CULTURAL ASSESSMENT
For the
PROPOSED
Kihei Promenade Light-Industrial Project

November 2013

Hana Pono, LLC - PO Box 2039 Wailuku, HI 96793 – hanapono@gmail.com

EXHIBIT "G"

CULTURAL ASSESSMENT
For the

PROPOSED

Kihei Promenade Light-Industrial Project

TMK: 2-2-02:15 & portion of 16 and 3-9-01:16

Prepared for:
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Sarofim Realty Advisors
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Prepared by:
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November 2013

Management Summary

Report	Cultural Assessment for the proposed Kihei Light-Industrial project
Date	November 2013
Project Location	County of Maui; Kula District; Ka'ono'ulu ahupua'a, TMK(s): 2-2-02:15 & portion of 16 and 3-9-01:16
Acreage	Approximately 88 acres
Ownership	Sarofim Realty Advisors
Developer/Applicant	Pacific Rim Land, Inc
Project Description	The proposed project will include light-industrial, commercial, and affordable housing uses. A final conceptual plan will be developed by the developer with input from the Kihei community and other stakeholders.
Region of Influence	Ka'ono'ulu ahupua'a, Kula Moku
Agencies Involved	SHPD/DLNR, Maui County Council, Maui County Planning Department, State Land Use Commission
Environmental Regulatory Context	The undertaking is subject to both State and County zoning regulations, and other environmental regulations
Results of Consultation	No significant impacts to cultural practices, resources, or beliefs. Lands in question have long been disturbed by ranching and construction.
Recommendations	• Adherence to all applicable rules governing earth-disturbance activities • Adherence to accepted SHPD-MLIBC archaeological monitoring plans

Cultural Summary

Sarofim Realty Advisors is proposing the construction of a light-industrial and commercial center just mauka (upland) of Pi'ilani Highway at Ka'ono'ulu Road. The entire project sits in the moku of Kula and the ahupua'a of Ka'ono'ulu, within the right of way or adjacent to the Pi'ilani Hwy and other previously disturbed lands. Whatever cultural practices or resources were practiced there in ancient times have long been abandoned and paved over in the construction of modern-day Kihei.

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Introduction

At the request of Mr. Charlie Jencks of Pacific Rim Land, Inc., Hana Pono LLC has completed a report for the Cultural Impact Assessment of the proposed Kihei Light-Industrial project at TMK(s): 2-2-02:15 & portion of 16 and 3-9-01:16. This study was completed in accordance with State of Hawaii Chapter 343, HRS, and the State of Hawaii Office of Environmental Quality Control (OEQC) Guidelines for Assessing Cultural Impacts (1997).

Guiding Legislation for Cultural Impact Assessments

It is the policy of the State of Hawaii under Chapter 343, Hawaii Revised Statutes, to alert decision makers about significant environmental effects that may occur due to actions such as development, re-development, or other actions taken on lands. Articles IX and XII of the State Constitution, other state laws, and the courts of the state require the promotion and preservation of cultural beliefs, practices, and resources of native Hawaiians and other ethnic groups.

The Guidelines for Assessing Cultural Impacts, as adopted by the Environmental Council, State of Hawaii 1997 and administered by the Office of Environmental Quality Control, including HAR Title 11 Chapter 200-4(a), include effects on the cultural practices of the community and state. The Guidelines also amend the definition of "significant effect" to include adverse effects on cultural practices.

Goal and Purpose

The goal of this study is to identify any and all Native Hawaiian, traditional, historical, or otherwise noteworthy practices, resources, sites, and beliefs attached to the project area in order to analyze the impact of the proposed development on these practices and features. Consultations with lineal descendents or kupuna (Hawaiian elders) with knowledge of the area in gleaning further information are a central part of this study.

Scope

The scope of this report compiles various historical, cultural and topographical accounts and facts of the project area and its adjacent ahupua'a.

> *The geographical extent of the inquiry should, in most instances, be greater than the area over which the proposed action will take place. This is to ensure that cultural practices which may not occur within the boundaries of the project area, but which may nonetheless be affected, are included in the assessment. An ahupua'a is usually the appropriate geographical unit to begin an assessment of cultural impacts of a proposed action, particularly if it includes all of the types of cultural practices associated with the project area. In some cases, cultural practices are likely to extend beyond the ahupua'a and the geographical extent of the study area should take into account those cultural practices. (OEQC, Guidelines for Assessing Cultural Impacts, Nov 9, 1997)*

Data will be compiled beginning with the first migrations of Polynesians to the area, progressing through the pre-contact period of Hawaiian settlement, containing data on the post-contact period, through to the current day and any cultural practices or beliefs still occurring in the project area. Hawaiian kupuna with ties to the area will be interviewed on their knowledge of the area and its associated beliefs, practices, and resources. Additionally, any other individuals

or organizations with expertise concerning the types of cultural resources, practices and beliefs found within the geographical area in question will be consulted.

Project Area

The project is located in the State of Hawaii, County of Maui, at TMK(s): 2-2-02:15 & portion of 16 and 3-9-01:16. The project is in the moku of Kula, the ahupua'a of Ka'ono'ulu, and centers around Pi'ilani Highway and its intersection with Ka'ono'ulu Street.

Approach & Method

The approach taken in this study was two-fold. Foremost, historical, involving as appropriate, a review of: mahele (land division of 1848), land court, census and tax records, previously published or recorded ethnographic interviews and oral histories; community studies, old maps and photographs and other archival documents. Secondly, an in-depth study involving oral interviews with living persons with ties, either lineal or cultural, to the project area and the surrounding region.

Objectives

The objectives of the Cultural Impact Assessment are as follows:

- to compile and identify historical and current cultural uses of the project area,
- to identify historical and current cultural beliefs & practices associated with project area,
- To assess the impact of the proposed action on the cultural resources, practices, and beliefs.

Tasks

Data gathered combined oral interviews of knowledgeable kupuna and families/individuals with long-standing ties to the area with all available written and recorded background information.

Archival Research

All sources of historical written data, old maps, and literature were culled for information.

Oral Interviews

Tasks completed for oral interviews included: identification of appropriate individuals to be interviewed, determination of legitimate ties to project area and surrounding region, interview recorded in writing and by digital audiocassette, transcription of interview, compilation of pertinent data.

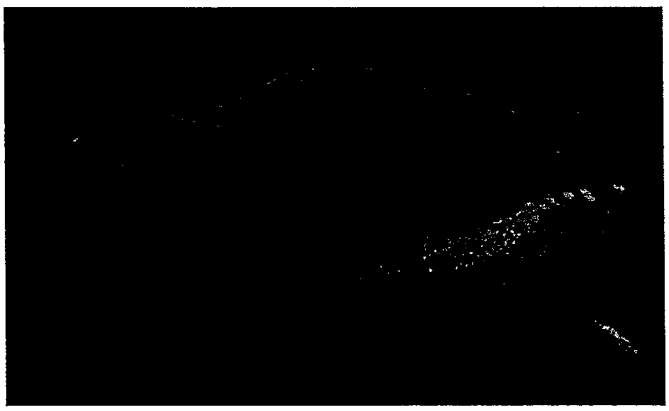
Level of Effort Undertaken

Interviewees are contacted and selected for inclusion in this report based on a sliding scale of legitimate authority based on the following characteristics: lineal descendents, cultural descendents, traditional practitioners, cultural practitioners, knowledgeable area residents of Hawaiian ancestry, knowledgeable concerned citizens. Every effort is made to obtain the highest quality interviewees and determination of appropriate individuals follows this criteria.

Historical & Current Cultural Resources & Practices

The island of Maui is comprised of twelve (12) traditional land districts, called moku. Each moku is made up of numerous ahupua'a, smaller land divisions wherein a self-inclusive community could find all the things needed for a satisfactory life. Usually these ahupua'a ran from the heights of the mountain peak to the edge of the outer reef like a giant pie slice, although many ahupua'a did not fit this template. As previously mentioned, the project area resides in the moku of Kula and the ahupua'a of Ka'ono'ulu. Handy relates that, "Kula was always an arid region, throughout its long, low seashore, vast stony kula [open country] lands and broad uplands. Both on the coast, where fishing was good, and on the lower westward slopes of Haleakalā a considerable population existed" (ESC Handy, 114). The moku of Kula is so called for its kula lands, meaning broad open expanses, likened to pasture land by the ranchers of the last century.

Although Kihei is one of the more dry areas of Maui in present time, it once was home to many fresh and brackish wetlands. Such as the wisdom of the ahupua'a system, the events mauka (upland) effected the land below. The mauka portion of Kula underwent major deforestation for farming and ranching and therefore, rainwater was less able to filter into the ground and recharge the ponds near the coast. The Honolulu Star-Bulletin and Advertiser reported in 1962, "a secondary result of the clearing of the Kula forests, he said, was the destruction of extensive fresh water ponds in Kihei, on the Mā'alaea Bay coast below Kula. When the forest was cleared, water was free to rush down the mountain, carrying soil from Kula to the coast and filling with mud the ponds for which Kihei was once famous" (Sterling, 245). This destruction started with the large-scale deforestation of the native Sandalwood in the 1800's and although short-lived was a major source of commerce for this area in those times.



The project area has been severely disturbed from its original and unaltered state for many decades, by the effects of grazing cattle and the construction of ranch roads, county roads and the construction of the Pi'ilani Highway. Any resources or practices occurring traditionally in the area are now non-existent and would have been obliterated.

First migrations

Traditional stories start with the creation chant called "Kumulipo." The Kumulipo brings darkness into light. Embedded in this all-encompassing chant includes the tale of the coming of the Hawaiian Islands through the mythical stories of Pele and another demigod named Maui who, with his brothers, pulls up all the islands from the bottom of the sea. The latest and last physical appearance of Pele occurred as late as mid-1800s when the Fire Goddess flowed from the top of the southern slopes of Haleakalā, south of our project area, down through Honua'ula and landing at the surf of Mākena and southward. In the Hawaiian Annual published by Thomas Thrum and James Dana's "Characteristics of Volcanoes", are reported Father Bailey's statements of his oral interviews explaining that the last flow had occurred in 1750 (Sterling 1998: 228). Many of the lava flows in the summit depression and in the Ulupalakua to Nu'u area were dark black and bare 'a'ā (rough, jagged type of lava landscape). The two freshest lava flows run near La Perouse Bay. The upper flow broke out of a fissure near Pu'u Mahoe and the lower flow broke out at Kalua o Lapa cone. Both flows contain large balls or wrapped masses of typical 'a'a found throughout Hawai'i.

The occupation of the Hawaiian archipelago after its mythical creation came in distinct eras starting around 0 to 600 A.D. This was the time of migrations from Polynesia, particularly the Marquesas. Between 600 and 1100 A.D. the population in the Hawaiian Islands primarily expanded from natural internal growth on all of the islands. Through the course of this period the inhabitants of the Hawaiian Islands grew to share common ancestors and a common heritage. More significantly, they had developed a Hawaiian culture and language uniquely adapted to the islands of Hawai'i which was distinct from that of other Polynesian peoples (Fornander, 222).

Between 1100 and 1400 A.D., marks the era of the long voyages between Hawai'i and Tahiti and the introduction of major changes in the social system of the Hawaiian nation. The chants, myths and legends record the voyages of great Polynesian chiefs and priests, such as the high priest Pa'ao, the ali'inui (Head Chief) Mō'ikeha and his sons Kiha and La'amaikahiki, and high chief Hawai'iloa. Traditional chants and myths describe how these new Polynesian chiefs and their sons and daughters gradually appropriated the rule over the land from the original inhabitants through intermarriage, battles and ritual sacrifices. The high priest Pa'ao introduced a new religious system that used human sacrifices, feathered images, and enclosed heiau (temples) to facilitate their sacred religious practices. The migration coincided also with a period of rapid internal population growth. Remnant structures and artifacts dating to this time suggest that previously uninhabited leeward areas were settled during this period.

Settling of Kula Moku & Ahupua'a

With its gentle and open white sand beaches, the coastal areas of Kula were surely a favorite location for fisherman and their families. Accounts tell of a large population on the coast with much bounty from the ocean, not only by fishing the open sea, but also by the construction of fishponds, gathering limu (seaweed), and diving for octopus, lobster, and other marine life. Inhabitants of this region relied on vegetable foods from other areas of the island. Possibly obtaining kalo (taro) from across the Mā'alaea plain in Waikapū and uala (sweet potato) from the mauka slopes of Haleakalā, the inhabitants of the coastal region were able to supplement their diet of fish, shellfish, and limu. Handy and Handy elaborate on the lands of the moku, "there were some patches of upland taro, not irrigated; but this was a notable area for sweet potato,

which, combined with the fishing, must have supported a sizable population although it cannot be counted as one of the chief centers" (272).

The project area rests in the Ahupua'a of Ka'ono'ulu, named for the delicious Ulu trees that grew in the upper, cooler portion of the ahupua'a that those residents on the coast would trek up the mountain to obtain. In ancient times the surrounding areas makai from the project were known for their fresh (brackish) water ponds that would fill up in times of rain and become dry during the summer months. Previously, there were many of these types of ponds that have now been filled in for development. There were no perennial streams here and the water supplied by these ponds and freshets of water that filled the gulches were an important lifeline for these peoples.

Hewahewa claimed Kalepolepo during the Great Mahele and was awarded over five thousand acres referred to as "Kaonoulu Ahupua'a" (Waihona). This award likely includes the project area. Hewahewa calls Kalepolepo his "fixed place of residence" (Waihona).

Place Names Associated With This Area

The Hawaiian culture places a particular importance on place-names. Throughout Polynesia, cultures are for the most part ocean-based, surviving and building their cultures around the bounty of the sea. While Hawaiians share common history with all Pacific peoples, because of the unique factors of these high-islands, their culture turned decidedly more land-oriented than many other Pacific cultures. The abundant access to fresh water sources, fertile soil, relative lack of reef and reef fish compared to older south pacific islands all contributed to their formation of a completely unique and distinct culture; a culture that placed a high inherent value on land and landforms, landscapes and their relationship to people's lives. In place-names one can find its purpose, their purpose, and the hidden *kaona* (symbolism) behind the word.

Ka'ono'ulu

The ahupua'a the project resides in is named for the breadfruit grown on its upper slopes in the cooler mauka region on Haleakala. This breadfruit would have been carried down to the coastline and traded for fish and other products.

Waiakoa

The ahupua'a adjacent and to the north of the project area, it is named for the Koa tree that grew on the upper slopes of that ahupua'a.

Waiohuli

The ahupua'a adjacent and to the south of the project area, it is named for the clouds that come down the slopes of Haleakala and let loose their rain before retreating again to the mauka regions.

Kalepolepo

The small coastal region directly makai of the project area that houses the fishpond of Ko'ie'ie, so called for the dirty (lepo) waters in the area during times of rain.

Ko'ie'ie

The name of the major ancient fishpond in the Ka'ono'ulu ahupua'a, that along with others supplied a variety of food to the residents. See the following sections for more detailed information on the history of Ko'ie'ie.

Kaipukaiohina

A section of beach named for the bounty of its waters, *Ka ipu kai o Hina* is the Ocean-basket of Hina.

Kihei

The contemporary name for the entire coastal area of Kula, Kihei literally means a cape or shawl as is interpreted as representing the cloak of dust spread over the area by fierce trade winds and/or the cloak of the clouds created by Haleakala that stretch out into the channel sometimes connecting to Kaho'olawe and Lana'i.

Traditional Hawaiian Uses & Practices

The inhabitants of the coastal areas of Ka'ono'ulu sustained themselves through the bounty of the ocean. Nearby to them was the fishpond of Kalepolepo, commonly called Ko'ie'ie. Kalepolepo was built by an early Maui chief and by the 16th century King Umi of Hawai'i Island tasked the commoners with rebuilding the walls. Later, during the reign of Kamehameha I he rebuilt Kalepolepo again, tasking all the people of the west side of Maui to work. Ke Alaloa o Maui, the broad highway of Maui constructed by King Pi'ilani crosses through the ahupua'a of Ka'ono'ulu on its way to Mākena and not much is mentioned of this area besides Kalepolepo pond and the dryness of the area.

Post-Contact Historical Uses & Practices

It was near Kalepolepo and the shoreline north of the project area that Kamehameha is said to have landed his canoes for his invasion of Maui. Kamehameha had previously been beaten by the forces of Maui because of their furious use of the ma'a (sling) for which Maui's warriors were famous. But Kamehameha this time had the foreign technology of mortars, muskets, and cannons. It was here he uttered the now famous saying, "Imua e nā poki'i. He inu i ka wai 'awa'awa", forward my brothers or drink of the bitter waters. He set fire to his canoes, their only form of retreat and challenged his men to win the battle or drink the bitter water of defeat and certain death. From Kalepolepo the army of Kamehameha pushed the warriors of Maui back to the West Maui Mountains.

