'i Community Plan. One of the decisions the CPAC made at the insistence of Planning Department staff was to completely gut out the East End Policy Statement that was drafted by kūpuna in the 1980s because it didn't fit the County's new planning template. This is a dangerous precedent. Form should never defeat substance, especially when the community's constitutional due process rights are at risk.

PG 4-5

conflict & redundancy

"Recommendation" does not belong in subarea plan. Already addressed in CP CH 9, pg. 9-4, policy #11

Response: There is no conflict, nor redundancy. The wording between the main body of the Moloka'i Community Plan and the East End Policy Statement are complementary. Pages 4-5 in the East End Policy Statement addressing Hunting/Conservation Cabins deliberately complements Policy # 11 on page 9-4 of the Moloka'i Community Plan. In order to give our East End Policy teeth, we recommended that the Planning Commission approve a motion for inclusion of similar language in the main body of the Moloka'i Community Plan. Furthermore, the Maui County Code provisions 2.80B.030 and 2.80B.070(E) do not prohibit these types of inclusions in the East End Policy Statement and Community Plan overall; rather these provisions encourage the level of planning undertaken by the Mana'e community.

conflict

C. Ocean access/boat ramp - not under county jurisdiction. State issue only - DLNR

Response: There is no conflict. The East End Policy Statement merely contains greater detail and specificity of the community's intent regarding whether or not a boat ramp should be allowed. It provides guidance to the Moloka'i Planning Commission and other governmental entities in future decision-making. This kind of public participation and community advocacy and vigilance should be encouraged rather than invalidated or devalued. These efforts -- a policy and practice of public participation and inclusion -- are the hallmarks of a functioning and effective democracy.

The language provided in the East End Policy Statement re: ocean access/boat ramp are relevant to

and congruent with the Maui County Code 2.80B.070 which provides community planning criteria.

While the County may not have primary jurisdiction in authorizing the construction of a boat ramp, this action would trigger county review and permit approvals (e.g., shoreline setback variance and special management area permit) as companion requirements to federal (e.g., Army Corps dredge and fill permit) and state permits (e.g., Environmental Assessment of Impact Statement, water quality permit, etc.).

PG 11

conflict

"Recommendation" does not belong in subarea plan.

Response: The Maui County Code provisions 2.80B.030 and 2.80B.070(E) do not prohibit this recommendation re: whether or not to authorize and/or permit a boat ramp in East Moloka'i. The East End Community Statement makes clear that this is a contentious issue that requires further vetting by the community and therefore, no preemptive approvals should be granted by the county, nor any other governmental entity. The East End Policy Statement makes clear that nothing should preclude the community from utilizing its local and traditional decision-making processes afforded through the 'Aha Kiole. This is conscientious planning at its best. The Maui County Code encourages rather than dissuades the level of planning and vigilance the Mana'e community has committed itself to, so that the rural character and the specialness of this place remains for present and future generations to enjoy.

PG 12

redundant

III. Environment and Natural Resources - all material covered in CP CH 3 Natural Resources

Response: Chapter 3.1 in the Moloka'i Community Plan provides a broader brush stroke of the natural resources throughout Moloka'i island. The East End Policy Statement more appropriately describes the natural resources of Mana'e. Mana'e is a micro-climate that is vastly different from other areas of the island and contains the richest resources. The language is not redundant, nor duplicative of the main body of the Moloka'i Community Plan. Rather, it enhances Chapter 3 in the Community Plan and better informs decision-makers about the important and unique resources in Mana'e that warrant protection. Once again, the Maui County Code does not prohibit, but rather encourages this level of planning.

PG 13

conflict

Lines 6-7 has nothing to do with Erosion. Also, hunting allowed for "Moloka'i residents"? What about non-Moloka'i residents?

