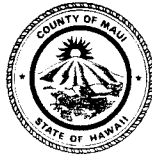


DANNY A. MATEO  
County Clerk



RECEIVED

PRL-1(25)2  
JOSIAH K. NISHITA  
Deputy County Clerk

2017 NOV 17 PM 4: 23

**OFFICE OF THE COUNTY CLERK**

COUNTY OF MAUI  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
www.mauiCounty.gov/county/clerk

OFFICE OF THE  
COUNTY COUNCIL

November 17, 2017

Honorable Don S. Guzman, Chair  
Parks, Recreation, Energy, and  
Legal Affairs Committee  
Council of the County of Maui  
Wailuku, Hawaii 96793

Dear Chair Guzman:

SUBJECT: BILL NO. 96 (2017), "A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF HAWAII DEPARTMENT OF DEFENSE, THE NATIONAL CEMETERY ADMINISTRATION OF THE U.S. DEPARTMENT OF VETERANS AFFAIRS, THE STATE HISTORIC PRESERVATION DIVISION OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION TO SET FORTH GUIDELINES TO MAINTAIN THE MAUI VETERANS CEMETERY AT 'SHRINE STATUS'"

Respectfully transmitted is a copy of Bill No. 96 (2017) which was recommitted to your Committee by the Council of the County of Maui at its meeting of November 17, 2017.

Please note that Bill No. 96 (2017) was passed on first reading on November 3, 2017, pursuant to the adoption of Committee Report No. 17-156.

Also attached is written testimony received from the Makawao Cemetery Association transmitting correspondence from their attorney, Isaac Hall, which was submitted at the meeting and referred to your Committee.

Respectfully,

A handwritten signature in black ink, appearing to read "Danny A. Mateo", is written over a faint, larger version of the same signature.

DANNY A. MATEO  
County Clerk

/jym  
Enclosures  
cc: Director of Council Services

ORDINANCE NO. \_\_\_\_\_

BILL NO. 96 (2017)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF HAWAII DEPARTMENT OF DEFENSE, THE NATIONAL CEMETERY ADMINISTRATION OF THE U.S. DEPARTMENT OF VETERANS AFFAIRS, THE STATE HISTORIC PRESERVATION DIVISION OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION TO SET FORTH GUIDELINES TO MAINTAIN THE MAUI VETERANS CEMETERY AT "SHRINE STATUS"

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Purpose. The County of Maui ("County"); State of Hawaii Department of Defense ("State"); the National Cemetery Administration of the U.S. Department of Veterans Affairs ("NCA"); the State Historic Preservation Division of the Department of Land and Natural Resources; and the Advisory Council on Historic Preservation wish to enter into a Memorandum of Agreement ("MOA") setting forth essential terms for the operations and maintenance of the Maui Veterans Cemetery located in Makawao, Maui, Hawaii.

The State recently received funding from the NCA to expand the Maui Veterans Cemetery, and such funding requires the grounds of the cemetery be maintained at "Shrine Status." Shrine Status is established by various NCA standards. Under State of Hawaii Executive Order 3279, the County manages the Maui Veterans Cemetery. In addition, Section 363-5, Hawaii Revised Statutes, states that the County "shall make provisions for the maintenance and upkeep of the [veterans] cemetery." The potential increased maintenance responsibility of maintaining the cemetery to Shrine Status may place additional financial obligations upon the County.

The MOA attached hereto as Exhibit "1" sets forth the terms decided upon at various mediations and consultations between the above-mentioned parties. The MOA directs that the State and County work together to draft a Memorandum of Understanding ("MOU") and a Cemetery Grounds Management Plan ("Plan") to further detail how the County will manage the Maui Veterans Cemetery to ensure it maintains Shrine Status. The future MOU and Plan shall be subject to Maui County Council approval.

The impetus for the MOA arose from the Makawao Cemetery Association filing a Complaint against various State of Hawaii agencies and the County, in Civil No. 15-1-0209(2), Circuit Court of the Second Circuit, State of Hawaii. To avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, the parties have attempted to reach a resolution of the claims by way of an MOA, the MOU, and Plan.

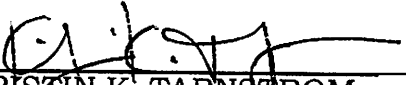
Section 2.20.020, Maui County Code, provides that, unless authorized by ordinance, the Mayor shall not enter into any intergovernmental agreement or any amendment thereto which places a financial obligation upon the County or any department or agency thereof.

Section 3.16.020(B), Maui County Code, provides that any settlement in excess of \$7,500 shall require Council authorization.

SECTION 2. Council Authorization. Pursuant to Section 2.20.020, Maui County Code, the Council of the County of Maui hereby authorizes the Mayor to enter into an intergovernmental agreement in the form of the MOA attached hereto as Exhibit "1."

SECTION 3. Effective Date. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM  
AND LEGALITY:

  
\_\_\_\_\_  
KRISTIN K. TARNSTROM  
Deputy Corporation Counsel  
County of Maui  
LIT-5483 / 2017-10-5 Bill for Ordinance – MOA – + Cemeteries

**MEMORANDUM OF AGREEMENT  
AMONG THE NATIONAL CEMETERY ADMINISTRATION OF THE  
U.S. DEPARTMENT OF VETERANS AFFAIRS,  
THE HAWAII STATE HISTORIC PRESERVATION OFFICER,  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION  
AND THE STATE OF HAWAII DEPARTMENT OF DEFENSE,  
REGARDING A GRANT TO SUPPORT IMPROVEMENTS TO  
THE MAUI VETERANS CEMETERY,  
MAKAWAO, MAUI, HAWAII**

WHEREAS, the National Cemetery Administration (NCA) of the U.S. Department of Veterans Affairs (VA) has made a grant to the State of Hawaii Department of Defense, Office of Veterans Services (OVS) to support expansion and improvement of the Maui Veterans Cemetery in Makawao on Maui, Hawaii; and

WHEREAS, NCA has determined that issuance and administration of its grant to OVS constitutes an undertaking requiring review under Section 106 of the National Historic Preservation Act, and has determined the undertaking's area of potential effects (APE) to include the existing and expansion property of the Maui Veterans Cemetery and the adjacent privately controlled Makawao Cemetery; and

WHEREAS, NCA has determined that this undertaking will have adverse effects on the Makawao Cemetery, which NCA and the Hawaii State Historic Preservation Division (SHPD) agree is eligible for the National Register of Historic Places; and

WHEREAS, NCA has consulted with the SHPD and OVS in accordance with 36 CFR § 800.6 to consider alternatives to resolve these adverse effects; and

WHEREAS, pursuant to 36 CFR § 800.6 (a)(1), NCA has invited the Advisory Council on Historic Preservation (ACHP) to participate in consultation, and the ACHP has participated; and

WHEREAS, NCA has invited Maui County Department of Public Works (County) to participate in consultation and they have participated; and

WHEREAS, NCA has invited the Maui County Veterans Council (Veterans Council), Makawao Cemetery Association (MCA) and Maui Green and Beautiful to participate in consultation and they have participated; and

WHEREAS, Maui Cultural Resources Commission, Makawao Community Association, Maui Burial Council, Maui County Planning Department, Maui County Planning Commission, State of Hawaii Aha Moku Advisory Committee were invited to participate in consultation and they have elected not to participate; and

WHEREAS, the NCA, SHPD, OVS, ACHP, the County, Veterans Council, MCA, Maui Green and Beautiful have consulted to resolve the undertaking's adverse effects,

NOW, THEREFORE, the NCA, ACHP, SHPD, OVS and the County, agree that the undertaking will be carried out in accordance with the following stipulations, in order to take into account its effects on historic properties.

## STIPULATIONS

- I. Allowance for Continuing Work on Phase I
  - A. Phase I construction may continue on the expansion portion of the project.
  - B. OVS will ensure that construction contractors and equipment will not damage any existing landscape or contributing features of the historic property in Lot 1 and Lot 2.
- II. Entry Gate and Rock Wall
  - A. OVS shall design the ornamental entry gate to Lot 1 to be similar to the existing gates found at the Kauai Veterans Cemetery and West Hawaii Veterans Cemetery. The gate height shall not exceed six feet.
  - B. The rock wall at the entry to Lot 1 will be compatible in type and style to the existing walls of the Makawao Cemetery. OVS will use dry-stacked basalt field rock and ensure that the wall does not exceed three feet above the adjacent ground surface in height to allow view planes of the cemeteries.
  - C. OVS will insure that the gate and rock wall are sited approximately as shown in the April 2017 drawings, subject to safety and setback requirements.
- III. Signage
  - A. Space shall be provided on the rock pillars, located on each side of the entry gate for OVS and MCA signs.
  - B. OVS and MCA signs shall be similar in design, size, style and material. Placement will be on opposite sides of the entry gate; one for the Maui Veterans Cemetery and one for the Makawao Cemetery. OVS will review the planned Makawao Cemetery sign to insure consistency in both designs prior to MCA's final preparation, fabrication, and installation of the sign.
  - C. OVS will fabricate and install the Maui Veterans Cemetery sign.
- IV. Landscape Design
  - A. OVS will engage a landscape architect to develop the landscape design using Native Hawaiian species and other acceptable plant species (e.g. Jacaranda).
  - B. County will have the opportunity to review and comment upon the proposed landscape design within 30 calendar days of date of receipt of the proposed design. OVS will take the comments into account, prior to any implementation.
  - C. Final landscape design is subject to Maui County permit approvals.

