



**STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS**
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November 11, 2020

Dr. Alan Downer
Administrator, State Historic Preservation Division
601 Kamokila Blvd, #555
Kapolei, HI 96707

**Re: Controversy at Kauaʻula, Lāhainā, Maui and Related Concerns Regarding the State
Historic Preservation Division Statutory Compliance**

Aloha e Dr. Downer,

The Office of Hawaiian Affairs (OHA) writes this letter with serious concerns regarding the current controversy at Kauaʻula, Lāhainā, Maui regarding the excavation, laying of pipe, and backfilling in an ongoing project by West Maui Construction in an area with both known unmarked burial sites and three cemeteries according to beneficiary and descendant testimony outlined in the resultant motions by the Maui/Lānaʻi Island Burial Council (MLIBC) at their October 8, 2020 duly noticed meeting.

OHA also has serious concerns over repeated inconsistent interpretation and implementation of your office's statutory duties as well as the observable lack of consistent and reliable administrative support of the island burial councils. Our most serious concern is a refusal to comply with both Chapter 6E, Hawai'i Revised Statutes (HRS) and Chapter 13-300, Hawai'i Administrative Rules (HAR) in fulfilling your public trust responsibilities to our beneficiaries.

The purpose of this missive is to call for your office's immediate intervention into the issue of the installation of a private waterline in Kauaʻula, Lāhainā, exempted from County of Maui permitting under Section 2684 § 4, 1998¹, Maui County Code, and of which resulted in ongoing

¹ Section 20.08.031 - Limited exclusions.

Sections 20.08.040 through 20.08.160 regarding permit applications and requirements shall not apply to the following, however all other provisions of this chapter, including the provision of minimum bmps as required by section 20.08.035, shall remain applicable to all work performed, and the following shall not affect the applicability of section 20.08.040.C relating to cut or fill activity in special management areas:

4. Trenching for underground utilities when the trenches are backfilled, and the surface restored to its pre-existing grade and ground cover. (Ord. 2684 § 4, Maui County Code, 1998)

protests by our OHA beneficiaries including the October 13, 2020 arrest of five beneficiaries protecting unmarked ancestral burial sites from destruction.

Lāhainā is designated as a National Historic Landmark.² The close proximity of this controversial excavation work so close to, and potentially within, the Lāhainā Historic District boundaries is particularly concerning³ especially given the inherent issues with the designated boundaries of record.⁴

A decade ago it was noted:

*On December 29, 1962 the Lāhainā Historic District was added to the list of National Historic Landmarks because “Lāhainā preserves the atmosphere of a mid-19th century Hawaiian seaport, when it was a favorite port of call for American whalers. It was also the center of missionary activities.” In 1970, the Lāhainā Historic District was nominated to the National Register of Historic Places. It was listed in on the Hawai‘i Register of Historic Places in 1971. **The district boundaries include an arbitrary rectangular land boundary of 33 acres; the northeast boundary lies above Honoapi‘ilani Highway and includes the Pioneer Sugar Mill, the south boundary is the beginning of the Makila site, the southwest boundary runs into the Pacific Ocean, and the north boundary stops at Pu‘unoa Point (emphasis added).***⁵

It is in fact this very area where the current utility excavations are occurring which was once bustling with pre-contact and post contact kānaka maoli life filled with kauhale and other permanent and transitory habitation, intensive agriculture, ‘auwai water transport systems, fields of pili grass, religious shrines and heiau, ki‘i pōhaku, human and faunal burials, and other precious cultural resources to be further discussed below.

The proximity of the utility project to Kaua‘ula Stream, which initiated the initial beneficiary concerns, should have been enough in and of itself to initiate SHPD action and

² Lāhainā was first established as a National Historic Landmark in 1962 which predates the National Historic Preservation Act of 1966 and the National Register System. Subsequent to the NHPA of 1966, Lāhainā was then nominated to the National Historic Register in 1970 and then the Hawaiian Register of Historic Places in 1972.

³ National Register of Historic Places Lāhainā National Historical Landmark-1974 Update, National Park Service, which reads in part regarding Boundary Considerations: *The setting for historic downtown Lāhainā consists of near - and far-sight zones. The near zone is much of the rest of Lāhainā town. The far zone inland is sloping agricultural land which blends into the backdrop of the West Maui mountains, with summits about five miles away; the far zone seaward crosses the ‘Au‘au Channel to the backdrop of Lanai island, almost eight nautical miles away. This setting of interrelated architectural, scenic, rural, natural and marine attributes is part and parcel of the history which led to National Historic Landmark designation in 1962 and the passing of Maui County Ordinance 514 in 1967. The entire existing complex of town, land and water gives Lāhainā national value to present and future Americans. Natural and visual boundaries enclose the “setting” of Lāhainā as a National Historic Landmark. These boundaries are the summits of the mountains behind the town; the island of Lanai across the channel; to the north Pu‘unoa point on the waterfront; and to the south Makila point on the waterfront. Within these visual limits lie the natural attributes which made Lahaina a 19th century town royal residence and international seaport.*

⁴ It should be noted that the boundaries of the landmark and district appear to be different leading to some confusion regarding the boundaries covered by environmental review triggers. The National Register of Historic Places (NRHP) usually somewhat rectangular in form are derived from coordinates on the actual NRHP Nomination Form. These older NRHP boundaries have been described as “problematic” by both SHPD and CRM firms in the past.

⁵ FINAL-Archaeological Monitoring Plan, Lāhainā Pier Improvements Project, Lāhainā, Maui, Pacific Legacy, Inc., May 2010

intervention. On the issue of the presence of cultural resources in the vicinity of Kaua‘ula Stream, even the County of Maui Department of Public Works and Environmental, represented by Mr. Mitsuru “Mich” Hirano, AICP, Of Munekiyo & Hiraga, Inc., noted in a court transcribed public hearing for the Lāhainā Watershed Flood Control Project:

*We understand that, you know, that Kaua‘ula Stream played a very important role in the pre-contact period and could be a source of cultural resources that need to be respected and protected.*⁶

The Lāhainā area was also the site of historically significant and legendary battles and a pu‘uhonua. A place of refuge for the kino, the physical body, and the wailua, the spirit.

Honolulu Magazine nominated the Lāhainā Historic District as one of the “most endangered” historic areas in 2010, based upon a 2008 report by the National Park Service which identified the historic district as threatened as well. A decade later, and Lāhainā is still under siege.⁷

Lāhainā is an important wahi pana and it is critically important to protect this historical and cultural legacy for not only our beneficiaries but for all who love and call Hawai‘i home.

Office of Hawaiian Affairs

OHA is the constitutionally established agency charged with the betterment of conditions for native Hawaiians which includes expressly assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians and conducting advocacy efforts for native Hawaiians and Hawaiians.⁸

Our concerns and comments require your agency to seriously consider the issues raised in this letter as it shall be the duty and responsibility of all state departments and instrumentalities of state government, providing services and programs which affect native Hawaiians and Hawaiians, to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.⁹

⁶ Public Hearing for Lāhainā Watershed Flood Control Project, Held at Lahainaluna Intermediate School, Lāhainā Maui, June 17, 2003. Mr. Hirano has represented the County of Maui at the June 5, 2003 meeting of the Maui County Cultural Resources Commission on this same project.

⁷ In partnership with Historic Hawaii Foundation, the article focused on the historical and structural integrity of the buildings in Lāhainā, however, the overall ancient and post-contact history of the area which adds to its significance and which is highly valued, especially by OHA beneficiaries is endangered and threatened by irreparable loss as well. Jenny Quill, HONOLULU Magazine, November 2010.

⁸ **§10-3 Purpose of the office.** The purposes of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians.
(2) The betterment of conditions of Hawaiians;
(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

⁹ **§10-1] Declaration of purpose.** (b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs. [L 1979, c 196, pt of §2]

As you are aware, the State of Hawai‘i Historic Preservation Division’s actions and decisions, to include inaction, greatly impact our beneficiaries directly. OHA takes our responsibilities very seriously.

A large portion of our beneficiaries’ requests for assistance, advocacy, and legal intervention, over the past decade, centers solely around historic preservation concerns, especially the care, management and protection of ancestral burials, and the functioning and efficacy of the SHPD, especially with regards to unmarked burial sites.¹⁰

OHA and Chapter 6E, HRS

An important kuleana of OHA centers around our advocacy role in matters of historic preservation, on the federal, state and local levels of government. With regards to Chapter 6E, HRS, the laws governing historic preservation on the state level, OHA possesses duties and responsibilities as outlined in this important statute and associated administrative rules and to fulfill our mandates requires the SHPD to fulfill your office’s statutory mandates.

Lāhainā and the Surrounding Area’s Historical and Cultural Importance to OHA and to our Beneficiaries

Lāhainā, i ka Malu ‘Ulu o Lele, or “*the Breadfruit Shade of Lele*”¹¹ and its surrounding area is one of the most important places in Hawaiian History as a seat of rule of the Kingdom of Hawai‘i¹² and an area of great Mana.

*The Kingdom of Hawai‘i was an independent and sovereign nation filled with a literate, engaged, and devoutly patriotic citizenry. We now know of the many broad and powerful actions of numerous men and women who fought bravely for their nation, often giving up their livelihoods and sometimes their lives.*¹³

A third name for the area was “*Na-Honu-a-Pi‘ilani*” or “*The Lands of Pi‘ilani*”¹⁴ in reference to the great Pi‘ilani¹⁵ who ruled as the 15th Mō‘ī of the island of Maui in the later part of the 16th century.¹⁶

¹⁰ The Burial Sites Program (BSP), a distinct, discrete and self-managed unit of the State Historic Preservation Division, under the History and Culture Branch, had its own Director position, an Assistant Director, Genealogist, Burial Specialist, GIS Inventory Records Specialist, and Administrative Assistant. The BSP Director was responsible for all burial decisions regarding inadvertent discoveries on a Statewide level, and for overseeing the functioning and administration of the five island burial councils. The BSP was firmly established within the SHPD from Act 306 in 1990 until 2004 when the Director position was no longer funded. In 2005, then SHPD Administrator Melanie Chinen informed OHA in a meeting that the BSP was abolished as a unit.

¹¹ Lahaina and the Southern shores of West Maui were famously known for extensive breadfruit groves (*Artocarpus altilis*) rivaled perhaps only by Puna, Hawai‘i Island. E.S.C. Handy, Hawaiian Planter, p.190

¹² Established formally by Kamehameha II, Liholiho in 1820

¹³ *Ola Nā Iwi: Building Future Leaders by Linking Students to the Past*. Dr. Ronald Williams, Ka ‘Elele Research. 2014. *Ola Nā Iwi* is funded by a Community Engagement grant from the Office of the Dean at the Hawai‘inuiākea School of Hawaiian Knowledge, UH Mānoa.

¹⁴ *Fragments of Hawaiian History*, John Papa Ii, 1959 p.109

¹⁵ Mō‘ī of Maui Pi‘ilani died at Lāhainā and the Kingdom went to his oldest son, Lono-a-Pi‘ilani. Samuel Kamakau, *Ruling Chiefs*, p. 22

¹⁶ G.H. Hanakauluna, *Features of Lāhainā*, Ke Au Okoa, October 26, 1871

The lands above Lāhainā in the late 1700s consisted of fields of pili grass¹⁷ undulating in the famous winds of Kaua‘ūla with intensive agriculture, intricate systems of ‘auwai and irrigation, kauhale, heiau, ahu, burial mounds, sacred stones, ki‘i pōhaku, and a thriving culture of kanaka maoli.

In 1793, Archibald Menzies¹⁸, upon arriving in Lāhainā, gives the following description:

*We observed the rugged banks of a large rivulet that came out of the chasm cultivated and watered with great neatness and industry. Even the shelving cliffs of rock were planted with esculent roots, banked in and watered by aqueducts from the rivulet with as much art as if their level had been taken by the most ingenious engineer. We could not indeed but admire the laudable ingenuity of these people in cultivating their soil with so much economy. The indefatigable labor in making these little fields in so rugged a situation, the care and industry with which they were transplanted, watered and kept in order, surpassed anything of the kind we had even seen before.*¹⁹

Even Jacques Arago²⁰ in 1819 noted, almost five decades later:

*The environs of Lāhainā are like a garden. It would be difficult to find a soil more fertile, or a people who can turn it to greater advantage; little pathways sufficiently raised, and kept in excellent condition, serve as communications between the different estates. These are frequently divided by trenches, through which a fresh and limpid stream flows tranquilly giving life to the plantations, the sole riches of the country.*²¹

In 1823, William Ellis, noted:

The appearance of Lāhainā from the anchorage is singularly romantic and beautiful. A fine sandy beach stretches along the margin of the sea, like for a considerable distance with houses, and adorned with shady clumps of kou trees, or waving groves of cocoanuts. The level land of the whole district for about three miles, in one continued garden, laid out in beds of taro, potatoes, yams, sugar cane or cloth plant. The lowly cottage of the farmer is seen peeping through the leaves of the luxuriant plantain and banana tree, and in every direction while columns of

¹⁷ *Ka ua Pa ‘ūpili o Lele. The Pili soaking rain of Lele.* The plains of Lāhainā, Maui, were covered with pili grass in ancient days. When the rain poured the grass was well-soaked. ‘Ōlelo No‘eau

¹⁸ Archibald Menzies, a surgeon and naturalist aboard the *Discovery*, commanded by Vancouver wrote extensively in his diary regarding Lāhainā.

¹⁹ E.S.C. Handy, *Hawaiian Planter*, p. 104-106

²⁰ Jacques Étienne Victor Arago (6 March 1790 – 27 November 1855) was a French writer, artist aboard the Freycinet expedition to Hawaii in 1819. *Narrative of a Voyage Around the World*, 1823.

²¹ *Id* at 106

*smoke ascend, curling up among the wide-spreading branches of the breadfruit tree.*²²

That same year, 1823, the Reverend Mr. Stewart recorded in his diary his observations of Lāhainā:

*The settlement is far more beautiful than any place we have yet seen on the islands. The entire district stretching nearly three miles along the seaside, is covered with luxuriant groves, not only of the cocoanut, but also of the breadfruit and of the kou...while the banana plant, wauke and sugarcane are abundant and extend almost to the beach. The whole extent included within these boundaries is perfectly level and thickly covered with trees and various vegetation...and the land is watered entirely by conducting the streams, which rush the mountains, by artificial courses, on every plantation.*²³

The lands we see today are vastly different from historical accounts of the amazing and verdant groves of trees and plant cultivation, human settlements and intricate ‘auwai transporting water all throughout the district. However, much remains intact just under the surface.

*Ola Nā Iwi: The Bones Live...*²⁴

‘Āina Ali‘i: Lāhainā the Royal Center

Lāhainā was also a seat of immense spiritual and governance power in ancient times²⁵ with famous Maui ali‘i such as Kahekilinuī‘ahumanu,²⁶ also known as Kahekili, making Lāhainā his home until his death in 1794²⁷, and his Royal Court²⁸ as well:

Kahekili, a well-known chief of Maui and ruler of Maui, Lāna‘i, Moloka‘i, and O‘ahu, made his home and royal court at Lāhainā from 1736 until his death in

²² William Ellis, Narrative of a Tour, pp. 57-63

²³ Albert Pierce Taylor, Lāhainā: The Versailles of Old Hawai‘i, 17th Annual Report of the Hawaiian Historical Society for the Year 1928, pp. 42-47

²⁴ “*Ola Nā Iwi*” or the “The Bones Live” signifies the great importance that Native Hawaiians place on preserving and honoring the experience and knowledge of elders—both living and deceased—and is explained by the revered Hawaiian scholar Mary Kawena Pukui in the text ‘Ōlelo No‘eau (Hawaiian Proverbs): “Said of a respected elder who is well cared for by his family.” Id at p.2

²⁵ Testimony of Kimo Falconer, Vice-President and General Manager of Pioneer Mill Company, Ltd., and member of. Maui Cultural Resources Commission, expressing with regards to cultural concerns that “Waine‘e is considered the most important in the State due to the location of Moku‘ula, the spiritual and political center of power for the ancient Hawaiian Kingdom.” Lāhainā -Bypass Final SEIS, p. 153

²⁶ “*Upon our coming near the king’s house (in the village of Lāhainā), the greater part of them separated from us, particularly the women, on account of the ground round it being tabooed. The royal residence was sheltered with beautiful spreading trees and cocoanut palms situated near some beautiful fishponds. Here we found Kahekili and some of his chiefs seemingly in deep consultation.*” Archibald Menzies, Albert Pierce Taylor, Lāhainā: The Versailles of Old Hawai‘i, 17th Annual Report of the Hawaiian Historical Society for the Year 1928, p. 28

²⁷ Lāhainā -Bypass Final SEIS, p. 147, citing Austin Tsutsumi & Associates, Inc. 1988

²⁸ It is said that Vancouver then left Kealahakua and sailed to Lāhainā, Maui. (It is understood in the progress of the story written by Alexander, Pogue, and some other historians of Hawai‘i that Kahekili was not dead at this time, in other words, at this second arrival of Vancouver on the island of Hawai‘i. By the testimony of those many persons, a meeting was held between Vancouver and Kahekili and his *ali‘i* at Lāhainā.) Kamehameha and his warrior Kekūhaupi‘o, Reverend Stephen L. Desha, Kamehameha Schools Press Honolulu 2000, p.362

1794. Soon after Kahekili's death, Kamehameha I returned to Maui, where he had ruled for a short time, and established his home and seat of government out of Lāhainā. In 1802, Kamehameha I built a palace for his punahele (favorite) wife, Ka'ahumanu and it was the first western-style house in the islands (Bartholomew and Bailey 1994), made from locally made bricks (Fredericksen and Fredericksen 1965). Kamehameha I was involved in the lucrative sandalwood trade with China (1790's-1829), in which Lāhainā served as the main Maui port. Kamehameha I died in 1819 and his son Liholiho (1796-1824) assumed the title of Kamehameha II, but shared the rule of the kingdom with Ka'ahumanu, as kuhina nui (prime minister). In 1825, Kauikeaouli (Kamehameha III), younger brother of Liholiho, seceded to the throne and established Lāhainā as the kingdom's capital from 1820s through 1840 (Bartholomew and Bailey 1994). During his reign, Kamehameha III began construction on a new palace in Lāhainā, which continued after his death in 1854.²⁹

As mentioned above regarding another name for Lāhainā, that being “Na-Honu-a-Pi'ilani” or “The Lands of Pi'ilani”, Pi'ilani, the 15th Mō'i of Maui also had his seat of government in Lāhainā, residing makai of Loko o Mokuhinia:

The site appears to have been very important to Kamehameha III, descended from both Maui and Hawai'i Island families. A few meters west of Moku'ula is the site of the Lahaina palace of the great Maui Mo'i Pi'ilani of the sixteenth century, as well as the official palace of Kamehameha III, Hale Piula.³⁰

Mō'i Pi'ilani's sacred daughter, Kihawahine Mokuhinia Kalama'ula Kalā'aiheana was transformed into the mo'o Kihawahine who became an 'aumakua of Kamehameha Pai'ea in his unification efforts of the Hawaiian islands.