With the arrival of the foreigners came the foreign interest of making money and one of the first goods to be mass exported from the islands was the Sandalwood. Ili'ahi in Hawaiian, the sandalwood tree has a fragrance highly prized by the Chinese and entire forests were denuded in the rush to make foreign money. Many of these forests were in the upper part of the Kula moku and the deforestation of these forests was a contributor to the siltation of the brackish ponds and loko i'a (fishponds).

While the rest of the island was undergoing a radical transformation of landscape with the construction of large sugar and pineapple plantations, the Kihei area remained largely unchanged

due to the lack of water. No foreign investors wanted to stake a claim to land out there knowing there was no way to water their crops. For a long time, Kihei remained the same, a few hundred Hawaiian families living off the bounty of the ocean.

In 1828 the first Catholic priest to the Hawaiian Islands, Father Bachelot, brought with him from Paris a seed which he grew into a tree and planted in a church in Honolulu. Soon after the seeds of this tree were taken to all the islands and began to dominate the leeward landscape of Maui. Kiawe soon was the most prolific tree in South Maui, so much so, that the kupuna (elders) of today remember Kihei as being covered in kiawe. There was so much kiawe that they would make slippers out of old car tires, the only thing that would stop the kiawe thorn from puncturing their feet. Oral accounts detailed how they would take the rubber tires off their bikes and replace it with a garden hose, wrapped multiple times and bound with wire, after getting too many flats with a regular tube tire.

Current Uses, Practices, & Resources of Project Area

Currently the project area is generally unmaintained former ranch lands mauka of the highway. There are no cultural practices or resources in the project area. The closest cultural resource of significance is the Ko'ie'ie fishpond and the other fishponds along the coast which are undergoing a revitalization effort to bring them back to their former glory and provide educational opportunities for the community.

Summary of Interviews

Paula Kalanikau

Paula was interviewed for another Kihei project in 2006 and again in October 2013, both interviews took place at her residence on Kenolio Street in Kihei. Paula married into the Kalanikau 'ohana, the family who owned the ahupua'a of Kaonoulu. She stated that there were three families involved in the ownership prior to the Great Mahele: the Waiwaiole's and the Kalanikauikealaleo's.

Paula Kalanikau moved to Kihei in the early 1960's. She reminisced that all of the people lived in the flood inundation zone and when the floods came from a Kona storm, people couldn't get in or get out. That was before Pi'ilani Highway. The old Suda Store at the beginning of South Kihei Road was the gateway to Kihei back in the 1960's and 1970's.

In 1972, Paula's husband worked with a group of neighborhood men to start the Kihei Canoe Club on Sugar Beach. All of the Sugar Beach hotels were already there by the time Kihei Canoe Club got that land from the County. The Kalanikaus were all active in the Kihei community.

Mrs. Kalanikau talked about the changes in Kihei and how a lot of the changes are for the worse. Her final comment sums up her feelings about the future of Kihei:

"Oh, I'm definitely interested in them having a High School here. I think the children deserve that; and a hospital. But we need to be also aware of what our ancestors have established in these areas and be mindful to developers what would be our priorities. And that is our priority: to look after our 'aina."

Paula and Minette Ngalu

Paula and Minette are both live-time residents of Kihei. Although each of them grew up further south of the project area, both recalled there being an abundant mango grove on the project area.

Synthesis of Archival, Literary, & Oral Accountings

The ahupua'a of Ka'ono'ulu carried a relatively large population in pre-contact times that survived on marine life, sweet potato, and ulu that was carried down from the upper slopes of Haleakala. Post-contact the area nearer the coast continued to support a variety of commerce and recreational activities centered around Ko'ie'ie fishpond until the siltation of the ocean area and breakdown of the fishpond wall made it unusable. The proposed project area has been used for ranching for the past century with no cultural resources in the vicinity.

Potential Effects of Development & Proposed Recommendations

This report finds that the proposed Kihei Light-Industrial Project located at TMK(s): 2-2-02:15 & portion of 16 and 3-9-01:16 has no significant effects to cultural resources, beliefs, or practices. As always, all applicable county, state, and federal laws concerning discovery of burials or other cultural materials should be followed to the letter.

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R. A STATEMENT ADDRESSING HAWAIIAN CUSTOMARY AND TRADITIONAL RIGHTS UNDER ARTICLE XII, SECTION 7 OF THE HAWAII STATE CONSTITUTION.

Piilani is aware of and is sensitive to the existence and practice of native Hawaiian customary and traditional rights that are protected under Article XII, Section 7 of the Hawai'i State Constitution. That certain Cultural Assessment dated November, 2013 ("Cultural Assessment"), prepared by Hana Pono, LLC, for the Piilani Parcels determined that there are no cultural practices or resources in the Piilani Project area. *See* Cultural Assessment at 3. In addition, the Cultural Assessment observed as follows:

> The Project area has been severely disturbed from its original and unaltered state for many decades, by the effects of grazing cattle and the construction of ranch roads, county roads and the construction of the Pi'ilani Highway. Any resources or practices occurring traditionally in the area are now non-existent and would have been obliterated.

Cultural Assessment at 7. Accordingly, the Piilani Project is not expected to have any effect upon the exercise of Hawaiian customary and traditional rights under Article XII, Section 7, of the Hawai'i State Constitution as there are cultural practices or resources within the Piilani Parcels.

PUBLIC ACCESS SHORELINE HAWAII, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Appellants-Appellees-Respondents, v. HAWAI'I COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO in his capacity as its chairman; and NANSAY HAWAII, INC., a Hawai'i corporation, Appellees-Appellants-Petitioners

NO. 15460

SUPREME COURT OF HAWAII

79 Haw. 425*; *903 P.2d 1246*; *1995 Haw. LEXIS 62

August 31, 1995, Decided
August 31, 1995, FILED

PRIOR HISTORY: [***1] CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS. (CIV. NO. 90-2J3K).

COUNSEL: Roy Vitousek, III (J. Robert Arnett, II, Nani Lee and John P. Powell, of Cades, Schutte, Fleming and Wright, with him on the briefs), for Appellee-Petitioner Nansay Hawaii, Inc.

Joseph Kamelamela, Deputy Corporation Counsel (Michael J.Matsukawa with him on the briefs), for Appellee-Petitioner Hawai'i County Planning Commission.

Skip Spaulding (Arnold L. Lum, Denise E. Antolini, Eric S. Walters and Lea O. Hong, of Sierra Club Legal Defense Fund, with him on the briefs), for Appellants-Respondents Public Access Shoreline Hawaii and Angel Pilago.

On briefs for amici curiae: David Kaapu, for the Kona, Hawaiian Civic Club; Mililani Trask, Kia'aina, for Ka Lahui Hawai'i; David L. Callies, Orlando R. Davidson, and Gordon M. Arakaki, for the Land Use Research Foundation; Carl C. Christensen, Alan T. Murakami, and Paul F. N. Lucas, (Native Hawaiian Legal Corporation), for Pele Defense Fund; Sherry P. Broder and Jon M. Van Dyke, for the Office of Hawaiian Affairs; Steven S. Michaels and Girard D. Lau, Deputy Attorneys General, for the State of Hawai'i; Hayden Aluli, for the 'Ohana Council; Williamson B.C. [***2] Chang and David Michael Foulkes, for Protect Kohanaiki 'Ohana, Inc., Kalamaula Homestead Association, and the Native Hawaiian Environmental Defense Fund.

JUDGES: MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

OPINION BY: Robert G. Klein

OPINION

[*429] [**1250] OPINION OF THE COURT BY KLEIN, J.

We issued a writ of certiorari to review the decision of the Intermediate Court of Appeals (ICA) in this case, which concerns a challenge by Public Access Shoreline Hawaii (PASH) and Angel Pilago to the Hawai'i County Planning Commission's (HPC) decision denying them standing to participate in a contested case hearing on an application by Nansay Hawaii, Inc. (Nansay) for a Special Management Area (SMA) use permit.

In order to pursue development of a resort complex on land within a SMA on the island of Hawai'i (Big Island), Nansay applied to the HPC for a SMA use permit. PASH, an unincorporated public interest membership organization based in Kailua-Kona, and Pilago opposed the issuance of the permit and requested contested case hearings before the HPC. The HPC denied the requests on the ground that, under its rules, neither PASH nor Pilago had standing to participate in a contested case. The HPC subsequently issued [***3] a SMA use permit to Nansay. When the case came before the circuit court, the court essentially vacated the permit by remanding to the HPC with instructions to hold a contested case hear-

ing in which both PASH and Pilago would be allowed to participate. In other words, because the SMA permit was granted pursuant to flawed procedures, the circuit court implicitly concluded that the SMA permit was void. On appeal, the ICA affirmed the circuit court's order with respect to PASH and reversed it with respect to Pilago. For the reasons set forth below, we affirm the ICA's decision and remand the case to the HPC for proceedings consistent with this opinion.

I. *BACKGROUND FACTS*

The HPC received a SMA use permit application from Nansay for a resort development on the Big Island. Nansay sought approval of its plans to develop a community complex including: two resort hotels with over 1,000 rooms; 330 multiple family residential units; 380 single family homes; a golf course; a health club; restaurants; retail shops; an artisan village; a child care center; and other infrastructure and improvements over a 450 acre shoreline area in the ahupua'a [1] of Kohanaiki on the Big Island. On September [***4] 28, 1990, the HPC held a public hearing on Nansay's permit application, as required by the agency's rules. *See* County of Hawai'i Planning Commission, Rules of Practice and Procedure (HPC Rules) 9-11(B) (1992). [2] At the public hearing, many parties presented testimony, including Pilago and the coordinator of PASH. Various individuals and groups orally requested contested case hearings. [3]

> 1 An "ahupua'a" is a land division usually extending from the mountains to the sea along *rational* lines, such as ridges or other natural characteristics. *In re Boundaries of Pulehunui, 4 Haw. 239, 241 (1879)* (acknowledging that these "rational" lines may also be based upon tradition, culture, or other factors).
>
> 2 HPC Rule 9-11(B) provides that a "hearing shall be conducted within a period of ninety calendar days from the receipt of a properly filed petition [for a SMA permit] . . . [and] all interested parties shall be afforded an opportunity to be heard." *Id.*
>
> 3 A written petition is not required until twenty days after the HPC determines that contested case procedures are required and publishes notice in a newspaper of general circulation in the county. HPC Rule 4-6(b)(2).
>
> In addition to PASH and Pilago, the HPC also received several requests concerning an alleged prescriptive easement over a jeep trail fronting the development area. The HPC postponed its hearing on Nansay's application for a scheduled sixty days so that these other groups and individuals could resolve the jeep trail issue through mediation or a declaratory action. Prior to reconvening the hearing, the other parties settled their claims with Nansay. Only PASH and Pilago, both of whom apparently did not pursue declaratory actions, had not settled their concerns with Nansay when the HPC resumed its deliberations on Nansay's permit application.

[***5] On November 8, 1990, after further testimony and discussion, the HPC determined that PASH and Pilago's interests were "not clearly distinguishable from that of the general public" and, therefore, that they did not have standing to participate in a contested case. *See* HPC Rule 4-2(6)(B). [4] The HPC [*430] [**1251] then voted to deny the contested case requests and to grant Nansay a SMA use permit.

> 4 HPC Rule 4-2(6)(B) provides in relevant part:
>
> "Party" . . . includes the following, upon the filing of timely requests[,] . . . any person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that that person will be so directly and immediately affected by the [HPC's] decision that that person's interest in the proceeding is clearly distinguishable from that of the general public; provided that such agency or person must be specifically named or admitted as a party before being allowed to participate in a contested case hearing.

PASH and Pilago sought review [***6] in circuit court of both agency decisions (denial of their contested case requests and issuance of the SMA use permit) pursuant to *HRS §§ 91-14* and *205A-6* (1985). [5] The circuit court determined that the HPC erred in finding that PASH and Pilago did not have interests that were distinguishable from the general public. Accordingly, the court remanded the case with instructions for the HPC to grant

PASH and Pilago a contested case hearing pursuant to its rules.

> 5 PASH and Pilago did not brief or argue jurisdiction under *HRS § 205A-6*, which permits a civil action alleging failure to comply with the Coastal Zone Management Act, because they believed "that it would have been inconsistent to have attacked the permit itself while still claiming error in the [HPC's] denial of a contested case hearing." *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n [PASH I], 79 Haw. 246, 249 n.1, 900 P.2d 1313, 1316 n.1 (App. 1993). See Punohu v. Sunn, 66 Haw. 485, 487, 666 P.2d 1133, 1135 (1983)* (holding that a declaratory judgment action would not lie where a specific remedy was available under *HRS § 91-14*). However, assuming that the primary jurisdiction doctrine does not apply because the HPC's decision-making process has concluded and there is no administrative appeal process to pursue, *see The Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Haw. 192, 202, 891 P.2d 279, 289 (1995)*, the circuit courts would appear to have *original* jurisdiction under *HRS § 205A-6* to hear either a procedural or substantive challenge to the agency's action. *Cf. Kona Old Hawaiian Trails v. Lyman, 69 Haw. 81, 92-94, 734 P.2d 161, 168-69 (1987)*. This would be the case notwithstanding a particular claimant's designation of the claim as an "appeal" rather than an original action. *In re Eric G., 65 Haw. 219, 224, 649 P.2d 1140, 1144 (1982)*. In the instant case, we need not further discuss PASH and Pilago's claims under *HRS § 205A-6* because we decide the issue of jurisdiction under *HRS § 91-14. See infra* section III.

[***7] Nansay and the HPC appealed, and the ICA affirmed in part, holding that PASH was entitled to contested case hearing procedures. *PASH I*, slip op. at 12. The ICA's conclusion was based on its determination that the HPC "disregarded the rules regarding the gathering rights of native Hawaiians and its obligation to preserve and protect those rights." *Id.* In other words, the ICA determined that PASH's "interest in the proceeding was clearly distinguishable from that of the general public[.]" *Id.* [6] However, the ICA reversed the circuit court with respect to Pilago, explaining that his acknowledged "special" interest in the proceeding was not a sufficiently "personal" interest "clearly distinguishable from that of the general public." *Id.*, slip op. at 15.

> 6 At the hearing before the HPC, Nansay did not directly dispute the assertion that unnamed members of PASH possess traditional native Hawaiian gathering rights at Kohanaiki, including food gathering and fishing for "opae, or shrimp, which are harvested from the anchialline ponds located on Nansay's proposed development site. *See, e.g., HRS § 174C-101* (Supp. 1992) (indicating that "traditional and customary rights shall include, but not be limited to . . . the gathering of [hihiwai], ['opae], ['o'opu], limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural and religious purposes"). Pilago's similarly *undisputed* concern and interest was that the area of the planned development would destroy important cultural sites, possibly including the burial site of King Kamehameha I.

[***8] The HPC and Nansay subsequently applied for a writ of certiorari, which we granted on May 7, 1993.

II. *THE RIGHTS OF A NON-APPEALING PARTY*

Appeals from decisions of the ICA are governed by *HRS § 602-59* (1985), which provides for an appeal only by application for writ of certiorari. *State v. Bolosan, 78 Haw. 86, 88, 890 P.2d 673, 675 (1995)*. In the instant case, the ICA ruled against the HPC and Nansay with respect to PASH's claims, and against Pilago with respect to his claims. The HPC and Nansay accordingly filed applications for writs of certiorari.

Notwithstanding our October 28, 1993 order permitting Pilago's counsel to withdraw and allowing PASH's representative to appear as counsel for Pilago, Pilago never filed [*431] [**1252] an application for writ of certiorari from the decision of the ICA. Accordingly, we decline to address Pilago's asserted rights in this opinion.

III. *JURISDICTIONAL REQUIREMENTS*

It is well-settled that "every court must . . . determine as a threshold matter whether it has jurisdiction to decide the issue[s] presented." *Pele Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 67, 881 P.2d 1210, 1213 (1994)*. Moreover, subject matter [***9] jurisdiction may not be waived and can be challenged at any time. *Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 133, 870 P.2d 1272, 1277 (1994)*.

In the instant case, the HPC and Nansay argue that the circuit court lacked jurisdiction to consider PASH's claims. Nansay asserts further that the proper remedy for PASH to pursue was an action for declaratory judgment and/or an injunction, rather than an appeal under *HRS § 91-14*. PASH contends that the circuit court properly exercised appellate jurisdiction under *HRS § 91-14*. [7]

> 7 *HRS § 91-14(a)* (Comp. 1993) provides:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is party to a contested case proceeding before that agency or another agency.