- D. To avoid blocking views of the Makawao Cemetery from entry to Lot 1, OVS will ensure that only plants that will not exceed three feet in height at maturity will be planted along Baldwin Avenue.
- E. OVS will plant native trees and shrubs reaching a height greater than six feet on the north boundary of the Makawao Cemetery at the maintenance area and shed to screen the facility from view.
- F. OVS obtained the services of a qualified arborist with experience in Hawaiian flora, who assessed the health and likely lifespan of the two Cook Island Pines (*Araucaria columnaris*) near the eastern boundary of Lot 1. They are estimated to survive approximately 50 – 100 years. It was recommended parking not be allowed under the trees and within the tree protection zone to avoid compaction of the soil and root damage, and the hazard of falling branches.

V. Lot 1 Design for Parking

- A. OVS developed a design for Lot 1 that reflects the discussion of the February 4, 2016 and December 13, 2016 consultation meetings. [Attachment A]
- B. The design retains the two Cook Island Pines and the open grass area in front of the Makawao Cemetery's main west entrance and east of the main entry road.
- C. A maximum of four parallel parking stalls will be located on the west side of the entry road. The open grass area fronting the Makawao Cemetery and the parallel parking stalls may be reduced to accommodate the required 24 -foot roadway width to allow for two-way traffic.
- D. A straight header curb is included in the new design on the roadway side and a protective curb or berm on the south side of the Cook Island Pines to prevent parking within the root zone protection area. The main entry roadway will have rolled curbs along its eastern edge fronting the Makawao Cemetery. The roll curbs will transition to straight curbs in the vicinity of the Cook Island Pines to prevent parking under and near the trees to avoid root damage.
- E. Parking on the grass along the area fronting the west side of Makawao Cemetery will be allowed for ceremonies, funerals and memorials for both cemeteries when those events cannot be accommodated by the parking provided at the Committal Shelter.
- F. No signage will be placed, and no berms will be constructed on the grass area between the entry road and the Makawao Cemetery.
- G. OVS, in consultation with NCA, will finalize the design and implement it.

VI. Access to Makawao Cemetery

- A. The main entry road, the road through the Veterans ten-acre expansion parcel, all paved parking stalls and the paved apron access to the Makawao Cemetery, as expanded, will be available for the vehicular and pedestrian use for those seeking access to Makawao Cemetery.

- B. A paved apron access way, no less than 15 feet in width, will be provided on Lot 1, from the main entry to the Makawao Cemetery second entry gate. The straight header curb and the protective curb or berm will continue on the outside of the root zone protection area for the two Cook Island Pines and terminate on the southerly side of the Makawao Cemetery second entry gate. The paved apron access to the Makawao Cemetery second entry gate will be located on the north side of the straight header curb and the protective curb or berm in order to protect the two Cook Island Pines.
- C. A paved apron access way, no less than 15 feet in width, will be provided on Lot 1, between the new access road and the Makawao Cemetery's third entry gate. This paved apron access will be designed and constructed at an approximate 70-degree angle to facilitate turning off the access road and into the Makawao Cemetery's third entry gate.
- D. A paved apron access, no less than 15 feet in width, will be provided on Lot 1, between the new access road and the Makawao Cemetery's fourth entry gate in the northern portion of the Makawao Cemetery, as expanded.

#### VII. Long Term On-going Maintenance

- A. OVS shall develop a Memorandum of Understanding (MOU) with the County that specifies implementation of a Cemetery Grounds Management Plan (Plan). Once finalized by the parties and approved by Maui County Council, the Plan will become Attachment B to this MOA.
- B. The Plan shall conform to the NCA National Shrine Commitment Operational Standards and Measures (Version 5.1, July 2014). County agrees that under the Plan, it must maintain the grass to meet NCA Shrine Standards once the improvement project is completed and maintenance responsibilities are conveyed to the County, and accepted by Maui County Council. The Plan will recognize unique environmental factors of Upcountry Maui and incorporate appropriate management concerns (e.g. type of turf). County will adhere to the Plan for all its maintenance activities.
- C. The MOU and Plan will address, *inter alia*, specific efforts to be taken by OVS and the County to discourage non-cemetery activities from occurring within the Maui Veterans Cemetery; the standard of care for grass maintenance to conform to NCA Shrine Standards; cost-sharing mechanisms between OVS and the County; and what steps to take and when to take them if the integrity of the grass or root systems of the Cook Island Pines are damaged or threatened.
- D. The Plan will provide that if OVS and the County determine that the grass and root systems of the Cook Island Pines are being damaged to the degree that soil and mud are more prevalent than grass and not acceptable under NCA Shrine Standards, County must erect systems of bollards connected by chains to prevent additional damage. The County shall revive, reseed or otherwise cause the grass to become healthy with complete coverage prior to removal of the bollard and chain system. OVS and the County will decide on a case-by-case basis when the bollards and chains may be removed for social events.



- E. The Plan will be developed jointly by OVS and the County. Subject to VII. H., the Plan will be presented for acceptance to both OVS and County accepting authorities within six months of execution of this MOA. NCA will review the draft Plan prior to finalization to determine if it complies with NCA operational directives.
- F. If the Plan is not adhered to or not implemented properly, OVS, NCA and County will meet to determine the specific issues and develop measures to address the issues. If an entity other than OVS, NCA or County objects to how the Plan is being implemented, the objections shall be addressed under Stipulation VIII. A.
- G. To the extent any part of the maintenance described in the Plan conflicts with this or any other agreement, this MOA shall prevail.
- H. This MOA, including the provisions as provided herein, as well as the MOU and Plan are subject to Maui County Council approval. County will seek such approval upon completion of the MOU and Plan. If such approval is not obtained, the parties will work toward a draft that will meet the concerns of Maui County Council, re-draft any relevant terms, and present again for Maui County Council approval. The parties may do this until this MOA, the MOU and Plan are accepted, or instructed by the Maui County Council further recommended changes would be futile. If Maui County Council refuses to approve such MOA, MOU and/or Plan, NCA must consult to determine if consulting parties agree to develop a new MOU.

#### VIII. Administrative Stipulations

- A. Resolving Objections
  - 1. Should any party to this MOA object in writing to NCA regarding any action carried out or proposed with respect to the undertaking, or to implementation of this MOA, NCA will consult with the objecting party(ies) within 30 calendar days of receipt of the objection to resolve the objection.
  - 2. If resolution is obtained, NCA will notify all signatories, and absent any additional objections, implement the MOA in accordance with the resolution.
  - 3. If after initiating such consultation, NCA determines that the objection cannot be resolved through consultation, NCA will forward all documentation relevant to the objection to the ACHP, including NCA's proposed response to the objection.
  - 4. Within 30 days after receipt of all pertinent documentation, the ACHP will exercise one of the following options:
    - i. Advise NCA that the ACHP concurs in NCA's proposed response to the objection, whereupon NCA will respond to the objection accordingly and provide its written response to all parties; or
    - ii. Provide NCA with advice on the resolution, which NCA will take into account in reaching a final decision regarding its response to the objection. Prior to reaching a final decision on the objection, NCA will prepare a written response that takes into account any advice from the ACHP regarding the objection.

- iii. If ACHP does not provide its response within the 30-day time period, NCA may assume the ACHP's concurrence in its proposed response to the objection. NCA may make a final decision on the objection and provide a written response to all signatories and concurring parties and proceed accordingly.
  5. Should the ACHP not exercise one of the above options within 30 days after receipt of all pertinent documentation, NCA may assume the ACHP's concurrence in its proposed response to the objection.
  6. NCA's responsibility to carry out all actions under this MOA that are not the subject of the objection will remain unchanged.
  7. At any time during implementation of the measures stipulated in this MOA, should an objection pertaining to this MOA or the effect of the undertaking on historic properties be raised by a member of the public, NCA will notify the parties to this MOA and take the objection into account, consulting with the objector and, should the objector so request, with any of the parties to this MOA to resolve the objection.
- B. Reporting
  1. On or before the end of the federal fiscal year, September 30, and each year thereafter until all stipulations of this agreement have been satisfied, the OVS will ensure that a progress report with status updates on each stipulation is prepared and distributed to all parties to this agreement, and made available to the public.
  2. The parties will be given 60 days to review the report and consider whether adjustments to this agreement, or its termination, are in order.
- C. Duration
  1. If the terms of this MOA have not been implemented by September 30, 2022, this MOA will be considered null and void.
  2. In such event NCA will so notify the parties to this MOA, and if it chooses to continue with the undertaking, will re-initiate review of the undertaking in accordance with 36 CFR Part 800.
- D. Amendment
  1. Any signatory to this MOA may propose to NCA that the MOA be amended, prior to September, 2022.
  2. NCA will consult with the other parties to this MOA to consider such an amendment, 36 CFR § 800.6(c)(1) will govern the execution of any such amendment.
- E. Termination
  1. If NCA determines that it cannot implement the terms of this MOA, or if the SHPD or ACHP determines that the MOA is not being properly implemented, such party may propose to the other parties to this MOA that it be terminated.
  2. The party proposing to terminate this MOA will notify all parties to this MOA, explaining in writing the reasons for termination and affording them at least 30 days to consult and seek alternatives to termination. The parties will then consult.
  3. Should such consultation fail, NCA or other signatory party may terminate the MOA by notifying all parties in writing.
  4. Should this MOA be terminated, NCA will either:

- i. Consult in accordance with 36 CFR § 800.6 to develop a new MOA; or
- ii. Request the comments of the ACHP pursuant to 36 CFR § 800.7.