Lāhainā was also the home of the Maui ali'i Kaka'alaneo and his brother Kakae, who jointly ruled from the court in Lāhainā,³¹ and the pre-10th Century Maui ruler Hua³² who is said to have built the first temples, or heiau, on Maui, being at least two of the many in the area of Lāhainā.³³

*Ko'ele na iwi o Hua i ka la.
The bones of Hua rattled in the sun.³⁴*

²⁹ FINAL-Archaeological Monitoring Plan, Lāhainā Pier Improvements Project, Lahaina, Maui, Pacific Legacy. Inc., May 2010

³⁰ Moku'ula: History and Archaeological Excavations at the Private Palace of King Kamehameha III in Lāhainā, Maui. Anthropology Department, Bishop Museum, Paul Christian Klieger, et al, 1995

³¹ Abraham Fornander, An Account of the Polynesian Race, Vol. II, p.88

³² Hua, also known as Huaapohukaina and also Huakapuaimanaku.

³³ Thomas G. Thrum, Tales from the Temples, Hawaiian Annual for 1909, p.44

³⁴ A warning not to talk too much of one's kin. Also, a reminder that trouble is sure to befall those who destroy the innocent. Hua was a chief of Maui who heeded the lies of jealous men and ordered the death of his faithful priest, Luaho'omoe. Before he died, he sent his sons to the mountains for safety, because it was foretold by gods what was to come over the land. After his death, drought and famine came. Many died, including the chief Hua. There was no one to hide his remains, so his bones were left exposed to sun and wind. Also expressed *Nakeke na iwi*

There are said to be three heiau in the area not built by Hua but associated with the rule of Kahekilini'āhumanu and under the priestly rule of Lanikaula. Two of these heiau, Halulukoakoa and Wailehua³⁵, were consecrated in 1802 by Liholiho as his first official public duty at the tender age of five years old as the heir of Kamehameha Pai'ea.³⁶

Another heiau in Lāhainā of record was Pu'uhale, noted as a luakini, or po'okanaka class of sacrificial temple where the Maui ali'i Oho'ohukulani was sacrificed by the ali'i Kauluā'au after the death of Maui ali'i Kaka'alaneo, to suppress a rebellion and allow to Kaululā'au to freely rule.³⁷

Many other heiau are noted throughout the area by historical accounts including the renown heiau of Kamohomoho, one of the famous ali'i of the ancient days. Kamohomoho was the first to build a heiau for worship of an akua called Mo'o. This lizard god excelled in strength.³⁸ Mokuhinia Pond in Lāhainā is associated with the famous Mo'o Kihawahine.³⁹

Kaka'alaneo was said to be the first ali'i to set the 'ahu'ula, or feather cloaks, as the symbol of royalty, of ali'i, and it is said to be in the mountains of Lāhainā, near Ukumehame, where 'Ele'io first met the spirit of Kanikaniaula who was the first to possess a feather cloak⁴⁰, which eventually fell into the possession of Kaka'alaneo.⁴¹

Kaka'alaneo was said to have lived at Pu'u Keka'a, and his son, Ka'ulula'au was born there. Ka'ululā'au, who was kolohe in vandalizing the many breadfruit trees of Lele, was banished to Lāna'i which was an island only inhabited by spirits. Using his mental and physical agility, he finally outwitted the spirits there and made Lāna'i safe for human habitation.

Pu'u Keka'a was also a "leina-a-ka-'uhane" or place where the departed spirits of the deceased leapt into Po, or ascended to other realms.

*When a person lay on his deathbed, his soul would leave his body and wander about. If all earthly obligations had been fulfilled, the soul found its way to Pu'u Keka'a. There it was taken by minor gods and at the moment physical death came to the individual's body. Every island had at least one if not several locations designated as a leina-a-ka-'uhane.*⁴²

³⁵ Wailehua Heiau, Polanui, "The premises adjoining the heiau of Wailehua was where the victims for the sacrifices upon its altars were slain, and on the nights of Kane, and Lono, the beating of drums within its precincts are constantly heard." Thomas G. Thrum, Tales from the Temples, Hawaiian Annual for 1909, p.44

³⁶ Ka Nupepa Kuokoa, July 20, 1867

³⁷ W. N. Pualewa, The Legend of 'Ele'io, Ka Nupepa Kuakoa, November 7, 1863.

³⁸ Abraham Fornander, Collection, 5:520

³⁹ "Maui's royal lizard was Kihawahine (placed on Maui by Mo'oinanea) and had mana like Mo'oinanea. This was the lizard that had the greatest number of caretakers and worshippers to deify it. Chiefs and commoners worshipped it all over Maui, Moloka'i and Lana'i in ancient times and to it belonged the pit in the pond of Mokuhinia in Lāhainā." Moses Manu, The Legend of Kaaomelemele, Ka Nupepa Kuokoa, April 25, 1885

⁴⁰ 'Alaneo: Of a single color or texture, especially of a feather cloak without design and made of feathers of a single kind and color. Hawaiian Dictionary, Pukui and Elbert

⁴¹ Dictionary of Hawaiian Localities, Saturday Press, August 11, 1883

⁴² Archaeological Inventory Survey Honoapi'ilani Highway Realignment Project, Lāhainā Bypass Section-Modified Corridor Alignment, Peter Jensen, Ph.D., Paul H. Rosendahl, Ph.D., Inc. 1991 citing John Clark, The Beaches of Maui, 1989

It is noted:

*Lāhainā District was a favorable place for the high chiefs of Maui and their entourage for a number of reasons: the abundance of food from both land and sea; its equable climate and its attractiveness as a place of residence; it had probably the largest concentration of population, with its adjoining areas of habitation; easy communication with the other heavily populated areas of eastern and northeastern West Maui, 'The Four Streams,' and with the people living on the western, southwestern and southern slopes of Haleakala; and its propinquity to Lanai and Molokai.*⁴³

Thus, Lāhainā remains a place of great importance on many levels in both the physical realm and spiritual realm.

‘Āina Kahuna: Lāhainā the Land of Priests

Associated with the many ali‘i who resided in, ruled from, and conducted ceremonial protocol at the many heiau in the area, were the kahuna class of priests, of which some of the ali‘i held both the position of ali‘i and kahuna.⁴⁴

*The kahuna said to him (Kaulula‘au), "This is the thing you should do, separate the land for the kahuna and when the kahuna lives on it to take care of the god, allot the lands for the chiefs and commoners." It was agreeable to him and he gave the land to the kahuna and the god. These were the lands for him to live on, the two Kapunakea, 'Alamihī and the three Pu'unoa, all together there were six lands set apart for the god. From the time that Kaulula‘au set apart the lands for the god down to the time of Kamehameha I, whose kahuna was Hewahewa, these lands were in their (the kahunas) care.*⁴⁵

In 1819, Captain Louis Claude Desaulles de Freycinet visited the royal compound at Keawa‘ike shortly after the death of Kamehameha and observed:

*We landed at Lāhainā and immediately visited the water supply and chose a suitable place to set up our observatory. The governor, Ke‘eaumoku, came with us, and allowed us to use the platform of a neighboring morai (heiau) and of a red brick house to set up our instruments. To the south was the habitation of the priests, and right next to it, a morai, constructed on a platform of stones, forming a sort of platform on the beach. The governor made our observatory taboo, so that we would not be bothered by curious onlookers.*⁴⁶

⁴³ Handy, et al. 1991:492

⁴⁴ The famous and undefeated O‘ahu Mo‘i Kualī‘i who ruled in the 17th Century was both ali‘i kaua, and a priest of ‘Ī.

⁴⁵ W. N. Pualewa, The Legend of ‘Ele‘io, Ka Nupepa Kuakoa, November 7, 1863.

⁴⁶ Moku‘ula: Maui’s Sacred Island. P. Christiaan Klieger, Bishop Museum Press. January 1998.

This again only adds more significance to the Lāhainā area and its cultural, historical and spiritual importance to our beneficiaries living today and those to arrive in the future. It is also reported that a possibly earlier name of Lahaina, was “Laha‘aina” or “Land of Prophecy”, derived from the ancient ali‘i kahuna and kaula, priests and prophets, who rendered their prophecies from the area.⁴⁷

Heiau were often sited based upon energy grids, below the surface, and above in the moving constellations. That the surface features of a heiau were removed to pave roads, build ranching or agricultural walls, or otherwise destroyed, does not remove the sacredness and Mana imbued in the ‘āina in that location, nor associated burials of attendant kahuna or mōhai.

‘Āina Pu‘uhonua: Lāhainā the Place of Refuge

Lāhainā was a Pu‘uhonua, or a “City of Refuge much like Pu‘uhonua o Hōnaunau in South Kona and others around the various islands.”⁴⁸

Such is the famed Pa‘upa‘u Hill⁴⁹ in Lāhainā:

On the Eastern side of the hill is a place of refuge where those fleeing from battle sought safety, also a hill where those who fled (from other troubles) were assured protection. That was probably the place where Kahekili the great and his soldiers fled after his battles with Kamehameha, chief of Hawai‘i. In the battle fought below Kaua‘ula where Kamehameha was victorious, they (Kahekili and his forces) ran to the place of refuge for safety; when the Hawai‘i forces commenced to climb, stones were rolled down on them; thus Kahekili escaped from the great spear of Kamehameha; thus the Maui forces escaped.⁵⁰

Queen Ka‘ahumanu herself was a Pu‘uhonua and her lands often became places of refuge such as her ahupua‘a of Paunau:⁵¹

A third means of safety was Ka‘ahumanu. The Chief Kamehameha treated her as if she were a goddess. Any condemned person could be saved if Ka‘ahumanu said the word. Her lands were also turned into places of refuge. Pu‘umau (Pu‘unau) in Lāhainā became a place where people could be saved from death.⁵²

Even Olowalu is said to be a Pu‘uhonua⁵³ and a living one even today:

The star that brings the canoes to Hawai‘i, the star that is the tutelary star of West Maui is Rigel, Puanakau, is the constellation and in that comes the guide to

⁴⁷ Inez Ashdown, personal notes, on file at the Maui Historical Society Library

⁴⁸ Ke Au Hou, September 21, 1910

⁴⁹ The chosen burial place of well-known and distinguished Hawaiian scholar and preacher David Malo.

⁵⁰ Abraham Fornander, Collection, p.520

⁵¹ Samuel M. Kamakau, “Ka Moololo Hawaii,” *Ke Au ‘Oko‘a*, 10 Malaki 1870.

⁵² S.M. Kamakau, Ruling Chiefs of Hawai‘i, p.312

⁵³ J. Ladana, 1858 "Mo‘o‘olelo Hawaii -- Helu 9, No ka Pu‘uhonua." *Ka Hae Hawaii*, June 2, 1858. Vol. 3:33 Honolulu.

Makali‘i...the idea of a pu‘uhonua is a very strong one. And it could be something that moves into people’s being quite differently than other places that seem to be more museum type situations. But we are coming into a living pu‘uhonua again. In the recognition of this place as a pu‘uhonua, in the constellation Puanakau is a star, at the lower bottom called Pu‘u Honua. Then there’s these other stars around it, the Cat’s Cradle, Kahiehie.⁵⁴

Lāhainā remains a Pu‘uhonua, a Place of Refuge, even to this very day for our beneficiaries to restore and heal in an increasingly stressful and complicated world, and to find refuge and safety, not so much from assaults on the kino, the body, but assaults on the wailua, the spirit.

‘Āina Kapu: Lāhainā the Forbidden

Lāhainā today is a burial area and repository for some of the highest ranking and highest Mana chiefs and chiefesses in Hawaiian history, like the famed ‘Iao Valley also on Maui.

Among the sacred ali‘i interred at Waine‘e is the Chiefess Keōpūolani:

One of the most sacred Ali‘i Nui born in the Islands, Kalanikauika‘alaneo Keōpūolani was the daughter of Kīwala‘ō—18th century ruler of Hawai‘i Island—and Keku‘iapoiwa Liliha—a sibling of Kamehameha Pai‘ea. Her maternal mo‘okū‘auhau (genealogy) was filled with centuries of Maui rulers including Kekaulike, Pi‘ilani, and Kaka‘alaneo.

Her paternal lineage brought her the mana of Hawai‘i Island ruling chiefs such as Kalani‘ōpu‘u and Keawe‘īkekahiali‘iokamoku, in whose time the island came to be known as “Moku o Keawe.” The deeper mo‘okū‘auhau of Keōpūolani has been cited as tracing back to Ulu, a descendent of Hulihonua and Keakahuilani the first man and woman. It was said of this Maui Ali‘i Nui that her mana was “equal to that of the gods.”⁵⁵

Chiefess Keopulani’s high-Mana factored greatly in establishing the dynasty of Kamehameha and the unified Kingdom of Hawai‘i and upon her death, she was interred at Waine‘e:

On 16 September 1823, Keōpūolani, sick and on her death-bed, was baptized, becoming the first Native Christian baptism in Hawai‘i: she passed away about an hour later. The sacred and beloved Ali‘i Nui was laid to rest on 18 September 1823 in a state funeral in Lāhainā. Her body was placed at a stone house named Hale

⁵⁴ Statement of Mr. Al Lagunero, President for the Olowalu Cultural Reserve, a 501c3 organization with an educational mission focused on learning opportunities where students can integrate and develop skills for either career or cultural re-growth with “*the land as the teacher ... the ocean as the mother teacher.*” Cultural Impact Assessment for the Proposed Olowalu Town Master Plan, Appendix H-1, Cultural Surveys Hawai‘i, Inc. March 2015

⁵⁵ *Ola Nā Iwi*: Building Future Leaders by Linking Students to the Past. Dr. Ronald Williams, Ka ‘Elele Research. 2014, p. 11, citing both Kamakau, *Ke Kumu Aupuni*. 1996. Fornander, *Ancient History of the Hawaiian People*, 1996 and Esther T. Mo‘okini, “Keōpūolani, Sacred Wife, Queen Mother, 1778-1823,” *Hawaiian Journal of History* v 32 (1998).

Kamani at Kaluaokiha, Lua‘ehu, Lāhainā. Keōpūolani’s son, Mō‘ī Kauikeaouli (Kamehameha III), constructed a Royal Mausoleum on the island of Moku‘ula—across Front street from Hale Kamani—where he lived and ruled. Upon completing the structure, Kauikeaouli moved the body of his mother to the mausoleum at Moku‘ula. It would eventually also house the bodies of his sister and several other of the highest Ali‘i Nui of Hawai‘i.⁵⁶

Eventually, Ke Ali‘i Bernice Pauahi Bishop sought to better protect Keōpūolani and her other ancestors by interring them in a church cemetery:

In the final years of her life, Princess Bernice Pauahi Bishop set upon a project to assure protection and dignity for the remains of her royal Maui and Hawai‘i Island ancestors. Accounts within the Hawaiian-language newspapers and testimony given in 1888 by the ali‘i Kalola record the transfer of burials from the Royal Mausoleum at Moku‘ula a few hundred yards east of the cemetery at Waine‘e. An oral account from Lāhainā kupuna Alice Ka‘ae describes a night-time torch-led procession in which the iwi of Keōpūolani, Nāhi‘ena‘ena, Ulumāheihei Hoapili, Kaumuali‘i and others were brought to the cemetery of Waine‘e Church and reinterred there. After Princess Pauahi’s death, her husband Charles Reed Bishop had a monument erected to these Ali‘i Nui within the cemetery.⁵⁷

Other notable and high-ranking individuals buried in Waine‘e include:

- *Harieta Keōpūolani Nāhi‘ena‘ena;*
- *Ulumāheihei Hoapili*
- *Kalākua Kaheheimālie*
- *Kaumuali‘i*
- *Miriam Kekau‘ōnohi*
- *Liliha*

Nā Kia‘i ‘O Waine‘e (The Guardians of Waine‘e)

The current events at Kaua‘ula are not the first time OHA beneficiaries and their supporters have come together to protect the sacred burials at Lāhainā:

In 2011, concern within Waiola Church over the condition of the cemetery led to the forming of a committee—Nā Kia‘i ‘O Waine‘e (The Guardians of Waine‘e)—that was dedicated to preserving and protecting the burials interred there and increasing knowledge about them. What began as a mission of grounds keeping and maintenance became a greater vision as those visiting the cemetery shared mo‘olelo of their kupuna and searched their memories for long held but untold

⁵⁶ Id at p.11

⁵⁷ Id at p.12 citing Hon. Daniel Kahaulelio, “Ka Moololo o Ke Kulanakauhale o Lahaina,” *Ka Lei Rose o Hawaii*, 15 ‘Aukake 1898. “Ka Hoike a Kalola no na Iwi o na alii e waiho la ma Lāhainā Maui,” GEN 12.12, Bernice Pauahi Bishop Museum. Alice Kaae in *The Story of Lāhainā*, 1947.

stories. The wishes of Princess Pauahi were fulfilled and expanded to include all those who rested at Waine'e as information on unnamed headstones and unmarked graves allowed for a mapping of the cemetery. In their unassuming way, Nā Kia'i 'O Waine'e and Waiola Church have again brought dignity and peace to those buried within this historic cemetery. Their work has inspired new interest in the burials.⁵⁸

Similarly, in October of 2020, we find Nā Kia'i 'O Kaua'ula (The Guardians of Kaua'ula) who have also awoken.