Response: There is no conflict, the analysis is aligned with community planning criteria under MCC 2.80B.030 and 280B.070(E). Hunting is a recommended solution here for erosion caused by feral ungulates/deer. Much of the lands are privately owned which makes it difficult for families to conduct subsistence hunting activities without being criminalized. Community planning is about the community weighing in on issues most important to them, it is not about worrying about non-residents. Further, the inclusion into the East End Policy Statement of the Mana'e Traditional and Customary Practices Report makes clear the concerns residents have of making hunting a commercial activity for outsiders because of the heavy dependence of all Moloka'i families on subsistence.

redundant

Lines 10-11, lines 19-20, line 24 Already addressed CH 6, pg. 6-9, policy #14 also all addressed in County Multi- Hazard Mitigation Plan

Response: Policy # 14 in Chapter 6, page 6-9 of the main body of the Moloka'i Community Plan acknowledges the wishes of the East End community to discourage hotel and multifamily development in Mana'e. The EEPS provisions referenced by the Planning Department here add more depth as to the community's rationale behind this recommendation; namely risks of flooding and tsunami inundation, and the need to further modify the environment to receive waste and treat increased sewage output. The EEPS adds further detail that is not provided in the main body of the community plan. The EEPS enhances the ability of the Planning Commission to make well-informed and conscientious decisions.

conflict/redundant

"Recommendation" does not belong in subarea plan. Make a specific recommendation to add to CP, not blanket inclusion of language. Also already covered in CH 3 Policy #8, Action 3.2.1, 3.2.2, 3.2.3

Response: This comment from the Planning Department is disingenuous. The only reason Actions 3.2.01, 3.2.02, and 3.2.03 are included in the community plan is because we asked the Planning Commission to include them based on recommendations made in the East End Policy Statement. The Planning Commission wanted to expand our recommendations to the entire island and that is how those action items were included in the overall Moloka'i Community Plan. Also, as stated above, there is no conflict and no redundancy here, the recommendations found in the East End Policy Statement merely provide greater detail and rationale behind the action steps described in the main body of the Moloka'i Community Plan and will assist the Moloka'i Planning Commission in making well-informed decisions.

PG 14	redundant	<p>IV. Cultural Resources & Traditional Land Uses - 3rd paragraph - already addressed in CH 3 Natural Resources, Policy #5, pg. 3-14</p> <p>Response: Again, this comment from the Planning Department is disingenuous. The only reason Policy #5 on page 3-14 is included in the community plan is because we asked the Planning Commission to include this provision. There is no redundancy here, the East End Policy Statement merely provides greater detail and rationale behind the provision in the main body of the Moloka'i Community Plan and will assist the Moloka'i Planning Commission in making well-informed decisions.</p>
	redundant	<p>Paragraph 5 - Already addressed in CP, CH 8 Policy #1, pg. 8-3; pg. 8-4 Policies #13 & 14</p> <p>Response: Again, this comment from the Planning Department is disingenuous. The only reason Policy #1 on page 8-3 respecting "priority water rights of Native Hawaiians under the Hawaiian Homes Commission Act, the State Water Code" and protecting various water resources that also important to the Native Hawaiian rights and practices that are protected under constitutional and statutory provisions is included in the community plan is because we asked the Planning Commission to include this provision. There is no redundancy here, the East End Policy Statement merely provides greater detail and rationale behind the provision in the main body of the Moloka'i Community Plan and will assist the Moloka'i Planning Commission in making well-informed decisions.</p>
PG 15	redundant	<p>Paragraphs 1 - 3 - Already addressed in Chapters 3 & 8 (Water)</p> <p>Response: The citation of laws and jurisprudence protecting public trust resources like water is important, as it best informs the Moloka'i Planning Commission on its constitutional obligations and standards of review. Again, there is no redundancy here, the East End Policy Statement merely provides greater detail and rationale behind the provision in the main body of the Moloka'i Community Plan and will assist the Moloka'i Planning Commission in making well-informed decisions.</p>
PG 16 - 17	conflict/redundant	<p>"Recommendations" does not belong in subarea plan. Recommendation 1 - Already addressed in CH 3 pg. 3-13, issues # 1& 2, policies #1-3 pg. 3-15 and Action 3.2.1, 3.2.2, 3.2.3, 3.2.4. Recommendations 3 & 4 - already addressed in pg. 3-14, Policies #3, 4, and 5. Recommendation 6 - already addressed in CH 3 policy #6 & 9. Recommendation 7 - already addressed in CH 6, pg. 6-9, policy #14.</p>

Recommendation 8 - already addressed in CH 3 pg. 3-14, policy #8. Recommendation 9 - already addressed in CH 3 - is the GOAL, policy #5, 19 Action 3.2.2 and also CH 6 policy #7. Recommendation 10 - already addressed in CH 8 (Water) pg. 8-3, policy #1, and pg. 8-4 policies 11, 13 & 14.