**F. Anti-Deficiency Act**

This agreement is subject to the Anti-Deficiency Act (31 U.S.C. Section 1341). NCA's responsibilities under this agreement are contingent upon the availability of appropriated funds from which payment, if any, can be made. Should funds not be available to allow NCA to meet its responsibilities, NCA will defer its final decision(s) on implementing the undertaking until it has re-initiated consultation and complied with 36 CFR § 800.4 through 800.7, as applicable.

**G. County Council Appropriation**

All financial obligations by the County as set forth in this agreement shall be subject to and conditioned upon annual appropriation by the Maui County Council. The County and Council will act in good faith to appropriate the monies necessary to meet the obligations under the MOA.

Execution and submission of this MOA, and implementation of its terms, evidence that NCA and the VA have taken into account the effects of the undertaking on historic properties, and afforded the ACHP an opportunity to comment on the undertaking and its effects on historic properties.

**SIGNATORIES**

NATIONAL CEMETERY ADMINISTRATION OF THE U.S. DEPARTMENT OF VETERANS AFFAIRS

\_\_\_\_\_ Date: \_\_\_\_\_

George D. Eisenbach Jr. Director, Veterans Cemetery Grants Program

HAWAII STATE HISTORIC PRESERVATION OFFICER

\_\_\_\_\_ Date: \_\_\_\_\_

Alan Downer, Executive Administrator

ADVISORY COUNCIL ON HISTORIC PRESERVATION

\_\_\_\_\_ Date: \_\_\_\_\_

John M. Fowler, Executive Director

**INVITED SIGNATORIES**

STATE OF HAWAII DEPARTMENT OF DEFENSE, OFFICE OF VETERANS SERVICES

\_\_\_\_\_ Date: \_\_\_\_\_

Ronald Han, Director

COUNTY OF MAUI

\_\_\_\_\_ Date: \_\_\_\_\_

Mayor Alan M. Arakawa

**CONCURRING PARTIES**

**MAUI COUNTY VETERANS COUNCIL**

\_\_\_\_\_ Date: \_\_\_\_\_

Dr. Robert Santry, President

**MAKAWAO CEMETERY ASSOCIATION**

\_\_\_\_\_ Date: \_\_\_\_\_

Camille Lyons, President

**MAUI GREEN AND BEAUTIFUL**

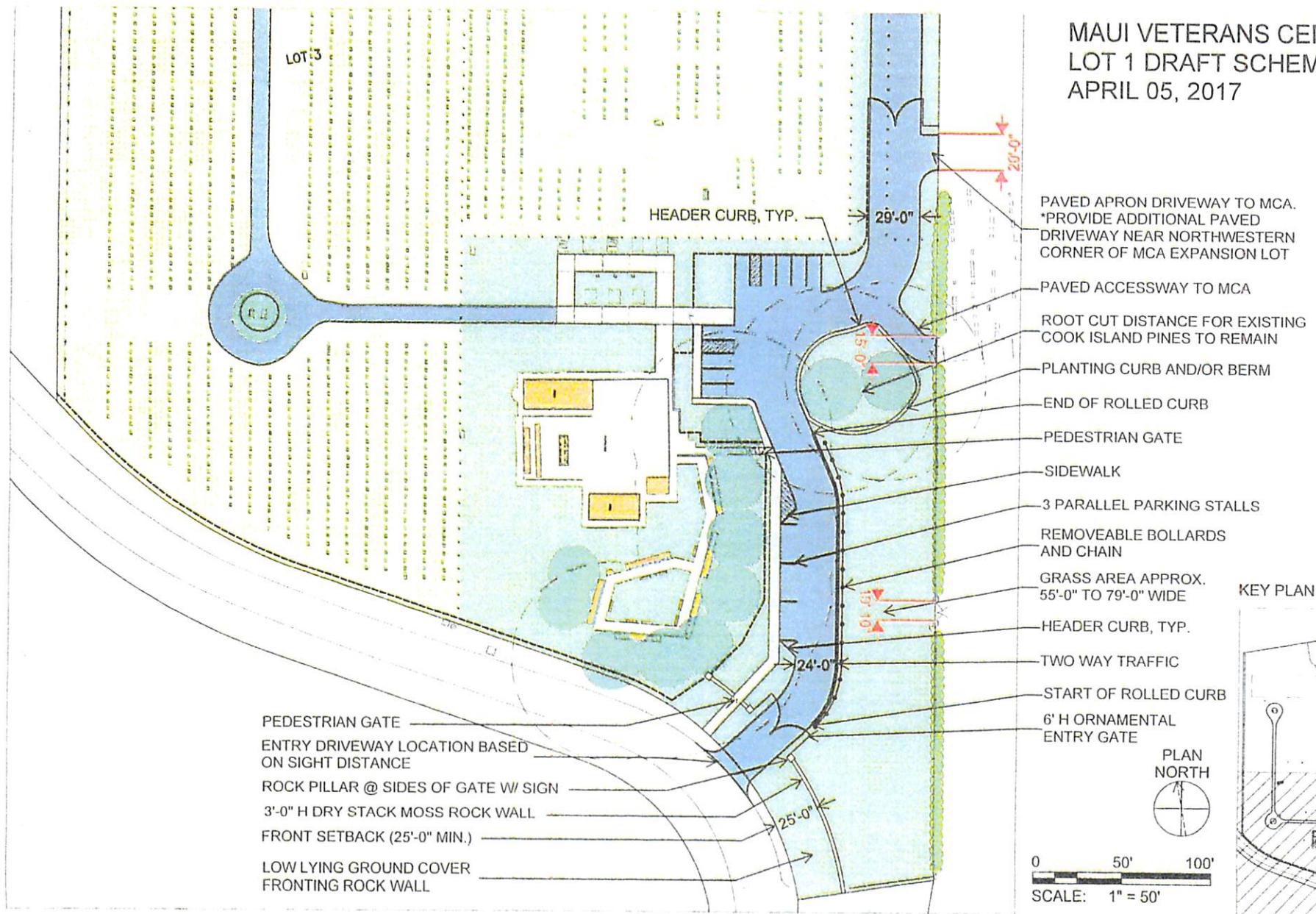
\_\_\_\_\_ Date: \_\_\_\_\_

Barbara Hernandez, President

Attachment A: Lot 1 design drawing

Attachment B: Maintenance Plan when agreed to and finalized per Stipulation VII. A.