Although the last sentence of this provision did not become effective until May 20, 1993, *see County of Hawai'i v. Civil Service Comm'n, 77 Haw. 396, 401, 885 P.2d 1137, 1142 (App. 1994)*, that fact does not prevent the HPC from appealing an adverse decision by the circuit court to the ICA or to this court. *See Fasi v. Hawai'i Pub. Employees' Relations Bd., 60 Haw. 436, 442, 591 P.2d 113, 117 (1979).*

[***10] The necessary inquiry in this case, therefore, is whether PASH has met the requirements of *HRS § 91-14*: first, the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing -- i.e., a hearing that was 1) "required by law" and 2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and finally, the claimant's legal interests must have been injured -- i.e., the claimant must have standing to appeal. *See generally Puna Geothermal, supra.* In the remaining subsections of this part, we shall apply this test to the circumstances presented in this appeal.

A. *Contested Case Hearing*

In *Puna Geothermal*, we observed that "a contested case must have occurred before appellate jurisdiction may be exercised. A contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of [***11] specific parties." *77 Hawai'i at 67-68, 881 P.2d at 1213-14* (citations and footnote omitted). In order for a hearing to be "required by law," it may be required by statute, agency rule, or constitutional due process. *See id.; at 68, 881 P.2d at 1214.*

In the instant case, we need only look to agency rules promulgated under the authority of *HRS § 205A-29* to find the hearing requirement. [8] *See* HPC Rule 9-11(B), *supra* note 2. In fact, the respective county planning commissions for all the neighbor [*432] [**1253] islands are authorized under the Coastal Zone Management Act (CZMA), HRS chapter 205A, and in accordance with the Hawai'i Administrative Procedures Act (HAPA), HRS chapter 91, to establish rules governing the grant or denial of a SMA permit. [9] *See, e.g., Chang v. Planning Comm'n, 64 Haw. 431, 436, 643 P.2d 55, 60 (1982).* In the City and County of Honolulu, on the other hand, the relevant authority under the CZMA (specifically, the Honolulu City Council) is a legislative body that is exempt from HAPA. *Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 368, 773 P.2d 250, 255 (1989).* No other law requires the Honolulu City Council to hold hearings on SMA applications. [***12] *Id. at 376, 773 P.2d at 260.* Similarly, in the County of Hawai'i, hearings are not required under the HPC Rules for cases involving SMA *minor* permit applications. *Kona Old Hawaiian Trails v. Lyman, 69 Haw. 81, 734 P.2d 161 (1981).* [10]

8 *HRS § 205A-29(a)* provides, in pertinent part:

> The authority in each county . . . *shall establish* and may amend pursuant to chapter 91, by rule or regulation the [SMA] use permit application procedures, *conditions under which hearings must be held*, and the time periods within which the hearing and action for [SMA] use permits shall occur . . . . Any rule or regulation adopted by the authority shall be consistent with the objectives, policies, and [SMA] guidelines provided in this chapter. Action on the special management permit shall be final unless otherwise mandated by court order.

(Emphases added.)

9 The Maui Planning Commission Rules of Practice and Procedure (MPC Rules) currently

provide for formal intervention (*see* MPC Rules §§ 12-201-39 to -46) and for appeal to the circuit court from denial thereof (*see* MPC Rules § 12-201-46) but make no provision for appeal of a SMA permit decision. Because Maui County Charter § 8.5.4 specifically restricts appeals to the Board of Appeals from those actions concerning "zoning, subdivision and building ordinances[,]" action on a SMA permit by the MPC is final and, therefore, appealable under the HAPA. *See also* Lana'i Planning Commission Rules (forthcoming, pursuant to Maui County Charter Amendment, as required by 1992 General Election Question No. 3, calling for a separate planning commission on Lana'i).

The Rules of Practice and Procedure for the Moloka'i Planning Commission (Moloka'i PC Rules) currently provide for formal intervention and contested case procedures (*see* Moloka'i PC Rules §§ 12-1-25 to -31), appeal to the circuit court from the denial of intervention (*see id.* § 12-1-31), and "judicial review of [all other] decisions and orders . . . in the manner set forth in *HRS § 91-14*." *See id.* § 12-1-61.

The Rules of Practice and Procedure of the County of Kaua'i, Planning Commission (KPC Rules) currently provide for formal intervention. *See* KPC Rule 1-4-1. Furthermore, "any person aggrieved by a final order and decision of the Planning Commission may obtain judicial review thereof in the manner pursuant to HRS [chapter] 91." KPC Rule 1-6-18(i).

[***13]

10 HPC Rules 9-10(D) and (E) omit the hearing requirement for SMA minor permit applications.

Next, we must determine whether the subject hearing determined the rights, duties, or privileges of a specific party. At this stage of the analysis, our inquiry is properly directed at the party whose application was under consideration by the HPC. *See Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214*; *Bush, 76 Hawai'i at 136, 870 P.2d at 1280*. During the proceeding initiated by the HPC on September 28, 1990 and resumed on Nov. 8, 1990, Nansay "sought to have the legal rights, duties, or privileges of land in which it held an interest declared over the objections of other landowners and residents" of the area, including persons allegedly having constitutionally protected interests on the development site in Kohanaiki. *Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214*; *Mahuiki v. Planning Comm'n, 65 Haw. 506, 513, 654 P.2d 874, 879 (1982)*. Consequently, we hold that the SMA use permit application proceeding before the HPC was a contested case. [11]

11 Nansay claims that Hawai'i appellate court opinions dealing with judicial review of agency decisions reflect an inconsistent legal analysis. Thus, Nansay suggests that PASH should have pursued alternative judicial measures, such as an action for an injunction or a declaratory judgment, rather than seeking appellate review under *HRS § 91-14. See Bush, 76 Hawai'i at 136-37, 870 P.2d at 1280-81*; *Town v. Land Use Comm'n, 55 Haw. 538, 557, 524 P.2d 84, 96, 55 Haw. 677 (1971)* (Ogata, J., dissenting, joined by Richardson, C.J.). The disparity perceived by Nansay between court holdings based on *procedural* and *substantive* errors in agency decision-making merely reflects application of a two-part test for determining whether a particular proceeding was a "contested case" under *HRS § 91-1(5)*. In their dissent, Justices Ogata and Richardson disagreed with the *Town* majority's application of this nascent test. The dissent believed that the agency hearing, although required by law, was not a contested case. *Town, 55 Haw. at 556-57, 524 P.2d at 96*. The dissenting opinion erroneously focused on the appellee's characterization of the hearing as a rule-making procedure. *Id. at 556, 524 P.2d at 95*. The majority, on the other hand, correctly concluded that the process for boundary amendment is not rule-making because it is "*adjudicative of legal rights* of property interests in that it calls for the *interpretation of facts applied to rules that have already been promulgated*[.]" *Town, 55 Haw. at 548, 524 P.2d at 91* (emphasis added).

[***14] B. *Finality for purposes of judicial review under § 91-14*

The second element of our analysis requires us to determine whether PASH appealed [*433] [**1254] from either "a final decision and order . . . or a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief[.]" *HRS § 91-14(a)*. In *Kona Old Hawaiian Trails*, we held that the HPC's "decision to grant a minor permit [was not] 'a final decision or order in a contested case' from which an appeal to court was possible." *Id. at 90-91, 734 P.2d at 167*. In that case, we looked to Hawai'i County Charter section 5-6.3 for the necessary provision granting appeal rights because the HPC Rules do not address judicial review of the grant or denial of a SMA *minor* permit. [12] *Id. at 91 n.11, 734 P.2d at 167 n.11* (providing for appeal to the county zoning board of appeals (ZBA) under section 5-6.3 of the county charter). The appellants in *Kona Old Hawaiian Trails* did

not avail themselves of this procedure; therefore, the courts could not properly exercise appellate jurisdiction.

> 12 *HRS § 205A-30* requires "specific procedures . . . for the issuance of . . . [SMA] minor permits, . . . and judicial review from the grant or denial thereof."

[***15] In the instant case, PASH was not required to appear before the ZBA prior to seeking judicial review because HPC Rules 4-6(h) and 9-11(D)(5) provide for direct appeal to the third circuit court. [13] Furthermore, the HPC has already rendered its final views for the purposes of judicial review. *See HRS § 205A-29, supra* note 8 (indicating that "action on the [SMA use] permit shall be final unless otherwise mandated by court order"). Even if we were to accept the Petitioners' claim that PASH does not contest the actual grant of Nansay's SMA use permit, *but see supra* note 5, we would still hold that the circuit court properly exercised its appellate jurisdiction in this case. HPC Rule 4-6(h); *see also In re Hawaii Gov't Employees' Ass'n, 63 Haw. at 89, 621 P.2d at 364* (upholding appellate jurisdiction where the agency's preliminary ruling ended the proceedings with respect to a party seeking intervention in a contested case).

> 13 HPC Rule 4-6(h) provides that "any petitioner who has been denied standing as a party may appeal such denial to the circuit court pursuant to *section 91-14*, [Hawai'i] Revised Statutes." The HPC Rules apparently provide an alternative means of obtaining judicial review: "Approval or denial of the petition [for a SMA permit] shall be *final and appealable* to the Third Circuit Court of the State of [Hawai'i] in accordance with Chapter 91, HRS, as amended." HPC Rule 9-11(D)(5) (emphasis added).

[***16] C. *Participation, including compliance with agency rules*

Under the third element of our analysis, PASH must demonstrate that it was involved, or participated, in the contested case hearing that culminated in the unfavorable decision. *Puna Geothermal, 77 Hawai'i at 70, 881 P.2d at 1216* (citing *Bush, 76 Hawai'i at 134, 870 P.2d at 1278*; *Mahuiki, 65 Haw. at 514-15, 654 P.2d at 879-80*). Moreover, "appellants seeking judicial review under *HRS § 91-14* must . . . follow agency rules 'relating to contested case proceedings . . . properly promulgated under HRS Chapter 91[.]'" *Puna Geothermal, 77 Hawai'i at 67-68, 881 P.2d at 1213-14.*

During the September 28, 1990 public hearing held by the HPC, PASH testified against the grant of a SMA use permit for Nansay's proposed development. Pursuant to HPC Rule 4-6(a), PASH also requested implementation of contested case procedures at this hearing as well as at the November 8, 1990 hearing. After the HPC denied its request, PASH sought judicial review under *HRS § 91-14* (as directed by HPC Rule 4-6(h) and pursuant to a discussion between the HPC and its deputy corporation counsel). [14] Having followed the procedures set forth [***17] by the HPC, PASH's participation in [*434] [**1255] the SMA use permit proceeding amounts to involvement "in a contested case" under *HRS § 91-14(a). See Puna Geothermal, 77 Hawai'i at 70, 881 P.2d at 1216.* The mere fact that PASH was not formally granted leave to intervene in a contested case is not dispositive because it did everything possible to perfect its right to appeal. *See id. at 71, 881 P.2d at 1217* (discussing *Jordan v. Hamada, 62 Haw. 444, 616 P.2d 1368 (1980)*, and *East Diamond Head Ass'n v. Zoning Board, 52 Haw. 518, 479 P.2d 796, 52 Haw. 572 (1971))*.

> 14 Counsel for the HPC suggested that if the contested case request were to be denied, PASH "should probably wait for the decision [of the circuit court]; and then the Supreme Court will determine whether [its] participation in the public hearing was sufficient standing for [it] to appeal from that decision."

D. *Standing as a "person aggrieved"*

The remaining element in our jurisdictional analysis requires PASH to "demonstrate [that its] . . . interests [***18] were injured[.]" *Puna Geothermal, 77 Hawai'i at 69, 881 P.2d at 1215.* Although the HPC Rules allow formal intervention through specified procedures, PASH was denied standing to participate in a contested case hearing because the agency found that its asserted interests were "substantially similar" to those of the general public. The HPC's restrictive interpretation of standing requirements is not entitled to deference. *See id. at 67, 70, 881 P.2d at 1213, 1216* (citing *Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989)*; *Akau v. Olohana Corp., 65 Haw. 383, 388-89, 652 P.2d 1130, 1134 (1982)). Cf. Mahuiki, 65 Haw. at 515, 654 P.2d at 880* (recognizing that "a decision to permit the [proposed] construction . . . on undeveloped land in the [SMA] could only have an adverse effect on" the appellants' "essentially aesthetic and environmental" interests). [15] Accordingly, we review *de novo* whether PASH has demonstrated that its interests were injured.

> 15 We stated in *Akau* that "a member of the public has standing to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by

any means, including a class action." *Akau, 65 Haw. at 388-89, 652 P.2d at 1134*. The necessary elements of an "injury in fact" include: 1) an *actual or threatened* injury, which 2) is traceable to the challenged action, and 3) is likely to be remedied by favorable judicial action. *See Puna Geothermal, 77 Hawai'i at 70, 881 P.2d at 1216*; *accord Pele Defense Fund v. Paty [Pele], 73 Haw. 578, 615, 837 P.2d 1247, 1257-58 (1992), cert. denied, 507 U.S. 918, 122 L. Ed. 2d 671, 113 S. Ct. 1277 (1993)*. In other words, individuals or groups requesting contested case hearing procedures on a SMA permit application before the HPC must demonstrate that they will by "directly and immediately affected by the Commission's decision." HPC Rule 4-2(6)(B). However, standing requirements are not met where a petitioner merely asserts "value preferences," which are not proper issues in judicial (or quasi-judicial) proceedings. *Puna Geothermal, 77 Hawai'i at 70, 881 P.2d at 1216*. Although the HPC Rules do not expressly require petitioners to detail the nature of their asserted interests in writing until *after* the HPC has determined whether a contested case hearing is required, *see* HPC Rules 4-6(b) and (c), a petitioner who is denied standing without having had an adequate opportunity to identify the nature of his or her interest may supplement the record pursuant to *HRS § 91-14(e)*.

The cultural insensitivity demonstrated by Nansay and the HPC in this case -- particularly their failure to recognize that issues relating to the subsistence, cultural, and religious practices of native Hawaiians amount to interests that are clearly distinguishable from those of the general public -- emphasizes the need to avoid "'foreclosing challenges to administrative determinations through restrictive applications of standing requirements.'" *Mahuiki, 65 Haw. at 512, 516, 654 P.2d at 878, 880* (quoting *Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981))*.

[***19] We agree with the ICA's thorough assessment of PASH's standing. *See PASH I*, slip. op. at 8-13. Through unrefuted testimony, PASH sufficiently demonstrated that its members, as "native Hawaiian[s] who [have] exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands, [have] an interest in a proceeding for the approval of [a SMA permit] for the development of lands within the ahupua'a which are [sic] clearly distinguishable from that of the general public." *Id.* at 8. Although we hold that PASH sufficiently demonstrated standing to participate in a contested case, at least for the purposes of the instant appeal, we observe that " opportunities shall be afforded all parties to present evidence and argument on all issues [*435] [**1256] involved" in the contested case hearing held on remand. *HRS § 91-9(c)*.

For the reasons discussed in subsections III.A. through D., *supra*, we hold that the circuit court had jurisdiction to determine the issues raised by PASH in this case.

IV. THE OBLIGATION TO PRESERVE AND PROTECT *CULTURAL AND HISTORIC RESOURCES*

Having established the jurisdiction of the [***20] courts in this case, we now turn to the substantive arguments advanced by Nansay and the HPC. [16]

16 Upon granting certiorari, we allowed the parties to submit supplemental briefs concerning issues raised in the application for writ of certiorari. *See HRS § 602-59(d)*. After reviewing these submissions, we then requested additional briefing on the following issues: (1) to what extent should native Hawaiian gathering rights on undeveloped land be protected when that same land is under consideration for development permits, and does the HPC have legal authority to condition a SMA permit on protection of those rights; (2) what criteria should be considered in determining whether the proposed development would infringe upon native Hawaiian rights; and (3) at what point, if any, does the protection of native Hawaiian rights in the land being developed implicate the "Takings Clause" of the Hawai'i and the United States Constitutions? The extensive briefing of these issues included submissions by numerous amici curiae: the Kona Hawaiian Civic Club, Ka Lahui Hawai'i, the Land Use Research Foundation, Pele Defense Fund, the Office of Hawaiian Affairs, the State of Hawai'i, the 'Ohana Council, and (collectively) Protect Kohanaiki 'Ohana, Inc., the Kalamaula Homestead Association, and the Native Hawaiian Environmental Defense Fund.

[***21] Nansay argues that the HPC has no obligation under the CZMA or any other law to consider, much less require, protection of traditional and customary Hawaiian rights. The HPC concurs, adding that the ICA's opinion in *PASH I* places an undue burden on the CZMA process. In any event, the HPC contends that it did not disregard protection of gathering rights because the SMA permit contains a condition requiring establishment of a program for preserving and maintaining the anchialline ponds on the development site. Nansay and the HPC also contend that PASH failed to establish a

prima facie claim of native Hawaiian gathering rights -- specifically, Nansay claims that the evidence only shows shrimp gathering at the ponds as far back as the late 1920's.