Response: The recommendations provided in the East End Policy Statement should be seen as companion language that is complementary and provides greater detail and rationale for the provisions and action steps found in the main body of the Moloka'i Community Plan. A number of these recommendations were formally adopted by the Planning Commission. This body saw the value of our recommendations as applicable to the entire island. This constitutes good planning. Furthermore, the recommendations provided in the East End Policy Statement directly reflect criteria set forth in the MCC 2.80B.070(E). Once more, there is no conflict and no redundancy here, the recommendations found in the East End Policy Statement merely provide greater detail and rationale behind the action steps described in the main body of the Moloka'i Community Plan and will assist the Moloka'i Planning Commission in making well-informed decisions.

PG 18

conflict/redundant

"Recommendations" does not belong in subarea plan. Already addressed in CH 3, pg. 3-14, line 20, policy #8, pg. 3-16, Action 3.2.2.

Response: The recommendations provided in the East End Policy Statement should be seen as companion language that is complementary and provides greater detail and rationale for the provisions and action steps found in the main body of the Moloka'i Community Plan. A number of these recommendations were formally adopted by the Planning Commission. This body saw the value of our recommendations as applicable to the entire island. This constitutes good planning. Furthermore, the recommendations provided in the East End Policy Statement directly reflect criteria set forth in the MCC 2.80B.070(E). Once more, there is no conflict and no redundancy here, the recommendations found in the East End Policy Statement merely provide greater detail and rationale behind the action steps described in the main body of the Moloka'i Community Plan and will assist the Moloka'i Planning Commission in making well-informed decisions.

conflict

B. Pu`u o Hoku - specific actions on private property

PG 19

redundant

D. Ke`ana O Hina - Recommendations - "Recommendations" does not belong in subarea plan. #3 - incomplete sentence? #5 already addressed in CH 3 and 5

PG 20

conflict

Reference to Moloka'i Nov 2015 draft plan - several changes made since then and should not be referenced. Source of data referring to # of households? Year?

Response: The best available data was utilized here. The experienced staff of the Planning Department may provide better research data if it elects to do so. References to the November 2015 draft plan were made because that was the most updated version available to the Mana'e community to review. There was a deep concern from the Mana'e community about the CPAC's decision under the recommendation of the Planning Department to totally exclude the East End Policy Statement from the updated Moloka'i Community Plan. This prompted greater vigilance on the part of the Mana'e community to advocate before the Planning Commission to approve the re-inclusion of the East End Policy Statement with additional amendments to the older version. As the Moloka'i Community Plan is nearing finalization, it is okay now to redact any references to the November 2015 draft plan.

Redundant/conflict

"Recommendations" does not belong in subarea plan. Already addressed in CH 5 pgs. 5-4,5, policies #1,2,3,4,5,7,8,12,13,14,15,16,17,18,19,20,22,23, pgs. 5-7, 8, Actions 5.1, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.14, 5.15, 5.16, 5.17. #3 refers to Aquaculture areas for consideration etc. -- under the jurisdiction of DLNR NOT the County

Response: The recommendations provided in the East End Policy Statement should be seen as companion language that is complementary and provides greater detail and rationale for the provisions and action steps found in the main body of the Moloka'i Community Plan. A number of these recommendations were formally adopted by the Planning Commission. This body saw the value of our recommendations as applicable to the entire island. This constitutes good planning. Furthermore, the recommendations provided in the East End Policy Statement directly reflect criteria set forth in the MCC 2.80B.070(E). Once more, there is no conflict and no redundancy here, the recommendations found in the East End Policy Statement merely provide greater detail and rationale behind the action steps described in the main body of the Moloka'i Community Plan and will assist the Moloka'i Planning Commission in making well-informed decisions.