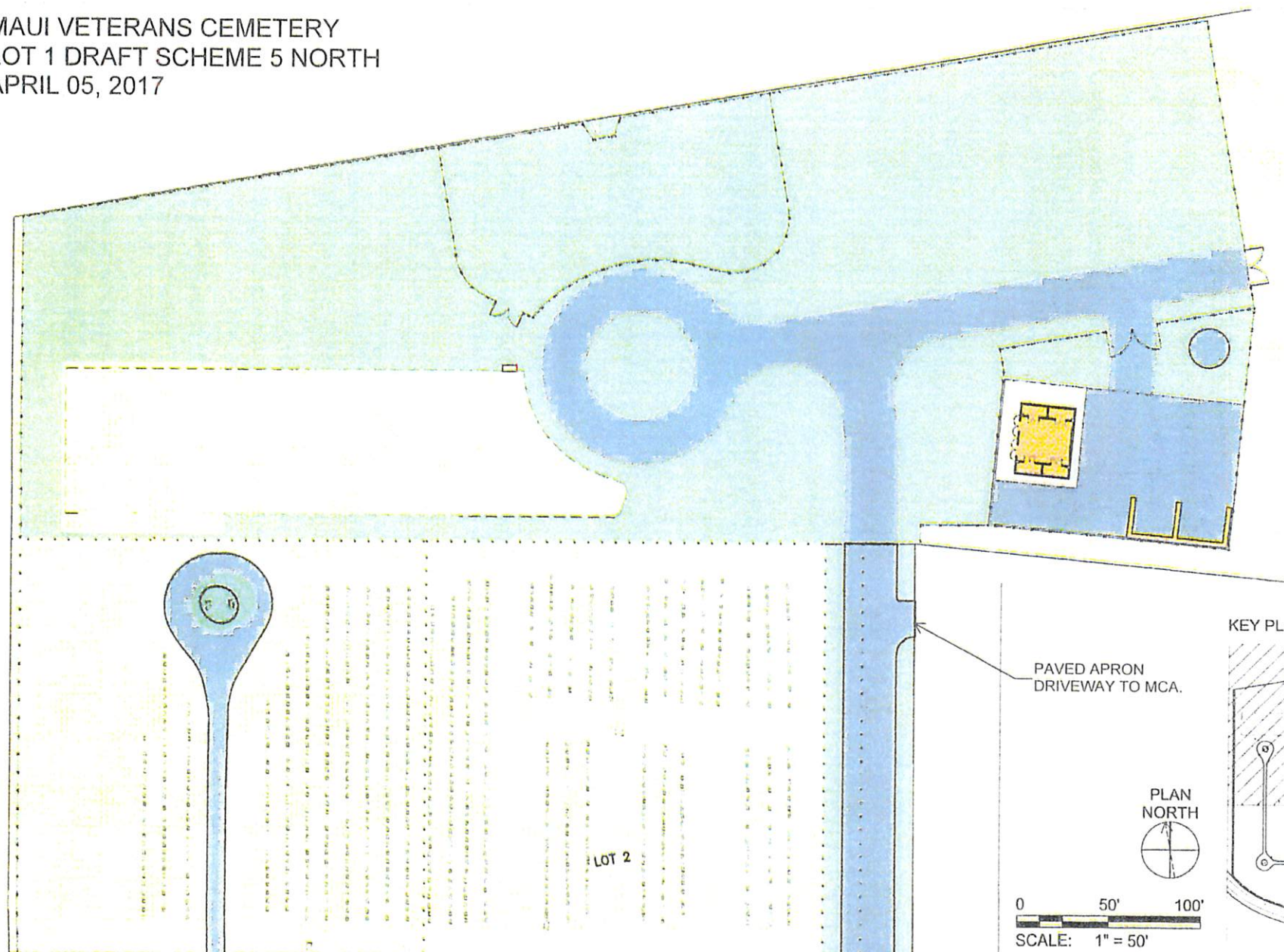
MAUI VETERANS CEMETERY  
LOT 1 DRAFT SCHEME 5 SOUTH  
APRIL 05, 2017



ATTACHMENT "A"



MAUI VETERANS CEMETERY  
LOT 1 DRAFT SCHEME 5 NORTH  
APRIL 05, 2017



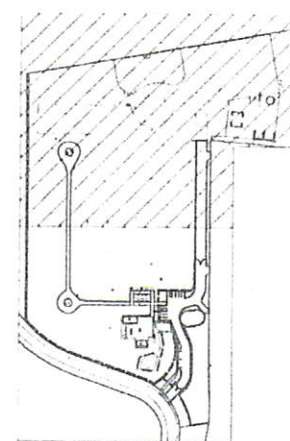
ATTACHMENT "A"

PAVED APRON  
DRIVEWAY TO MCA.



0 50' 100'  
SCALE: 1" = 50'

KEY PLAN



DIGEST

ORDINANCE NO. \_\_\_\_\_  
BILL NO. 96 (2017)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF HAWAII DEPARTMENT OF DEFENSE, THE NATIONAL CEMETERY ADMINISTRATION OF THE U.S. DEPARTMENT OF VETERANS AFFAIRS, THE STATE HISTORIC PRESERVATION DIVISION OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION TO SET FORTH GUIDELINES TO MAINTAIN THE MAUI VETERANS CEMETERY AT "SHRINE STATUS"

This bill proposes to authorize the Mayor to enter into an intergovernmental agreement with the State Department of Defense, the National Cemetery Administration of the U.S. Department of Veterans Affairs, the State Historic Preservation Division of the Department of Land and Natural Resources, and the Advisory Council on Historic Preservation, setting forth essential terms for the operations and maintenance of the Maui Veterans Cemetery in Makawao, Maui, Hawaii, at Shrine Status.

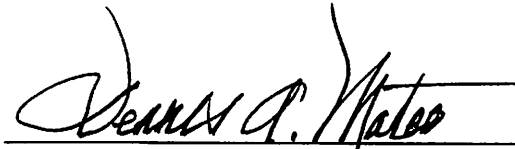
I, DENNIS A. MATEO, County Clerk of the County of Maui, State of Hawaii, DO HEREBY CERTIFY that the foregoing BILL NO. 96 (2017) was passed on First Reading by the Council of the County of Maui, State of Hawaii, on the 3rd day of November, 2017, by the following vote:

AYES: Councilmembers Alike Atay, Eleanora Cochran, S. Stacy Crivello, G. Riki Hokama, Kelly T. King, Yuki Lei K. Sugimura, Vice-Chair Robert Carroll, and Chair Michael B. White.

NOES: None.

EXCUSED: Councilmember Donald S. Guzman.

DATED at Wailuku, Maui, Hawaii, this 6th of November, 2017.

  
\_\_\_\_\_  
DENNIS A. MATEO COUNTY CLERK  
COUNTY OF MAUI, STATE OF HAWAII

Copies of the foregoing Bill, in full, are on file in the Office of the County Clerk, County of Maui, for use and examination by the public.




**MAKAWAO CEMETERY ASSOCIATION**

PO Box 150, Makawao, HI 96768

**TRANSMITTAL**

**DATE:** November 16, 2017

**TO:** Maui County Council

**FROM:** M. Walker - Treasurer 

**RE: Bill No. 96 – Intergovernmental Agreement Regarding Maui Veterans Cemetery**

OFFICE OF THE  
COUNTY CLERK

2017 NOV 16 PM 3:10

RECEIVED

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**COMMENTS:**

Enclosed please find 16 copies of correspondence from our attorney, Isaac Hall, to the various parties involved in Bill No. 96. This letter explains the position of the Makwao Cemetery Association on this matter and with this information we are requesting that the County Council defer any final action on this bill until the matters in questions have been resolved

ISAAC DAVIS HALL

ATTORNEY AT LAW  
2087 WELLS STREET  
WAILUKU, MAUI, HAWAII 96793  
(808) 244-9017  
FAX (808) 244-6775

November 8, 2017

Via Email and U. S. Mail

Thomas.Paquelet@va.gov  
george.eisenbach@va.gov  
Mr. Thomas R. Paquelet  
Mr. George D. Eisenbach, Jr.  
Veterans Cemetery Grants Program  
National Cemetery Administration  
United States Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

Via Email and U.S. Mail

tmcculloch@achp.gov  
cdaniel@achp.gov  
Mr. Tom McCulloch  
Assistant Director  
Federal Property Management Section  
Office of Federal Agency Programs  
Mr. Christopher Daniel  
Program Analyst  
Liaison for Department of Veterans Affairs  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001-2637

Via Email and U. S. Mail

Amanda.J.Weston@hawaii.gov  
Ms. Amanda J. Weston, Esq.  
Deputy Attorney General  
Dept. of the Attorney General  
465 S. King Street, Room 300  
Honolulu, HI 96813

Re: Maui Veterans Cemetery Expansion and Improvement Project  
FAI No. HI-12-31; DAGS Job No. 15-14-7509  
Section 106 Consultation Process  
National Historic Preservation Act, 16 U.S.C §§ 470 et seq.

Dear Thomas Paquelet, George Eisenbach, Tom McCulloch, Christopher Daniel and Amanda Weston:

This letter is written to Thomas Paquelet and George Eisenbach for the Veterans Cemetery Grants Program, National Cemetery Administration, United States Department of Veterans Affairs ("NCA"), as the "agency official," to Tom McCulloch and Christopher Daniel for the Advisory Council on Historic Preservation ("ACHP") and to Amanda Weston, as counsel for the Office of Veterans Services, Department of Defense, State of Hawaii ("OVS").

This letter is written on behalf of the Makawao Cemetery Association, Inc. ("MCA"), the Plaintiff in *The Makawao Cemetery Association v. Eisenbach, et al.* and a consulting party in the above referenced matter. MCA clearly met the tests for participation as a consulting party due: (1) to the nature of [MCA's] legal or economic relation to the undertaking or affected properties and (2) MCA's concern with the undertaking's effects on historic properties. See 36 CFR §800.2(c)(5).

It is the position of MCA that through the positive and productive in-person Section 106 Consultation that took place on Maui that agreements were reached resolving the adverse effects of the undertaking on the Makawao Cemetery, as expanded, and Lot 1, both of which are historic properties entitled to protection pursuant to the National Historic Preservation Act, 16 U.S.C §§ 470 et seq.

The purpose of this letter is to make every effort to maintain these positive and productive relationships to ensure that some of the agreements reached – that are not yet memorialized in the Memorandum of Agreement ("MOA") – are included within any Final MOA so that all parties are able to sign the MOA with the knowledge that what was agreed to resolve the adverse effects of the undertaking has been included in the MOA.

#### **I. INTRODUCTION/ BACKGROUND AVAILABLE TO MCA**

It was through the efforts of the MCA that the NCA recognized that MCA's cemetery, the Makawao Cemetery, including Lot 1, are eligible for the National Register of Historic Places ("NRHP") under 36 CFR §60.6(a), (b), and (c), for its association with significant events in the history of Maui, its association with significant individuals in that history, and its design characteristics. See NCA letter dated January 11, 2016.

Lot 1 is described by the NCA as "the shared entrance to and parking area for both cemeteries" meaning the Makawao Cemetery and the Veterans Cemetery. See NCA letter dated January 11, 2016. MCA possesses substantial property interests in Lot 1. A Deed Restriction in favor of MCA requires that Lot 1 must be used for parking and roadway uses only. MCA also benefits from a recorded easement in its favor from Baldwin Avenue, abutting the Makawao Cemetery property. These property interests are also the subject of a lawsuit, *The Makawao Cemetery Association v. OVS, et al.* now pending in the Hawaii State Courts.

The Area of Potential Effects ("APE") of the undertaking was determined by the NCA to be as shown on Attachment 1 to the NCA letter dated January 11, 2016. Attachment 1 includes the Makawao Cemetery, the expanded Makawao Cemetery, Lot 1, the Veterans Cemetery and the ten-acre expansion to the Veterans Cemetery.