A. *Obligations Under the CZMA*

Within the scope of their authority, "all agencies" in Hawai'i must ensure that their rules comply with the objectives and policies of the CZMA. *HRS §§ 205A-4(b)* and *-5*. Moreover, the neighbor island county planning commissions and the Honolulu City Council are specifically required to give "full consideration . . . to . . . *cultural* . . . [and] *historic* . . . *values* as well as to needs [***22] for economic development" when implementing the objectives, policies, and SMA guidelines set forth in the CZMA. *HRS § 205A-4(a)* (emphasis added).

In accordance with statutory mandates, HPC Rule 9-11(C) provides that the relevant governmental authority may grant a SMA use permit only upon finding that the proposed development:

(1) "will not have any significant adverse environmental or ecological effect"; [17] (2) "is consistent with [CZMA] objectives and policies . . . and the [SMA] guidelines"; [18] and (3) "is consistent with the General Plan, Zoning Code and other applicable ordinances." A "significant adverse effect," for the purposes of deliberations upon [*436] [**1257] a SMA permit application, [19] includes the expected primary or secondary consequences of a proposed development, as well as the short- and long-term effects or cumulative consequences of the proposal.

17 Limited exceptions to the "[no] significant adverse effect" requirement are available where such impact is minimized to the extent practicable, or is clearly outweighed by public health, safety, or compelling public interest. HPC Rule 9-11(c).

[***23]

18 The SMA guidelines are contained in HPC Rule 9-7, which essentially tracks *HRS §§ 205A-26(1)* and *(2)*. HPC Rule 9-7(A) directs certain minimizing efforts where reasonable. HPC Rule 9-7(B) substantially parallels HPC Rule 9-11(C), differing by the addition of a provision that includes the cumulative impact of *separate development proposals* as potentially significant adverse effects.

19 The definition of a "significant adverse effect," *see* citations to HPC Rule 9-10(H), *infra* this section, appears in the context of the HPC's threshold determination of qualification for a SMA minor permit versus a SMA use permit. The Director may issue a SMA minor permit only after the following events take place: (1) the Director determines that a proposed project (a) will not have a significant adverse effect and (b) does not exceed $ 125,000.00 in valuation; and (2) the Chief Engineer reviews the proposed project and makes a recommendation. HPC Rule 9-10(E).

Accordingly, the HPC may not issue a SMA use permit unless it finds that the proposed project will not have any significant adverse [***24] effects. *Cf. Hui Alaloa v. Planning Comm'n, 68 Haw. 135, 705 P.2d 1042 (1985)*. In *Hui Alaloa*, the Maui Planning Commission (MPC) failed to make the requisite finding that a proposed development on the island of Moloka'i was consistent with CZMA historic protection and preservation objectives. Notwithstanding the inclusion of permit conditions requiring the developer to retain a qualified archaeologist and to substantially comply with the CZMA and HAPA, we vacated the MPC's orders granting SMA permits.

The following factors, inter alia, may constitute significant adverse effects: (a) "an irrevocable commitment to loss or destruction of any natural or *cultural resource, including but not limited to, historic sites* and view planes"; (b) effects upon "the *economic or social welfare and activities of the community*, County or State"; and (c) actions "contrary to the objectives and policies of [the CZMA] and the [SMA] Guidelines." HPC Rule 9-10(H)(1), (4) & (10) (emphasis added). *See also* HPC Rule 9-6(A)(2); *HRS § 205A-2(b)(2)* (one of the CZMA's objectives and policies is to protect and preserve "those natural and manmade historic and prehistoric resources in the [***25] coastal zone management area that are *significant in Hawaiian . . . history and culture*") (emphasis added). The interests asserted by PASH fall within these broad categories; therefore, they are entitled to protection under the CZMA. [20] *See HRS § 205A-21* (finding that "special controls on development are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure . . . adequate access"); HPC Rule 9-11(C) (authorizing the the HPC to attach "reasonable terms and conditions" to SMA permits); *cf. Hammond v. North Slope Borough, 645 P.2d 750, 761-62 (Alaska 1982)* (holding that Alaska's version of the CZMA requires its agencies to "assure opportunities for subsistence usage of coastal areas and resources" and to issue development permits only where consistent with Alaska's environmental and cultural interests).

20 The State, as amicus curiae, asserts title to the anchialline ponds as "public trust" lands by virtue of the fact that they are affected by the tides. Although we do not decide this issue, we recognize that the CZMA clearly requires protec-

tion and preservation of public "coastal" areas. *See 16 U.S.C. § 1454(b)(7) (1985)* (requiring each state to create a planning process that provides adequate protection of such resources before federal approval is granted and funding will be made available); *16 U.S.C. § 1455(d)(2)(G) (Supp. 1993)* (requiring a Secretarial finding to that effect).

[***26] In order for any conditions placed on a SMA permit issued by the HPC on remand to be deemed "reasonable," they must bear an essential nexus to legitimate State interests and must be "roughly proportional" to the impact of the proposed development. *See infra* section V.B. (discussing the respective requirements from *Nollan v. California Coastal Comm'n, 483 U.S. 825, 836, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1986)*, and *Dolan v. City of Tigard, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994)*). Here, the relevant State interests are reflected in *article XII, section 7 of the Hawai'i Constitution* (1978) and *HRS § 1-1*. *See infra* section IV.B. In other words, the HPC may require dedications appropriately tailored to the special [*437] [**1258] and quantifiable burdens associated with granting discretionary benefits to Nansay, through a SMA permit, which facilitate development of the company's land. Conditions that ensure continued access to the subject property for the legitimate and reasonable practice of customary and traditional rights would presumably comply with constitutional prohibitions against the uncompensated taking of private property. *See infra* section V.B.

B. *Obligations Under Article XII, Section 7 of the Hawai'i Constitution* [***27] *and HRS § 1-1*

In addition to the requirements of the CZMA, the HPC is obligated to protect customary and traditional rights to the extent feasible under the Hawai'i Constitution and relevant statutes. *Article XII, Section 7 of the Hawai'i Constitution* (1978) provides:

> The State reaffirms and *shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes* and possessed by ahupua's 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.*

(Emphases added.) *HRS § 1-1* (Supp. 1992) provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of [Hawai'i] in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage*; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

(Emphasis added.) [***28] [21]

21 *See also Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands* 91 (1892) [hereafter L. 1892], ch. LVII, § 5 (providing for exceptions to the English common law where "established by Hawaiian *national* usage") (emphasis added). Although references to the provisions contained in *HRS § 1-1* generally focus on the 1892 statute as its predecessor, an examination of historical developments suggests that the principles codified in this statute have much earlier origins. One of the initial attempts to codify the laws of Hawai'i indicated that " the Hawaiian kingdom was *governed until the year 1838, without other system than usage*, and with a few trifling exceptions, without legal enactments." 1 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 3 (1845-46) [hereafter L. 1845-46] (emphasis added). As the kingdom developed further, written laws were promulgated to secure civil liberties and to codify the constitutional monarchy that emerged. *See infra* section IV.B.4 (discussing the development of private property rights in Hawai'i). For example, the first two Acts of Kamehameha III established the Executive Department, including five Ministers and a Privy Council. These initial acts of Kamehameha III dramatically restructured Hawaiian society, but also retained many cultural elements deemed crucial to the survival of the nation's native people. *See infra* note 33 (noting that part of the second Act preserved "native usages in regard to landed tenures"); *see also infra* note 24 (indicating that the titles issued for particular parcels of property typically contained provisions expressly reserving "tenant" rights).

The third Act of Kamehameha III created an independent Judiciary. Act of September 7, 1847, ch. I, § IV; 2 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* (1847) [hereafter L. 1847]. The Judiciary was given the authority to cite and adopt " the reasonings and analysis of the common law, and of the civil law

> [of other countries] . . . so far as they are deemed to be founded in justice, and *not in conflict with the laws and usages of this kingdom*." L. 1847, at 5 (emphasis added). Shortly thereafter, on September 27, 1847, the House of Nobles and Representatives passed a resolution calling for the preparation of a civil code. As eventually codified, chapter III, § 14 of the Code provided: " the Judges . . . are *bound* to proceed and decide according to equity. . . . To decide equitably, *an appeal is to be made . . . to received usage*, and resort may also be had to the laws and usages of other countries." The Civil Code of the Hawaiian Islands ch. III, § 14, at 7 (1859) [hereafter 1859 Civil Code] (emphases added). *See also id. at 195* (prohibiting "conflict with the laws and *customs* of this kingdom" in § 823) (emphasis added). Finally, §§ 14 and 823 of the 1859 Civil Code were expressly repealed in "An Act to Reorganize the Judiciary Department," the very same legislation that codified the provision now referred to as *HRS § 1-1*. *See* L. 1892, at 123-24.

[***29] The aforementioned provisions were discussed by this court, in the context of an individual's asserted gathering rights, in *Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982)*. Ten years later, in *Pele Defense Fund v. Paty, supra*, we recognized [*438] [**1259] that ancient Hawaiian gathering rights may have extended beyond the boundaries of individual ahupua'a in certain cases. *73 Haw. at 620, 837 P.2d at 1272*. Nevertheless, neither *Kalipi* nor *Pele* precluded further inquiry concerning the extent that traditional practices have endured under the laws of this State. "In *Kalipi*, we foresaw that the precise nature and scope of the rights retained by *§ 1-1* would, of course, depend upon the particular circumstances of each case.'" *Pele, 73 Haw. at 619, 837 P.2d at 1271* (quoting *Kalipi, 66 Haw. at 12, 656 P.2d at 752*).

In order to determine whether the HPC must protect traditional and customary rights of the nature asserted in this case, we shall first review our analysis of gathering rights in *Kalipi* and *Pele*. Then we shall clarify the status of customary rights in general, as a result of relevant judicial and legislative developments in Hawaiian history. [***30] Finally, we will provide the HPC with some specific, although not necessarily exhaustive, guidelines to aid its future deliberations in the event that Nansay elects to pursue its challenges to the legitimacy of PASH's claims.

1. *Kalipi v. Hawaiian Trust Co.: judicial recognition of traditional Hawaiian gathering rights based upon residency in a particular ahupua'a*

Kalipi involved an individual's attempt to gain access to private property on the island of Moloka'i in order to exercise purportedly traditional Hawaiian gathering rights. The court prefaced its consideration of Kalipi's claims with a discussion of the State's obligation to preserve and enforce traditional Hawaiian gathering rights under *article XII, section 7 of the Hawai'i Constitution*:

> We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But *any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail.*

66 Haw. at 4, 656 P.2d [***31] *at 748* (emphasis added).

The court then began its analysis of Kalipi's asserted gathering rights by interpreting *HRS § 7-1* (1985) [22] so as to essentially "*conform* these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right to exclude is perceived to be an integral part of fee simple title." *Id. at 7, 656 P.2d at 749* (emphasis added). Accordingly, the court fashioned a rule permitting "lawful occupants of an [ahupua'a] . . . [to] enter undeveloped lands within the [ahupua'a] [*439] [**1260] to gather those items enumerated in the statute $ *(HRS § 7-1*]." *Id. at 7-8, 656 P.2d at 749*.

> The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the [ahupua'a], including fully developed property, to gather the enumerated items. [23] *In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could* [***32] *not consider it anything short of absurd and therefore other than that which was intended by the statute's framers. Moreover, it would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of*

other residents were integral parts of the culture.

Similarly the requirement that the rights be utilized to practice native customs represents, we believe, a reasonable interpretation of the Act as applied to our current context. The gathering rights of *§ 7-1* were necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways.

22 *HRS § 7-1*, which has not undergone significant change since the 1851 enactment that amended an earlier version of the statute, provides:

> **Building materials, water, etc., landlords' title subject to tenants' use.** Where the *landlords* have obtained, or may hereafter obtain, allodial titles to their lands, *the people on each of their lands* shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

(Emphases added.) *See* Act of July 11, 1851, *reprinted in Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 98-99 (1851) [hereafter L. 1851]. The 1851 enactment deleted provisions established the previous year, which required that persons wishing to exercise such rights must obtain the " landlord['s] . . . consent." *See* Act of August 6, 1850, § 7, *reprinted in Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 202, 203-04 (1850) [hereafter L. 1850]; *see also infra* section IV.B.4 (discussing both the 1850 enactment and its apparent predecessor, quoted *infra* note 34, which was enacted in 1846).

The term "landlord" appears to be a loose translation of "konohiki" from the Hawaiian language versions of these acts. The word "konohiki" is defined as " headman of an *ahupua'a* land division under the chief." Pukui & Elbert, *Hawaiian Dictionary* 166 (2nd ed. 1986).

[***33]

23 On the contrary, however, " all of the witnesses who testified regarding traditional custom testified that the custom requires that anyone seeking access to the ahupua'a may only exercise those rights in the *uninhabited portions* of the ahupua'a where that person is a tenant, *always respecting the private areas* of other tenants." Kalipi's Reply Brief (No. 6957) at 11 (emphases added). Furthermore, as Kalipi understood his asserted gathering rights, "custom required that *anything planted and cared for by people should be left alone.*" Kalipi's Opening Brief (No. 6957) at 49 (emphasis added).

Id. at 8-9, 656 P.2d at 749-50 (citation omitted) (footnote and emphasis added).

Because Kalipi did not actually reside within the subject ahupua'a, the court held that he was not entitled to exercise *HRS § 7-1* gathering rights there. *Id. at 9, 656 P.2d at 750*. Nevertheless, the court specifically refused to decide the ultimate scope of traditional gathering rights under *HRS § 1-1* because there was "an *insufficient basis* to find that such rights would, or should, accrue [***34] to persons who did not actually reside within the [ahupua'a] in which such rights are claimed." *Id. at 12, 656 P.2d at 752* (emphasis added). In other words, *Kalipi* did not foreclose the possibility of establishing, in future cases, traditional Hawaiian gathering and access rights in one ahupua'a that have been customarily held by residents of another ahupua'a.

2. Pele Defense Fund v. Paty: judicial recognition of traditional access and gathering rights based upon custom

Pele involved, inter alia, the assertion of customarily and traditionally exercised subsistence, cultural, and religious practices in the Wao Kele 'O Puna Natural Area Reserve on the Big Island. For the purposes of summary judgment, we held that there was a sufficient basis to find that gathering rights can be claimed by persons who

do not reside in the particular ahupua'a where they seek to exercise those rights. *Pele, 73 Haw. at 621, 837 P.2d at 1272* (reversing summary judgment and remanding for trial on this issue). We specifically held that "native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawaiian resides." *Pele, 73 Haw. at 620,* [***35] *837 P.2d at 1272.* In so holding, we explicated the discussion of gathering rights in *Kalipi* by recognizing that a claim based on practiced customs raises different issues than assertions premised on mere land ownership.

> Unlike Kalipi, [Pele Defense Fund] members assert native Hawaiian rights based on the traditional access and gathering patterns of native Hawaiians in the Puns region. Because Kalipi based his claims entirely on land ownership, rather than on the practiced customs of Hawaiians on [Moloka'i], the issue facing us is somewhat different from the issue in *Kalipi.*

Pele, 73 Haw. at 618-19, 837 P.2d at 1271.

Although we later mentioned "other requirements of *Kalipi*" with approval -- implicitly [*440] [**1261] referring to the "undeveloped lands" and "no actual harm" requirements of *Kalipi, see 73 Haw. at 621, 837 P.2d at 1272* -- our holding in *Pele* was not intended to foreclose argument regarding those requirements in future, unrelated cases involving assertions of customary and traditional rights under *HRS § 1-1.* "In *Kalipi*, we foresaw that 'the precise nature and scope of the rights retained by *§ 1-1* would, of course, depend upon [***36] the particular circumstances of each case.'" *Pele, 73 Haw. at 619, 837 P.2d at 1271* (quoting *Kalipi, 66 Haw. at 12, 666 P.2d at 752*).

3. *The "other requirements of Kalipi"*

In addition to creating the "undeveloped land" requirement, *see Kalipi, 66 Haw. at 7-8, 656 P.2d at 749*, the court in *Kalipi* made the following observations concerning claims of traditional gathering rights under *HRS § 1-1*: [24]

> We perceive the Hawaiian usage exception to the adoption of the common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law. The statutory exception is thus *akin to the English doctrine of custom* whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law. *This is not to say that we find that all the requisite elements of the doctrine of custom were necessarily incorporated in § 1-1. Rather we believe that the retention of a Hawaiian tradition* [***37] *should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.*

In this case, Plaintiff's witnesses testified at trial that there have continued in certain [ahupua'a] a range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in *§ 7-1.* [25] Where these practices have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in *§ 1-1* insures their continuance for so long as no actual harm is done thereby.