Remaining Vestiges of a Rich History Threatened

Lāhainā was a populous area in ancient times and undoubtedly the iwi of thousands of its former inhabitants are deposited along the shorelines, into the kula and mauka.

Shortly after the arrival of these British ships in Hawai'i Nei, two French ships arrived at Maui under command of Captain La Perouse. It was said that these French warships arrived at Honua'ula, and from thence sailed to Lāhainā, as Lāhainā was a place of many people in the times of the ancient ali'i.⁵⁹

We know from history as well that Lāhainā and its surrounding areas were not immune from the devastating epidemics and plagues that swept through the islands decimating the native populations.⁶⁰ Even John Papa Ii noted with regards to a ship arriving in Lāhainā from smallpox ravaged O'ahu:

Passing Honokohau and Ka'anapali, they saw a white flag at Lahaina where people from O'ahu were not allowed to land because of the smallpox.⁶¹

While it remains unclear as to the ultimate impact of smallpox on the Lāhainā populace in 1853, such mass and tragic deaths can lead to large unmarked burial grounds and cemeteries no longer possessing any surface markers.⁶²

With regard to native habitation and occupation in the area and the subject area of Kaua'ula stream in particular, it was noted:

The water in question flows from its sources at the head through a deep valley called Kaua'ula, situated in the rear of the town of Lāhainā. The entire stream is taken up and used upon land in the valley on both sides of the stream for irrigating crops of kalo and on the flats below for sugar cane. This region was formerly thickly

⁵⁸ *Ola Nā Iwi: Building Future Leaders by Linking Students to the Past.* Dr. Ronald Williams, Ka 'Elele Research. 2014. p.6

⁵⁹ Kamehameha and his warrior Kekūhaupi'o, Reverend Stephen L. Desha, Kamehameha Schools Press Honolulu 2000, p.227

⁶⁰ In 1826 an epidemic of cough and bronchitis carried off several chiefs and commoners, Kahakuka'akoiwahinepio also died of it at Moku'ula, Maui. She was the sister of Kalanimoku and Boki. S.M. Kamakau, *Ruling Chiefs of Hawai'i*, p.274

⁶¹ *Fragments of Hawaiian History*, John Papa Ii, p.174

⁶² Walmart, Ke'caumoku Project and Honuakaha 1853 Smallpox Cemetery, both on O'ahu, collectively contain upwards of 1000 unmarked burials based upon archaeological investigation, inadvertent discoveries and historic research.

*populated, and the kuleana granted to natives by the Land Commission within and outside of the valley are numerous.*⁶³

We know from previous archaeological work in Lāhainā that unmarked burials have been found directly associated with land commission awards making the current utility trajectory through kuleana parcels and land commission awards highly likely to encounter ancestral human skeletal remains.⁶⁴

While there remain many kuleana parcels and land commission awards in and around Lāhainā, in ancient days, habitation areas extended all throughout Lāhainā and many habitation sites, whether temporary or permanent, were known to have scant structure, consisting of cleared areas with scatterings of ‘ili‘ili while others consisted of low-walled semi-circular enclosures next to rock outcroppings, large rocks or groups of rocks.⁶⁵

By 1819, Arago noted that the population in Lāhainā was estimated at 2500 and the kauhale in the area, roughly ten by six feet broad, were mostly used to sleep in wet and cool weather, with most life, including eating, sleeping and living, occurring in the open air under the shade of numerous kou and ulu trees.

*The Lāhainā District was considered to be a favorable place by high chiefs because of its natural resource qualities and its proximity to Lana‘i and Moloka‘i. The majority of lands up to approximately the 700-foot elevation comprised a nearly continuous band of agricultural and related habitation features. Initial development of the field systems likely occurred between AD 1200 to 1400. Seasonal dryland agricultural practices eventually evolved to year-round cultivation as water diversion and distribution improvements were implemented. Historical accounts document Lāhainā as an important population center.*⁶⁶

In 1846 the seat of government was moved from Lāhainā to Honolulu. Census information from this period in Lāhainā history was published by Mr. Taylor in The Friend, June 1, 1846:

In January, 1846, the census of Lāhainā, Maui, was taken, by which it appears there are, of native children under 14 years of age, 1062; 589 of these boys, 473 girls. Of native adults, there are 1198 men, 1185 women, in all 2383 adults. The total native population is 3345. Of foreigners there 88 men, 6 women, or 94 adults; 7 boys, 11 girls, or 18 children. Total foreign population 112, not including seamen of the hospital and others on the hands of consuls.

⁶³ Horner v. Kumuli‘ili‘i, Hawaiian Reports, 10:174-182, C. F. Horner and Paul Isenberg, Pioneer Mill owners

⁶⁴ SIHP No. 50-50-03-5239, human burial in LCA 5382 led to the conclusion by the archaeologist that “it remains possible that additional burials may be contained in this LCA as well as other LCAs that are crossed by the Lāhainā Watershed Flood Control Project.” An Archaeological Inventory Survey of the Lāhainā Watershed Flood Control Project, Erik M. Frederickson & Demaris L. Frederickson, Xamanek Researches, March 7, 2003

⁶⁵ W. M. Walker, Archaeology of Maui, p.78

⁶⁶ Based upon a series of archaeological inventory surveys along the Modified Project alignment, Ka‘anapali Connector and Lahainaluna Road-Bypass Access conducted by Paul H. Rosendahl, Ph.D., Lāhainā -Bypass Final SEIS, p. 146

Of the natives, 1422, including men, women and children, have no land or cultivation of their own, in the language of the country, are kuewas.⁶⁷

Kuewa: Vagabond, exile, wanderer; wandering, friendless, homeless, unstable.

Taylor in *The Friend* continues:

The people of Lāhainā have within a few years made commendable progress in civilization. Whale ships have furnished them with increased facilities for wealth, and there has been an increasing disposition, on their part, to use these means to procure for themselves better houses, to purchase bedsteads, table chairs, table and kitchen furniture, time keepers, decent clothing and in many cases, better education for their children.

In all Lāhainā, there are. 882 grass houses, 155 adobe houses, and 59 of stone or wood. In all 1096 houses.⁶⁸

Unfortunately, a rich and vibrant culture was reduced to forced assimilation into a Western view of the world leaving many kuewa wandering aimlessly in its destructive socioeconomic wake.

In addition, the practices of sugar cane barons led to wanton and intentional destruction of all signs of ancient kākā maoli life further disassociating and disconnecting the natives from their ancestral and cultural foundations.

Workers clearing fields for sugarcane cultivation were sometimes told to bulldoze any rock structures into gulches to erase any sign of pre-contact Hawaiian life.⁶⁹ Many of these rocks can still be seen in these gulches and ravines.⁷⁰ Given the destruction of the flatlands for agriculture, gulches can also be areas of the last remaining vestiges of intact ancient historic sites as well.⁷¹

Even Pioneer Mill, who exerted control over approximately 12,500 acres of land in west Maui, systematically cleared the land of pōhaku as noted in 1936:

In these fields the rocks are cleared away and built into a series of stone walls from 5 to 6 feet apart and often 3 feet high. These stone walls form the banks of the cane row; and between these walls the ground is softened up with pick and then planted. The soil in these areas, although extremely difficult to get at, is very

⁶⁷ Cited in: Archaeological Inventory Survey Honoapi'ilani Highway Realignment Project, Lāhainā Bypass Section-Modified Corridor Alignment, Peter Jensen, Ph.D., Paul H. Rosendahl, Ph.D., Inc. 1991

⁶⁸ Taylor, *The Friend*, 1928:p.56-57

⁶⁹ Personal communication, Kōhala Sugar Company retired employee Declaration to DLNR/SHPD Burial Sites Program staff in 2001.

⁷⁰ It should be noted that Kimo Falconer, Vice President and General Manager of Pioneer Mill Company, Ltd. reported that Pioneer Mill's former ranching activities utilized the land in gulch areas, as well as land between the sugarcane fields and the West Maui Mountains. Lāhainā -Bypass Final SEIS, p.153

⁷¹ See testimony of machine operators in Mālama Kakanilua's intervention in Grand Wailea project currently before Maui Planning Commission and in contested case filings: "Human skeletal remains in buckets were dumped into gulches."

*fertile and yields as great as from 90 to 100 tons per acre can be secured off such fields.*⁷²

This destruction by cane cultivation, especially of heiau, was also noted by archaeologists⁷³ and other historians, even in Lāhainā specifically:

*Above the Pioneer Plantation reservoirs, terraces cover the flatland just below the entrance to Ukumehame Canyon. Only a few of these are now under cultivation. The terraces used to extend well down over the land below the valley, but, with the exception of one tiny taro plantation standing like an island in the midst of the cane, all vestiges of the ancient cultivation have been plowed under. This is excellent wet taro soil.*⁷⁴

Thus, all forms of surface markers, consisting of pōhaku, were systematically erased and plowed under. This includes heiau and religious structures, kauhale house sites, burial sites, agricultural terraces, ‘auwai, and a host of other signs of ancient Hawaiian life.

With regards to Lāhainā specifically:

*Cultivation in the project area has involved deep plowing and extensive surface modifications and substantial disturbance to subsurface deposits. The extent of disturbance is substantial as evidenced by the presence of massive field clearing debris.*⁷⁵

Public testimonies by cultural practitioners for nearby Olowalu regarding efforts in preserving the last vestiges of historic and cultural sites there included:

*Those who are astute in Hawaiian history are well aware of the destruction of the Hawaiian cultural way of life, native areas of cultural habitat, and cultural practices by the plantations and modern development.*⁷⁶

Winslow Walker, who conducted archaeological surveys in the 1920s and 1930s of Maui, noted with regards to the aforementioned Waiehua Heiau:

Located in the ‘ahupua‘a of Makila at the shore, heiau measured 130x80 feet according to Thrum in 1909, who says it was built by Kauhi-ai-moku-kama, the son of Kekaulike, in or about 1738. Its class is not known but drums were heard

⁷² Hawai‘i Sugar Manual, Gilmore 1936

⁷³ Halekumukalanai Heiau: Walker Site 7, in cane lands of Pu‘ehu‘ehunui mauka of railroad of Pioneer Mill Co., a small sacrificial heiau not totally destroyed. Apahua Heiau: Walker Site 8, Location: Cane Fields above Waine‘e. Remarks: Totally destroyed. Thrum credits its building to Hua-nui, about fifty years later than Huaapohakukaina. Waie Heiau: Walker Site 9, Location: Kapaulu District south of Lahainaluna Road, in cane. Totally destroyed. W.M. Walker, Archaeology of Maui, p.110-112

⁷⁴ E.S.C. Handy, Hawaiian Planter, p.103

⁷⁵ Based upon a series of archaeological inventory surveys along the Modified Project alignment, Ka‘anapali Connector and Lahainaluna Road-Bypass Access conducted by Paul H. Rosendahl, Ph.D., Lāhainā -Bypass Final SEIS, 2002 p. 96

⁷⁶ Testimony of Mr. John Duey and Mrs. Rose-Marie Duey, Cultural Impact Assessment for the Proposed Olowalu Town Master Plan, Appendix H-1, Cultural Surveys Hawai‘i, Inc. March 2015

on the night of Kāne. Now destroyed. Site now used for residence of Mr. Burns, manager of Pioneer Mill Co.

Despite the systematic erasure of surface features, we know from experience that much culture still survives and remains below the surface⁷⁷ including intact ancestral human burial sites previously found in former cane lands in the current utility project trajectory, and even in heavily developed and altered portions of Lāhainā. Even at Moku‘ula, which has been filled in and dramatically altered in the last century, and in which human burial sites were encountered, it was noted:

*Archaeological excavations have shown that many architectural and other cultural features from the period of royal residences on Moku‘ula are very well preserved.*⁷⁸

Archaeological monitoring at the Kamehameha III Elementary School in 2000 yielded ten *in situ* burials as well as disturbed remains, believed to be from the 16th century and some of which possessed burial goods indicating high-status individuals of ali‘i rank.⁷⁹

Another archaeological survey⁸⁰ conducted between 2006 and 2007 in the area of the current utility trenching discovered two unmarked burial sites. A historic period coffin burial⁸¹ mauka of the utility trench trajectory and what appears to be a pre-contact burial makai of the project. Thus the current utility trenching is proceeding right between these two burial finds.⁸²

Despite previous archaeological studies and inadvertent finds in the subject area, there is an incredible lack of study or knowledge of what lies beneath the surface.

Although formal archaeological survey work was initiated relatively early on Maui (e.g., Emory 1921; Walker 1930), the island’s prehistoric resources still remain less intensively studied than the resources for either Hawai‘i or O‘ahu. Although major segments of this 16th century alignment remains intact elsewhere around the island, according to Handy and Handy (1972:490-491)”...it was

⁷⁷ “However, as noted by interviewees, there still exists a potential to uncover features which may underlie exposed former sugar cane lands.” Lāhainā -Bypass Final SEIS, 2002 p.156

⁷⁸ Moku‘ula: History and Archaeological Excavations at the Private Palace of King Kamehameha III in Lāhainā, Maui. Anthropology Department, Bishop Museum, Paul Christian Klieger, et al, 1995

⁷⁹ Frederickson and Frederickson, Xamanek Researches, 2001

⁸⁰ An Archaeological Inventory Survey of a 480-Acre Parcel of Land in Waine‘e And Various *Ahupua‘a*, Lāhainā District, Island Of Maui (Tmk: [2] 4-6-13, 14, 15, 16, 18, 25 And 4-6-01, 02) Ka‘anapali Land Management Corporation, Xamanek Researches, LLC, 2009

⁸¹ One previously unidentified burial was located during testing in Backhoe Trench 26 (Site 6473). While excavation was undertaken on Site 6473, it was minimized in order to reduce impacts on the find. The human remains were contained in what appeared to be the remnants of a coffin. This burial appeared to have been previously impacted by the plow zone. It is noteworthy that this find was located in the land of Paunauiki, c. 122 m (400 ft) SSW of the previously identified Site 5289 human burial in LCA 5832 to Kaaumeiewa. Id at p.ii

⁸² SIHP Sites 6473 and 5239, Frederickson, Xamanek Researches, 2009

formerly clearly visible across the West Maui golf links, but was obliterated in the Lahaina area and beyond by the cultivation of cane and pineapple.”⁸³

Regarding what may lay just underneath the surface, the karsts in Lāhainā are of most significant importance and concern as karsts are associated with burials, repositories for the mea kapu of ali‘i, and thorough fares for deities such as mo‘o.⁸⁴ This is even corroborated by native tenants of the area.⁸⁵ This is also substantiated through archaeological investigations in Lāhainā:

In addition to discovering intact architecture associated with the last known surface of Malu‘ulu o Lele Park, one of the most interesting aspects of the ongoing excavation and data recovery efforts was the discovery that portions of Malu‘ulu o Lele Park were apparently slowly “sinking” into the active karst system.⁸⁶

Further discussion:

To this day, you can see brackish water being pushed up through the two, distinct layers of historic fill during time of heavy rains and/or high tides, leaving large patches of sea salt on the surface when the waters recede. This provides clear evidence of an active karst system still at work in Lāhainā. A karst is a subterranean landscape created when a soluble form of rock, such as limestone, comes in contact with slightly acidic water. This dissolution is characterized by sinkholes, caves and drainage systems. Traditional place names in Lāhainā, such as Waine‘e (Flowing Waters) to the South and Kahoma (Thin or Hollow) to the North, provide important clues as to what lies both above and below.

The dusty red soil on slopes above Lāhainā, once covered in heavily-irrigated, verdant fields of sugar cane, is known as Oxisol. Oxisol is formed from basic igneous rock combined with alluvial deposits – including coral and gravel. The Lahaina Series Oxisol is acidic. Rainwater traveling down from the West Maui Mountains to Kalua‘ehu percolates down through the acidic soils above and then enters into a series of lava tubes that carry it to the alluvial plain far below.