The NCA determined that the NCA Project "will have adverse effects on the Makawao Cemetery, including but not limited to [1] visual effects resulting from the proposed [a] removal of trees and [b] construction of a new entry gate and [2] effects on the cemetery's use resulting from changing parking facilities on Lot 1." See NCA letter dated January 11, 2016.

NCA invited the MCA to consult with the NCA "to resolve these adverse effects." See NCA letter dated January 11, 2016. NCA has admitted that the MCA has legal or economic relations to the undertaking or affected properties by acknowledging that Lot 1 is the shared

entrance to and parking area for the Makawao Cemetery and the Veterans Cemetery. NCA has admitted that MCA is concerned with the undertaking's effects on historic properties. As the Plaintiff in *The Makawao Cemetery Association v. Eisenbach, et al.*, MCA prevailed upon the NCA to recognize that the Makawao Cemetery, including Lot 1, were historic properties eligible for the National Register of Historic Places and the protections of the National Historic Preservation Act, 16 U.S.C §§ 470 et seq. MCA has a significant stake in the manner in which the Makawao Cemetery and Lot 1 are protected from the adverse effects that NCA admits this undertaking will cause.

NCA scheduled a consultation meeting on Maui for December 13, 2016. Prior to this consultation, NCA provided MCA, and others, with a Draft MOA dated November 10, 2016 ("Draft MOA No. 1, 11/10/16"). See undated letter from NCA to MCA with the November 10, 2016 Draft MOA attached. This Draft MOA states, in the section on the Design of Lot 1, that OVS will provide designs for Lot 1 to all consulting parties and that consulting parties shall have thirty days to comment upon the design.

MCA participated in a productive face-to-face consultation on Maui on December 13, 2016, with most consulting parties, during which agreements were reached on the terms to be contained within an MOA, as well as an agreement on a Plot Plan. The Notes/Minutes/Record for the meeting reflect that MCA stated that it should be a signatory to the MOA.

It was agreed that another MOA would be drafted memorializing what had been agreed to during the December 13, 2016 consultation meeting. It was represented that there would be comments solicited upon the Draft MOA and, thereafter, further consultation would take place.

An important component of these agreements is a yet to be completed Memorandum of Understanding ("MOU") between OVS and the County of Maui by which the County's agreement to maintain the Veteran's Cemetery to Shrine Standards makes it possible for MCA to continue to park on the grass on Lot 1, as MCA has done for at least sixty-five years, under certain terms. MCA supports an MOU that will accomplish these important purposes.

NCA circulated a Draft MOA through a letter from the NCA dated March 2, 2017 attaching another MOA dated February 2017 ("Draft MOA No. 2, 2/17"), without the referenced attachments, requesting comments on the MOA within thirty days. The MOA stated in Section V.A. that OVS will develop a design for Lot 1 in the first quarter of 2017 [no later than March 30] that reflects the discussion of the February 4, 2016 and December 13, 2016 consultation meetings. [Attachment A]. There was no attachment A. Section V.F. states:

OVS will provide the design to all consulting parties for review. All consulting parties shall have 30 calendar days from date of receipt to provide their comments to OVS. OVS, in consultation with NCA, will finalize the design and implement it.

Section VII.A. states that OVS shall develop a Memorandum of Understanding ("MOU") with Public Works that specifies implementation of a Cemetery Grounds Management Plan ("Plan"). [Attachment B]. There was no Attachment B.

MCA provided its comments on the MOA through a letter to the NCA dated April 6,

2017. There has been no further consultation or contact by the NCA or OVS with the MCA since April 6, 2017 regarding the comments upon, and requests for revisions to, the Draft MOA dated February 2017 submitted by the MCA to the NCA on April 6, 2017. Neither the NCA nor the OVS have consulted with, or contacted further, the MCA, to discuss or resolve the comments, suggested additions or deletions to the Draft MOA submitted by the MCA on April 6, 2017.<sup>1</sup>

A Draft MOA ("Draft MOA No. 3, 9/17") was submitted to the Parks, Recreation, Energy, and Legal Affairs Committee of the Maui County Council on September 26, 2017, that was discovered by MCA, through its own efforts, much later.

MCA is aware of another Draft MOA ("Draft MOA No. 4, 10/17") that had been informally provided by counsel for OVS to counsel for the MCA on October 19, 2017, at the request of State Court Judge Peter Cahill.<sup>2</sup>

In the Seventh Joint Status Report filed on November 4, 2017 in *The Makawao Cemetery Association v. Eisenbach, et al.* the NCA states that it plans to simply distribute for review and signature a Final MOA. MCA objects to this proposed conclusion of the Section 106 consultation under the circumstances of this case. See Section III. below.

MCA is still hopeful that the positive and productive in-person Section 106 Consultation meeting that took place on December 13, 2016 can lead to an amicable resolution of the issues raised. Towards these ends, MCA makes this further effort to resolve the adverse effects of this undertaking through this communication to the NCA, OVS and ACHP.

## **II. TO BE CONSISTENT WITH THE TERMS AGREED TO DURING THE IN-PERSON SECTION 106 CONSULTATION ON DECEMBER 13, 2016, ADDITIONAL CLARIFYING TERMS MUST BE INCLUDED IN THE MOA**

### **A. ALL AGREE THAT THE MOA MUST REFLECT AND BE CONSISTENT WITH THE AGREEMENTS REACHED DURING THE FEBRUARY 4, 2016 AND DECEMBER 13, 2016 CONSULTATION MEETINGS**

All of the Draft MOAs of which the MCA is aware provide that:

OVS will develop a design for Lot 1 that reflects the discussion of the February 4, 2016 and December 13, 2016 consultation meetings. [Attachment A]. See Draft MOA No. 3, 9/17; §IV.A.

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<sup>1</sup> During the week of October 30, 2017, Counsel for the MCA telephoned counsel for OVS and initiated a discussion about the contents of the MOA that had been informally provided by counsel for OVS to counsel for the MCA on October 19, 2017, at the request of State Court Judge Peter Cahill; however, before that there had been no regular contact with OVS about the comments of the MCA on the MOA submitted on April 6, 2017. The NCA sent a letter to consulting parties dated August 31, 2017 that was simply a notice that the MOA will be provided to the parties in the future and does not discuss or resolve the comments, the suggested additions or deletions to the Draft MOA submitted by the MCA on April 6, 2017.

<sup>2</sup> These four Draft MOAs are all of the MOAs of which the MCA is aware. There may be more Draft MOAs and more Draft MOAs that were circulated for review by only some of the consulting parties. All of the Draft MOAs should be made part of the record.

OVS developed a design for Lot 1 that reflects the discussion of the February 4, 2016 and December 13, 2016 consultation meetings. [Attachment A]. See Draft MOA No. 4, 10/17; §IV.A.

Unfortunately, the designs of which MCA are aware do not reflect and are not consistent with the agreements reached on February 4, 2016 and on December 13, 2016. Most of these agreements were put in writing on a board on December 13, 2016 and/or were placed on a plot plan that was agreed upon on December 13, 2016. Photographs of both of these are attached to MCA's comments dated April 6, 2017.

No plot plan showing the design for Lot 1 was attached to Draft MOA No. 2, 2/17. This MOA states:

OVS will develop a design for Lot 1 in the first quarter of 2017 [no later than March 30] that reflects the discussion of the February 4, 2016 and December 13, 2016 consultation meetings. [Attachment A]. See Draft MOA No. 2, 2/17, §V.A.

No design for Lot 1 was transmitted to the consulting parties by March 30, 2017. No design for Lot 1 has ever been formally presented to consulting parties for review and comment. MCA did secure informally a design of Lot 1 dated April 5, 2017 through an email dated September 8, 2017 from County attorney, Ms. Kristin Tarnstrom; however, without any assurances that this was a formal or final design of Lot 1. For further detail on this issue, see Section III.A. below. MCA is now only able to refer to this document as an unofficial design for Lot 1.

The design for Lot 1 of which MCA is aware also does not reflect and is not consistent with the agreements reached on February 4, 2016 and on December 13, 2016. Before any MOA is circulated for signature, MCA requests the following amendments or deletions to the Draft MOAs and the plot plan design for Lot 1 that are necessary to make these documents reflect and be consistent with the agreements reached on February 4, 2016 and on December 13, 2016.<sup>3</sup>

**B. PROVISION TO MCA OF KEY TO GATE ACROSS ROADWAY WITHIN FLAG POLE PORTION OF LOT 1**

The Draft MOA No. 4, 10/17 includes a Section on "Access to Makawao Cemetery." It provides:

The main entry road, the road through the Veterans ten-acre expansion parcel, all paved parking stalls and the paved apron access to the Makawao Cemetery, as expanded, will be available for the vehicular and pedestrian use for those seeking access to Makawao Cemetery. See, Draft MOA No. 4, 10/17, §VI.A.

There is a proposed locked gate across the road through the Veterans ten-acre expansion parcel, within the flag pole portion. In its comments dated April 6, 2017, the MCA had requested the

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<sup>3</sup> See §III.A below for a further discussion of this issue.

addition of the following language:

A second gate is located across Lot 1 and the roadway, to the north of the Makawao Cemetery third entry gate, which is open during weekdays and during certain hours. A key to this gate shall be provided by Public Works to MCA so that MCA has access beyond the gate during the weekend and after hours. See, MCA Comments dated April 6, 2017, §VI.E.