Oni v. Meek, [2 Haw. 87, (1858)], does not preclude this conclusion, for in that case the application of the doctrine of custom was argued and the doctrine itself was not rejected. . . . Moreover, the language in *Oni* respecting the conclusiveness of *§ 7-1* does not necessarily preclude application of the doctrine.

> 24 The court in *Kalipi* also addressed the "kuleana" reservation in the title to the lands in question. The "kuleana" reservation provides, "'Koe nae no kuleana a na kanaka moloko,' [which was] translated at trial to mean 'the kuleanas [sic] of the people therein are excepted' . . . [, and which thereby states the government's intention to] '. . . hereby declare these lands to be set apart as the lands of the Hawaiian Government, *subject always to the rights of tenants.*'" *Kalipi, 66 Haw. at 12, 656 P.2d at 752* (emphasis added). Although the court withheld comment on the precise scope of

this alternative source of gathering rights, *see Kalipi, 66 Haw. at 12-13, 656 P.2d at 752*, it nevertheless indicated that *Territory v. Liliuokalani, 14 Haw. 88, 95 (1902)* (holding that a similar reservation did not incorporate any public right to the use of certain shoreline areas included within a grant of land), does not necessarily dispose of the "kuleana" reservation as a source of additional gathering rights beyond *HRS § 7-1. Id. at 12, 656 P.2d at 752.*

The word "kuleana" is defined as, inter alia, "right, privilege, concern, responsibility, . . . [or] small piece of property, as within an *ahupua'a*[.]" Pukui & Elbert, *Hawaiian Dictionary* 179 (2nd ed. 1986). The word "kanaka" is defined, inter alia, as "person, individual, . . . subject, as of a chief; laborer, . . . Hawaiian[.]" *Id. at 127.*

[***38]

25 These included the gathering of items not delineated in *§ 7-1* and the use of defendants' lands for spiritual and other purposes. *Id. at 10 n.4, 656 P.2d at 751 n.4.*

Id. at 10-11, 656 P.2d at 751 (citations omitted) (footnote renumbered and internal citation [*441] [**1262] added) (emphasis added). [26] In reaching its conclusion regarding the continued existence of customary rights, the *Kalipi* court necessarily rejected the appellee's contentions that 1) "any customary rights which might otherwise have been retained by *§ 1-1* have been abrogated by judicial precedent[,]" and 2) "no customary rights other than those found in . . . $ *(HRS § 7-1]* survived the [*Mahele*]." [27] *Id. at 9-10, 656 P.2d at 750. Oni* does not stand for the proposition that customary rights, which had not yet been formally established through judicial proceedings, were extinguished *sub silentio* by the *Mahele* or its associated legal developments. *Oni* merely rejected one particular claim based upon an apparently non-traditional practice that had not achieved customary status in the area [***39] where the right was asserted.

26 The elements of the common-law doctrine of custom, as set forth in 1 W. Blackstone, Commentaries 76-78 (Sharwood ed. 1874) [hereafter Blackstone's Commentaries] are that the alleged custom must be, or have been:

(1) exercised so long "that the memory of man runneth not to the contrary" -- according to subsequent commentators, "

long and general" usage is sufficient, *see, e.g., State ex rel Thornton v. Hay, 254 Ore. 584, 596, 462 P.2d 671, 677 (Or. 1969)* (citing Professor Cooley's edition of the Commentaries);

(2) without interruption (as to the *right* versus *exercise* thereof -- i.e., continuous exercise is not required: "the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove");

(3) peaceable and free from dispute (i.e., exercised by consent);

(4) reasonable -- i.e., "of artificial and legal reason, warranted by authority of law" and appropriate to the land and the usages of the community;

(5) certain;

(6) obligatory or compulsory (when established); and

(7) consistent with other customs.

[***40]

27 *Kalipi* implicitly rejected the Hawaiian Trust Company's argument, which was based on language in *Oni* to the effect that the rights provided by the Act of August 6, 1850, were declarative of "*all* the specific rights of the [*hoa'aina*] (except fishing rights) which should be held to prevail against the fee simple title of the konohiki[.]" *2 Haw. at 95.*

The English version of the 1850 Act uses the term "people," which was held to be synonymous with the word "hoa'aina." *Id. at 96.* The word "hoa'aina" is defined as "tenant, caretaker, as on a *kuleana.*" Pukui & Elbert, *Hawaiian Dictionary* 73 (2nd ed. 1986). Meanwhile, the term "tenant" includes "one who holds or possesses real estate

or sometimes personal property . . . by *any kind* of right[.]" *Webster's Third New Int'l Dictionary* 2354 (1967 ed.) (emphasis added). Therefore, it is possible to construe the term "tenant" so as to incorporate the traditional native Hawaiian concept of a cultural link to the land. *See McBryde Sugar Co. v. Robinson [McBryde II], 55 Haw. 260, 289 n.29, 517 P.2d 26, 42 n.29, cert. denied, 417 U.S. 976, 41 L. Ed. 2d 1146, 94 S. Ct. 3183 (1974)* (Levinson, J., dissenting) (suggesting the need for comparative analysis of bilingual statutes because the English version is binding under *HRS § 1-13* only when there is a "radical or irreconcilable difference" between the two versions); *In re Ross, 8 Haw. 478, 480 (1892)* ("the effort is always made to have [the two versions] exactly coincide, and the legal presumption is that they do). *See also infra* note 35 (discussing the definition of "maka'ainana"). Nevertheless, we recognize that the Hawaiian language version of this Act actually uses the word "kanaka." *See supra* note 24.

[***41] The *Kalipi* court implicitly acknowledged the possibility of recognizing certain customary rights, under *HRS § 1-1*, to gather items that are not specifically delineated in *HRS § 7-1*. *See supra* note 26 & accompanying text (quoting *Kalipi, 66 Haw. at 10* & n.4, *656 P.2d at 751* & n.4). However, the court did not fully embrace the opportunity to clarify *Oni* with respect to the potential application of the doctrine of custom. [28] We believe that the *Kalipi* court's preoccupation [*442] [**1263] with residency requirements under *HRS § 7-1* obfuscated its cursory examination of Kalipi's alternative claim based on customarily and traditionally exercised Hawaiian rights. [29] Accordingly, we read the discussion of customary rights in *Oni* and *Kalipi* as merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner.

28 Immediately prior to its substantive analysis, the court in *Kalipi* summarily stated:

> Kalipi asserts that it has *long been the practice* of him and his family to travel the lands of the Defendants in order *to gather indigenous agricultural products for use in accordance with traditional Hawaiian practices. . . .*
>
> A trial was had and *the jury, by special verdict, determined that Kalipi had no such right.* He now alleges numerous errors in the trial court's instructions to the jury and conduct of the trial. We find, for the reasons stated below, that none of the alleged errors warrants reversal.

Kalipi, 66 Haw. at 3-4, 656 P.2d at 747 (emphases added). Nevertheless, the undisputed facts of the case reveal that the jury asked the trial court, "May we please have the book with the 1892 reference to rights in question . . . [i.e., Special Verdict Interrogatory Number 8]?" The trial court responded by instructing the jury to *disregard* Special Verdict Interrogatory Number 8, which read: "Did Hawaiian custom and usage as of 1892 include the right of a tenant of land in an [ahupua'a] to gather native products from his [ahupua'a]?" *See* Kalipi's Opening Brief (No. 6957) at 14, 53-57; Hawaiian Trust's Answering Brief (No. 6957) at 52-54.

Although Jury Instruction No. 21 already contained the 1892 reference (i.e., the text of *HRS § 1-1*), it is difficult to reconcile the trial court's response, or the appellate court's conclusion that there was no reversible error, with the implicit rejection of related Jury Instruction No. 19 in *Kalipi*. *See supra* note 27 & accompanying text (rejecting an argument based on parallel language from *Oni*). Jury Instruction No. 19 read:

> If you find that prior customs, usages and practices with respect to rights of kuleana owners *have been superseded or abrogated by the enactment of $ (HRS] § 7-1* or its predecessor statutes, then you may find that the specific rights which are enumerated in $ *(HRS] § 7-1* are *all of the rights* . . . which Plaintiff may be entitled to exercise.

Kalipi's Opening Brief (No. 6957) at 54 (emphasis added); Hawaiian Trust's Answering Brief (No. 6957) at 10 (emphasis added).

[***42]

29 Kalipi focused on his status as a landowner merely as an attempt to show that he belonged to the class of persons intended to benefit under *HRS § 7-1*. *See* Kalipi's Opening Brief (No. 6957) at 28 (citing *McBryde Sugar Co. v. Robinson, 54*

Haw. 174, 192, 504 P.2d 1330, 1341 (defining "people" in *HRS § 7-1* parenthetically as "meaning owners of land"), *aff'd upon rehearing, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed* and *cert. denied, 417 U.S. 962, 94 S. Ct. 3164, 41 L. Ed. 2d 1135, cert. denied, 417 U.S. 976, 94 S. Ct. 3183, 41 L. Ed. 2d 1146 (1974))*. In other words, Kalipi claimed that the statute preserved access and gathering rights as an incident of ownership, so long as these rights were utilized for valid purposes associated with that particular site. *Cf. Damon v. Tsutsui, 31 Haw. 678, 687 (1930)*; *Smith v. Laamea, 29 Haw. 750, 755-56 (1928)*; *Haalelea v. Montgomery, 2 Haw. 62, 71 (1858)* (interpreting the term "tenant" so as to pass the common right of piscary to the grantee, through sale or other conveyance, as an appurtenance to the land). The claim in *Oni* involved a purported right of pasturage arising primarily from the claimant's status as a landowner. *2 Haw. at 90*. To the extent that Oni's claims might have otherwise been based on ancient tenure, he abandoned these claims by entering into a special contract to provide labor for the konohiki in exchange for the right to pasture his horses. *Id. at 91*.

[***43] On the other hand, the *reasonable* exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7. *See Pele, 73 Haw. at 618-21, 837 P.2d at 1269-72* (holding that rights primarily associated with residence in a particular ahupua'a under *HRS § 7-1* might have extended beyond those bounds through ancient Hawaiian custom preserved in *HRS § 1-1*); *id. at 620, 837 P.2d at 1272* (holding that article XII, section 7 reaffirmed "*all* such rights"). Traditional and customary rights are properly examined against the law of property as it has developed in this state. Thus, the regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of "property."

4. *The development of private property rights in Hawai'i*

Some of the generally understood western concepts of property rights were discussed in *Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982)*.

> The western doctrine of "property" has traditionally implied certain rights. Among these are the right to the use of [***44] the property, the right to exclude others[,] and the right to transfer the property with the consent of the "owner". In conformance with creation of private interests in land, each of these rights were embodied in the delineation of post-[Mahele] judicial water rights. Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts of property, compelled [*443] [**1264] the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.

Id. at 547, 656 P.2d at 68. Although the court in *Reppun* focused on interests in water, its discussion of the development of Hawaiian property rights is enlightening.

> In 1840 the first constitution of the Kingdom of [Hawai'i] proclaimed that although all property belonged to the crown "it was not his private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head, and had the management of the landed property." [Hawai'i] Const. of 1840 in *Fundamental Laws of Hawaii* 3 (1904). Thus, prior to the [Mahele], all land remained [***45] in the public domain. However, other laws passed during the same period lay the foundation for the eventual imposition of private property rights in land by limiting the King's and landlords' heretofore unregulated authority to disseize one to whom land had been granted and insuring certain rights of the common people and lesser lords.

Id. at 542, 656 P.2d at 65.

The 1839 Declaration of Rights, which was incorporated into the 1840 Constitution, provided that "nothing whatever shall be taken from any individual except by *express* provision of the laws." Thurston, *Fundamental Law of Hawaii* 1 (emphasis added) [hereafter *Fundamental Law*]. *See also Kiekie v. Dennis, 1 Haw. 69, 70 (1851)* (recognizing that the rights of each hoa'aina, or ahupua'a tenant, were secured by the 1840 constitution). Several laws enacted in 1839 and 1840, and later compiled in the Laws of 1842, permitted the extinguishment of tenant rights in limited circumstances. *See, e.g.*, Act of Nov. 9, 1840, ch. III, § 7, *reprinted in Fundamental Law* at 20 (excepting from restoration to previous holders those residuum lands that were separated from their affiliated lands for reasons [***46] of public interest);

Fundamental Law at 43 (providing compensation for incursions related to road-building); *id. at 133-35* (permitting dispossession of tenants because of idleness, where such idleness is proven at trial).

The 1840 constitution reflected an attempt to deal with chiefs and foreigners who sought to vest land rights without the required consent of the King. *See* Kuykendall, *The Hawaiian Kingdom 1778-1854* (1938) [hereafter Kuykendall]. [30] Gun-boats frequently came to Hawai'i to enforce the claims of foreigners. Levy, "Native Hawaiian Land Rights," 63 Cal. L. Rev. 848, 852 (1975) [hereafter Levy]; Kuykendall at 153. For example, British Consul Richard Charlton claimed a valuable piece of land based upon a 299-year lease supposedly obtained from a Hawaiian named Kalanimoku in 1826. Kuykendall at 208. Kalanimoku was a husband of the dowager Queen Ka'ahumanu and also served as a [*444] [**1265] guardian of the young King Kamehameha III. The lease purportedly covered land occupied by Charlton as well as an adjoining piece, which had been occupied since 1826 by the retainers of Queen Ka'ahumanu. *Id. at 208-09*. Kamehameha III rejected this claim in 1840 for various reasons, [***47] including absence of legitimate authority to make the grant. *Id. at 209*. Conflicts exacerbated by further adverse decisions of the King and the Hawaiian courts, *see id. at 208-12*, eventually led to the provisional cession of Hawai'i on February 25, 1843, under threat of violence, to Lord George Paulet, commander of the British warship *Carysfort*. [31] *Id.* at 216; Levy at 852. Although Hawaiian independence was reaffirmed on July 31, 1843, these events would have a profound impact on future socio-political developments in the islands.

> 30 Before 1820 the foreigners who became residents of Hawai'i and who acquired land were predominantly of a humble status, commonly sailors. They conformed, in matters of property, to the customs of the country. After 1820 conditions changed. . . . *Foreigners began to deal with their property as they would have done in their home countries; in doing so they sometimes violated Hawaiian customs.* On the other hand, the native authorities treated the property of foreigners as they did that of their own subjects, thus creating much dissatisfaction. . . . After 1830 there were many cases arising out of alleged violations of the land and property rights of foreigners. *Foreigners began to deny the right of the government to arbitrarily dispossess them of land or to prevent the transfer of property from one foreigner to another, and they appealed to their own governments for protection--successfully in some instances.*
>
> Kuykendall at 137-38 (emphasis added).
>
> "Westerners entered . . . land usage patterns [in Hawai'i when certain] . . . foreign settlers were 'given' lands by the King or chiefs in return for services or merely out of traditional Hawaiian generosity." Levy, "Native Hawaiian Land Rights," 63 Cal. L. Rev. 848, 850 (1975). *See Keelikolani v. Robinson, 2 Haw. 514 (1862)* (describing an 1827 agreement involving the grant of rights in a Honolulu wharf, which were provided in exchange for payment of half the expenses of maintaining the wharf and half of any proceeds collected therefrom). However, foreigners who received land in Hawai'i "held it by the same precarious tenure as native subjects, simply at the pleasure of the King." Kuykendall at 73; *see also* 1 *Privy Council Records* 149 (1845-46) ("we indeed did wish to give Foreigners lands . . . but *to the natives they are revertable*") (emphasis added).

[***48]

> 31 Many of the King's advisors urged him to let them fire upon the invading forces, "but the usual pacific course prevailed." Kuykendall, at 214. After Rear Admiral Richard Thomas rejected the provisional cession and reconfirmed Hawaiian sovereignty, "the King is said to have made use of the expression which became the motto of [Hawai'i], *Ua mau ke ea o ka aina i ka pono* ('The life of the land is preserved in righteousness')." *Id. at 220 n.47.*

The minutes of a Privy Council meeting on October 9, 1845 reveal the continuing belief that "nothing but difficulties, even though we should be without fault, would result from the system of Reports of Foreign Consuls, being supported, and their complaints redressed without inquiry, by the Naval Forces of their nations." 1 *Privy Council Records* at 89, 91. Later, during the kingdom's ongoing efforts to resolve Charlton's land claim, additional claims surfaced. The minutes of another Privy Council meeting indicate:

> The King remarked, . . . give up this new claim, and then the General will claim the whole harbour. They all agreed [***49] that in some way or other, not disrespectful to the British Government, an end must be put to these pretensions coming upon them unexpectedly, *contrary to all the law and usage among them.*

Id. at 147 (emphasis added).