We disagree with the Planning Department that aquaculture activities do not fall under the purview of the County. Multiple county, state, and federal permit approvals are required for aquaculture

		<p>operations whether within fishponds or nearshore. The Planning Department and the Moloka'i Planning Commission will have to weigh in on these permit applications. Therefore, understanding what the Mana'e community considers acceptable land use, including aquaculture operations is important to their decision-making.</p>
<p>PG 21</p>	<p>conflict</p>	<p>Taxes - not appropriate in a CP</p> <p>Response: This comment from the Planning Department is overly simplistic and fails to address the larger implications of county actions that have heretofore allowed transient vacation rentals and bed and breakfast establishments. These operations, whether operating legally or illegally, have had a direct and harsh consequence on Mana'e residents as newcomers buy up former kuleana lands through quiet title actions and develop these newly acquired properties to accommodate tourists. While these TVRs are untaxed as compared to valid hotel establishments; they steadily increase property taxes for the long-time residents of Mana'e to the point where they can no longer afford to live in Mana'e and are forced to sell their lands and relocate. This is a major problem that has to be addressed and the Planning Commission can take these things into consideration when reviewing permits for TVRs and bed and breakfast establishments. The Planning Commission would be better equipped to understand the larger implications of these types of permit applications that have a significant impact on changing the character of the community to one that is stable and long-standing to a transient population that has no commitment to caring for Mana'e.</p>
<p>PG 22 - 25</p>	<p>redundant</p>	<p>VII A Legal Framework for Land Use Policy, Permitting, and Decision-making - should not be contained in CP -- repetitive and is addressed in HRS as appropriate</p> <p>1. Do not understand why redundant under MCC 2.80B and why it cant be included; as it is not prohibited under MCC 2.80B.030 and 2.80B.070 subsection E, #1-16?</p>

ACTION STEPS TO INTEGRATE
THE MARCH 2016 EAST END POLICY STATEMENT
TO THE MOLOKA'I COMMUNITY PLAN 2016 UPDATES
FOR THE MOLOKA'I PLANNING COMMISSION

March 24, 2016, 10:00 a.m.

Kilohana Community Center

The following **COMMENTS AND TESTIMONY** ("Testimony") are offered on behalf of the The Mana'e community as a companion piece to the proposed March 2016 revisions to the East End Policy Statement. This Testimony reflects issues, policies, and action items to fit within the appropriate sections and body of the Moloka'i Community Plan Update, draft dated November 2015. This Testimony also reflects the consensus reached at the March 21, 2016 community meeting hosted by the 'Aha Kiole O Moloka'i at Kilohana Community Center.

Chapter 3: Natural, Heritage, and Scenic Resources

- **Recommendation 3.1: Include the importance of Mana'e. The community recommends that page 3-1, line 11, be amended to read as follows:**

"Mana'e is the heart and life source of Moloka'i. The larger Moloka'i community identifies Mana'e as a pu'uhonua (safe refuge). Mana'e traditionally sustained the highest population on island and contained the oldest settlement sites dating back to 450 A.D., showing that Mana'e is where our ancestors first settled. It has the most critical natural resources, including the water. It is made up of four major valleys with between 3-5 million gallons of pristine rivers/waters flowing through these valleys everyday, feeding the rich estuaries and near shore fisheries in addition to the multitude of intact terraces. In addition, Mana'e's abundance of water on the north shore finds its way to the south shore through underground tunnel systems and springs, providing for the ideal ecological conditions that supported numerous fishponds along Mana'e's south shore. This is the value of Mana'e, the land of 'aina momona (abundance). Thus, it is critical to protect Mana'e as a special place for all of Moloka'i as a pu'uhonua (safe refuge), cultural kīpuka (rural area that serves as a living repository of Hawaiian traditional knowledge, understandings, and practices), and a place essential to 'aina momona (continued food and water security) for its abundant fishponds, lo'i kalo (taro patches), rich forests, streams, and springs."

- **Recommendation 3.2: Amend policy 8, page 3-12, to read as follows:**

"Protect traditional cultural landscapes such as Hālawā Valley, Hoku Kano-'Ualapu'e Complex, Ka'amola, and Kamalo through the designation of all of Mana'e within a Traditional Land Use Overlay."

- **Recommendation 3.3: Add an additional action to Table 3.2 on page 3-12, to read as follows:**

“Encourage efforts in Waikolu valley to partner with the Kalaupapa National Historical Park - National Park Service, Department of Land and Natural Resources, the community, and other stakeholders to: a) conduct archaeological studies; b) conduct invasive species removal; and c) implement traditional uses of the valley.”