This language has been removed from later Draft MOAs. The access guaranteed to MCA will be meaningless if MCA has no way to unlock the gate during the weekend and after hours. First, NCA and OVS have agreed that MCA shall have a fourth entry way to its own parking area, north of and past the gate across the roadway. It will be impossible to use this fourth entry way during the weekend and after hours if MCA is unable to unlock the gate. Second, MCA conducts funerals, at times, during the weekend and after hours. It must be able to unlock the gate during large events to use both entrances/exits to its parking area.

At the very minimum, the following language must be added at the end of §VI.A of the Draft MOA No. 4, 10/17: "...including providing to MCA the ability to lock and unlock the second gate, that is located across Lot 1, to the north of the Makawao Cemetery third entry gate, during the weekends and after hours."

#### **C. AGREEMENT ON LOT 1 FLAG POLE COMMON BOUNDARY FENCING**

NCA originally planned to construct a six-foot high chain link fence along the common boundary with MCA in the flag pole portion of Lot 1. In order to preserve views from the historic Makawao Cemetery, as expanded, to the West Maui mountains, NCA and OVS agreed to reduce the height of this fence to a maximum of four feet. MCA proposed the addition of this language in its comments dated April 6, 2017; see, §IV.I.

MCA agreed that it may continue the four-foot high wrought iron fence and hedging along its common boundary with the flag lot portion of the Veterans ten-acre expansion parcel, leaving openings for the gates to the third and fourth entries to the Makawao Cemetery, as expanded. MCA proposed the addition of this language in its comments dated April 6, 2017; see, §IV.J.

The subsequent Draft MOA dated September 2017 includes no language limiting the height of this NCA/OVS fence; however, some of the language proposed by MCA was adopted:

MCA may continue the four-foot high wrought iron fence and hedging along its common boundary with the flag lot portion of the Veterans ten-acre expansion parcel, leaving openings for the gates to the third and fourth entries to the Makawao Cemetery, as expanded.

NCA/OVS also adds:

When the new wrought iron fence, rock wall and hedge is constructed, MCA shall remove the four-foot high chain link fence along the Veterans ten-acre expansion parcel

immediately fronting the new wall. See, Draft MOA No. 3, 9/17, §IV.G.

This language might have marginally sufficed; however, it was deleted from the next Draft MOA dated October 2017. See, Draft MOA No. 4, 10/17, §IV.

To reflect and be consistent with the agreements reached on February 4, 2016 and on December 13, 2016, any fence constructed by OVS/NSA along the common boundary with the Makawao Cemetery within the flag pole portion of Lot 1 must be expressly limited in the MOA to a maximum of four feet in height from the ground. Language should also be included regarding the ability of MCA to continue the four-foot high wrought iron fence and hedging along its common boundary with the flag lot portion of the Veterans ten-acre expansion parcel, leaving openings for the gates to the third and fourth entries to the Makawao Cemetery, as expanded. This provides continued design integrity for the historic Makawao Cemetery, as expanded.

#### **D. AGREEMENT ON LANDSCAPING ALONG THE COMMON BOUNDARY OF THE FLAG POLE PORTION OF LOT 1**

There was a great deal of discussion on February 4, 2016 and on December 13, 2016 on the appropriate landscaping to be planted on the NCA side of the common boundary with the Makawao Cemetery in the flag pole portion of Lot 1. In the initial Draft MOA, dated November 10, 2016, within the topic of “Landscape Design,” the Draft MOA provided:

To avoid blocking views of the Makawao Cemetery, OVS will ensure that only plants unlikely to exceed three feet in height at maturity will be planted **on the boundary between the two cemeteries** and along Baldwin Avenue. (Emphasis added). See, Draft MOA No. 1, 11/10/16, §IV.C.

In subsequent Draft MOAs the language protecting views on the boundary of the two cemeteries was deleted. See, Draft MOA No. 2, 2/17, §IV.D, for example.

In its April 6, 2017 comments on the Draft MOA No. 2, 2/17, MCA requested the addition of the following:

OVS may plant native or other trees or shrubs, acceptable to OVS, Public Works and MCA, on the easterly side of the roadway on the flag portion of the ten-acre expansion parcel, instead of the originally planned crepe myrtle trees.

There had been a landscaping plan that indicated a separation between these trees thus assuring ample views between the trees.<sup>4</sup> This proposed language was removed from subsequent Draft MOAs. The “Landscape Design” section provides for the preparation of a landscape design but limits review and comment on that “Landscape Design” to the County Department of Public

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<sup>4</sup> See Section III.B. below regarding the failure to provide the promised Landscape Plan.



Works.<sup>5</sup> See, for example, Draft MOA No. 3, 9/17, §§IV.A. and B.

The MOA must include language addressing, in particularity, the landscaping along the common boundary with the Makawao Cemetery in the flag pole portion of Lot 1. The Makawao Cemetery, as expanded, as part of a historic property, must have the views to the West Maui mountains protected.

#### **E. ADDITION OF SIDEWALK**

When MCA discovered the existence of the plot plan design for Lot 1 on September 8, 2017, MCA first learned that a sidewalk had been added to the design for Lot 1 that does not reflect and is not consistent with the agreements reached on February 4, 2016 and on December 13, 2016.<sup>6</sup> MCA has three major concerns about this newly discovered sidewalk, as follows:

First, there was no discussion about such a sidewalk on February 4, 2016 or on December 13, 2016. The sidewalk is not shown on either of the documents memorializing the agreements of the parties reached on December 13, 2016, the written list of agreements and the plot plan, both of which are attached to the comments of MCA submitted to the NCA on April 6, 2017.

Second, the written list of agreements and the plot plan memorializing the agreements of the parties reached on December 13, 2016, both of which are attached to the comments of MCA submitted to the NCA on April 6, 2017, indicate that there was to be, at least, a specified number of feet between the entry roadway and the Makawao Cemetery boundary that was to be left as a green, open space. This was listed as “maximum.” The number of feet intended can be easily calculated and should be calculated. Inserting a sidewalk between the roadway and the columbarium likely moves the entry roadway towards the Makawao Cemetery, diminishing the amount of green, open space for a purpose never discussed during any consultation.<sup>7</sup> It should first be determined if this “maximum” agreed to by the parties on December 13, 2016 is exceeded by the introduction of the sidewalk as a feature.

Third, as an aesthetic matter, one of MCA’s primary goals has been to protect the grassed, open space and park-like feel of Lot 1 as it serves as the entry to its historic cemetery. MCA suggests that the sidewalk, if it is to remain, be located along the fence on the western side of the entry road. This would preserve a larger area of green space.

#### **F. 70 DEGREE ANGLE FOR PAVED APRON ACCESS WAY AT THIRD ENTRY GATE**

Draft MOA No. 4, 11/17 provides that the paved apron access way between the new access road and the Makawao Cemetery’s third entry gate will be designed and constructed at an approximate 70-degree angle to facilitate turning off the access road and into the Makawao Cemetery’s third entry gate. See, §VI.C. The design for Lot 1, or the plot plan for Lot 1, does

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<sup>5</sup> The issue of the deletion of all language by which responsibilities are assumed by MCA is discussed in Section IV. below.

<sup>6</sup> For an analysis of the failure to consult regarding the design for Lot 1 and the plot plan for Lot 1, see §III.A below.

<sup>7</sup> See §III.D below.

not show this 70-degree angle and should do so.

### **G. INSTALLATION OF MCA ENTRY SIGN**

The MCA should be responsible for the fabrication and installation of its own entry sign. This should be plainly stated in the MOA. For a more in-depth analysis of this issue, see § IV. D below.

### **III. FURTHER GOOD FAITH CONSULTATION IS REQUIRED BEFORE ITS CONCLUSION**

Section 106 Consultation must take place with all consulting parties in a good faith attempt to resolve the adverse effects of an undertaking. The NCA and OVS have systematically reneged on promised future review and consultation with consulting parties regarding (1) the plot plan, (2) the landscaping plan, (3) the MOA and (4) the MOU, among other important documents.

In the Seventh Joint Status Report filed on November 4, 2017 in *The Makawao Cemetery Association v. Eisenbach, et al.* the NCA states that it plans to simply distribute for review and signature a Final MOA. MCA objects to this proposed conclusion of the Section 106 consultation under the circumstances of this case. Here, further good faith consultation is required before just circulating an MOA and plot plan for signature.

#### **A. DESIGN FOR LOT 1**

The Draft MOA dated February 2017 states that the new design concept for Lot 1 would be provided to consulting parties on or by March 30, 2017 and, thereafter, consulting parties would have thirty days to review and comment upon the new design concept for Lot 1.

No plot plan showing the design for Lot 1 was attached to Draft MOA No. 2, 2/17. This MOA states:

OVS will develop a design for Lot 1 in the first quarter of 2017 [no later than March 30] that reflects the discussion of the February 4, 2016 and December 13, 2016 consultation meetings. [Attachment A]. See Draft MOA No. 2, 2/17, §V.A.

Section V.F. of this MOA further states:

OVS will provide the design to all consulting parties for review. All consulting parties shall have 30 calendar days from date of receipt to provide their comments to OVS. OVS, in consultation with NCA, will finalize the design and implement it. See Draft MOA No. 2, 2/17, §V.F.