Consequently, the development of private property rights was deemed "indispensable" to the "political existence" of the kingdom. L. 1845-46, at 5. Furthermore, the "increase of foreign commerce and the enhanced value of property . . . required something more of the Hawaiian courts than mere investigation of facts." *Id.* ("The events of the late Provisional Cession to Great Britain conclusively prove that some more minute and extensive judicature was long since requisite."). *See also* 2 *Privy Council Records* 231 (1846-47) (discussing a "compromise for the sake of peace" in another dispute with foreigners). At the time, native Hawaiian subjects frequently petitioned Kamehameha III regarding the dramatic changes taking place in the kingdom. *See, e.g.*, petition signed by 301 residents of Lana'i, dated April 1845, Hawai'i State Archives (HSA), Interior Dept., Miscellaneous File (asking the King not to appoint foreign Ministers, and not [***50] to sell any more land to foreigners, because "we are afraid that the wise will step on the ignorant"); *The Friend*, vol. III, no. XV, August 1, 1845, at 118-19 (reprinting a similar petition, signed by over 1600 people). [32]

32 The accompanying reply from the Privy Council, which was approved without dissent by the nation's legislators, reveals the government's rationale: "formerly there were many difficulties, and the land was taken; it was not taken because the government was really in wrong, but because evil was sought. Here is the difficulty which ruins the government, viz: *the complaint of foreign governments followed by the infliction of punishment.*" *The Friend* at 118 (emphasis added). Furthermore, regarding the sale of land to foreigners:

> it is by no means proper to sell land to aliens, nor is it proper to give them land, for the land belongs to Kamehameha III.; there is no chief over him. But we think it is proper to sell land to his Majesty's people, that they may have a home. But if these persons wish to sell their lands again, they cannot sell to aliens, for there is only one sovereign over those who hold the lands; but if the people wish to sell to those who have taken the oath of allegiance, they can do so, for Kamehameha III is over them. . . . There has not been much land sold, but foreigners have heretofore occupied lands through favor, without purchasing. It is better to sell.

Id.

[***51]

The next major step in the evolution of private property rights was the formation [*445] [**1266] in 1845 of the Board of Land Commissioners to quiet land titles. See *Law Creating the Board to Quiet Land Titles*, in Fundamental Laws of Hawaii 137 (1904). It was the Land Commission's responsibility to ascertain or reject claims of interests in land brought before it. Decisions of the Board were to be made in accordance *with the civil law and native customs of the Kingdom.* [33] The Board itself was not empowered to grant fee simple title to land. Rather, its duty was to define each applicant's identifiable interests in land and issue an award describing those interests. Actual title to land could be gained only by a payment of commutation to the Kingdom and issuance of a royal patent. See, Chinen, *The Great Mahele: Hawaii's Land Division of 1848* (1958).

To carry out its duties, the Land Commission adopted principles that were to be followed in quieting title to land. The principles were subsequently also adopted by the legislative council of the Kingdom and were made binding rules by which all claims to land would be tested. Laws of 1847, at 81, RLH 1925, Vol. II at 2124. In its statement [***52] of principles the Land Commission related the necessity of its establishment to the unenforceability of the laws passed at the time of the Constitution of 1840 noting that:

> Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection

> of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

The Land Commission therefore viewed its responsibilities as including the actualization of the laws of 1839 and 1840, among them, of course, the law[s] governing . . . [residuum lands and dispossession of tenants, *see* selected provisions from the compiled Laws of 1842, *supra* this section].

Thus, when in the next paragraph the Board reserves from allocation to private persons "the sovereign prerogatives" of the King, including the power:

> To encourage and even to enforce [***53] the usufruct of lands for the common good[,]

it is clear that in accordance with pre-existing civil law and native usage, the Commission intended to reserve to the sovereign the right to regulate . . . [undeveloped land] in accord with the needs of the people of the Kingdom.

> 33 Specifically, the Land Commission was constrained to make its decisions regarding interests in land "in accordance with the principles established by the civil code of this kingdom in regard to . . . occupancy, . . . [and] *native usages in regard to landed tenures*[.]" Act of April 27, 1846, pt. I, ch. VII, art. IV, § 7; L. 1845-46, at 109, *reprinted in* 2 *Revised Laws of Hawaii* 2123 (1925).

Reppun, 65 Haw. at 543-44, 656 P.2d at 66 (footnote added) (bracketed material inserted in place of references to interests in water). *See also McBryde, 54 Haw. at 184-86, 504 P.2d at 1337-38* (indicating that the Mahele proclaimed Kamehameha's intention to "share" the lands with his people, and that [***54] confirmation of title was subject to inalienable sovereign prerogatives). Thus, the Land Commission's principles included appropriate provisions intended to preclude the konohiki from "disposing of the grass land as to leave . . . his hoaainas [sic] destitute" and to preclude the government from selling "unoccupied" or "vacant" land so "as to leave the [hoa'aina] destitute." L. 1847, at 70-72 (citing §§ 2 and 6 of Act of November 7, 1846). [34]

> 34 The Act of November 7, 1846, "Joint Resolutions on the Subject of Rights in Lands and the Leasing, Purchasing and Dividing of the Same," also codified certain gathering rights:
>
> > The rights of the *Hoaaina* [sic] in the land consist of his own taro patches, and all other places which he himself cultivates for his own use; and if he wish to extend his cultivation on unoccupied parts, he has the right to do so. He has, also, rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot make agreement with others for the pasturage of their animals without the consent of his konohiki, and the Minister of Interior.
>
> *Id.*, § 1, *reprinted in* 2 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 70 (1847) [hereafter L. 1847] (emphasis in original); *cf.* 3 Kent's Commentaries 404 (12th ed. 1989) (discussing "rights of common").

[***55] After the Mahele, the Privy Council considered the rights of tenants under the new [*446] [**1267] system of private land ownership and proposed a resolution providing that:

> the rights of the makaainanas [sic] to firewood, timber for house, grass for thatching, ki leaf, water for household purposes in said land, and the privilege of

> making salt and taking certain fish from the seas adjoining said lands shall be and is hereby sacredly reserved and confirmed to them for their private use [should they need them] but not for sale . . . provided, that before going for firewood, timber for houses and grass for thatching, said makaainanas [sic] shall give notice to the Lord or his luna resident therein.

3B *Privy Council Records* 681, 687 (1850). [35] The King responded, however, by expressing his concern that "a little bit of land even with allodial title, if they were cut off from all other privileges, would be of very little value[.]" *Id. at 713*. Accordingly, the final resolution was passed with the comment that "the proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached [***56] to their own particular land exclusively, is agreed to[.]" *Id. at 763*; *see* L. 1850, § 7, at 203-04. Provisions of the law requiring the landlord's consent were repealed the following year because "many difficulties and complaints have arisen from the bad feeling existing on account of the Konohiki's [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them." L. 1851, at 98.

> 35 The word "maka'ainana" is defined as "commoner, populace, people in general; citizen, subject . . . people that attend the land." Pukui & Elbert, *Hawaiian Dictionary* 224 (2nd ed. 1986). Our observations concerning the interpretation of "hoa'aina" and "tenant" as incorporating traditional Hawaiian cultural attitudes toward the land, *see supra* note 27, are further supported by this legislative history. *See also* Kent, *Treasury of Hawaiian Words* 386 (1986) (defining "maka'ainana" as, inter alia, the "laboring class, which was resident on the land they worked and transferred with it when ownership changed").
>
> The bracketed phrase "should they need them" was inserted in the subsequent enactment of August 6, 1850, *see* L. 1850, at 202, along with the additional requirement that "they shall also inform the landlord or his agent, and proceed with his consent." *Id.* However, these phrases were deleted the following year. *See supra* note 22.

[***57] Given the preservation of Hawaiian usage in conjunction with the transition to a new system of land tenure, *see, e.g., supra* note 23 (outlining the continued reliance on custom and usage throughout the kingdom's legal history, which was adopted as the law of the territory upon annexation of these islands to the *United States); supra note 33* (quoting L. 1845-46, at 109), [36] it is doubtful that "acceptance" of traditional and customary rights was required or that recognition of such rights would have "fundamentally violated the new system." *Kalipi, 66 Haw. at 11 n.5, 656 P.2d at 751 n.5.* [37] *See supra* section IV.B.3 (indicating that *Kalipi* implicitly rejected the argument that customary rights were extinguished by the specification [*447] [**1268] of tenant rights in the 1846, 1850, and 1851 legislative enactments).

> 36 *See also In re Ashford, 50 Haw. 314, 440 P.2d 76, 50 Haw. 452 (1968)* ("[Hawaiian] land laws are unique in that they are based upon ancient tradition, practice and usage.").
>
> 37 In *Kalipi*, the court added the following dictum after enunciating its balancing test for retention of *HRS § 1-1* rights: "the relevant inquiry is . . . whether the privileges which were permissibly or contractually exercised persisted to the point where it had evolved into an *accepted* part of the culture and whether these practices had continued without *fundamentally violating the new system.*" *Id.* (emphases added). As indicated in the text above, we disapprove any additional requirements for the establishment of customary rights that might be inferred from this dictum.

[***58] Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i. *Cf. Stevens v. City of Cannon Beach, 317 Ore. 131, 143, 854 P.2d 449, 456 (1993), cert. denied, 127 L. Ed. 2d 679, 114 S. Ct. 1332 (1994)* (holding that "when plaintiffs took title to their land, they were on [constructive] notice that exclusive use . . . was not part of the 'bundle of rights' that they acquired"). In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property. *Cf. United States v. Winans, 198 U.S. 371, 384, 49 L. Ed. 1089, 25 S. Ct. 662 (1905)* (observing that the United States Congress was competent "to secure to the Indians such a remnant of the great rights they possessed").

Although this premise clearly conflicts with common "understandings of property" and could theoretically lead to disruption, *see Kalipi, 66 Haw. at 8-9, 656 P.2d at 750*, the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances. *See, e.g., supra* note 22 and *infra* note 43. In any [***59] event, we reiterate that the State retains the ability to reconcile competing interests under article XII,

section 7. We stress that unreasonable or non-traditional uses are not permitted under today's ruling. *See, e.g., Winans, 198 U.S. at 379* (noting that the trial court found "that it would 'not be justified in issuing process to compel the defendants to permit the Indians to *make a camping ground of their property while engaged in fishing*'") (emphasis added). [38]

38 The United States Supreme Court has also held that use of the hallucinogenic drug peyote is an unreasonable traditional practice, *see Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*, as are attempts by religious practitioners to exclude all other uses, including timber harvesting, from sacred areas of the public lands. *Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988)*.

There should be little difficulty accommodating the customary and traditional Hawaiian rights asserted in the instant case with Nansay's avowed purposes. [***60] A community development proposing to integrate cultural education and recreation with tourism and community living represents a promising opportunity to demonstrate the continued viability of Hawaiian land tenure ideals in the modern world.

5. *Customary Rights under Hawai'i law*

The *Kalipi* court properly recognized that "all the requisite elements of the doctrine of custom were [not] necessarily incorporated in *§ 1-1*." *66 Haw. at 10, 656 P.2d at 751*. Accordingly, *HRS § 1-1* represents the codification of the doctrine of custom *as it applies in our State*. One of the most dramatic differences in the application of custom in Hawai'i is that passage of *HRS § 1-1*'s predecessor fixed November 25, 1892 as the date Hawaiian usage must have been established in practice. *Compare State v. Zimring [Zimring II], 58 Haw. 106, 115 n.11, 566 P.2d 725, 732 n.11 (1977)* (citing *State v. Zimring [Zimring I], 52 Haw. 472, 479 P.2d 202, 52 Haw. 526 (1970))*, *with Oni, 2 Haw. at 90* (implying that the "time immemorial" standard "is entitled to great weight" but declining to express a conclusive opinion). [39]

39 The *Zimring I* court implicitly disapproved the "time immemorial" standard when it indicated that "the Hawaiian usage mentioned in *HRS § 1-1* is usage which predated November 25, 1892." *52 Haw. at 475, 479 P.2d at 204*. The court in *Oni* also appears to have misconstrued other elements of the doctrine of custom by concluding that the custom urged in that case was "so unreasonable, so uncertain, and so repugnant to the spirit of the present laws[.]" *2 Haw. at 90*. *See supra* note 26 (listing elements 4, 5, and 7). Contrary to the apparent understanding of the *Oni* court: (1) "consistency" is properly measured against other customs, not the spirit of the present laws; (2) a particular custom is "certain" if it is objectively defined and applied; certainty is not subjectively determined; and (3) "reasonableness" concerns the manner in which an otherwise valid customary right is exercised -- in other words, even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no "good legal reason" against it. *See* Blackstone's Commentaries at 76-78.

Although the administrative record in this case only contains specific evidence of shrimp gathering as early as the 1920's, the unrefuted testimony by members of PASH sufficiently established their interests in the SMA permit proceeding for our present purposes. *See supra* section III.D. Having effectively curtailed PASH from developing a complete record, Nansay cannot complain about a procedural remand. However, Nansay is not precluded from raising the issue of standing on remand. *See HRS § 91-9(c)*.

[***61] Other differences in the doctrine's applicability are readily discernible. For example, [*448] [**1269] under English common law, "a custom for every inhabitant of an ancient messuage [meaning "dwelling-house with the adjacent buildings and curtilage," *see Black's Legal Dictionary* 990 (6th ed. 1990)] within a parish to take a profit *a prendre* in the land of an individual is bad." Blackstone's Commentaries, at 78 n.18. Strict application of the English common law, therefore, would apparently have precluded the exercise of traditional Hawaiian gathering rights. As such, this element of the doctrine of custom could not apply in Hawai'i. *See supra* note 21 (discussing the prominent status of custom throughout Hawaiian legal history).

In light of the confusion surrounding the nature and scope of customary Hawaiian rights under *HRS § 1-1*, the following subsections of this opinion discuss applicable requirements for establishing such rights *in the instant case*.

a.

Nansay argues that the recognition of rights exercised by persons who do not actually reside in the subject ahupua'a "represents such a departure from existing law . . . [that *Pele*] should be overruled or strictly [***62] limited to its specific facts." Nansay's Third Supp. Brief, at 2-3 n.1. Nansay contends further that *Pele* is inconsistent with the fundamental nature of Hawaiian land tenure, which allegedly recognizes only three classes: government, landlord, and tenant. *Id. at 3-4*; *see* Princi-

ples adopted by Land Commission (1847), *reprinted in* 2 Revised Laws of Hawai'i (RLH), at 2124-37 (1925).

We decline Nansay's invitation to overrule *Pele*; on the contrary, we reaffirm it and expressly deem the rules of law posited therein to be applicable here. In *Pele*, we held that article XII, section 7, which, inter alia, obligates the State to protect customary and traditional rights normally associated with tenancy in an ahupua'a, may also apply to the exercise of rights beyond the physical boundaries of that particular ahupua'a. *Pele, 73 Haw. at 620, 837 P.2d at 1272*; *see also Palama v. Sheehan, 50 Haw. 298, 300-01, 440 P.2d 95, 97 (1968)* (noting that Hawaiians did not necessarily reside in the same place that they exercised traditional rights). Although it is not clear that customary rights should be limited by the term "tenant," *see supra* note 27, we are nonetheless [***63] aware that the "tenant" class includes at least one sub-class. *See* 2 RLH (1925), at 2124, 2126 (mentioning a "lowest class of tenants," "lower orders" and "sub-tenants," apparently from the Hawaiian terms "lopa ma lalo," "hoa'aina ma lalo," and "lopa"). Therefore, we hold that common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state.

b.

In the context of an argument challenging the Pele Defense Fund's (PDF) standing to bring its claim, as raised on appeal in *Pele*, we made passing reference to the circuit court's finding that PDF's membership included persons of "fifty percent or more Hawaiian blood[.]" *73 Haw. at 615 n.28, 837 P.2d at 1269 n.28*; *see also 73 Haw. at 620 n.34, 837 P.2d at 1272 n.34* (citing affidavits of persons with at least one-half native Hawaiian blood). Because the lower court's relevant factual determination was not challenged on appeal, we did not disturb this finding in *Pele*.

Nevertheless, these references in *Pele* were not intended to imply our endorsement of a fifty percent blood quantum requirement [*449] [**1270] for claims based upon traditional or customary Hawaiian rights. The definition [***64] of the term "native Hawaiian" in the Hawaiian Homes Commission Act (HHCA) [40] is not expressly applicable to other Hawaiian rights or entitlements. Furthermore, the word "native" does not appear in *HRS § 1-1*. Because a specific proposal to define the terms "Hawaiian" and "native Hawaiian" in the 1978 Constitutional Convention was not validly ratified, the relevant section was deleted from the 1985 version of the HRS. *See Kahalekai v. Doi, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979)*. Consequently, those persons who are "*descendants of native Hawaiians* who inhabited the islands prior to 1778," and who assert otherwise valid customary and traditional Hawaiian rights under *HRS § 1-1*, are entitled to protection regardless of their blood quantum. *Haw. Const., art XII, § 7* (emphasis added). [41] Customary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty. The rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within the territorial bounds of the United States. *See* Organic Act, § 83; Act of April 30, 1900, c. 339, 31 Stat. 141, 157, *reprinted in* 1 HRS 36, 74 (1985) (as amended). [***65]

40 For the purposes of the HHCA, the term "'native Hawaiian' means any descendant of not less than one half part of the blood of the races inhabiting the Hawaiian islands previous to 1778[.]" HHCA, 1920, § 201(a)(7); Act of July 9, 1921, c. 42, 42 Stat. 108, 108 (codified as amended at 48 U.S.C. note prec. § 491 (1988) and *Haw. Const. art. XII, § 1*), *reprinted in* 1 HRS 167, 167 (1985).