Chapter 5: Economic Development

- **Recommendation 5.1: Include importance of Moloka‘i’s subsistence economy and public trust legal protections on page 5-1, line 27, to read as follows:**

“Additionally, according to the 1994 Governor’s Moloka‘i Subsistence Task Force Final Report, subsistence is a viable sector of Moloka‘i’s economy. Subsistence practices on Moloka‘i have continued into today primarily due to the availability of renewable natural resources. With Moloka‘i’s history of years of macroeconomic strategies that have had negative implications on Moloka‘i’s natural resources and native ecosystems, in addition to recognizing Moloka‘i’s subsistence economy, it is equally important to carefully move forward with future endeavors to develop and diversity Moloka‘i’s economy.

In *Wāiahole I*, the Hawai‘i Supreme Court held that the public trust doctrine affords protection to natural resources that are important for Native Hawaiian traditional and customary practices,¹ including subsistence. The Court further held that private commercial use is not a protected public trust use.² Additionally, as public and private interests often conflict, the State has a constitutional obligation to weigh competing interests in public trust resources with a presumption in favor of public use, access, and enjoyment.³ In order to ensure Moloka‘i’s subsistence economy remains its viable and ensure the rural character of Mana‘e remains in tact, it is critical to ensure that the continuous development of Moloka‘i’s economy is done so in a way that is in accordance with the state’s affirmative obligations.”

- **Recommendation 5.2: Add a policy in section 5.C on page 5-4, to read as follows:**

“Protect the north shore coastline, valleys, and fisheries from all commercial activities.”

Chapter 6: Land Use and Housing

- **Recommendation 6.1: Clarification of Mana‘e Boundaries on page 6-4, line 8, to read as follows:**

“The boundaries of Mana‘e by ahupua‘a are from Makolelau to Halawa on the south shore, and from Pelekunu to Halawa on the north shore. This area boundary was

¹ *In re Waiāhole Combined Contested Case Hearing (Waiāhole I)*, 94 Hawai‘i 97, 136 9 P.3d 409, 448, 137.

² *Id.* at 138.

³ *Id.* at 141-42.

chosen since the lands contained within that area match the East Moloka'i Planning Region, are similar in actual use/ownership today, and match the community lifestyle."

- **Recommendation 6.2: Include kuleana land and tax related issues on page 6-4, line 17 to read as:**

"Amongst other issues, the increase in land tax has and continues to create financial hardships for ahupua'a and kuleana land owners. The ahupua'a owner is usually able to manage any increase in land taxes, whereas the kuleana owner often is not. Quiet title actions and the inability for kuleana landowners to bring together multiple, undivided interests has caused a shift in the demographics where there are more non-residents purchasing real estate on Moloka'i and establishing and driving up land and home values. This also drives up property taxes and forces out remaining families living on their lands and kuleana lands. It has also been creating a lucrative, illegal transient vacation rental scheme where people don't know who their neighbors are and public beach accesses are blocked. Because there are numerous amounts of kuleana lands in Mana'e, these issues are magnified. This unique Mana'e issue combined with the conventional statewide problems of land tax and development, produces hurdles over which responsible land use and land tax assessment becomes a problem. Tax burdens on kuleana land owners must be alleviated."

- **Recommendation 6.3: Add an additional issue in section 6.1.C on page 6-8, to read as follows:**

"There are potential future impacts from sea level rise to existing coastal development that are not adequately planned for."

- **Recommendation 6.4: Add the following policies to section 6.1.D on page 6-9, to read as follows:**
 - "Alleviate tax burdens on kuleana land owners potentially by basing assessments on actual use, rather than potential use value."
 - "Develop a climate change policy and adaptation plan to address rising sea levels and beachfront housing and development in Mana'e."
 - "Identify and protect Mana'e's numerous cultural and natural resources through adoption of a "Traditional Land Use" Overlay Designation. The boundaries of the Overlay should be from Makolelau to Halawa on the south shore. Adoption of this TLU Overlay means that any proposed development in Mana'e should be aligned with the data and community recommendations from the Mana'e GIS Mapping Project (COM, 2008) and the Traditional and Cultural Practices Report for Mana'e (OHA, 2016). In addition, this area should allow for traditional Hawaiian structures to allow people to live in these sensitive areas to take care of them."