To date, NCA has not formally transmitted the new design concept for Lot 1 to MCA and has not provided MCA thirty days to comment upon the new design concept for Lot 1.

The NCA has not formally transmitted any Final MOA or the Management Plan for continued maintenance of Lot 1 to MCA and has not provided MCA an opportunity to review

and consult about either or both of these documents.

Counsel for the MCA and counsel for the County of Maui, Ms. Kristin Tarnstrom, had an informal discussion about the whereabouts of the Plot Plan for Lot 1. In an email dated September 8, 2017, Ms. Tarnstrom wrote to Ms. Amanda Weston, counsel for OVS, with a copy to counsel for MCA, stating that Ms. Tarnstrom thought that she had received, somewhere, a copy of a site plan for the Lot 1 area and that she was not sure who she received it from, but that counsel for the MCA was interested in obtaining a copy. See Tarnstrom Email dated September 8, 2017.

On September 11, 2017, Ms. Amanda Weston, counsel for OVS, transmitted a Plot Plan for Lot 1 dated April 5, 2017, stating that: "Attached is the most recent drawing I have of the proposed changes to the cemetery." This is the only Plot Plan that counsel for MCA has received and these are the circumstances under which it was received. The MCA does not know if this is the official, final version of the Plot Plan and does not regard this as an official receipt of the Plot Plan or design for Lot 1.

If the NCA follows through on its plan to circulate an MOA to consulting parties for signature, this will be under the circumstances that MCA has never had the opportunity to review, comment and consult upon a plot plan or design for Lot 1 that is formally identified by NCA or OVS as its planned design for Lot 1.

## **B. LANDSCAPING PLAN**

In Draft MOA No. 1, 11/10/16, in the Section entitled "Landscape Design," it states:

**OVS will develop the landscape design using Native Hawaiian species in priority to other species. All consulting parties will review and comment upon the proposed landscape design within 30 calendar days of receipt of the proposed design. OVS will take the resulting comments into account, prior to any implementation.** (Emphasis added). See, Draft MOA No. 1, 11/10/16, §IV.A.

In Draft MOA No. 2, 2/16, NCA deletes this promise of consultation with the following:

OVS will engage a landscape architect to develop the landscape design using Native Hawaiian species and other acceptable plant species (e.g. Jacaranda). See Draft MOA No. 2, 2/16, §IV.A

Public Works will have the opportunity to review and comment upon the proposed landscape design within 30 calendar days of date of receipt of the proposed design. OVS will take the comments into account, prior to any implementation. See Draft MOA No. 2, 2/16, §IV.B

At this juncture, the only consulting party that is permitted to review and comment on the landscape plan for Lot 1 is the Public Works Department of the County of Maui.

MCA has never seen any Landscaping Plan for Lot 1 prepared by a landscape architect

engaged by OVS. This is so even though the MOA admits that views of, and from, the Makawao Cemetery, as a historic property, deserve protection and should not be blocked. MCA must be able to review this Landscaping Plan as part of the Section 106 Consultation process.

### **C. MOA**

NCA circulated a Draft MOA through a letter from the NCA dated March 2, 2017 attaching Draft MOA No. 2, 2/17, without the referenced attachments, requesting comments on the MOA within thirty days.

MCA provided its comments on the MOA through a letter to the NCA dated April 6, 2017. There has been no further consultation or contact by the NCA or OVS with the MCA since April 6, 2017 regarding the comments upon, and requests for revisions to, the Draft MOA dated February 2017 submitted by the MCA to the NCA on April 6, 2017.<sup>8</sup>

Neither the NCA nor the OVS have consulted with, or contacted further, the MCA to discuss or resolve the comments, suggested additions or deletions to the Draft MOA submitted by the MCA on April 6, 2017.<sup>9</sup> There has been no consultation or response by NCA or OVS to the comments on whether the suggested additions, deletions and modifications can or cannot be accepted and, as importantly, why. Neither NCA nor OVS have provided MCA with any reasons for why its suggested additions, deletions and modifications can or cannot be accepted. Section 106 Consultation cannot close under these circumstances.

### **D. THE ADDITION OF THE SIDEWALK FEATURE**

The sidewalk feature was added to the plot plan without any consultation with MCA. MCA has no idea why the sidewalk feature was added, what party sought its addition or why the particular location for the sidewalk was selected.

### **E. MCA OBJECTION TO CONCLUSION OF SECTION 106 CONSULTATION UNDER THESE CIRCUMSTANCES**

MCA objects to any attempt to simply distribute for review and signature a Final MOA under the circumstances described above and, since this appears to be what is contemplated by the NCA, MCA will make this final effort to resolve the adverse effects of this undertaking through this communication to NCA and OVS.

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<sup>8</sup> MCA has discovered that there that there has been continued consultation with other parties concerning the MOA; however not with MCA.

<sup>9</sup> During the week of October 30, 2017, Counsel for the MCA telephoned counsel for OVS and initiated a discussion about the contents of the MOA that had been informally provided by counsel for OVS to counsel for the MCA on October 19, 2017, at the request of State Court Judge Peter Cahill; however, before that there had been no regular contact with OVS about the comments of the MCA on the MOA submitted on April 6, 2017. The NCA sent a letter to consulting parties dated August 31, 2017 that was simply a notice that the MOA will be provided to the parties in the future and does not discuss or resolve the comments, the suggested additions or deletions to the Draft MOA submitted by the MCA on April 6, 2017.

**IV. MCA IS ENTITLED TO SIGN THE MOA IN THE CAPACITY AS AN “INVITED SIGNATORY”**

**A. MCA IS A MAJOR STAKEHOLDER IN THIS CASE**

MCA has a significant stake in assuring that the protections afforded by the MOA in this case are not amended or terminated, potentially causing adverse effects to its property, the Makawao Cemetery, as expanded, or to Lot 1.

MCA owns the Makawao Cemetery, as expanded, that has been determined to be a historic property.

MCA owned the fee to Lot 1 and conveyed it initially to the County of Maui in 1951, subject to a Deed Restriction and Easements, benefitting the MCA and the Makawao Cemetery. The State of Hawaii now owns the underlying fee to Lot 1, subject to these significant beneficial real property interests possessed by MCA in Lot 1, namely the Deed Restriction providing that “Lot 1 shall be used by the Grantee, its successors and assigns, for parking and road purposes only” and a twenty-foot wide easement over Lot 1 providing access to the Makawao Cemetery.

A recorded easement now exists, from Baldwin Avenue, over and across Lot 1, along the boundary of the Makawao Cemetery, benefitting the Makawao Cemetery property and the MCA. To effectuate any agreed-upon MOA and Plot Plan MCA would be responsible for cooperating to relocate and terminate the above-described easement.

Lot 1 is described by the NCA as “the shared entrance to and parking area for both cemeteries,” meaning the Makawao Cemetery and the Veterans Cemetery. MCA has used Lot 1, based upon the 1951 Deed Restriction and easement, as the entry, and for grass parking, for the Makawao Cemetery for at least sixty-five years. How Lot 1 is improved as the entry to the historic Makawao Cemetery, how parking takes place on Lot 1 for those attending services at the historic Makawao Cemetery and the effect of any use of Lot 1 on the historic Makawao Cemetery is of vital importance to the MCA.

It was through the efforts of the MCA, in filing *The Makawao Cemetery Association v. Eisenbach, et al.*, that the NCA recognized that MCA’s cemetery, the Makawao Cemetery, as expanded, and Lot 1, are eligible for the National Register of Historic Places and were determined to be historic properties protected by the National Historic Preservation Act, 16 U.S.C §§ 470 et seq.

**B. THE REGULATIONS REQUIRE THE RECOGNITION OF MCA AS AN “INVITED SIGNATORY”**

The MCA has formally sought recognition as an “Invited Party,” in its comments submitted to the NCA on April 6, 2017, and elsewhere.

The federal regulations on the “Protection of Historic Properties,” in 36 CFR 800.6 (c)(2), entitled “Invited signatories,” state as follows:

- (i) The agency official **may** invite additional parties to be signatories to a memorandum

of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official **may invite** an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to **historic properties located off tribal lands** to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official **should invite** any party that assumes a responsibility under a memorandum of agreement to be a signatory. (Emphasis added)

The NCA has some discretion about inviting signatories to sign MOAs generally and when they are Native Americans attaching religious or cultural significance to **“historic properties located off tribal lands.”** See, 36 CFR 800.6 (c)(2)(i) and (ii) above. This discretion is signaled by the use of the words “may invite.” The use of the word “may” is held to confer discretion.

The agency has discretion when the concern is with lands other than those owned by the consulting party. If the Native American group is not concerned with its own tribal lands and is, instead, concerned with different or other lands, the agency has discretion about whether to invite that group to be an “Invited Signatory.”

It would be different if the group were concerned with the historic significance of lands that it owned. This is the case here. MCA, likewise, is concerned with the historic significance of its own land, the Makawao Cemetery, as expanded, and with Lot 1.

By these regulations, discretion does not exist to refuse to invite a party as a signatory when “any party assumes a responsibility under a memorandum of agreement.” See, 36 CFR 800.6 (c)(2)(iii) above. Under these circumstances, the regulations provide that the agency “should invite” that party to be a signatory to the MOA. There is no discretion here. The agency has a duty to invite such a party to be an “Invited Signatory.”