41 We do not decide the question whether descendants of citizens of the Kingdom of Hawai'i who *did not* inhabit the Hawaiian islands prior to 1778 may also assert customary and traditional rights under the "ancient Hawaiian usage" exception of *HRS § 1-1*. Furthermore, we expressly reserve comment on the question whether non-Hawaiian members of an "'ohana" -- meaning "family, relative, kin group; . . . extended family, clan[,]" *see* Pukui & Elbert, *Hawaiian Dictionary* 276 (2nd ed. 1986) -- may legitimately claim rights protected by article XII, section 7 of the state constitution and *HRS § 1-1. Cf. Morton v. Mancari, 417 U.S. 535, 555, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974)* ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

[***66] c.

The court in *Kalipi* suggested that the "Hawaiian usage exception in *§ 1-1* may be used as a vehicle for the continued existence of those customary rights which continued to be practiced[.]" *66 Haw. at 11-12, 656 P.2d at 751-52. See also id. at 10, 656 P.2d at 751* (indicating the court's belief that "retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the *application of the custom has continued in a particular area*") (emphasis added); *Pele, 73 Haw. at 619, 837 P.2d at 1271* (reading *Kalipi* as upholding the right "to practice *continuously exercised* rights . . . so long as no actual harm [is] done by the practice") (emphasis added). The court in *Zimring II* noted further that although "usage

must be based on actual practice" and not on assumptions or conjecture, the establishment of traditional usage "would be of little weight" because the practice "would not have carried over into a private property regime within the framework of a private enterprise economic system." *58 Haw. at 116-18, 566 P.2d at 732-33*. On the other hand, the *Kalipi* court also indicated [***67] that the traditional practices enumerated under *HRS § 7-1* remain "available to those who *wish to continue* those ways." *Id. at 9, 656 P.2d at 750* (emphasis added).

Contrary to the dictum in *Zimring II, supra*, the ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights established through the Land Commission. *Compare Zimring II, 58 Haw. at 116-18, 566 P.2d at 732-33, with Kukiiahu v. Gill, 1 Haw. 54 (1851)*, and *Kiekie, 1 Haw. at 70* (recognizing that ahupua'a tenant's rights were secured by the constitution and could not have been conveyed away "even if the King had not made [the kuleana] reservation[,]" *see supra* note 24). *See also supra* [*450] [**1271] notes 21, 33, and 36 (citing statutory authority and case law that supports this conclusion). Furthermore, the reservation of sovereign prerogatives, *see supra* section IV.B.4 (citing *Reppun, 65 Haw. at 543-44, 656 P.2d at 66*; *McBryde, 54 Haw. at 184-86, 504 P.2d at 1337-38*), in conjunction with limitations on the Land Commission's authority, *see supra* section IV.B.4 (citing L. 1847, at 70-72), [42] confirms that fee simple title in Hawai'i [***68] is specifically limited by the sovereign authority to regulate its use. In other words, the right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest. *See supra* note 26 (citing Blackstone's Commentaries for the proposition that continuous exercise is not absolutely required to maintain the validity of a custom).

> 42 The sovereign power to enforce the usufruct of lands may not be lost through inaction, because "there cannot be adverse possession against the sovereign." *State v. Zimring, 52 Haw. 472, 478, 479 P.2d 202, 204, 52 Haw. 526 (1970)* (citing *Application of Kelley, 50 Haw. 567, 445 P.2d 538 (1968)*); *cf. Corporation of the Presiding Bishop v. Hodel, 265 U.S. App. D.C. 226, 830 F.2d 374, 383 (D.C. Cir. 1987)* (indicating that communal land in American Samoa is not eligible for taking by adverse possession), *affirming 637 F. Supp. 1398 (D.D.C. 1986)*.

[***69] d.

We have stated previously that rights of access and collection will not necessarily prevent landowners from developing their lands. *Pele, 73 Haw. at 621 n.36, 837 P.2d at 1272 n.36* (reiterating "the early holding that article XII, [section] 7 does not require the preservation of . . . [undeveloped] lands in their natural state" and that "*Kalipi* rights only guarantee access to undeveloped lands"); *see also Kalipi, 66 Haw. at 8 n.2, 656 P.2d at 749 n.2*. Our analysis in the instant case is consistent with these cases. [43]

> 43 The State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights, *see Haw. Const. article XII, § 7*, necessarily allows the State to permit development that interferes with such rights in certain circumstances -- for example, where the preservation and protection of such rights would result in "actual harm" to the "recognized interests of others." *Kalipi, 66 Haw. at 12, 656 P.2d at 752*. Nevertheless, the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.

[***70] The *Kalipi* court justified the imposition of a non-statutory "undeveloped land" requirement by suggesting that the exercise of traditional gathering rights on fully developed property "would conflict with our understanding of the traditional Hawaiian way of life in which *cooperation and non-interference with the well-being of other residents were integrated parts of the culture*." *66 Haw. at 9, 656 P.2d at 750* (emphasis added). The court also stated that, without the undeveloped land limitation, "there would be nothing to prevent residents from going anywhere within the ahupua'a, *including fully developed property*, to gather the enumerated items." *Id. at 8, 656 P.2d at 750* (emphasis added); *but see supra* note 23. However, the court did not expressly hold that the exercise of customary gathering practices would be absurd or unjust when performed on land that is less than fully developed.

For the purposes of this opinion, we choose not to scrutinize the various gradations in property use that fall between the terms "undeveloped" and "fully developed." Nevertheless, we refuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in [***71] the context of evaluating deliberations on development permit applications. Such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i, *see HRS § 5-7.5* (Supp. 1992), [44] which can also be successfully incorporated in the context of our current culture. Contrary to the suggestion in *Kalipi* that there would be nothing to prevent the *unreasonable* exercise of these rights, article XII, [*451] [**1272] section 7 accords an ample legal basis for

regulatory efforts by the State. *See also supra* note 23 (citing evidence suggesting that ancient Hawaiian usage was self-regulating). In other words, the State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed.

> 44 In accordance with *HRS § 5-7.5(b)*, we are authorized to "give consideration to the 'Aloha Spirit'." The Aloha Spirit "was the working philosophy of native Hawaiians[;] . . . 'Aloha' is the essence of relationships in which each person is important to every other person for collective existence." *HRS § 5-7.5(a)*.

[***72] Depending on the circumstances of each case, once land has reached the point of "full development" it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property. However, legitimate customary and traditional practices must be protected to the extent feasible in accordance with article XII, section 7. *See supra* note 43. Although access is only *guaranteed* in connection with undeveloped lands, and article XII, section 7 does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence.

Thus, to the extent feasible, we hold that the HPC must protect the reasonable exercise of customary or traditional rights that are established by PASH on remand.

V. *NONE OF NANSAY'S PROPERTY INTERESTS HAVE BEEN TAKEN*

It is a fundamental rule under the United States and Hawai'i Constitutions that the uncompensated taking of private property is prohibited. The recognition and protection of Hawaiian rights give rise to potential takings claims under two theories: judicial taking and regulatory taking.

A. *Judicial Taking*

Under the judicial [***73] taking theory, when a judicial decision alters property rights, the decision may amount to an unconstitutional taking of property. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235, 41 L. Ed. 979, 17 S. Ct. 581 (1897)*; *see also Hughes v. Washington, 389 U.S. 290, 296-98, 19 L. Ed. 2d 530, 88 S. Ct. 438 (1967)* (Stewart, J., concurring) (suggesting that a state supreme court's decision -- that the state owned accreted land built up by the ocean -- amounted to a sudden, unpredictable, and unforeseeable change in state property law, which amounted to an unconstitutional judicial taking). However, the judicial taking theory is "by no means a settled issue of law." *Corporation of the Presiding Bishop v. Hodel, aff'd, 265 U.S. App. D.C. 226, 830 F.2d 374, 381 (D.C. Cir. 1987)* (declining to decide the question whether a judicial taking occurred), *affirming 637 F. Supp. 1398 (D.D.C. 1986)*; *see also Hodel, 637 F. Supp. at 1407* (rejecting a takings claim based on a decision by the High Court of American Samoa). Assuming, without deciding, that the theory is viable, a Judicial decision would only constitute an unconstitutional taking of private property if it "involved retroactive alteration of state law such as would constitute an unconstitutional [***74] taking of private property." *Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 337 n.2, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1973)* (Stewart, J., dissenting). [45]

> 45 The majority in *Bonelli* mentioned the judicial taking theory, but did not rely upon it, in reversing the judgment of the Arizona Supreme Court. In addition, *Bonelli* was overruled on other grounds in *Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977)* (overruling *Bonelli* to the extent that it called for application of federal common law to determine ownership of a river bed in Oregon).

In the instant case, Nansay argues that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights. However, Nansay's argument places undue reliance on western understandings of property law that are not universally applicable in Hawai'i. Moreover, Hawaiian custom and usage have always been a part of the laws of this State. Therefore, our recognition of customary and traditional Hawaiian rights, [***75] as discussed in section IV.B., *supra*, does not constitute a Judicial taking.

B. *Regulatory Taking*

A regulatory taking occurs when the government's application of the law to a [*452] [**1273] particular landowner denies all economically beneficial use of his or her property without providing compensation. *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886, 2895 (1992)*. However, not every limitation on the use of private property will constitute a "taking." For instance, the government "assuredly [can] . . . assert a permanent easement that [reflects] a pre-existing limitation upon the landowner's title." *Lucas, 112 S. Ct. at 2900*. Furthermore, conditions may be placed on development without effecting a "taking" so long as the conditions bear an "essential nexus" to legitimate state interests and are "roughly proportional" to the impact of the proposed development. *Dolan v. City of Tigard, 129 L. Ed. 2d 304, 114 S. Ct. 2309, 2317-19 (1994)*.

In the instant case, the HPC must consider PASH's alleged customary rights on remand. As we have held in section IV.B.5.d. of this opinion, if such rights are established, the HPC will be obligated to protect them to the extent possible. This may [***76] involve the placement of conditions on Nansay's permit to develop its land. No determination as to the extent of any applicable limitations on Nansay's ability to develop its land may be made until the HPC holds a contested case hearing in accordance with this opinion. For that reason, we agree with Nansay that any claim alleging a regulatory taking would be premature at this time. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 185-86, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1984); cf. Robinson v. Ariyoshi, 441 F. Supp. 559, 585-86 (D. Haw. 1977), aff'd, 753 F.2d 1468, 1474 (9th Cir. 1985), vacated, 477 U.S. 902, 106 S. Ct. 3269, 91 L. Ed. 2d 560, dismissed, 887 F.2d 215 (9th Cir. 1989).* [46]

46 The United States Court of Appeals for the Ninth Circuit "concluded that even if the State of [Hawai'i] has placed a cloud on the title of the various private owners, this inchoate and speculative cloud is insufficient to make this controversy ripe for review." *887 F.2d at 218-19.*

VI. *CONCLUSION*

This court has jurisdiction [***77] over the instant appeal under *HRS § 91-14.* Having effectively curtailed PASH from developing a complete record, Nansay and the HPC cannot complain about a procedural remand. The CZMA requires the HPC to give the cultural interests asserted by PASH "full consideration." In addition, both the CZMA and *article XII, section 7 of the Hawai'i Constitution* (read in conjunction with *HRS § 1-1*), obligate the HPC to "preserve and protect" native Hawaiian rights to the extent feasible when issuing a SMA permit. Finally, this decision does not effect a judicial taking of Nansay's private property because it is grounded in preexisting principles of State property law.

Accordingly, we affirm the ICA's decision and remand to the HPC for further proceedings consistent with the foregoing analysis.

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STATE OF HAWAI'I, Plaintiff-Appellee, vs. ALAPAI HANAPI, Defendant-Appellant

NO. 19746

SUPREME COURT OF HAWAI'I

89 Haw. 177*; *970 P.2d 485*; *1998 Haw. LEXIS 520

November 20, 1998, Decided

PRIOR HISTORY: [***1] APPEAL FROM DISTRICT COURT OF THE SECOND CIRCUIT, MOLOKAI. (CASE NO. CTR2:11/14/95).

DISPOSITION: Affirmed Hanapi's conviction of and sentence for criminal trespass in the second degree.

COUNSEL: Brian K. Nakamura, for defendant-appellant.

Moana M. Lutey, Deputy Prosecuting Attorney, for plaintiff-appellee.

JUDGES: MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

OPINION BY: KLEIN

OPINION

[*178] [**486] OPINION OF THE COURT BY KLEIN, J.

Defendant-appellant Alapai Hanapi appeals from his conviction of and sentence for criminal trespass in the second degree, in violation of Hawai'i Revised Statutes (HRS)

§ 708-814(1)(a) (1993). [1] On appeal, Hanapi contends that his conviction should be reversed because: (1) the district court committed reversible error when it excluded relevant evidence and testimony in support of his constitutionally protected native Hawaiian rights; and (2) there was insufficient evidence to convict him because the prosecution failed to negative his native Hawaiian rights claim. Because Hanapi failed to show that his conduct constituted protected constitutional activity, we affirm his conviction of and sentence for criminal trespass in the second degree.

1 *HRS § 708-814* states in relevant part:

> **Criminal trespass in the second degree.** (1) A person commits the offense of criminal trespass in the second degree if:
>
> (a) The person knowingly enters or remains unlawfully in or upon premises which are enclosed in a manner designed to exclude intruders or are fenced[.]
>
> ...
>
> (2) Criminal trespass in the second degree is a petty misdemeanor.

[***2] I. *BACKGROUND*

Hanapi and his wife, Louise, assert that they are "native Hawaiian artists and cultural practitioners who work, live, and reside on the ancestral family kuleana within the ahupua'a of 'Aha'ino on the island of Moloka'i." Adjoining the Hanapis' property are twin fishponds popularly called Kihaloko and Waihilahila. Hanapi maintains that "for generations [his] family and. . . ancestors have practiced traditional native Hawaiian religious, gathering, and sustenance activities in and around the fishponds."

Gary Galiher purchased the land next to the Hanapis' property. Galiher subsequently fenced the property and allegedly began to grade and fill the area near the ponds with the apparent intention of building a boat landing. [2] The Hanapis viewed Galiher's grading as "the desecration of [a] traditional ancestral cultural site" and allegedly voiced their objection, first with Galiher and then to the U.S. Army Corps of Engineers (COE).

2 This background fact was mentioned in Hanapi's opening brief, but not reflected in the trial transcripts.

[***3] The COE determined that a "wetlands violation" occurred and entered into an agreement with Galiher to restore the property. [3] The COE agreed to a voluntary, unsupervised restoration of the property, subject to the advice and oversight of a consultant/archaeologist. Galiher hired Aki Sinota, an archaeologist, and Vernon Demello, the on-site supervisor, to remove the fill and restore the property.

3 As near as we can tell, Galiher committed an alleged "wetlands violation" and entered into an agreement with the COE to restore his property. No further facts were available regarding Galiher's violation. *See infra,* part III. A.

The restoration took place on August 14-16, 1995. The work consisted principally of removing the fill and regrading the land with a bulldozer. For the first two days, Hanapi [4] entered the property without incident to observe and monitor the restoration.

4 It appears from the record that Hanapi and his wife were both present on Galiher's property throughout the restoration process. However, we will not address Louise's participation in this case unless it relates to issues concerning Hanapi.

[***4] On the third day, Demello told Hanapi that he was not to enter the property. Ignoring the warning, Hanapi entered the property [*179] [**487] and allegedly observed Demello using a bulldozer to push the fill into a "punawai," or fresh water spring. Hanapi believed the destruction of the "punawai" was not consistent with the restoration ordered by the COE and complained to Sinota. Sinota explained to Hanapi that the water was not a spring, but actually water that had collected in a hole left by an uprooted tree. During this discussion, Demello approached Hanapi and ordered him off the property. When Hanapi refused to leave, police were called and arrested Hanapi for criminal trespass in the second degree, in violation of *HRS § 708-814.*

Trial commenced in the District Court of the Second Circuit on November 14, 1995, with Hanapi appearing *pro se.* At trial, Galiher stated that he employed Demello as a foreman to maintain and operate equipment on his land and "take[] on assignments as I give him." Galiher also testified that he gave Demello the authority to exclude people from his enclosed property.