- **Recommendation 6.5: Add the following actions to Table 6.2, on page 6-10, to read as follows:**

- Action: “Adopt a “Traditional Land Use” (TLU) Overlay into the Community Plan Designations. The County Planning Department should look at existing Community Plan Designations and County Zoning in Mana’e and recommend zoning adjustments based on current land use suitability analysis methods, as well as on the community recommendations included in the Mana’e GIS Mapping Project (COM, 2008) and the Traditional and Cultural Practices Report for Mana’e (OHA, 2016)”; Lead County Agency: “Planning Dept.”; Partners: “Aha Kiole o Moloka’i, Moloka’i Community”
- Action: “Research and conduct viable options to alleviate tax burdens on kuleana land owners, potentially by basing assessments on actual use rather than potential use value.”; Lead County Agency: “Planning Dept.”; Partners: “Aha Kiole o Moloka’i, Moloka’i Community”
- Action: “Research and develop a climate change policy and adaptation plan to address rising sea levels and beachfront housing and development.”; Lead County Agency: “Planning Department”; Partners: “Aha Kiole o Moloka’i, Moloka’i Community”

- **Recommendation 6.6: Add the following policies to section 6.2.C, on page 6-14, to read as follows:**

- “Establish a cap on the amount of Transient Vacation Rentals (TVRs) and Short-Term Rental Homes (STRHs) on Moloka’i.”
- “Prohibit the future building of homes and structures from mid to high elevations in Mana’e, with exception to proposed cabins and/or structures for natural resource management and hunting.”
- “Determine an acceptable policy regarding current and future Mana’e subdivisions such as Kilohana Kai and Kalua’aha.”

- **Recommendation 6.7: Add an action to Table 6.3, on page 6-15, to read as follows:**

Action: “For the East End, Moloka’i, establish the cap on TVRs for as one, establish the cap on STRHs as five, and establish that there should be no further issuances of conditional permits for TVRs or STRHs.”; Lead County Agency: “Planning Dept.”

Chapter 9: Public Facilities and Services

- **Recommendation 9.1: Amend Policy 9 on page 9-4 to include the following additional language:**

“9. Support and expand the State Na Ala Hele trail system by considering such designation for all traditional trails, and including a coastal trail system.”

- **Recommendation 9.2: Add a policy on page 9-4, to read as follows:**

“Install cabins up mauka in Mana’e along each ahupua’a or ahupua’a cluster (e.g., Pua’ahala - Ka’amola; ‘Ohia - Ualapu’e; Kalua’aha; Mapulehu - Puko’o; etc.). These cabins would be multi-purpose: Hunters can use them to access areas with a high concentration of ungulates they cannot reach within a day’s hike, who need to stay overnight to continue the hunt and bring the animals down the mountain. The second purpose is to conduct conservation work, such as monitoring, removal of invasive species, establishing new strands of native plants, and maintenance of trails and cultural sites.”

Additional Recommendations

- **Recommendation 10.1: The community recommends that a new and additional sub-section entitled “Legal Foundations”, be created in Chapter 1 of the Moloka’i Community Plan to read as follows:**

“The following section provides an important legal framework in which agencies are must follow when engaging in decision making actions that may impact Native Hawaiian traditional and customary practices. Hawai’i Revised Statute § 1-1 guides agencies to look to Hawaiian judicial precedence and custom and usage in making their decisions. Agencies are required to protect their kuleana rights of hoa’āina or kuleana.

“A. The ‘Aha Kiole: The People’s Councils and The Eight Realms of Decision Making

‘According to Kumu John Ka’imikaua the purpose of the ‘aha councils was to utilize the expertise of those with ‘ike (knowledge) to mālama ‘āina, to care for the natural resources, and to produce food in abundance not just for the people, but for successive generations. ‘Aha council leadership was determined by the people who collectively understood who the experts were in their community.’⁴

With this in mind, when you look at Hawaiian custom and usage, the ancient traditions of which Moloka’i’s ‘āina momona was based upon are the eight realms of decision making from the ancient ‘aha councils. Historically, the ‘aha councils of Moloka’i considered the following eight realms before making their decisions:

- 1) **Moana-Nui-Ākea** – the farthest out to sea or along the ocean’s horizon one could perceive from atop the highest vantage point in one’s area.