MCA assumes responsibilities under the MOA, expressly or by implication. Although the NCA and OVS have attempted to avoid these facts, they remain true. MCA is entitled to recognition as an “Invited Signatory.”

**C. THE DRAFT MOAs INITIALLY RECOGNIZED THE RESPONSIBILITIES ASSUMED BY MCA BUT THEREAFTER PROGRESSIVELY OBSCURED OR DELETED THEM**

By the first three Draft MOAs, MCA was assigned responsibilities under the MOAs. For examples:

- \* **OVS and Makawao Cemetery Association will cooperate in designing two signs .... OVS and Makawao Cemetery Association will cooperate in installing such signs. Draft MOA No. 1, 11/10/17, §III.A.**
- \* **... MCA will submit their design to OVS for review and to insure consistency**

in design prior to final preparation and installation of the signs. Draft MOA No. 2, 2/17, §III.B.

- \* MCA will assume the financial responsibility for fabricating and installing the Makawao Cemetery sign. Draft MOA No. 2, 2/17, §III.C.
- \* MCA may continue the four foot high wrought iron fence and hedging along its common boundary with the flag lot portion of the Veterans ten-acre expansion parcel, leaving openings for the gates to the third and fourth entries to the Makawao Cemetery, as expanded. When the new wrought iron fence, rock wall and hedge is constructed, MCA shall remove the four-foot high chain link fence along the Veterans ten-acre expansion parcel immediately fronting the new wall. Draft MOA No. 3, 9/17, §IV.G.

These provisions were all eventually deleted or obscured in subsequent MOAs, without any reason or explanation being given.

#### **D. THE EXAMPLE OF THE MCA SIGNAGE**

Section III. of the Draft MOAs covers "Signage." Draft MOA No. 2, 2/17, states:

OVS and MCA signs shall be similar in design, size, style and material. Placement will be on opposite sides of the entry gate; one for the Maui Veterans Cemetery and one for the Makawao Cemetery. **MCA will submit their design to OVS for review and to insure consistency in design prior to final preparation and installation of the signs.** (Emphasis added) See § IV.B.

Section III.C provides that:

**MCA will assume the financial responsibility for fabricating and installing the Makawao Cemetery sign.** (Emphasis added)

Section III.D provides that:

**OVS will assume the financial responsibility for fabricating and installing the Maui Veterans Cemetery sign.** (Emphasis added)

These provisions are consistent with the ACHP "Guidance on Section 106 Agreement Documents" which states under the heading of "Do the stipulations clearly identify who is responsible for carrying out each measure?" and state:

**Section 106 agreement documents should clearly identify the responsible party for each action.** Sometimes agreements are explicit about the measures that will be carried out but fail to clearly assign the duty to implement such measures to a specific party or parties. For example, an agreement may state: "Prior to its demolition, Building X will be documented in accordance with Historic American Buildings Survey (HABS) standards." While this statement specifies the action, it fails to identify who will carry it out. Changing the statement in the following manner identifies both the responsible party and

the specific action: "Prior to its demolition, the Department of the Navy will document Building X in accordance with HABS standards." **Specifying the party assigned to implement each measure should help avoid confusion and disagreement and any delay in the agreement's completion and implementation that may result from disputes or misunderstandings.** (Emphasis added)

The language quoted above in Sections III.C and III.D was still included in Draft MOA No. 3, 9/17. See §§III.A – D. In Draft MOA No. 4, 10/17, however, this language clearly assigning responsibilities was removed, and replaced with the following:

OVS and MCA signs shall be similar in design, size, style and material. Placement will be on opposite sides of the entry gate; one for the Maui Veterans Cemetery and one for the Makawao Cemetery. OVS will review the planned Makawao Cemetery sign to insure consistency in both designs prior to MCA's final preparation, fabrication, and installation of the sign. See, Draft MOA No. 4, 10/17, §III.B

OVS will fabricate and install the Maui Veterans Cemetery sign. See, Draft MOA No. 4, 10/17, §III.C.

The drafters of Draft MOA No. 4, 10/17 do what the ACHP recommends against in its "Guidance on Section 106 Agreement Documents" regarding the subject matter of "Do the stipulations clearly identify who is responsible for carrying out each measure?" The drafters try to avoid the clear statement that:

**MCA will assume the financial responsibility for fabricating and installing the Makawao Cemetery sign.**

Instead they avoid this plain statement assigning a responsibility to MCA by ignoring whose express duty it is to pay for, fabricate and install the MCA sign. What is stated now is:

**OVS will review the planned Makawao Cemetery sign to insure consistency in both designs prior to MCA's final preparation, fabrication, and installation of the sign.** (Emphasis added) See, Draft MOA no. 4, 10/17, III.B.

It is only by a more discerning reading that we can understand that this responsibility is still being assigned to MCA.

**E. TO EFFECTUATE ANY AGREED-UPON MOA AND PLOT PLAN, RESPONSIBILITIES ARE PLACED UPON MCA**

A recorded easement now exists, from Baldwin Avenue, over and across Lot 1, along the boundary of the Makawao Cemetery, benefitting the Makawao Cemetery property and the MCA. This easement conflicts with the MOA and plot plan agreed-upon on December 13, 2016. To effectuate any agreed-upon MOA and Plot Plan, MCA is responsible, at least by implication, for cooperating to relocate and terminate the above-described easement. MCA is willing to be responsible for this action as part of any agreed-upon MOA and plot plan. This is a rather obvious responsibility that must be assumed by MCA which is, for no stated reason, ignored.



**F. MCA IS ENTITLED TO SIGN THE MOA AS AN “INVITED SIGNATORY”**

Unless MCA is an “Invited Signatory,” the agreements that it has worked so hard to reach on December 13, 2016, in the MOA and in the Plot Plan, can all be amended or terminated, without the approval of the MCA. The MCA has a significant stake in assuring that the protections afforded by the agreements reached on December 13, 2016, the MOA and the Plot Plan in this case are not amended or terminated, potentially causing adverse effects to the Makawao Cemetery, as expanded, and Lot 1.

The whole point of MCA’s securing recognition of the historic significance of the Makawao Cemetery and Lot 1 and participating in Section 106 Consultation could be rendered meaningless if the MOA could be amended or terminated in a manner that caused adverse effects to MCA’s historic Makawao Cemetery or Lot 1 - that is so important to MCA as an entryway and parking area for its cemetery - when the objections of MCA could be ignored.

The MCA must be recognized as an “Invited Signatory” to assure that the MCA has the ability to protect and preserve, into the future, the Makawao Cemetery, as expanded (that the MCA owns) and Lot 1, both of which are historic properties.

These responsibilities cannot be left to parties that have a significantly less and more distant interests in the protection of the Makawao Cemetery. MCA is entitled to sign the Final MOA in the capacity of an “Invited Party” and we trust that the Final MOA will provide as much.

**G. THERE WOULD BE A HIGHER LEVEL OF COMMITMENT TO SUCCESS AND CONTINUED ENGAGEMENT AND PARTNERSHIP IN THE PROCESS WITH MCA AS AN “INVITED SIGNATORY”**

The ACHP “Guidance on Section 106 Agreement Documents” concludes the section on “Invited Signatories, as follows:

**Asking parties to be invited signatories to a Section 106 agreement can evidence a higher level of commitment to success in the agreement's implementation as well as continued engagement and partnership in the process. (Emphasis added)**

This is precisely what MCA seeks here.

**V. CONCLUSION**

MCA is still hopeful that the agreements reached in the positive and productive in-person Section 106 Consultation meeting that took place on December 13, 2016 can lead to an amicable resolution of the issues raised.

MCA also supports the development of a Memorandum of Understanding (“MOU”) with Public Works Department of the County of Maui that specifies implementation of a Cemetery Grounds Management Plan that permits the continuation of grass parking on Lot 1.

There remain, for MCA, a few more issues – addressed in this letter – to resolve, at which point all of the parties will be able to agree that the Section 106 Consultation was a success and the adverse impacts of the undertaking have been resolved.

MCA had hoped that, through the good faith participation in the consultation process, NCA or OVS would have contacted MCA by now to resolve the adverse effects noted in its April 6, 2017 comments on the Draft MOA No. 2, 2/17.

However, because neither the NCA nor the OVS have done so, the MCA takes this opportunity to reach out to the NCA and OVS – before consultation closes – to attempt to resolve these adverse effects of the undertaking within the still open Section 106 Consultation process.

MCA requests that representatives of NCA and OVS quickly contact a representative of MCA to discuss the contents of this letter before the conclusion of the Section 106 Consultation process so that agreed-upon modifications may be included in the Final MOA and attached documents, before they are circulated for signature.

This letter should be made part of the record in this case and taken into consideration in further consultations in this case.

Please contact Ms. Camille Lyons or myself to discuss these issues further.

Sincerely,

Isaac Hall  
Attorney for the  
Makawao Cemetery Association, Inc.

IH.gr

Encls.

Ccs:

Ms. Camille D. Lyons

MCA

Michelle DeGrandi (Via Email)

Douglas Pulak (Via Email)

Claudia Nissley or successor NCA agent (Via Email)

Thomas F. King or successor NCA agent (Via Email)

Alan Downer (Via Email) Susan Lebo (Via Email)

Jessica Puff (Via Email) Chris Nakahashi (Via

Email) Andrew Phillips (Via Email)

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