When the increasingly acidic groundwater comes into contact with the soluble rock, e.g., limestone, it dissolves it forming a complex network of solutional passageways

⁸³ Archaeological Inventory Survey Honoapi‘ilani Highway Realignment Project, Lāhainā Bypass Section-Modified Corridor Alignment, Peter Jensen, Ph.D., Paul H. Rosendahl, Ph.D., Inc. 1991

⁸⁴ Karsts in ‘Ewa and Mō ‘ili‘ili, O‘ahu, have been found to have human burials, hidden ki‘i of wood and stone, ‘ahu‘ula and other significant cultural and historical resources.

⁸⁵ “When asked about the water source for the pond, Mrs. Rodrigues stated that the spring water ran underneath the location of her house from Olowalu Valley. She went on to further explain that there was a mo‘o or lizard, that also lived in the pond.” Interview of Mrs. Adeline Rodrigues, as well as “This distinction is relevant as it relates to the route in which Kihawahine, the mo‘o goddess would travel from the West Maui Mountains to Kalokoi ‘aokapāiki, the fishpond that once fronted their family home.” Interview of Hinano Rodrigues, Cultural Impact Assessment for the Proposed Olowalu Town Master Plan, Appendix H-1, Cultural Surveys Hawai‘i, Inc. March 2015

⁸⁶ Draft Final Report on Archaeological Data Recovery for the University of Hawai‘i -Maui College Field School and Excavation at Moku‘ula (SIHP #50-50-03-2967), Waine‘e Ahupua‘a, Lāhainā District, Maui Island, Janet Six, Ph.D., Sixth Sense Archaeological Consultants, September 2012.

that function as a natural drainage system. Over time, some of these “drains” eroded, forming larger passages and caves, increasing the flow of water from the mountain to the sea (Gunn 2004). According to the 1995 Bishop Museum Phase I Final Report, “Initial documentation has shown the pondfield system in Kalua`ehu to have been a very dynamic system – the fertility of Lahaina in leeward West Maui depended on it” (Klieger and Lebo, 1995, Pg. 8).⁸⁷

Mokuhinia is believed to have existed for thousands of years as a natural karstic pond:

Data further indicate that although the fishpond of Mokuhinia is most likely natural, having been in existence for thousands of years, the island appears to have been largely man-made, probably in the early nineteenth century.⁸⁸

Mokuhinia also possessed a rare black form of limu kala.⁸⁹ Limu kala is important as a healing limu when a poultice is made, or when a lei limu kala is worn around the neck in an open fashion, and as one enters the ocean in humble reverent prayer, and as the lei floats away, it takes the ma‘i or pilikia with it:

Limu kala is also used for spiritual healing. Sometimes families quarrel. The kūpuna would gather young shoots of the limu kala. The kūpuna would then have ‘ohana sit in a circle. Each person would receive several young shoots of the limu kala. Then the family would pray. They would ask each other for forgiveness. Then each of them would eat their limu, because kala means to forgive. There is a famous saying that talks about the limu kala: He kala nō, a ho‘i ka pilikia. Trouble leaves with forgiveness.⁹⁰

Furthermore, as the home of Kihawahine, Mokuhinia adds great importance and sacredness to the whole of Lāhainā:

“In the center was the sacred island of Moku‘ula, the home of the highest ali‘i nui. It was surrounded by the fishpond Mokuhinia, the “pit of Kiha.” Kalua o Kiha was in turn enveloped by Kalua`ehu, the chiefly region of Lāhainā. Beyond this circle lived the maka‘āinana, the commoners of West Maui... Kalua`ehu was bordered on the north by Pāuhaumanamana Stream, the present Dickinson Street, and on the south by Kaua`ula stream... Kalua`ehu extended to the Wao Akua, the divine forest of Mauna Ke`eke`ehia, and the valleys of Kaua`ula and Launiupoko.⁹¹

⁸⁷ Id a pp 43-45

⁸⁸ Moku‘ula: History and Archaeological Excavations at the Private Palace of King Kamehameha III in Lāhainā, Maui. Anthropology Department, Bishop Museum, Paul Christian Klieger, et al, 1995

⁸⁹ Fragments of Hawaiian History, John Papa Ii, 1959 p.109

⁹⁰ Kumukahi.org by Kamehameha Publishing

⁹¹ Draft Final Report on Archaeological Data Recovery for the University of Hawai‘i -Maui College Field School and Excavation at Moku‘ula (SIHP #50-50-03-2967), Waine‘e Ahupua‘a, Lāhainā District, Maui Island, Janet Six, Ph.D., Sixth Sense Archaeological Consultants, September 2012, p.9

Traditional and customary practices related to mo‘o are still evident today as demonstrated by cultural practitioners relating to Lake Waiau⁹² on Mauna Kea:

Water. Let us talk about the lake in the context of cultural practices. As home of Mo‘oinanea, the Royal Order of Kamehameha feels they have specific duty here is because Mo‘oinanea, when you go back into the genealogies. It is pretty much a mystical realm, Mo‘oinanea comes through and her first descendant is Kihawahine is the one who gives birth to the entire mo‘o clans in Hawai‘i. Their birth place being at Waikīkī and Pu‘uloa and that is why her kino lau is the mother of pearl shell. The story in the 1800s Pu‘uloa is raided along with the northwest Hawaiian Islands. Pearl and Hermes reef were pretty much fished out of all of our pearl shells, but about the same time a mo‘olelo came out where it is said that she was angry because a chief severely punished one of the kama‘ina for taking the pearl shell when it was kapu, but the kama‘ina was starving so Mo‘oinanea became angry and took the pearl shell to Tahiti, so if you see a pearl shell, right at the time that mo‘olelo is gone, and the pearl shell has gone to Tahiti and what today the pearl shell is flourishing there; which is beautiful so it connects of kua mo‘o [the back of the mo‘o] and it is all through Mo‘oinanea too. The navigator has her with the pearl shell I on their wa‘a [canoe]. She is significant because she is also is the caregiver of the kupua [demigod or supernatural being] and other ali‘i children. When the sacred chief Keopuolani is the bearer of the Kiha [supernatural lizard] and because of that Kamehameha had to marry her. Her lover was Wahilani. Kiha was her kino lau. I know that there are some people that go up to give ceremony for Mo‘oinanea, that is their primary deity. The ones I know that are of the mo‘o clan.⁹³

Kihawahine is said to travel from her home in Mokuhinia as far as Haneo‘o and Waihe‘e and beyond as celebrated in mo‘olelo, chant and even hula.⁹⁴ It is imperative that the karst system remains intact, unobstructed from surface collapse, and retain its subsurface integrity.

Much of the water that supplied Loko o Mokuhinia and the rest of the Lāhainā wetlands was primarily supplied by a network of springs bubbling out of a series of subterranean solutional caves or sinkholes; the most famous being Kalua o Kiha – the watery grotto residence or “pit” of the Mo‘o Kihawahine that purportedly lies directly under Moku‘ula island. Half-dragon and half-woman, mo‘o are associated with flowing water and reside in numerous fresh and brackish ponds on Maui and throughout the archipelago. There are three mo‘o associated with the wetlands of Lāhainā – Kalama‘ula, Kihawahine and Mokuhinia. Often associated with more than one site, these chthonic deities are mobile – utilizing subterranean

⁹² Lake Waiau is said to be a portal by cultural practitioners possessing what Mary Kawena Puku‘i describes as ‘ike papa lua, a portal where divine beings come back and forth to earth, such as mo‘o when the constellation Makali‘i, or the Pleiades, is above the lake. It is also a reflecting pool where the akua can see their true selves.

⁹³ Testimony of Kealoha Pisciotta, CIA for the TMT Observatory and TMT Mid-Level Facility Project, FEIS Volume 3, Appendices, Thirty Meter Telescope, University of Hawai‘i at Hilo, May 8, 2010

⁹⁴ Kumu Hula Nina Maxwell and her halau, composed and performed hula celebrating Kihawahine’s epic subterranean travels around Maui.

*lava tubes and solutional caves to fluidly travel beneath the surface of Maui from pond to pond.*⁹⁵

In fact, a very famous and reknown ki'i lā'au akua of Kihawahine may be returning to Hawai'i, and possibly Moku'ula, Lāhainā⁹⁶ soon after 140 years away from the islands:

The ki'i, along with a second figure, were taken by the German bacteriologist Dr. Eduard Christian Arning in 1885. Arning had been brought to Hawai'i by the Hawaiian Kingdom Board of Health to work on a cure for Hansen's Disease. While here, he amassed a large collection of "artifacts" artworks, and other cultural items. Known as a "collector," he was notified of the find in Laupahoehoe by the planter Herbert Purvis who had heard about it from some of his workers. Arning writes about the journey to retrieve the items in the accession files held by the museum in Berlin. "After a dangerous boat trip [led by Purvis] in which they tried for two days and one night to land at the location, the passengers were forced to swim to save themselves. Purvis succeeded in getting near the location but because of shark infested waters he was not able to land directly on the spot. The two native guides were somehow able to reach the pit in which the figures were hidden and remove them. Besides the idols, they found a human skull." The original museum accession files in the Berlin museum contain excerpts from Arning's journal which states: "Five years ago at a place on the coast of Hamakua, Hawaii, which can only be reached by swimming and which is in the vicinity of an area which goes by the name Laupahoehoe iki, a flat stone plate was found on the occasion of the excavation of a hole for the erection of a distilling boiler to secretly prepare okolehau schnapps from the Ti root; after this plate was taken up this God image lay in a hole constructed from stones. It was brought to the next valley, Waimano; however, immediately upon the command of the Kahunas it was removed and again concealed in a hole on the rocky shore. Immediately after the idol was brought into the village a disease quickly spread which had for its main symptoms white spots on the lips, mouth, and mucous membrane, and this plague was viewed by the Kahunas as punishment for the disturbance of the God." Arning found out about the ki'i and hired "Native" assistants to bring recover it once again. He added this piece to his large collection. When Arning was preparing to return to Germany he spoke with Mō'i Kalākaua who agreed to let him take the 150+ items he had

⁹⁵ Draft Final Report on Archaeological Data Recovery for the University of Hawai'i -Maui College Field School and Excavation at Moku'ula (SIHP #50-50-03-2967), Waine'e Ahupua'a, Lāhainā District, Maui Island, Janet Six, Ph.D., Sixth Sense Archaeological Consultants, September 2012, p.9

⁹⁶ "It is reported that Kamehameha I carried this image around the islands on the Makahiki circuit. The female image had bleached hair and was once decorated with feathers. Its eyes were inlaid with pearl shell, and human teeth lined the mouth. It is also stated that the image was wrapped in a turmeric-dyed tapa cloth." Note: It is recorded that Kamehameha landed in Lāhainā to begin his Makahiki circuit of Maui as well. After leaving Lāhainā to wage an unsuccessful battle to gain control of Kaua'i, Kamehameha established his court in Honolulu. On several occasions he revisited Lāhainā. "In 1812, he (Kamehameha) stopped (in Lāhainā) to collect tribute at the time of the Makahiki, and appoint his brother-in-law Kahekili Ke'eaumoku as governor of Maui Frederickson, Waine'e AIS citing Klieger et al., 1995a, p. 26.

*acquired but knowing the rarity of the Kiha piece, Kalākaua insisted that a painting be made of it first.*⁹⁷

With regards to Lāhainā, it should be noted that human burials were found at Olowalu in the karst system there⁹⁸ and the karstic system in ‘Ewa, O‘ahu has long been a place where human burials have been found in both sinkholes, caverns and underground passageways as well as burial and religious items.⁹⁹

With regards to Lāhainā as a healing place, associated with the karst system, there exists the renown Hauola Stone:

*Just over the sea wall at the ocean end of Lahaina Power & Light, is the Hauola Stone, a sacred Hawaiian object which is according to legend, the girl, Hauola, who was turned to stone by her gods to save her family from her enemies. Kahuna la‘au, or medicine men, used to send their patients to bathe in the sacred sea water at this stone and it is reported that many were cured.*¹⁰⁰

Further information on the Hauola stone states:

*Easily visible from the waterfront in Lahaina is a stone sacred to Hawaiians, but as no marker of explanation has been erected, few visitors know about it. The Lāhainā Historical Guide has this to say about it: “Off the right-hand end of the stone wall that separates Wharf Street (the street in front of Pioneer Inn) from the ocean is a cluster of large rocks which stand above the waves. The rock that looks like a modern chair with a spacious seat and a small angular back is the healing rock, the front which is worn and hollow. Hawaiians believed that ailing people had only to sit in the seat, dangle their legs in the water, and let the waves wash over them to regain their health.”*¹⁰¹

Like the famous Waikiki “Wizard Stones”, or Nā Pōhaku Ola Kapaemahu a Kapuni, which sat both on the beach and in the stream outlet, great healing took place by kahuna there in the near-shore ocean waters. Where Ka Wai Ola a Kāne, the life-giving fresh waters of Kāne, flow above

⁹⁷ Summary by Dr. Ronald Williams who provided research to OHA combined with further research and advocacy by Edward Halealoha Ayau and OHA staff regarding an effort to repatriate the ki‘i of Kihawahine back home to Hawai‘i from the German museum.

⁹⁸ Possibly SIHP 50-50-08-4693, a pre-contact burial ground consisting of a minimum of six individuals discovered by Xamanek Researches.

⁹⁹ OHA has been involved in close to thirty years of advocacy, including litigation to the Hawai‘i Supreme Court regarding significant historical and cultural resources at One‘ula, ‘Ewa, where Haseko ‘Ewa, Inc. has been constructing a marina and associated housing and commercial subdivisions. One‘ula is the site of a January 2001 inadvertent discovery of human skeletal remains representing a high-ranking chiefess directly associated with both Kauikeaouli and Queen Ka‘ahumanu and recognition in April 14, 2010 by the O‘ahu Island Burial Council. During excavations in the area, Haseko’s Engineering Reports state that the massive excavations have encountered “hundreds of underground voids, some small, and some cavernous.” These elements of the karstic desert in ‘Ewa and burials have been archaeologically documented from Campbell Industrial Park, Kalaeloa and One‘ula.

¹⁰⁰ Jeanne Booth Johnson, Quaintness of Lāhainā, Honolulu Advertiser (Hawaiian Holiday), March 1, 1959, as discussed in Sites of Maui

¹⁰¹ Hauola Stone, Maui News (Maui-Go-Round), August 6, 1966, p.9

and below the ground, and embrace his brother Kanaloa's ocean waters, great healing and life ensues. Limu flourishes, fingerlings find safe harbor and kanaka heal.¹⁰²

Hauola may be a reference to more than the singular Hauola stone, but the healing ocean there itself, according to Kamakau when referring to the untimely death of Nahi'ena'ena:

*The king (Kamehameha III) arranged to have her laid away on Maui, the land where her mother, Harriet Ke-opu-o-lani had been laid away, "in the calm of Hauola."*¹⁰³

OHA remains vitally concerned that the utility project may impact or puncture elements of the karst system in Lāhainā. There is currently a County of Maui Department of Public Works project, Lāhainā Aquatic Center Basin Restoration, before the SHPD¹⁰⁴ for review and comment pursuant to Section 6E-8, HRS in the area of Mill Street that beneficiaries have also raised concerns about.

According to public documents, geotechnical investigations in this area conducted in 2014 discovered ground water as close as 2.5 feet just under the surface of the ground. These are clearly elements of the underground karst system which could be breached by the current utility work by West Maui Land Partner, especially along Mill Street.

There needs to be extra vigilance with regards to excavations in Lāhainā to avoid adversely impacting the karsts, human burial sites and other cultural legacy, as well as to avoid collapse and obstruction of these important subterranean passageways for both Ka Wai Ola a Kāne and mo'o.

Battles at Lāhainā

It is important to understand areas with pre-contact battles not only for their historical significance, but also due to a higher probability of inadvertently discovering the remains of the war dead, who were at times left on, or buried right where they were slain upon, the battlefield during particularly brutal and contentious fighting.

Around 1737, Hawai'i island Ali'i Alapa'inui learns of an uprising against his brother and Maui Mō'i Kamehamehanui by Kauhaimokuakama. Fleeing to Hawai'i island, Kamehamehanui joins Alapa'inui until their return to Maui a year later, well provisioned and well-armed, to Lāhainā where the command center was established for forces and canoes which extended from Ukumehame to Honokawai.

Mō'i of O'ahu, Peleioholani, is summoned by Kauhaimokuakama, for assistance, responds and lands his forces at Kekaha with his regiments camped around Honolua and Honokahua.

¹⁰² Na Pohaku Ola Kapaemahu a Kapuni, Restoration 1997, Prepared for: The Queen Emma Foundation, Historic Preservation Division of the Department of Land and Natural Resources, Fields Masonry, July 1997

¹⁰³ Ruling Chiefs of Hawai'i, S.M.Kamakau, p.341

¹⁰⁴ SHPD Log Intake: 2019.02494

Alapaʻinui severely punished Kauhiaimokuakama, as often done in declaring war, by destroying the taro patches, cutting down the niu, or coconut trees, and destroying the famous ʻauwai, or waterways that extended down from Kauaʻula and Kahoma Valleys into the kula below to starve the opponent's forces.

A great battle ensued from Honokowai and into Lāhainā and to this day, *“heaps of human bones and skull, half-buried in various places in the sand, attest to the bitterness of the strife and the carnage committed”*¹⁰⁵.