⁴ Malia Akutagawa, Shaelene Kamaka’ala, Harmonie Williams, et al., OFFICE OF HAWAIIAN AFFAIRS, TRADITIONAL & CUSTOMARY PRACTICES REPORT FOR MANA’E, MOLOKA’I, 47 (2016).

- 2) **Kahakai Pepeiao** – where the high tide is to where the lepo (soil) starts. This is typically the splash zone where crab, limu (seaweed), and 'opihi (limpet) may be located; sea cliffs; or a gentle shoreline dotted with a coastal strand of vegetation; sands where turtles and seabirds nest; or extensive sand dune environs.
- 3) **Ma Uka** – from the point where the lepo (soil) starts to the top of the mountain.
- 4) **Nā Muliwai** – all the sources of fresh water, ground/artesian water, rivers, streams, springs, including springs along the coastline that mix with seawater.
- 5) **Ka Lewalani** – everything above the land, the air, the sky, the clouds, the birds, the rainbows.
- 6) **Kanaka Hōnua** – the natural resources important to sustain people. However, management is based on providing for the benefit of the resources themselves rather than from the standpoint of how they serve people.
- 7) **Papahelōlona** – knowledge and intellect that is a valuable resource to be respected, maintained, and managed properly. This is the knowledge of the kahuna, the astronomers, the healers, and other carriers of 'ike.
- 8) **Ke 'Ihi'ihi** – elements that maintain the sanctity or sacredness of certain places.⁵

This ancient decision making matrix honors our ancestral past and wisdom, by looking to the needs of the present and ensuring that our decisions provide for abundance for future generations yet unborn. For every decision made and every land use proposal, any proposed amendments to the Moloka'i Community Plan or any permit request, should be analyzed according to the impacts of these eight realms and the decision making matrix should be applied because these are customary laws from ancient times, which were codified by the Kingdom, and adopted by the State of Hawai'i. These laws are inherent rights of Native Hawaiians to self-determination and sovereignty.

Additionally, international law recognizes the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which President Obama signed this into law in 2010. Since then, various federal advisory councils that serve as advisory bodies to federal agencies, have provided guidelines for which to implement UNDRIP and to implement provisions for free, prior, and informed consent of native peoples. As such, we here by adopt the UNDRIP and its underlying principles as a mandate that the State and County government must adhere to in making land use decisions in collaboration with native individuals and communities on Moloka'i.

'There are certain vested rights of native Hawaiian ahupua'a tenants (hoa'āina) that have their origins in the ancient land tenure system. This customary law was codified by the Hawaiian Kingdom and later adopted by the State of Hawai'i. The State has reaffirmed these rights in its Constitution and statutes. A unique body of jurisprudence has developed around these laws which reflect a heightened obligation by the State and

⁵ Interview with Dr. Kawika Winter, Director, Limahuli Garden and Pres., Hā'ena Makai Watch Coordinator, and former member of the late Kumu John Ka'imikaua's Halau Hula o Kukunaokalā in Honolulu, Haw. (Dec. 10, 2014).

its political subdivisions to reasonably protect traditional and customary Native Hawaiian rights on both public and private lands.⁶

The native people of Mana‘e and Moloka‘i continue to strongly with their cultural practices and their relationship to ‘āina. For these reasons, this community plan is a reflection of self-determination and the community’s right to determine its own autonomy. As a people, the greater Hawaiian community is exploring different avenues to attain sovereignty. However, as the Mana‘e and Moloka‘i community engages with local government, international, federal, state, and county laws need to be recognized and upheld.

B. Sources of Native Hawaiian Rights Law

The Hawai‘i State Constitution reaffirms these rights--particularly Hawaiian access rights--which are protected in ones ahupua‘a of residence⁷ or if shown to be customary, in other ahupua‘a without the benefit of tenancy if shown that this was the accepted custom and long-standing practice.⁸ All State and County agencies and decision making bodies are obligated under the Hawai‘i State Constitution and various statutes to ensure that these Hawaiian rights are not regulate out of existence. There are affirmative obligations to protect Hawaiian custom and usage and the resources that Native Hawaiians depend upon.⁹ State and County agencies must make an independent assessment regarding the impact that a proposed action may have on Native Hawaiian traditional and customary practices, and must consider the following three factors:

- (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 [State and/or its political subdivisions] to reasonably protect native Hawaiian rights if they are found to exist.¹⁰

C. ‘Ohana Values: The Foundations of Hawaiian Traditional and Customary Practices

⁶ Akutagawa, Kamaka‘ala, Williams, et al., TRADITIONAL & CUSTOMARY PRACTICES REPORT FOR MANA‘E, *supra* note 4 at 58.