Even after the subsequent historical and famed Battle of Kakanilua, and after Kahekili and Kalaniʻōpuʻu had met, about four days later to be precise, the royal court moved to Lāhainā.¹⁰⁶

The Battle of Kepaniwai

Even Kauaʻula figures into the historic accounts of epic battles:

*“Kahiki” where “Kalaniʻōpuʻu drove Maui warriors over the cliff” is the cliff at the head of Kauaʻula Valley. Mrs. Alice Kaʻae told me about it and said that it is also once of the cliffs over which Kamehameha drove Kalanikūpule's warriors during the Battle of Kepaniwai at ʻIao. The Pali Kahili looks like a warrior's helmet (mahiole) and face and is seen from both Lāhainā and Wailuku.*¹⁰⁷

The famous Kauaʻi Aliʻi Kāʻeokūlani of Kauaʻi, and kakaina, or younger brother, of Kahekili, on his way to his epic and final battle on Oʻahu, reinforced himself with aliʻi kaua and 1,200 warriors from Lāhainā.¹⁰⁸

The Battle of Nuʻuanu Pali

Lāhainā was the site of the famous war conference of Kamehameha and his war chiefs regarding strategy for attacking Oʻahu which culminated in the Battle of Nuʻuanu.

Amongst those who went on this expedition against Kalanikūpule on Oʻahu were Kaʻiana and Nāhiʻōleʻa who had many men with them, perhaps as many as six hundred or twenty-four hundred by the counting of this time.

On this journey of Kamehameha with his high chiefs and skilled generals, supported by those four ships which were navigated by his haole friends, they first landed at Lāhainā, Maui. At this landing, the shores of Lahaina were covered over by Kamehameha's large war canoes (waʻa kaua peleleu). Perhaps four miles of the

¹⁰⁵ Abraham Fornander, An Account of the Polynesian Race, Volume 2, p.140

¹⁰⁶ Kamehameha and his warrior Kekūhaupiʻo, Reverend Stephen L. Desha, Kamehameha Schools Press Honolulu 2000

¹⁰⁷ Inez Ashdown, September 28, 1952, in W.M. Walker, Archaeology of Maui, 77a

¹⁰⁸ Id at p.382

Lāhainā shoreline were covered by numerous canoes, from the boundary of Launiupoko almost to the hill of Keka‘a.

On landing at Lāhainā, Kamehameha called a conference of his generals and important ali‘i as well as his seers and counselors (kuhikuhipu‘uone). Also, at this conference was the renowned warrior Kekūhaupi‘o as Kamehameha never departed from the words of guidance by Holo‘ae and his son-in-law, Kekūhaupi‘o.

The reason for calling this conference was to appoint the classes of the various leaders of Kamehameha’s armies, and because he believed in discussing the war strategies of this expedition so that the leaders understood their duties. This was truly wise of this renowned ali‘i of this most famous island of Hawai‘i Nui Kuauli.
¹⁰⁹

This war conference was also the last gathering where ali‘i Ka‘iana decided to leave Kamehameha and join Kalanikūpule’s forces making it also historically significant as well as a place where battles not only occurred, but where battles were strategized and planned, and negotiated in peace and diplomacy as well.

Finally, areas of famous battles in ancient Hawaiian history and the movement of armies of chiefs and their warriors are often known today as the pathways of the huaka‘i pō, or ghostly processions known as night marchers:

The winds that blow occasionally are the Kaua‘ula, the Imihau, the Ho‘olua and the Kona. If a gentle sea breeze, like the Ma‘a‘a blows at night, that wind is the Ululoa. It is kapu to go on the sandy shores of Lāhainā then, lest one encounters the procession of ghosts, the marchers of the night, according to the old folks.¹¹⁰

There are corroborating accounts by native tenants of huaka‘i pō at nearby Olowalu as well:

Funny kind music, it had no tune...like monotone, there was music but no tune to it, so you know, that’s not real, it’s not real. We use to hear that, and my husband and I would get up and go to the window and go listen and see what is that sound coming from, but we knew that it was pō kane, when they walk in with the drum, and even the drum there was no rhythm, you know but the warriors are walking at night. I think the last time my husband and I heard that back here, was 1970s.

With regard to the path of the night marchers, Mrs. Rodrigues recalled that the trail went from heiau to heiau, or from Kaiwaloa Heiau to Heki‘i Heiau at Ukumehame. Another path in which the spirits would walk during certain times of the month was located between the school cottage and a fresh water well.

¹⁰⁹ Id at p.401

¹¹⁰ G.H. Hanakauluna, Features of Lahaina, Ke Au Okoa, October 26, 1871

Again, there remains much spiritual mana at Lāhainā and a continuing presence of the ancestors very much worth protecting with best management practices in the field of historic preservation and under current laws and rule.

Substantive OHA Concerns

Iwi: Bone; The bones of the dead, considered the most cherished possession, were hidden, and hence there are many figurative expressions with iwi meaning life, old age: Na wai e ho'ōla i nā iwi? Who will save the bones?¹¹¹

Issue 1: Failure to Timely and Consistently Notify OHA of Inadvertent Discoveries of Human Skeletal Remains

OHA continues to be dismayed at the lack of adherence by the SHPD to both law and rule pertaining to the timely notification of the discoveries of human skeletal remains across the islands after repeated reminders over the years.

Specifically, Section 6E-43.6, HRS, and Section 13-300-40, HAR:

§6E-43.6 Inadvertent discovery of burial sites. (a) In the event human skeletal remains are inadvertently discovered, any activity in the immediate area that could damage the remains or the potential historic site shall cease until the requirements of subsections (b) to (d) have been met.

(b) The discovery shall be reported as soon as possible to the department, the appropriate medical examiner or coroner, and the appropriate police department. As soon as practicable, the department shall notify the appropriate council and the office of Hawaiian affairs.

Furthermore:

§13-300-40 Inadvertent discovery of human remains. (c) Once the report of an inadvertent discovery has been made, the department shall do the following: (6) Notify the council member who represents the geographic region where the human skeletal remains were discovered, and the Office of Hawaiian Affairs;

OHA even established an email address, burials@oha.org, to help facilitate the SHPD's mandate. Yet consistently, inadvertent discoveries discussed on island burial council agendas or brought to our attention via other means are often not transmitted to our office at all. Some islands are more consistent than others with O'ahu and Maui complying more consistently than Kaua'i and Hawai'i Island.

¹¹¹ Hawaiian Dictionary, Pukui & Elbert, 1957

This information is critical to allow OHA to address beneficiary concerns regarding iwi cases across the islands, as well as determine the magnitude of the occurrences to help assess resources and strategies.

It is unfortunate that on Friday, October 23, 2020, OHA had to first learn about the inadvertent discovery of a human cranium¹¹² during excavation work by West Maui Construction in Kāuaʻula from social media posts. Details were scant and OHA had to garner more details four days later from an article in the Maui News¹¹³ on October 27, 2020, with no statutory notification provided to OHA yet by SHPD as of November 7, 2020¹¹⁴

OHA has been involved in both investigating this unpermitted trenching work, pursuant to a County of Maui exemption, as well as testifying at the October 8, 2020 meeting of the Maui/Lānaʻi Islands Burial Council on this issue. For the SHPD to keep OHA in the dark about this significant and controversial find when your department has mandates of timely notification by both law and rule is unconscionable and another stark example of non-compliance.

In addition, with coastal sea level rise, there will soon be a crisis of ancestral remains eroding out of shorelines across the islands at a previously unforeseen level. Maui has had seasonal erosion issues impacting burial sites for the past 20 years with no overall strategy implemented to address the ongoing exposure and destruction of these burials.¹¹⁵ Ancestral remains continue to be exposed to the elements and curiosity seekers.¹¹⁶

This letter shall serve as OHA's last administrative notice to timely and fully comply with §6E-43.6, HRS.

Issue 2: Support of Mauʻi/Lānaʻi Island Burial Council (MLIBC)

OHA offers the following comments and advice based upon our advisory and oversight role throughout Chapter 6E, HRS and Chapter 13-300, HAR, and our long history of involvement in historic preservation matters.¹¹⁷ OHA is also very familiar with the administrative functioning and implementation of both the law and rules in fulfilling the statutory mandates with regards to

¹¹² The skull, or poʻo, is the most sacred part of the skeletal body of kanaka ʻoiwi, as well as the most sacred part of the aliʻi.

¹¹³ Human remains found on West Maui Land site during protests, Maui News, October 27, 2020

¹¹⁴ OHA recently learned of the inadvertent discovery of seven burials in Kaʻaʻawa, Oʻahu via an email conversation between SHPD staff and a beneficiary. OHA received no notification of these seven burials discovered sometime in October.

¹¹⁵ OHA has conducted site visits to Hāmākuapoko last year and other coastal areas on Maui and witnessed first-hand burial pits and human skeletal remains eroding out of cliff-faces as well as sandy beach pits. In a two-week period in the late 1990s, then SHPD Maui Archaeologist Theresa Donham retrieved seventy individuals in a two-week period of high surf at Hāmākuapoko. The situation is only going to exacerbate in the coming decade.

¹¹⁶ Maui SHPD records of woman absconding with human skull at Kuʻau and when confronted by enforcement, then claiming she thought it was a monk seal skull.

¹¹⁷ Section 6E-43.5 Island burial councils; creation; appointment; composition; duties provides that "at all times, at least two of the regional representatives of each council shall have been appointed from a list of nominees submitted to the governor by the office of Hawaiian affairs, as provided under subsection (b). Furthermore, OHA staff has traditionally served on the various island burial councils in the past including full eight-year appointments as well as serving as Chairs of the councils on various islands.

the care, management and protection of unmarked burial sites and possesses a strong basis for our analysis, advice and recommendations to you and your office.¹¹⁸

The island burial councils are administratively attached to the DLNR, as represented by the SHPD. SHPD staff assigned to the MLIBC assists with the production and filing of meeting agendas, ensuring council members receive the necessary information to conduct agendized business, to include burial treatment plans, archaeological assessments and inventory survey reports, development plans and other necessary documentation. The SHPD staff also assists in the recording and transcribing of minutes of each burial council meeting.¹¹⁹

With regards to the issue of agency, the island burial councils, although administratively attached to the SHPD/DLNR, are their own separate and distinct agency from the SHPD/DLNR. The council may maintain a legal action against the SHPD and vice-versa. It is OHA's understanding that this has been a long-standing position of the Land and Transportation Division of the Department of the Attorney General based upon previous and direct communications with the Office of the Attorney General.¹²⁰

Unfortunately, it appears that when the MLIBC inquired with the Attorney General's office, during a relatively recent meeting, about what would happen if the MLIBC disagreed with the SHPD's interpretation of responsibilities and duties in a particular case or on a particular issue, the MLIBC was reportedly advised that they would have to seek their own legal counsel.¹²¹ The MLIBC, as volunteers, serving the interests of the populace, under the authority of Chapter 6E, HRS, should not be advised that they have to fend for themselves legally. They are entitled to competent and regular legal representation from the Department of the Attorney General, distinct and separate from the SHPD.

It is therefore conceivable that the SHPD/DLNR could have conflicting interests in your interpretation of the council's authority and mandates, than the council themselves. *OHA urges*

¹¹⁸ It should be noted that OHA currently employs four staff within Advocacy that previously worked for the SHPD for varying terms, with two of these staff directly working for the Burial Sites Program which included overseeing the staffing and administrative functioning the island burial councils, to include providing legal advice to the councils prior to the intermittent staffing by deputy attorney generals which is the current practice. Furthermore, our Compliance Enforcement Manager, Kai Markell, Esq. served at the SHPD for over ten years where he held the position of Director of the Burial Sites Program (BSP) and was co-drafter of Chapter 13-300, HAR along with the former Director of the BSP, Edward Halealoha Ayau, Esq.

¹¹⁹ § 13-300-28, HAR, Role of the department. (a) The department shall provide all necessary administrative support services to the council which shall include but not be limited to the following: (1) Post a notice of council meeting agenda with the Lieutenant Governor's office; (2) Make necessary arrangements to reserve a place for council meetings and assist in arranging site inspections; (3) Record and transcribe minutes of council meetings; (4) Acquire and verify all information necessary for a council determination of burial treatment and refer the matter to the council for determination; (5) Submit to the applicant in writing the council's determination and any recommendations accepted by the department; (6) Generate correspondence on behalf of the council to implement the applicable provisions of chapter 6E, HRS, and this chapter; (7) Provide information to the council on any matters relating to appropriate management, treatment, and protection of Native Hawaiian burial sites and on any other matters relating to Native Hawaiian burial sites; and (8) Conduct any other administrative acts as deemed necessary. (b) The department shall develop a statewide inventory which identifies and documents burial and reburial sites in accordance with section 13- 300-31.(c) Legal issues may be referred to the attorney general's office for appropriate action.[Eff SEP 28 1996 (Auth: HRS §6E-43.5) (Imp: FIRS §6E-43, 43.5, 43.6) §13-300-29 to 13-300-30 (Reserved)]

¹²⁰ Previous Department of the Attorney General Land and Transportation Supervisor Sonia Faust and Deputy Attorney General Dawn Chang direct communications with former Burial Sites Program staff.

¹²¹ Personal communication from MLIBC Chairperson.

the SHPD to consider providing separate legal counsel be present at every island burial council meeting, counsel separate and distinct from the legal counsel that regularly advises the SHPD/DLNR. This of course is contingent upon staffing and resources from the Department of the Attorney General's offices but the virtual and remote meeting format due to the COVID-19 pandemic has increased access to meetings for most and decreased other issues such as transportation and parking.

MLIBC MOTIONS

At the October 8, 2020 regularly scheduled and duly noticed meeting of the MLIBC, the council voted on and passed the following motions:

1. The Maui/Lāna'i Island Burial Council recommends the immediate cessation of all utility installation work in the area of the Pioneer Mill Cemetery, Jacobson Cemetery and Pu'ehu'ehuiki Cemetery in order to avoid burial sites and cemeteries associated known from this area, based on testimony from lineal and cultural descendants, and maps, which indicate the presence of iwi kupuna in the proposed utility installation route within an area containing known historic Burial Grounds on Kaua'ula Road (TMK: 02-04-06-015) and installation along Mill Street at Hokiokio Place (TMK 02-04-07-003:031 and 02-04-06-013). Ahupua'a of Pāhoa, District of Lāhainā, Island of Maui.

2. The Maui/Lāna'i Island Burial Council recommends that SHPD review this project and conduct additional archaeological work in order to discern if a suitable route exists, and the location of a such a route, for the utility installation project within an area containing known historic Burial Grounds on Kaua'ula Road (TMK: 02-04-06-015) and installation along Mill Street at Hokiokio Place (TMK 02-04-07-003:031 and 02-04-06-013). Ahupua'a of Pāhoa, District of Lāhainā, Island of Maui.

3. The Maui/Lāna'i Island Burial Council recommends that SHPD, Principal Archaeologist for the County of Maui, Dr. Janet Six, and the MLIBC conduct an agendized site visit to the project area at Kaua'ula Road (TMK: 02-04-06-015) and installation along Mill Street at Hokiokio Place (TMK 02-04-07-003:031 and 02-04-06-013). Ahupua'a of Pāhoa, District of Lāhainā, Island of Maui.

These motions were in direct response to descendant and community testimony delivered to the MLIBC and in response to a September 17, 2020 letter to the MLIBC by Maui County Councilmember Tamara Paltin, which was copied to OHA, and which stated in relevant part:

At the beginning of last month, Lāhainā resident Ke'eaumoku Kapu made me aware of two construction projects that looked to have little to no oversight and no archeological monitoring. First, a private entity had begun cold planning on Kaua'ula Road (TMK 02-04-06-015). Secondly, that same entity was trenching for

a utility installation along Mill Street at Hokiokio Place (TMK 02- 04-07-003:031 and 02-04-06-013). Despite concerns over burials from Mr. Kapu and others, the landowner insisted that it was his property, and he could proceed as he sees fit.

As a result, both Mr. Kapu and I each submitted Requests for Service with the County. After we waited for a response for several weeks, an employee with Public Works told us the County has no jurisdiction on the mauka portion of Kaua‘ula Road, and utility installation does not require a permit. Because there was no permitting process, there was no trigger for archaeological monitoring or SHPD review, even though there are known burials in the area (see pages 25 and 26 of attachment 1).

Moreover, it is my understanding that these construction projects are taking place adjacent to an SMA area with a known historic burial ground and an archaeological preservation area with a suspected burial (see attachments 2 and 3).

The motions passed by the MLIBC were also in fulfilment of the council’s statutory mandates, specifically:

§13-300-24, HAR: Duties and responsibilities. (a) The primary responsibility of the council shall be to determine preservation or relocation of previously identified Native Hawaiian burial sites as set forth in this chapter.
(b) The council shall assist the department in the inventory and identification of Native Hawaiian burial sites by providing information obtained from families and other sources.
(c) The council shall make recommendations to the department regarding appropriate management, treatment, and protection of Native Hawaiian burial sites, and on any matters related to Native Hawaiian burial sites. (Emphasis added)

Publicly recorded statements by SHPD representatives appear to both dismiss and undermine the responsibilities of the MLIBC with regards to their valid concerns regarding the excavation work occurring at Kaua‘ula.

It is vastly unjust to not effectively interact and guide the MLIBC with regards to the roles of the SHPD and reinforce the administrative processes of the MLIBC, allowing them to craft and make two important motions, then to question their role and responsibilities afterwards, nearly a week later when our beneficiaries felt it necessary to exercise their constitutionally protected rights to protect the ancestral remains of their ancestors.

The MLIBC sought to avoid this situation and the resultant arrests. While the MLIBC may not have direct authority to issue a cease-and-desist order, they certainly can urge a time-out as can the SHPD and the County of Maui.

OHA would like to emphasize that the legal disposition of the dead, throughout common law, belongs to the next of kin, the 'ohana. In the absence of identified descendants, the island burial councils fulfill this important role in acting on behalf of the 'ohana in determining proper care, management and protection of ancestral human skeletal remains.

In the presence of identified descendants, the island burial council, supports the requests of the 'ohana in effectuating their important statutory role in the care, management and protection of ancestral remains.

SHPD would be well advised to support the MLIBC Motions rather than seek to undermine or dismiss them.¹²²

Issue 3: Section 6E-42, HRS Interpretation

OHA also understands that the SHPD's publicly stated position that due to the absence of permit for the current utility work at Kaua'ula, due to the County of Maui Ordinance Exemption, that Section 6E-42, HRS no longer applies and effectively renders the SHPD impotent with regards to intervening in the exempted waterline work at Kaua'ula. This is a most disappointing interpretation of your office's statutory mandates after three decades of island burial council functioning.

Section 6E-42, HRS, states:

§6E-42 Review of proposed projects. (a) Except as provided in section 6E-42.2, before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places.

While the County of Maui exemption of the Kaua'ula waterline work apparently does not require a permit for which the SHPD would be provided an opportunity to review and comment in accordance with Section 6E-42, HRS, the SHPD's statutory mandates and role is clearly not defined by only one section of Chapter 6E, HRS, especially with regards to the care, management and protection of unmarked burial sites.

Given testimony of the existence of not only unmarked burial sites in the project area but three separate cemeteries with most surface markers lost to the ravages of time or through intentional

¹²² OHA understands that the current SHPD Administration holds that the island burial councils are not Native Hawaiian Organizations (NHO) pursuant to the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), despite almost three decades of various island burial councils being not only recognized NHOs under NAGPRA but official NAGPRA Claimants in many concluded as well as current repatriation efforts.

grading and grubbing work for agricultural use¹²³ over the years, this is especially important that the SHPD recognize its constitutional and statutory responsibilities.¹²⁴

A. Constitutional Mandates

OHA would like to remind the SHPD that the important responsibilities to protect iwi kupuna is a mandate of the Hawai'i Constitution. Article IX, section 9 recognizes the significance of the cultural resources of Hawai'i by granting the State of Hawai'i the power to preserve such resources.

Furthermore, Chapter 6E, HRS classifies burial sites as part of Hawai'i's public trust.

§ 6E-13, HRS, provides:

Any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person upon a showing of irreparable injury, for the protection of an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration, or transfer of the property or burial site (emphasis added).

Furthermore:

*According to the State legislature, the public has a vital interest in the proper disposition of its deceased persons, which is in the nature of a sacred trust for the benefit of all. 1990 Haw. Sess. Laws Act 306 § 1 at 956. Because burial sites are part of the public trust, one cannot own a burial site — not even a landowner who owns the land upon which iwi are situated can claim ownership over that burial.*¹²⁵

And to elucidate further:

*The public trust doctrine is a fundamental principle of constitutional law in Hawai'i. When anyone, including the State and its political subdivisions, takes action that may impact iwi and moepū, regardless of whether they are known to exist, that individual or entity must do so "pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our State."*¹²⁶

¹²³ It should be noted that intact subsurface historic and cultural sites can be found even when the surface has been disturbed by intensive agricultural activities. This was proven especially on the island of Maui in former cane fields and on O'ahu in former pineapple fields.

¹²⁴ (1) §6E-42 applies to any project "which may affect historic property ... or a burial site", as defined by this section; (2) a burial site can be found in a cemetery; and (3) a cemetery can also be a historic property, as also defined by this section, church building project was not exempt from the historic preservation review process required by §6E-42 and its implementing rules because the project involved a cemetery. 128 H. 455 (App.), 290 P.3d 525 (2012)

¹²⁵ *Ho'i Hou I Ka Iwikuamo 'o, A Legal Primer for the Protection of Iwi Kupuna in Hawai'i Nei*, Baldauf & Akutagawa, 2013

¹²⁶ See *In re Waiāhole Combined Contested Case Hearing*, 94 Hawai'i 97, 118, 132, 9 P.3d 409, 444, 455 (2000).

Additionally, article XII, section 7 of Hawai‘i’s Constitution recognizes and protects customary rights to engage in Kānaka Maoli religious and cultural practices, subject to the State’s ability to reasonably regulate these rights.¹²⁷

Significantly, Hawai‘i’s highest court has acknowledged that this constitutional provision protects the cultural and religious practice of preserving iwi kūpuna and also upheld a Native practitioner’s claim that the desecration of iwi kūpuna caused cultural and religious injury.¹²⁸

In the Supreme Court of the State of Hawai‘i ruling in *Paulette Ka‘anohiokalani Kaleikini vs. Laura Thielen*, No. 28491 issued on August 18, 2010, the Supreme Court affirmed this responsibility by stating:

*As indicated by Kaleikini, the issue presented here—the availability of judicial review of decision relating to the removal of Native Hawaiian burial sites—is of great public importance. In amending chapter 6E to include, inter alia, the relevant sections pertaining to Native Hawaiian burial sites, the legislature specifically recognized that “[a]ll human skeletal remains and burial sites within the State are entitled to equal protection under the law regardless of race, religion, or cultural origin. **The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all** [.] 1990 Haw. Sess. Laws Act 306, § 1 at 956 (emphasis added). The legislature further found that “native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance.” *Id.* **Such legislative pronouncements evince a recognition of the public importance of the issue***

¹²⁷ See e.g., Haw. Const. art. XII, § 7 (holding that the State shall protect all customary and traditional rights exercised for subsistence, cultural, and religious purposes of ahupua‘a tenants who are descendants of native Hawaiians who inhabited Hawai‘i before 1778); Haw. Rev. Stat. § 1-1 (noting the common law of England is the common law of Hawai‘i except for when it conflicts with an established Hawaiian usage); Haw. Rev. Stat. § 7-1 (“people shall not be deprived of their right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live”); *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982) (affirming the right of Kānaka Maoli to practice traditional gathering rights on undeveloped lands within their ahupua‘a); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992) (holding that traditional and customary rights may be practiced beyond the boundary of the ahupua‘a so long as the practice was traditionally exercised in this manner); *Public Access Shoreline Hawai‘i v. Hawai‘i Cnty. Planning Comm’n*, 79 Hawai‘i 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995) [hereinafter “PASH”] (holding that the State and its agencies are “obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible”); *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 46-47, 7 P.3d 1068, 1083-84 (2000) (holding that when reviewing a petition for reclassification of district boundaries, the State must make specific findings and conclusions regarding: “(1) 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; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist”); *State v. Hanapi*, 89 Hawai‘i 177, 970 P.2d 485 (1998) (establishing a three factor test to prove defense of constitutionally protected conduct: (1) he or she must be a Native Hawaiian; (2) the claimed right must be constitutionally protected; and (3) the right must be practiced on undeveloped lands). *Ho‘i Hou I Ka Iwikuamo‘o, A Legal Primer for the Protection of Iwi Kūpuna in Hawai‘i Nei*, Baldauf & Akutagawa, 2013

¹²⁸ See *Kaleikini v. Thielen*, 124 Hawai‘i 1, 26, 237 P.3d 1067, 1092 (2010). *Ho‘i Hou I Ka Iwikuamo‘o, A Legal Primer for the Protection of Iwi Kūpuna in Hawai‘i Nei*, Baldauf & Akutagawa, 2013

presented here, i.e., “the process of deciding to remove previously identified Native Hawaiian burial sites.” Thus, the question presented here, like in Right to Know, is of a public nature. (Emphasis added)

Furthermore, the Supreme Court espoused:

In this case, Petitioner’s “constitutionally protected right” was the denial of her right to exercise her Native Hawaiian customary and traditional practices—specifically, to ensure that the iwi receive proper care and respect. Native Hawaiian rights are protected by article XII, section 7 of the Hawai‘i Constitution. Pele Def. Fund v. Paty, 73 Haw. 578, 616-21, 837 P.2d 1247, 1269-72 (1992); PASH, 79 Hawai‘i at 434, 903 P.2d at 1256. Article XII, section 7 of the Hawai‘i Constitution provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

In light of these constitutional provisions, native Hawaiians, whose customary practices demand that the iwi remain in place, have equal rights to a contested case hearing where these practices are adversely affected.

The Hawai‘i Supreme Court has firmly established the great public interest in protecting the bodies of the deceased and acknowledged that Native Hawaiians seeking to protect ancestral burial sites is a constitutionally protected right as a Native Hawaiian customary and traditional practice on par with a landowner’s interests regarding rights to a contested case involving the removal of ancestral burial sites.

The SHPD possesses constitutional mandates, responsibilities and duties above and beyond Chapter 6E, HRS and Chapter 13-300, HAR and OHA encourages your office to immediately fulfill them.

In looking at the intent of Chapter 6E, HRS, the legislature opined:

[§6E-1] Declaration of intent. The Constitution of the State of Hawaii recognizes the value of conserving and developing the historic and cultural property within the State for the public good. The legislature declares that the historic and cultural heritage of the State is among its important assets and that the rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage. The legislature further declares that it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens. The legislature

further declares that it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property. [L 1976, c 104, pt of §2] (Emphasis added)

Importantly, Section 6E, HRS states:

§6E-3 Historic preservation program. There is established within the department a division to administer a comprehensive historic preservation program, which shall include but not be limited to the following:

(1) Development of an ongoing program of historical, architectural, and archaeological research and development, including surveys, excavations, scientific recording, interpretation, signage, and publications on the State's historical and cultural resources;

(3) Development of a statewide survey and inventory to identify and document historic properties, aviation artifacts, and burial sites, including all those owned by the State and the counties;

(7) Provision of technical and financial assistance to the counties and public and private agencies involved in historic preservation activities;

(10) Coordination of the evaluation and management of burial sites as provided in section 6E-43;

(11) Acquisition of burial sites in fee or in any lesser interest, by gift, purchase, condemnation, devise, bequest, land exchange, or other means, to be held in trust;

(14) Employment of sufficient professional and technical staff for the purposes of this chapter which shall be in accordance with chapter 76;

(17) Development and adoption, in consultation with the office of Hawaiian affairs native historic preservation council, of rules governing permits for access by native Hawaiians and Hawaiians to cultural, historic, and pre-contact sites and monuments (Emphasis added).

Clearly Section 6E-42, HRS is but one section of the comprehensive and expansive tools afforded the SHPD to effectuate the important historic preservation program in Hawai'i as envisioned by the legislature and people of Hawai'i, especially with regards to the care, management and protection of important trust resources.

While OHA looks forward to the collaborative effort between the SHPD, County of Maui and OHA regarding the production of cultural sensitivity GIS overlays to help in future historic preservation efforts in identifying areas of low, medium and high cultural sensitivity in land planning permitting and approvals, it is OHA's understanding that the area of Kaua'ula currently impacted by the utility trenching would warrant both a medium and high rating of cultural sensitivity according to the County of Maui Cultural Resource staff.

That unpermitted work is already being performed in this area should not preclude both intervention and negotiations to effectively protect these public trust resources. Furthermore, the County of Maui is basing its assessment on GIS layers produced by the SHPD which apparently substantiates the concerns of OHA's beneficiaries regarding the likelihood of adversely and irreparably impacting unmarked burial sites.

According to official minutes of the Maui Cultural Resources Commission (MCRC) Regular Meeting in August 7, 2008, brought to OHA's attention by our Beneficiary Ke'eaumoku Kapu, in a discussion under Agenda Item C.2.a. titled: *"Mr. Fred Cajigal, on behalf of Hawai'i State Department of Transportation-Highways Division, requesting comments on a Proposed Landscape Planting Plan as a Condition of the Special Management Area Use Permit for the Honoapi'ilani Highway Widening Project from Lahainaluna Road to Aholo Road, Lāhainā, Maui, Hawai'i."* the Dept. of Transportation sought the advice of the MCRC regarding the final design for the landscaping in the project area which was a condition of approval for the special management area permit by the Maui Planning Commission.

During the consultations and discussions which ensued in the official minutes, it was revealed that part of the landscaping plan was to excavate the foundation for a wall that was to run about a mile along the mauka side of Honoapi'ilani Highway from Shaw Street to Aholo Road.

MCRC Vice Chair Erik Frederickson, himself an archaeologist, descending from a family of archaeologists owning the archaeological firm of Xamanek Researchers L.L.C., raised concerns during the meeting regarding the depth of the excavation given the length of the project.

Vice Chair Frederickson inquired whether the SHPD knew about the proposed trenching given their finding of "no historic properties affected" and called Hinano Rodrigues, SHPD History and Culture Branch Chief, to the table.

Mr. Rodrigues stated:

"Hinano Rodrigues. State Historic Preservation. Based upon the communication that they provided to me, it looks as though maybe the walls weren't discussed in 2006 so now we have to a new issue with respect to whether or not we would hit historic properties."

Vice Chair Frederickson, in response to HI DOT Representative Charlene Shibuya, the presenter, stating that the noise walls were a Federal requirement, stated himself:

"Yeah, no, and I understand that, but one of the concerns that I would have, you know, just from an archaeological point of view, is this area, we've done a fair amount of work on the mauka side of Honoapi'ilani Highway, makai too, but I mean pretty close to this, and when Honoapi'ilani Highway was widened, there were several burials that were encountered that had to be relocated and that sort of a situation could certainly occur somewhere down the road, so to speak, or the wall, and so it might be, I think certainly it would be appropriate for SHPD to take a look

at this again given this, you know this, I mean now that there's an actual, you know, design."

The following excerpts and exchanges from the official minutes, included in their entirety, are particularly important and relevant to the current controversy at Kaua'ula regarding the exempted utility trenching:

Ms. Shibuya: *Yeah, cause we know there's that cemetery over here and from what I understand that I guess some burials might have been in there, I'm not sure...*

Mr. Frederickson: *Yeah...*

Ms. Shibuya: *But, you know, they talk about that there were burials.*

Mr. Frederickson: *And there are burials that aren't necessarily in the cemetery that nobody knows where they are.*

Ms. Shibuya: *Yeah. Correct. Yeah, cause...*

Mr. Frederickson: *We found...we found a couple just testing on the other side in the cane fields.*

Ms. Shibuya: *Yeah, cause I understand that up here or something, you know, they found some stuff.*

Mr. Frederickson: *Yeah.*

Ms. Shibuya: *So we're aware that, you know, just because it was disturbed by, you know, roadways, there would be some more stuff underneath there.*

Mr. Frederickson: *But I think it would be a good idea to have SHPD revisit this. Yeah, sorry Hinano.*

Mr. Rodrigues: *Hinano Rodrigues, SHPD. Your right Erik. And actually I do know where there are burials that are unmarked. The assumption is made that the burials are restricted to Pu'ehu 'ehu 'iki Cemetery, and I cannot tell you because that information was given to me confidentially, but there are burials in the area that most people don't think are there but this is Opunui family area and so the Opunui family are very aware of burials there that are unmarked.*

Mr. Frederickson: *And there could be burials that people just don't know about cause it's even that much further, you know, back in time and, you now, that information got lost.*

Mr. Rodrigues: *Right.*

Mr. Frederickson: *But certainly there could be stuff there.*

Mr. Rodrigues: *So my only concern is, and I'm happy with the communication between the State and SHPD, my only concern is that in looking at the letter where we approved, looking at the letter where we said no historic...*

Mr. Frederickson: *No effect. Yeah.*

Mr. Rodrigues: *Effect. I looked at the rationale in that letter and it talked about, well, they're only going to do just this little bit of work, but I don't see any mention of the wall and doing a wall would actually kick it up a notch. Just one more point since I'm up here, Charlene, you know, if you read the writings of the people who came into Lāhainā way back then, they always talk about Lāhainā and the ulu trees. Yeah, that's why we hae Malu'uluolele, so my suggestion is maybe trees could be ulu trees.*

The meeting then digresses into a somewhat lengthy discussion about ulu trees and liability issues, then concludes this section with:

Ms. Shibuya: ...on the issue of the wall, what I can do is do a formal, now that we have, you know, full construction plans, do a submittal, a new submittal to SHPD and have them review it. And of course, you know, we can always, during construction, we can keep them in a tight loop during the work on the wall cause that's going to be probably the more significant...

Mr. Frederickson: Excavation.

Ms. Shibuya: Excavation type of work.

Then the relevant discussion finally concludes with:

Mr. Frederickson: Yeah, and excuse me Robyn, SHPD may, I don't know, but they may, SHPD may end up saying that the wall excavation may be deep enough that it merits actual monitoring.

Ms. Loudermilk: And if it does require that, then they would be required to do that, and we would, the Planning Department would assist them in terms of if there's, we usually get the first call, and then we can work with the Maui staff in terms of the appropriate mechanisms or procedures to go forward to make sure everything gets covered. So basically, those two items. Is that my understanding Commission?

Such that the issue of unmarked burial sites, cemeteries and other sub-surface historic and cultural sites in the vicinity of the current utility work at Kaua'ula were discussed in detail a decade ago by the MCRC and the SHPD as valid concerns, it is extremely troubling that the SHPD, in the absence of Section 6E-42 review, or in the case of HI DOT, Section 6E-8, HRS, would not intervene in the current controversy to fulfill mandates to advise the County of Maui as well as help identify and protect unmarked burial sites.

The exempted utility trench work which progressed for quite some distance without any archaeological monitoring, voluntarily in this case, combined with the County exemption conditions that the trench work effectively be "excavated, pipe laid, and then backfilled as quick as possible"¹²⁹ is a disaster in the making for determining whether any sub-surface historic sites, including ancestral human burials, were adversely impacted or otherwise destroyed.