⁷ FORMAN & SUSAN K. SERRANO, HO‘OHANA AKU, A HO‘OLA AKU HO‘OLA AKU: A LEGAL PRIMER FOR TRADITIONAL AND CUSTOMARY RIGHTS IN HAWAI‘I 9 (2012) [hereinafter FORMAN & SERRANO, HO‘OHANA AKU, A HO‘OLA AKU] (citing Kalipi, 66 Haw. at 9, 656 P.2d at 750).

⁸ Pele Def. Fund v. Paty (*Pele I*), 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992). See FORMAN & SUSAN K. SERRANO, HO‘OHANA AKU, A HO‘OLA AKU, *supra* note 7, at 13 (citing *Pele I*, 73 Haw. at 620, 837 P.2d at 1272).

⁹ Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n, 94 Hawai‘i 31, 7 P.3d 1068, 1083 (2000).

¹⁰ FORMAN & SUSAN K. SERRANO, HO‘OHANA AKU, A HO‘OLA AKU, *supra* note 7, at 17 (citing *Ka Pa‘akai*).

'Dr. Davianna Pōmaika'i McGregor interviewed a large number of kama'āina informants residing in "cultural kīpuka" (rural areas that have maintained cultural understandings and practices)¹¹ who identified common 'ohana cultural values and customs for subsistence and mālama. It is the essence of these understandings that should be the standard by which to measure whether something is a customary practice or not.¹² According to Dr. McGregor, what distinguishes Hawaiian custom and practice is the honor and respect for traditional 'ohana cultural values and customs to guide subsistence harvesting of natural resources. Such 'ohana values and customs include but are not limited to the following:

- 1) Only take what is needed.
- 2) Don't waste natural resources.
- 3) Gather according to the life cycle of the resources. Allow the native resources to reproduce. Don't fish during their spawning seasons.
- 4) Alternate areas to gather, fish and hunt. Don't keep going back to the same place. Allow the resource to replenish itself.
- 5) If an area has a declining resource, observe a kapu on harvesting until it comes back. Weed, replant and water if appropriate.
- 6) Resources are always abundant and accessible to those who possess the knowledge about their location and have the skill to obtain them. There is no need to overuse a more accessible area.
- 7) Respect and protect the knowledge which has been passed down inter-generationally, from one generation to the next. Do not carelessly give it away to outsiders.
- 8) Respect each other's areas. Families usually fish, hunt, and gather in the areas traditionally used by their ancestors. If they go into an area outside their own for some specific purpose, they usually go with people from that area.
- 9) Throughout the expedition keep focused on the purpose and goal for which you set out to fish, hunt, or gather.
- 10) Be aware of the natural elements and stay alert to natural signs, e.g. falling boulders as a sign of flash flooding.
- 11) Share what is gathered with family and neighbors.
- 12) Take care of the kūpuna who passed on the knowledge and experience of what to do and are now too old to go out on their own.
- 13) Don't talk openly about plans for going out to subsistence hunt, gather, or fish.
- 14) Respect the resources. Respect the spirits of the land, forest, ocean. Don't get loud and boisterous.
- 15) Respect family 'aumakua. Don't gather the resources sacred to them.¹³

¹¹ DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE, 21 (2007).

¹² Akutagawa, Kamaka'ala, Williams, et al., TRADITIONAL & CUSTOMARY PRACTICES REPORT FOR MANA'E, *supra* note 4 at 7-58.

¹³ DAVIANNA MCGREGOR, THE NATURE CONSERVANCY, CULTURAL ASSESSMENT FOR THE KAMAKOU PRESERVE, MAKAKUPA'IA AND KAWELA, ISLAND OF MOLOKA'I 16-17 (2006).