It appears that the current utility work was in fact performed in great haste and quite a distance was covered prior to the implementation of voluntary archaeological monitoring which has already resulted in the discovery of a human cranium.

¹²⁹ 20.08.031 - Limited exclusions.

Sections 20.08.040 through 20.08.160 regarding permit applications and requirements shall not apply to the following:

4. ***Trenching for underground utilities when the trenches are backfilled, and the surface restored to its pre-existing grade and ground cover.*** (Ord. 2684 § 4, Maui County Code, 1998)

Issue 4: Unmarked Burial Sites and Cemeteries

Finally, there appears to be a genuine jurisdictional issue revolving around the unmarked cemeteries¹³⁰ in the area of the current utility trenching.

The MLIBC in their motions to SHPD identified at least three cemeteries in the project area in which unmarked burial sites¹³¹ are threatened:

1. *Pioneer Mill Cemetery*¹³²
2. *Jacobson Cemetery*¹³³
3. *Pu'ehu'ehuiki Cemetery*¹³⁴

With regards to the Pioneer Mill Cemetery (PMC), depicted on an 1884 map, there appears to be a genuine material issue of fact as to whether the PMC was ever formally consecrated and utilized for the interment of human remains. There has been conflicting evidence presented in various public communications and until such time that the available information, documents, records, testimonies, etc. can be sorted out, the PMC should be assumed to be a highly sensitive area containing unmarked human burials.

There is a death certificate from 1909 which states the place of burial as the Pioneer Plantation Cemetery which raises serious concerns.¹³⁵ There is also declared testimony by Kalani Kapu, attesting to a 1997 sworn affidavit by his aunt, Lucy Pornellos, that Mr. Kapu's grandmother, Julia Kealo Kapu, was buried in Haleka'a in the Pioneer Mill Cemetery. Ms. Pornellos remembers the graveside service not far from the Old Government Road, now known as Mills Street. Mr. Kapu also remembers his father leaving the household in times of quarrel to find solace down in the fields of Haleka'a searching for his own mother's grave.¹³⁶

¹³⁰ Referencing a proposed project by Ka'anapali Land Management Corporation, in 2009, an archaeologist noted: "*There are two designated cemeteries that border the project area but are not contained within it. They are along Honoapi'ilani Highway on the mauka side of the road on the southern end of the project area. The cemeteries are on the corner of Aholo Road and the highway.*" An Archaeological Inventory Survey of a 480-Acre Parcel of Land in Waie'e And Various Ahupua'a, Lāhainā District, Island Of Maui (Tmk: [2] 4-6-13, 14, 15, 16, 18, 25 And 4-6-01, 02) Ka'anapali Land Management Corporation, Xamanek Researches, LLC, 2009

¹³¹ Note that for purposes of Chapter 6E, HRS and Chapter 13-300, HAR, the term "unmarked" does not mean the absence of a surface marker, or even an engraved headstone with names and dates, but "unmarked" in the sense of not being in an "actively used and maintained" cemetery dedicated in accordance with Chapter 441, HRS under the Department of Health.

¹³² As depicted on an 1884 map of Lāhainā in the possession of Mr. Ke'eaumoku Kapu.

¹³³ (TMK: 4-6-15: 02)

¹³⁴ "*The Puehuhueiki4 Cemetery (TMK: 4-6-13: 3, 4, &11) appears on the TMK map as one cemetery but the northern portion is fenced off and is locally sometimes referred to as the Chinese Cemetery. This cemetery has its own name (in Chinese) and a separate designation. The correct spelling for the ahupua'a which this cemetery sits on is Puehuhueiki. It is assumed that the spelling on the sign is incorrect. The TMK map lists this land as Puehuehu Cemetery.*" An Archaeological Inventory Survey of a 480-Acre Parcel of Land in Waie'e And Various Ahupua'a, Lāhainā District, Island Of Maui (Tmk: [2] 4-6-13, 14, 15, 16, 18, 25 And 4-6-01, 02) Ka'anapali Land Management Corporation, Xamanek Researches, LLC, 2009

¹³⁵ Ms. Haru Fujiwara, Territory of Hawai'i Record of Death, Lāhainā, Maui

¹³⁶ A Deposition for known Burials along Mill Street (also known as the old Government Rd) situated in the Ahupua'a of Haleka'a, Lāhainā, HI, by Kalani Kapu, based upon a sworn Affidavit by Lucy Aikala, aka Lucy Pornellos, executed on December 29, 1997 and filed in the Bureau of Conveyances, State of Hawai'i.

More compelling evidence of both the existence and usage of Pioneer Mill Cemetery can be found in the October 29, 2020 recorded oral testimony of Mr. Raymond Gonsalves as interviewed by Jennifer Ms. Noelani Ahia.

In his first interview, Mr. Gonsalves states:

Pioneer Mill Cemetery used to have a middle road from the Pu'ehu'ehuiki cemetery, used to have a dirt road that goes up and used to have a lot of koa bushes in the center of it and the road used to go up. That's what they used to call a cemetery, when they leave the koa growing big in that area and had sugarcane around it. So I remember the days used to have koa in the middle and sugarcane all around those cemetery. And each camp on the West side of the island, all those plantation camps, they was all being buried in that area, because the camps, there's a lot of individual camps all over the place and people get buried in those areas.¹³⁷

In his second interview the same day, Mr. Gonsalves both reaffirms and expands on his recollection:

JNA: *What is it about the koa bushes? What does that designate?*

RG: *It designates that back in the days, all the guys that used to work in the mill, that is the cemetery area. So they always work around it, and they used to leave the koa bushes growing inside. They know something might happen, so they work around it and they plant cane around it, those koa bushes. And there are piles of rocks you sometimes see over there, you know, and they just leave it. Olowalu has the same thing, if you go up, the center road going up too, and you look on the left-hand side, there is a Japanese cemetery there. So wherever field you go, you look at, there's a lot of koa bushes and sugarcane you plant around it. Around the cemetery.*

JNA: *So on Aholo Road, you said, next to Puehuililili Cemetery, you remember coming up that road?*

RG: *Yeah, yeah, there's a road that goes up in the center, and there's a lot of koa bushes, the left-hand side, when you going up this way (pointing to map), left-hand side. I remember seeing koa bushes when I was young, but all around it was sugarcane. That gotta be another cemetery they had over there. So like the Jacobsen Cemetery, they plant sugarcane around it, but they shrunk it. I think it was bigger back then. But who knows, over the years, it shrank, but the tombstones, they couldn't da kine, but the (unintelligible) was the one (unintelligible). So they let the koa bushes grow, the haole koa, and the trees growing on them now, and the reason why they work around that now because of the cemeteries. And every camp has one.*

JNA: *Someone said that maybe whoever was buried at the Pioneer Mill Cemetery, that the bodies had been moved?*

¹³⁷ Emailed as an m4a audio file by Jennifer Noelani Ahia to OHA on Thursday, October 29, 2020 at 10:25am.

RG: *I don't think anyone when move them, as I never seen mine, as I have been told, from way before, they never move no bodies from over there. All I knew was after that it was all sugarcane.*

JNA: *Did you say they put the fill or something?*

RG: *They always backfill the land because it used to be a hanawai field, that was all the cane wash water, all the dirty water, that used to hanawai the lower fields. And then they started going into drip system, so they backfill them.*

JNA: *So where the Pioneer Mill Cemetery is shown on the map...*

RG: *They cover...*

JNA: *Its been covered...*

RG: *Yeah..I don't think they moved anything from there. Pretty much if you look all the camps, if you look around, its all been covered. There a lot of sugarcane camps, whoever, way back in the days when I heard the stories from a lot of the kupuna who was talking, and I hang with a lot of them and stuff, they tells me that every single camp had their own cemetery. (Unintelligible) has their own cemetery too and we don't know what they doing up that side because they built a lot of rich houses so we don't know if they when cover that up. But I remember it was on the left-hand side of the cemetery. My name is Raymond Gonsalves. I lived at Waine'e Village Camp way back in the days, before the Mill shut down and this is all my playground over here, and I learned a lot of history from the elders, they tell me a lot. Aloha. (October 29, 2020)¹³⁸*

At the October 8, 2020 regularly scheduled and duly noticed meeting of the MLIBC, and without official or draft minutes available at the time of the composition of this letter, developer Josh Dean, testifying before the council apparently stated that the trenching work performed through the area where the Pioneer Mill Cemetery is depicted on a map, was done with extra caution given the potential that unmarked burials may be discovered in the area.

It is unclear if some form of archaeological monitoring occurred, and under what conditions or qualifications. However, if remains were inadvertently discovered, it could be seen as a violation of Chapter 6E, HRS and Section 13-300-43, HAR, which states:

§13-300-43 Penalty. (a) It shall be unlawful for any person, natural or corporate, to knowingly take, appropriate, excavate, injure, destroy, or alter any burial site or the contents thereof, located on private lands or lands owned or controlled by the State, or any of its political subdivisions, except as permitted by the department.

Arguably, the trenching work through the PMC was done cautiously, however, any impact to an unmarked burial site would be considered “knowingly” and without the permission of the department, under the assumption that the SHPD didn't give any approval for this work tacitly or expressly.

¹³⁸ Emailed as an m4a audio file by Jennifer Noelani Ahia to OHA on Thursday, October 29, 2020 at 10:27am.

With regards to the Jacobsen Cemetery, a descendant of ancestors buried in this cemetery, Charles Tilton,¹³⁹ shared in an email sent to Hinano Rodrigues of the SHPD, on September 25, 2020, with the Subject: Cemetery Desecration, in relevant part:

I wanted to bring to your attention the desecration that has already occurred at the "Jacobsen's Cemetery" where my ancestors, along with several other ohana are buried. We did discuss this some time ago. Mahalo to Keeaumoku for bringing this out on his facebook posts -- which I happened to catch a few nights back. As per Keeaumoku's observation of the area, it seems the new landowner -- Wainee Land Development or something like that -- has already covered over most of the cemetery. Fortunately, my ancestor's tomb survived the "cover up" somehow -- perhaps because it's remotely hidden further back.

There are plans to run a pipeline through this area -- which seems to be proceeding along unchecked. Isn't there supposed to be an archeological survey prior to the start of these projects? It appears this has been sadly overlooked, or more than likely, blatantly ignored, in light of what has already occurred.

Mr. Rodrigues of SHPD responded later that day, in relevant part:

As far as I know, the installation of the pipeline is not near your 'ohana grave site. The landowner has hired an archaeological firm to do voluntary monitoring and I already informed them of those graves. If it is okay with you, I will tell them to clean up the area carefully and they are the new landowner. I believe the prior landowner was Kaanapali Land?

SHPD cannot ask for an AIS because there is no necessary permit that would trigger the law (6E42) that would get us involved. Since permits are a County kuleana, it is the County that would ask us to comment if the landowner filed for a permit. It is at that point that we can recommend an AIS. But that is not the situation here.

I was informed that the landowner has hired a monitoring firm and they are obligated under the law to report any discovery of human skeletal remains or a burial site. To date, there has been none.

The following morning, on September 26, 2020, Ke'eaumoku Kapu added the following to the conversation, in relevant part:

Aloha Charles and Hinano. Mahalo for reaching out and addressing this issue of a possible violation by this new waine'e land company. To my observation because

¹³⁹ Mr. Tilton is in possession of photographs of the Jacobsen Cemetery from 2008 and 2014 during his last visit which show homeless camps and incredible garbage strewn throughout the cemetery. It is OHA's understanding that the bulldozing of the homeless camps and debris occurred approximately five-years ago and it is unclear if burial markers were impacted either by the homeless populace or the County bulldozing.

I have gone there many times and have personal knowledge of this cemetery and the full extent of the surrounding area that more than half of this cemetery has been covered over of fill by operators from West Maui land company especially an area that was cared for by kupuna Oberly Kaanana which I have helped a few times when he lived on Maui and until his ohana moved him to the big island the caring and manicuring of his great grandmothers burial which was makai of the known 6 identified burials of the Jacobson cemetery and the concern raise by Charles Tilton which I have met a few times when he came to Lahaina inquiring about the possibility of cleaning the Jacobson cemetery saddens me that it couldn't be accomplished with the prior land owner and the red tape having to deal with mainly liability issues from the prior land owner then and unexpectedly knowing the property was recently sold 2 years ago to Wainee villages Peter Martin land company who has no regard to the protection of any and all historic properties and especially the palina of post and precontact sites.

Yes you can say that the laying of the pipeline may not be near the area of the cemetery non the less this company should be taking every precaution necessary to assure historic properties are not impacted only until our organization waived red flags only then Waine'e decided to hire a monitor throughout this whole project area from the crossing of Kaua'ula stream to Lahaina town an extent of 3 miles of pipeline being allowed to cut through multiple ili's and LCA without being required to have a permit or a monitoring plan is totally unacceptable on the part of the county and State SHPD behooves me to think we have laws that are set in place to assure land companies follow the full extent of the law which they are not.

I have raised enough factual issue to require for a full extensive investigation to the magnitude of multiple inter agency conflicts and ethical violations.

If the Land company does go forward with cleaning the Jacobson cemetery i want to request that a public notice be sent out to all heirs and anyone knowing of the location of these know and possible unknown burials within this location be sought out and a long term preservation plan be done.

Mahalo again for including us in this email and I hope we can help in any way to find remedy for this great kuleana before us.

OHA finds it deeply troubling that nearly a month later, after the SHPD is put on notice of serious concerns and unresolved issues, that five of our beneficiaries are arrested trying to protect unmarked burial sites in the project area, unmarked burial sites of which the SHPD was made aware of, and acknowledged, as far back as the August 7, 2008 regularly scheduled meeting of the MCRC referenced above.

Finally, with regards to Pu'ehu'ehuiki Cemetery, which was discussed also in the 2008 MCRC meeting regarding the work along Honoapi'ilani Highway, as well as included in the October 8, 2020 MLIBC meeting motions to SHPD for a cessation of all excavation until a proper

assessment could be made of the pipeline trajectory. There is an associated Chinese Cemetery officially referred to as the “*Man Fook Tong*” cemetery in the Maui Cemetery Plat Book for Maui County. It shouldn’t be assumed that this cemetery only contains remains of Chinese ancestry as there very well may be Native Hawaiian remains in and around the cemetery as well as pre-contact unmarked burials as well both within and outside of the known boundaries.¹⁴⁰

This raises the larger question of how exempted trenching work can proceed through, or perilously close to, identified and recorded cemeteries, as well as in the vicinity of unmarked burials sites located outside of these three known cemeteries, through previous archaeological work, with seeming impunity from both State and County agencies.

Now we have the impacts and disturbance to a human cranium.

Cemetery Jurisdiction

As the SHPD is aware from the protracted litigation surrounding the Kawaiaha ‘o Church Multi-purpose Center Project¹⁴¹, cemeteries can present unique situations with three State of Hawai‘i departments¹⁴² retaining jurisdiction over various historic cemeteries.

As discussed in the aforementioned section, the MLIBC is concerned with at least three identified cemeteries in the utility trenching project area and the high possibility of unmarked burial sites being located both within, and outside, of the suspected cemetery boundaries.

When Chapter 13-300, HAR was being drafted prior to its September 1996¹⁴³ promulgation, the issue was how to make the rules comport with the statutory usage of the term “*specific unmarked location*”¹⁴⁴ with regards to jurisdictional issues and the application of historic preservation review and responsibilities.¹⁴⁵

¹⁴⁰ According to the Lāhainā Quad Map 3-A in the Maui Cemetery Directory, in addition to the three cemeteries mentioned above, there are also the Pu‘upihā Cemetery, Lahainaluna Mission Cemetery, Seamen’s Cemetery, Maria Lanakila Church Cemetery, Lāhainā Episcopal Church Cemetery, and Waiola Church Cemeteries of record, and undoubtedly many other smaller cemeteries lost to time. Note: Walmart, Ke ‘eaumoku had an unknown and undiscovered smallpox cemetery from 1853 containing at least 65 discovered burials in plots in a very heavily developed and utilized urban core area. Lāhainā had an intense populace at times in its history.

¹⁴¹ §6E-2 Definitions Case Notes: (1) §6E-42 applies to any project "which may affect historic property ... or a burial site", as defined by this section; (2) a burial site can be found in a cemetery; and (3) a cemetery can also be a historic property, as also defined by this section, church building project was not exempt from the historic preservation review process required by §6E-42 and its implementing rules because the project involved a cemetery. 128 H. 455 (App.), 290 P.3d 525 (2012).

¹⁴² The Department of Health, the Department of Commerce and Consumer Affairs, and the Department of Land and Natural Resources as represented by the State Historic Preservation Division.

¹⁴³ It should be noted that Chapter 274, HAR and other archaeological rules were not adopted until 2002 and officially signed in 2003, over six years after Chapter 13-300, HAR was officially in effect.

¹⁴⁴ **§6E-2 Definitions.** As used in this chapter: Burial site" means any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods are interred, and its immediate surrounding archaeological context, deemed a unique class of historic property and not otherwise included in section 6E-41.

¹⁴⁵ **§6E-43 Prehistoric and historic burial sites.** (a) At any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old, the remains and their associated burial goods shall not be moved without the department's approval.

Clearly prehistoric and historic burials at risk of disturbance and destruction could possess surface markers in the form of natural formations, pōhaku (singular and structured), trees and even ultimately more formal headstones with names and dates, yet still be in danger of destruction. Thus, the drafters of Chapter 13-300, HAR, incorporated the definition of “unmarked” into this framework of legislative intent.

Thus in Section 13-300(2) Definitions, the drafters defined unmarked as:

"Unmarked location" means with regard to a human burial, any site located outside the boundaries of a known, maintained, actively used cemetery dedicated in accordance with chapter 441, HRS. [Eff SEP 28 1996] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 92F-3, 92F-12, 441-2, 441-3)

This framework appeared to work for many years as any burial outside of a “known, maintained and actively used cemetery” overseen by DOH could be in jeopardy of being lost or destroyed, such as small plantation cemeteries once surrounded by cane cultivation.

However, an issue arose when the Burial Sites Program of SHPD met with Dr. Alvin Onaka of the DOH,¹⁴⁶ regarding the issuance of disinterment permits and jurisdictional issues, and learned that the DOH has no definitive master list of all “known, maintained and actively used cemeteries” dedicated in accordance with Chapter 441, HRS. This, of course would have made jurisdictional determinations between DOH and SHPD clearer.

To further complicate matters, as you and your staff are aware, SHPD oversees cemetery removal or re-designation in Section 6E-41, HRS which states:

§6E-41 Cemeteries; removal or redesignation. (a) Any person removing or redesignating any cemetery shall comply with the following requirements:

(1) Publish a notice in a newspaper of general circulation in the State, requesting persons having information concerning the cemetery or persons buried in it to report that information to the department;

(2) Photograph the cemetery generally, and take separate photographs of all headstones located in the cemetery;

(3) Turn over to the department all photographs and any other relevant historical records;

(4) Move all headstones to the place of reinterment; and

(5) Obtain the written concurrence of the department prior to any removal or redesignation if the cemetery has existed for more than fifty years.

¹⁴⁶ Personal testimony of former Burial Sites Program staff.

(b) The requirements of subsection (a) shall be in addition to any requirements imposed by the department of health. [L 1988, c 265, pt of §1; am L 1990, c 22, §2]

Thus, a cemetery over fifty years in age needs the SHPD's written concurrence prior to removal or re-designating it.

Now OHA adds the issue of unmarked cemeteries which are not defined in Chapter 6E, HRS or the burial rules, but clearly exist and are usually treated as an assemblage of discrete unmarked burial sites under Chapter 6E, HRS.

OHA maintains, for example, that Phase 6 of Maui Lani is clearly an unmarked ancient cemetery. Walmart was an unmarked smallpox cemetery from 1853 with at least 65 people interred and many more, as of yet undiscovered extending out under the surrounding sidewalk and streets, beyond both the landowner and project boundaries. Honuakaha Smallpox Cemetery makai of Kawaiaha 'o Church and Queen Street are also unmarked cemeteries, with Honuakaha reportedly containing over a 1000 burials¹⁴⁷ bounded by South Street. Dozens of burials were discovered during utility work on Quinn Lane, with so many people dying in 1853, that they were literally buried on their sides and packed in one next to another to conserve space.¹⁴⁸

As your office is also aware, from the resultant litigation and archaeological investigations, Kawaiaha 'o had a cemetery proper with boundaries which consisted of marked burials, but also older unmarked burials which most likely predated the establishment of the church and the formal cemetery opening up the issue of potential mixed jurisdiction between DOH, SHPD and DCCA for one singular cemetery.

Ultimately, the SHPD which was handling the case with DOH who issued a disinterment permit, should have had the OIBC oversee the request to disinter hundreds of unmarked burial sites.

Now we add in the DCCA and Chapter 441 laws relating to the dedication of cemeteries:

§441-1 Definitions. As used in this chapter:

"Cemetery" means any property, or part interest therein, dedicated to and used or intended to be used for the permanent interment of human remains. It may be a burial park with one or more plots, for earth interment; a mausoleum with one or more vaults or crypt interments; a structure or place with one or more niches, recesses, or other receptacles for the interment of cremated remains, or any combination of one or more thereof.

¹⁴⁷ Cultural Surveys of Hawai'i estimates.

¹⁴⁸ Honuakaha Brewery Housing Project and Quinn Lane utility excavations; Personal communication of former Burial Sites Program staff.

"Cemetery authority" means any person who undertakes to establish, maintain, manage, operate, improve, or conduct a cemetery to inter human remains; or offers perpetual care of the cemetery; or sells or holds money in trust for pre-need interment services, whether or not the person undertakes such activity for profit; provided that this shall not apply to the designated trustee of the funds.

"Cemetery property" means any property, or part or interest therein, dedicated to, used or intended to be used for, the permanent interment of human remains. It may be a plot or plots in a burial park for earth interment; a place or places in a mausoleum for vault or crypt interment; one or more niches, recesses, or other receptacles for the interment of cremated remains; or any combination of one or more thereof.

§441-2 Certificate of dedication. Every cemetery authority from time to time as its property may hereafter be made available for cemetery purposes, shall file in the office of the bureau of conveyances or, in the case of registered land, in the office of the assistant registrar of the land court, a written certificate of dedication containing a description of the land or other property which is to be made available for cemetery purposes, and dedicating the property exclusively to cemetery purposes. [L 1967, c 199, pt of §1; HRS §441-2]

Thus, a pertinent question that needs to be asked and ideally answered, “Did Pioneer Mill ever formally establish the Pioneer Mill Cemetery as a dedicated cemetery? If so, in what manner and under which authority?”

In further looking at the DCCA rules:

§441-3 Map or plat required; unique identifier. (a) The cemetery authority, as any of the dedicated cemetery property, or any part or section thereof, is offered for sale, transfer, or disposition in the form of plots, crypts, or niches, shall also:

(1) In the case of land, survey and subdivide the dedicated cemetery property into sections, blocks, plots, avenues, walks, or other subdivisions; make a good and substantial map or plat showing the sections, blocks, plots, avenues, walks, or other subdivisions, with descriptive names, initials, or numbers that uniquely identify each plot;

(2) In the case of a mausoleum or columbarium, make a good and substantial map or plat on which shall be delineated the sections, halls, rooms, corridors, elevation, and other divisions, with descriptive names, initials, or numbers that uniquely identify each niche, mausoleum, or crypt; and

(3) File the maps or plats required by this section in the office of the bureau of conveyances or the office of the assistant registrar of the land court, and maintain a copy of all filed maps as a permanent record of the cemetery authority.

(b) The cemetery authority shall also maintain a permanent, accurate record of the identity of each person whose remains are located in the cemetery, together with the corresponding unique identifier that indicates the location of the person's remains within the cemetery. The records required by this section shall be prepared and maintained in a manner that will enable the cemetery authority to timely respond to inquiries from the public or the department regarding the location of a person's remains within the cemetery.

(c) The cemetery authority shall specify the unique identifier of a plot, crypt, or niche in any document that provides for the sale, transfer, or disposition of the plot, crypt, or niche. [L 1967, c 199, pt of §1; HRS §441-3; am L 2007, c 188, §2]

Thus more questions arise and need to be investigated. At the time Pioneer Mill established their cemetery, what were the pertinent statutes and laws at the time? Did they sell plots? It seems ‘ohana recall burials there and death certificates reference the Pioneer Plantation Cemetery. Did Pioneer Mill advertise it as a place of interment for company employees and their families or to the public?

Furthermore, regarding cemetery dedication recordation:

§441-6 When dedication complete; effect of dedication. Upon the recordation or filing of a map or plat and certificate of dedication pursuant to sections 441-2 and 441-3, the dedication is complete with respect to all property or parts thereof which are described or depicted in or on both the certificate of dedication and map or plat for all purposes and thereafter the property shall be occupied and used exclusively for cemetery purposes. [L 1967, c 199, pt of §1; HRS §441-6]

If Pioneer Mill never formally dedicated the land for cemetery purposes, then arguably the whole cemetery is under SHPD jurisdiction, as "unmarked graves" and more likely under the MLIBC jurisdiction as previously identified burials in a known cemetery of "unmarked" burial sites.

Ultimately, the excavation work through the Pioneer Mill Cemetery that Mr. Josh Dean admittedly told the MLIBC about, at their October 8, 2020 meeting, noting that they had voluntarily monitored the utility work in this area as well, because they knew it was the cemetery area in question, could have been a Chapter 6E, HRS violation if workers hit and damaged any human skeletal remains such as the cranium impacted on Friday, October 23, 2020 in the West Maui Land Baseyard.

The associated penalties are indeed severe:

§13-300-43 Penalty. (a) It shall be unlawful for any person, natural or corporate, to knowingly take, appropriate, excavate, injure, destroy, or alter any burial site or the contents thereof, located on private lands or lands owned or

controlled by the State, or any of its political subdivisions, except as permitted by the department.

(b) Violators of this chapter and section 6E-11(b), HRS, are also subject to prosecution pursuant to section 711-1107, HRS, the penalties for which shall be imposed in addition to, and not in lieu of, any penalties imposed by section 6E-11(c), HRS, which include:

(1) A fine of not more than \$ 10,000 for each separate offense;

(2) If the violator directly or indirectly caused the loss of, or damage to, a burial site, a fine of an additional amount determined by the court to be equivalent to the value of the lost or damaged burial site;

(3) Seizure and disposition by the State without compensation to its owner or owners of all equipment used for the taking, appropriation, excavation, injury, destruction, or alteration of a burial site, or for the transportation of the violator to and from the burial site; and

(4) Prohibition from participating in the construction of any state or county funded project for ten years, as provided by section 6E-11(d), HRS.

(c) Each day of continued violation of this provision shall constitute a distinct and separate offense for which the offender may be punished, as provided by section 6E11(c), HRS.

[Eff SEP 28 1996] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-11, 711-1107)

OHA now raises the question of whether the SHPD knew about West Maui Land's excavation activity through the Pioneer Mill Cemetery? Was permission granted by the SHPD either expressly or tacitly?

Finally, adding to all this are the Vital Statistics and Public Health statutes in Chapter 338, HRS:

§338-25.5 Disinterment of human bodies. (a) No corpse, nor the remains of any dead human body, exclusive of ashes, shall be exposed, disturbed, or removed from its place of burial, nor shall the receptacle, container, or coffin holding the remains or corpse be opened, removed, or disturbed after due interment, except upon written application made to the director of health for a permit therefor and upon the issuance and according to the terms of a permit granted therefor by the director. After any removal or disturbance, the grave shall be filled at once and restored to its former condition. A cemetery authority with a current and active license with the department of commerce and consumer affairs may disinter and reinter a corpse or remains within that same cemetery without filing an application for a permit from the department of health if the cemetery authority has written authorization from the majority of the next-of-kin of the person whose corpse or remains is disinterred, as determined by the priority of succession order required by section 531B-4; provided that this exception shall not apply to disinterment of a corpse or remains for transfer off of the cemetery property to another physical address. The cemetery authority may require a licensed embalmer to be available during the disinterment in the event that human remains may be exposed.

For the purposes of this subsection, "cemetery," "cemetery authority," and "cemetery property" have the same meaning as provided in section 441-1.

(b) Notwithstanding the provisions of subsection (a), the department of land and natural resources pursuant to sections 6E-43 and 6E-43.6 may authorize exposure, removal, disinterment, or any other act without obtaining a permit from the department of health. [L 1921, c 111, §1; RL 1925, §4493; RL 1935, §5800; am L 1937, c 195, §1; RL 1945, §11200; RL 1955, §276-1; am L Sp 1959 2d, c 1, §19; HRS §734-1; ren L 1972, c 9, pt of §1; am L 1990, c 306, §14; am L 2019, c 198, §1]

Again, the critical jurisdictional and procedural analysis depends upon how the Pioneer Mill Cemetery was first established, and when. We also have the Jacobsen Cemetery with testimony from Charles Tilton about his 'ohana buried there and reporting that most of the cemetery appears to be covered up. Pu'ehu'ehuiki Cemetery and the Man Fook Tong adjacent cemetery should rightfully receive the same investigation and analysis for future permitting and development actions to properly determine jurisdictional issues prior to ground disturbance in the area.

It would be prudent for the SHPD and County of Maui to identify all cemeteries in the Lāhainā area, determine their status under DOH dedication rules, and under Chapter 13-300, HAR rules, to determine jurisdictional issues prior to granting permits for work in and around the known cemeteries to avoid litigation in the nature of Kawaiaha'o Church. The DCCA should also be brought into the discussion and analysis as well as any identified family members of persons buried in these cemeteries.

All agencies possess a vested interest in resolving these issues before burial sites and families are impacted and traumatized by unclear jurisdictional and procedural issues. The County of Maui will benefit as well and the larger issue can apply to similar situations on the other islands.

Summary:

Lāhainā remains one of the most important and sacred historical and cultural landscapes in the islands and it is critical and paramount that the last vestiges of this important wahi pana be identified, protected and preserved not only for the living descendants today who rely upon its integrity to continue to practice their constitutionally protected rights for cultural, religious and subsistence purposes, but also for future generations to come.

OHA urges your department to fully comply with and adhere to the statutory requirements of Section 6E-43.6, HRS, and Section 13-300-40, HAR, with regards to the consistent and timely notification of OHA at burials@oha.org of all inadvertently discovered human skeletal remains to uphold both the spirit and intent of the law and associated rules.

It is critical to enable OHA to better address the ongoing concerns of our beneficiaries, especially in regards to the care, management and protection of iwi kūpuna, “*our most cherished possession*” as a lāhui. This is also an affirmative duty of your department as set forth in statute.¹⁴⁹

OHA also reiterates our support for the MLIBC Motions rendered at their October 8, 2020 meeting regarding the work at Kaua ‘ula and urges the SHPD to provide more substantive support of the council members who serve this important kuleana as volunteers for the State of Hawai ‘i.

OHA urges the SHPD to not define your vast duties and responsibilities by a limiting interpretation of Section 6E-42, HRS, or even Section 6E-8, HRS, but to embrace both your power and responsibilities to help identify, inventory, and protect unmarked burial sites throughout the islands and to render important technical advise regarding historic preservation matters to the Counties as well.

Clearly the current County of Maui exemption regarding utility trenchingⁱ which allows substantive excavation through a known cemetery should raise the alarms at SHPD, given your statutory mandates, and OHA would expect the SHPD to be leading the charge in both addressing this loophole and mandating its repeal or revision. The County of Maui is already providing leadership in this regard.

Finally, OHA urges the SHPD to work with the Department of Health, Department of Commerce and Consumer Affairs, and the Department of the Attorney General to seek clarification regarding the many cemeteries in Lahaina, both marked and unmarked, to determine jurisdictional and procedural issues before they end up in costly litigation such as the case of Kawaiaha ‘o Church.

Closing with the words of one of our beneficiaries leading this effort to protect Kaua ‘ula and Lāhainā, Ke ‘eaumoku Kapu¹⁵⁰, as he passionately shared over 17 years ago regarding another large project in Lāhainā:

It’s always the cultural aspects of any project is the first priority on the list, but it’s the last to be addressed when the project is finalized to be completed. Okay? So how we going to solve our solutions for the future when we getting rid of all these precious resources, these precious commodities that we need to be basically dependent upon? We know what is is to be oppressed. We know how it is to basically be faced against the wall, yeah, by being put down by so many entities, okay. Historic preservation is the recommendation, that’s all. Yeah? State Land Use

¹⁴⁹ [§10-1, HRS] Declaration of purpose. (b) *It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.* [L 1979, c 196, pt of §2]

¹⁵⁰ Ke ‘eaumoku Kapu has served as Chairperson of the Maui/Lana ‘i Islands Burial Council, Chairperson of OHA’s Native Hawaiian Historic Preservation Council, and also on the Maui Cultural Resources Commission. Mr. Kapu currently serves as the CEO of ‘Aha Moku o Maui and resides upon his kuleana lands in Kaua ‘ula with his ‘ohana.

Commission, what do they do? Nothing. County? I still waiting for them to do their fiduciary duties pertaining to what our plight has been from the beginning.¹⁵¹

OHA looks forward to the meaningful intervention by the SHPD into the current controversy at Kaua‘ūla as well as working both with your office and the County of Maui to help successfully resolve long-standing issues and ensure that all of our agencies uphold important public trust responsibilities and constitutional mandates for the benefit and enlightenment of the kānaka ‘ōiwi, and ultimately for all who love and call Hawai‘i home.

*Ka ipukukui pio ‘ole i ke Kaua‘ūla.
The light that will not go out in spite of the blowing of the Kaua‘ūla wind.¹⁵²*

Should you have any questions, please contact our Compliance Enforcement Manager, Kai Markell, at (808) 594-1888, or by email at kaim@oha.org.

‘O wau iho nō me ka ‘ōia ‘i‘o,



Sylvia M. Hussey, Ed.D.
Ka Pouhana, Chief Executive Officer

SH:km

Cc:

OHA Maui Trustee Carmen Hulu Lindsey
Linda Chow, Deputy AG, Department of the Attorney General
Director Rowena Andaya Dagdag, Maui County DPP
Hailialoha Hopkins, NHLC
Dane Maxwell, Chair, MLIBC
Ke ‘eaumoku Kapu
West Maui Land, Co.

ⁱ Ord. 2684 § 4, Maui County Code, 1998

¹⁵¹ Public Hearing for Lāhainā Watershed Flood Control Project, Held at Lahainaluna Intermediate School, Lahaina Maui, June 17, 2003.

¹⁵² Said of the Lahainaluna School, where many leaders of old Hawai‘i were educated. ‘Ōlelo No ‘eau 1414