Demello testified that on August 16, 1995, when Hanapi came onto Galiher's property [***5] he asked him to leave the premises. Hanapi refused Demello's request and the police were called. Demello stated Hanapi was arrested and removed from the premises.

As part of Hanapi's defense, he called his wife, Louise, to testify on his behalf. Hanapi first asked Louise if she knew what was happening on Galiher's premises the day he was arrested. Louise responded that "there was a wetland[s] violation that was issued by the. . . [COE] . . . to restore the wetland area [on Galiher's property]." The prosecutor objected on the grounds of relevance. Hanapi advised the court that he was "trying to establish [his] rights [as a native tenant] . . on the land regardless of whether Mr. Galiher. . . owned it or not[.]" The court sustained the prosecution's objection and told Hanapi, "you're getting into something that is a Circuit Court matter, Mr. Hanapi. Right now we are talking about trespass."

Hanapi persisted in his attempt to assert his constitutional rights as a native Hawaiian tenant and sought to elicit further testimony from Louise concerning the native Hawaiian right being claimed by him at the time of his arrest. The following colloquy took place:

[DEFENDANT]: [***6] Are you aware of native tenant laws?

[LOUISE]: Yes, I am.

[DEFENDANT]: Do you exercise your native tenant right in the ahupua'a?

[LOUISE]: Yes, I do.

[DEFENDANT]: Were you there and were members of your family there exercising your native rights on the property?

[LOUISE]: Yes, we were.

[PROSECUTOR]: Your Honor, I'm going to object as to relevance.

[COURT]: What's the relevance, Mr. Hanapi?

[DEFENDANT]: I'm trying to show the Court that we had a right to be there, your Honor, during this time, during this particular time.

[COURT]: Well, see if you can. Go ahead.

[DEFENDANT]: So you were there. Was anybody else with you from your family or anybody who lives in the ahupua'a, were they there on the property?

[LOUISE]: Yes. My sister. On the second day my sister was there.

[DEFENDANT]: Anybody else?

[LOUISE]: Yes. There were other family members (inaudible).

...

[DEFENDANT]: [Louise], would you explain what you were doing there on the property?

[PROSECUTOR]: Your Honor, I'm going to object as to relevance.

[COURT]: Objection is sustained.

[DEFENDANT]: As an ahupua'a [***7] tenant, as a native tenant, do you have a responsibility and obligation to the natural resources of your ahupua'a?

[LOUISE]: I certainly do. It's my responsibility to be aware of what's happening in my ahupua'a because --

[PROSECUTOR]: Your Honor, I'm going to ask that you strike anything past the word yes. It's narrative.

[COURT]: Stricken. Anything past the word yes is stricken.

[*180] [**488] [DEFENDANT]: So do you have a moral -- I mean a responsibility and obligation to --

[LOUISE]:Yes.

[PROSECUTOR]: I object as to leading.

[COURT]: Asked and answered.

[DEFENDANT]: Do you have [an] obligation and responsibility to the aina?

[COURT]: Objection.

[PROSECUTOR]: Your Honor, I object.

[COURT]: Objection sustained. Same question, same answer.

[COURT]: Now what is happening is that you're asking her the same question over and over again. You're asking her is she aware of native rights. She's answered yes. Now, from now on anything you ask that will the be the same question I will sustain the objection because the answer has already been given to you. Okay?

[DEFENDANT]: Thank you, your Honor. I mean no disrespect.

[COURT]: [***8] All right. Move along.

[DEFENDANT]: Did you have a right to be on the property?

[PROSECUTOR]: Your Honor, I'm going to object.

[COURT]: What's your objection?

[PROSECUTOR]: Your Honor, she is not before this Court being charged with criminal trespass. It's not relevant.

[DEFENDANT]: If she's a witness -- she was there at that time of the day.

[COURT]: The objection is sustained, Mr. Hanapi.

Despite several adverse rulings, Hanapi continued to question Louise about the moral obligation native Hawaiian tenants have to the land.

[DEFENDANT]: Is this property developed?

[PROSECUTOR]: I'm going to object as to relevance.

[COURT]: What's the relevance, Mr. Hanapi? What is the relevance?

[DEFENDANT]: Well, we have certain rights, like I said. I'm trying to find out whether there is a development down there and whether we were disturbing anybody's privacy on being on the land exercising our rights. That's the relevancy.

[COURT]: Well, the question is, is there any development; is that right?

[DEFENDANT]: Is there any structures or any development down there on the property.

[COURT]: I'll allow the [***9] question.

[LOUISE]: No, there isn't any.

[DEFENDANT]: At the time of -- on the restoration, was there any interference by or any members of the family?

[PROSECUTION]: Your Honor, I'm going to object as to relevance.

[COURT]: Objection sustained.

[DEFENDANT]: Okay. Do you feel your native rights were violated by this type of development of Mr. Galiher laying the fence line on the road to go down to the ocean?

[PROSECUTION]: Objection. Relevance.

[COURT]: Objection sustained.

...

[DEFENDANT]: At the time of my arrest, what was the reason for me going on top of the land?

[PROSECUTION]: I'm going to object, your Honor. It calls for speculation.

[COURT]: Objection sustained.

Following Hanapi's unsuccessful questioning, Hanapi testified on his own behalf. In a narrative form, Hanapi stated:

We are adjacent land owners. We're native tenants of the ahupua'a. We are also legal land owners and we enjoy the rights mandated by the state constitution, article 12 and HRS [sections] 1 - 1 [and] 7-1 which allows us access for gathering reasons, for religious purpose and also to -- we have -- as native tenant we [***10] also have a moral responsibility and obligation to protect our natural resources. This is an undeveloped ahupua'a. We subsist in this ahupua'a, what I mean by subsisting is subsist off the water, the fishpond, the ocean, the springs[,] and also mauka side.

[*181] [**489] So, when this restoration was taking place the family was of course concerned that it would be done appropriately and done right, with respect.

We went over to perform our religious and traditional ceremonies of healing the land. We shared that with Mrs. Billington, that we had to go over and start. . . to heal the land at that time. And that's what our total purpose was just to make sure that restoration was done properly.

So we as a kama'aina of the native peoples that lived in that area and have been there since ancient times, we know -- we have knowledge of that area and how it was prior to the damage that was done. So we were offering our -- we felt that it was our right to be there and to be included to make sure it was done right.

On cross-examination, Hanapi did not contest that he was on Galiher's property on the date he was arrested. He did not recall, however, Demello asking him to leave the property. [***11] The prosecutor then asked Hanapi if he was on Galiher's property exercising his gathering or religious rights. Hanapi responded affirmatively, stating that he was "gathering for religious purposes to start the healing of the land before the machines came in[.]"

At the close of trial, the district court convicted Hanapi of criminal trespass in the second degree and made the following oral findings:

[1.] There was no showing that the property is owned by anyone other than ... Mr. Gary Galiher.

[2.] The charge of criminal trespass in the second degree specifically indicates that the person willingly [sic - knowingly] enters or remains unlawfully in or upon premises which are enclosed in a manner designed to [exclude] intruders or fenced.

[3.] The testimony [offered] was that the property on which Mr. Hanapi entered was fenced, that he was specifically asked to leave the premises. He did not leave and was arrested.

[4.] The definition of enters or remains unlawfully includes the fact that regardless of the person's intent, a person [who] enters or remains upon premises does so unless he defines [sic] a lawful owner [sic] not to enter or remain [***12] personally communicated to the person by the owner of the premises or by some other authorized person. And the owner of the property, Mr. Galiher, specifically indicated that Vernon Demello, his foreman, had the right to exclude people.

[5.] Mr. Demello also testified that he asked Mr. Hanapi to leave and he did not leave.

[6.] There [was] no showing by the defendant that whatever rights he asserts as a native tenant which has been testified to only by his wife.

[7.] There was no other showing that [Hanapi] is in fact a native tenant of that particular property beside[s] his own testimony and that of his wife.

[8]. There is no showing also that he did enter for any religious or gathering purposes.

Accordingly, the district court fined Hanapi $ 100.00. Hanapi timely filed this appeal.

II. *STANDARDS OF REVIEW*

A. *Evidentiary Rulings*

Different standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate [***13] review is the right/wrong standard.

State v. Bates, 84 Haw. 211, 227, 933 P.2d 48, 64 (1997) (quoting *Kealoha v. County of Hawaii, 74 Haw. 308, 319, 844 P.2d 670, 676, reconsideration denied, 74 Haw. 650, 847 P.2d 263 (1993))*. "This court reviews questions of relevancy, within the meaning of *Hawai'i Rules of Evidence (HRE) Rules 401* . . . and 402 (1993) [,] under the 'right/wrong' standard, inasmuch as the application of those rules 'can yield only one correct result.'" *State v. Wallace, 80 Haw. 382, 409,* [*182] [**490] *910 P.2d 695, 722 (1996)* (footnotes omitted) (quoting *Kealoha, 74 Haw. at 319, 844 P.2d at 676*).

B. *Constitutional Right*

Additionally, Hanapi claims that he was asserting a constitutionally protected right at the time of his arrest. "We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Thus, we review questions of constitutional law under the right/wrong standard." *State v. Mallan, 86 Haw. 440, 443, 950 P.2d 178, 181 (1998)*

(quoting *State v. Arceo, 84 Haw. 1, 11, 928 P.2d 843, 853 (1996)* (internal quotation marks and citations omitted)).

C. [***14] *Sufficiency of Evidence*

Where the defendant challenges the sufficiency of evidence supporting his or her conviction,

> the test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. . . . 'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And [the] trier of fact. . . is free to make all reasonable and rationale inferences under the facts in evidence, including circumstantial evidence.

State v. Pulse, 83 Haw. 229, 244, 925 P.2d 797, 812 (1996) (quoting *State v. Jackson, 81 Haw. 39, 46, 912 P.2d 71, 78 (1996)* (citations omitted)).

III. *DISCUSSION*

A. *The District Court Did Not Commit Reversible Error When It Excluded Evidence and Testimony Supporting Hanapi's Claimed Constitutional Right.*

The offense of criminal trespass in the second degree with which Hanapi was charged is defined in *HRS § 708-814(1) (a)* as "knowingly entering or remaining unlawfully in or upon [***15] premises which are enclosed in a manner designed to exclude intruders or are fenced [.]" *See supra,* note 1. A person "'enters or remains unlawfully' in or upon premises when the person is not licensed, invited, or otherwise *privileged* to do so." *HRS § 708-800* (1993) (emphasis added).

At trial, Hanapi essentially claimed he had a privilege, as a native Hawaiian, to remain lawfully on Galiher's property to engage in a constitutionally protected activity. In his brief, Hanapi characterizes his constitutionally protected native Hawaiian right as a defense to the charge of criminal trespass in the second degree. To establish this defense, Hanapi claims that he need only present "some credible evidence" to support his claim. Thereafter, Hanapi contends that the prosecution bore the burden of proving beyond a reasonable doubt facts negativing his defense.

The prosecution does not object to this characterization. However, by construing Hanapi's claim of a constitutional right as a penal defense, the parties misapprehended their respective burdens of proof.

Generally, in a criminal case, the prosecution has the burden of proving all the elements of the offense [***16] *and* negativing a defendant's statutorily defined defense, beyond a reasonable doubt. *HRS § 702-205* (1993). The Hawai'i Penal Code (HPC) describes a defense as "a fact or set of facts which negatives penal liability." *HRS § 701-115(1)* (1993). When a penal defense is raised, the defendant has the initial burden "to come forward with some credible evidence of facts constituting the defense

...." Commentary on *HRS § 701-115*. Once a defendant establishes his or her prima facie defense, the burden then shifts to the prosecution to disprove the defense beyond a reasonable doubt. *HRS § 701-115(2) (a).* [5]

> 5 *HRS § 701-115(2)(a)* states in relevant part:
>
> (2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented then:
>
> (a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt[.]

[***17] [*183] [**491] In contrast, the assertion of a constitutionally protected right presents a purely legal issue that must be determined by the court. *Cf. Hawai'i Rules of Penal Procedure (HRPP) Rule 12(b) (3)* (motions to suppress physical evidence and statements is a general issue of law for the judge to decide); *State v. Kelekolio, 74 Haw. 479, 516-17, 849 P.2d 58, 75* ("The admissibility of evidence is a question of law for the trial judge to determine.") (citing *Territory v. Buick, 27 Haw. 28, 52 (1923))*; *HRE Rule 104 (a)* (1985) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court.")); *State v. Fukusaku, 85 Haw. 462, 491, 946 P.2d 32, 61 (1997)* (stating that "issues involving law .. are decided by a judge"). When a criminal defendant claims to have been engaged in a constitutionally protected activity, the burden is placed on him or her to show that his or her conduct fell within the prophylactic scope of the constitution's provision. *Cf. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1993).*

In *Clark, supra,* the United States Supreme Court addressed the issue of [***18] "whether a National Park Service regulation prohibiting camping in certain parks violated the First Amendment [of the United States Constitution] when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless." *Id. at 289, 104 S. Ct. at 3067.*

Without expressly deciding whether overnight sleeping as part of a demonstration is expressive conduct protected by the First Amendment, the Supreme Court upheld the regulation as a reasonable time, place, or manner restriction that was content neutral and narrowly tailored to further the Government's substantial interest in maintaining the parks in an attractive and intact condition for the general public's enjoyment. *Id. at 295-97, 104 S. Ct. at 3067-71.* The Supreme Court further reasoned:

> Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applied. To hold otherwise would be to create a rule that all conduct is presumptively [***19] expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from that general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.
>
> *Id. at 293 n.5, 104 S. Ct. at 3069 n.5.*

Similarly, in *United States v. Powell, 563 A.2d 1086, 1091 n.8 (D.C. App. 1989)*, the defendants were charged with unlawful entry for refusing to leave an area in the metrorail subway station that was to be closed for the night. The court stated that, in the District of Columbia:

> When a person is charged ... with unlawful entry on public property, the government must prove some additional specific factor establishing the [person's] lack of a legal right to remain. Such factors may consist of posted regulations, signs, or *fences or barricades* regulating the public's use of government property .... The purpose of this requirement is to protect any First Amendment rights which may be implicated in the defendant's conduct, so that an individual's lawful presence is not conditioned upon the mere whim of a public official ....

Id. at 1089 (emphasis in original). Although the [***20] Appeals Court did not directly address the issue whether there was sufficient evidence to show that the defendants were engaged in First Amendment activity, [6] the court noted that a person desiring to engage in assertedly expressive conduct must demonstrate that the conduct falls within the protections of the First Amendment. *Id. at 1091 n.8* (citing *Clark, supra,* and *Spence v.* [*184] [**492] *Washington, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974)).*

> 6 The court did not address this issue because it held that a pair of folding, accordion like gates that enclosed the subject area constituted an additional specific factor establishing the defendants' lack of a legal right to remain on the property. *563 A.2d at 1091 n.8.*

The *Clark* and *Powell* holdings are instructive. As a practical matter, it would be unduly burdensome to require the prosecution to negative any and all native Hawaiian rights claims regardless of how implausible the claimed right may be. "To hold otherwise would be to create a [***21] rule that all conduct is presumptively [protected under the Constitution]." *Clark, 468 U.S. at 293 n.5, 104 S. Ct. at 3069 n.5.* We therefore hold that it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected.

The preferred method for a defendant to raise a constitutional right in a criminal prosecution is by way of a motion to dismiss. *See HRPP Rule 12(b)* ("Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion.") . *See also, e.g., Mallan, 86 Haw. at 440, 950 P.2d at 178* (defendant claimed in a motion to dismiss that he had a right to smoke marijuana protected by *art. I, section 6 of the Hawai'i Constitution*); *State v. Chung, 75 Haw. 398 at 398, 862 P.2d 1063 at 1063* (defendant filed a motion to dismiss his terroristic threatening charge on the ground that his statements were protected by the first amendment right of free speech and expression). In a bench trial, however, when the judge consolidates the motion to dismiss and the trial, he or she must make factual findings and legal conclusions on the constitutional issue [***22] separate and apart from the other substantive statutory elements of the offense.

In the instant case, because Hanapi appeared *pro se* at trial, [7] it is understandable that he failed to file a motion to dismiss. Nevertheless, the trial court begrudgingly allowed Hanapi to testify in support of his constitutional claims. The burden was squarely placed on Hanapi to prove that his conduct ought to have been accorded constitutional protection.

> 7 "A jury trial was not required for the charge of criminal trespass in the second degree because it is a petty misdemeanor punishable by a thirty-day maximum term of imprisonment." *State v. Sadler, 80 Haw. 372, 374, 910 P.2d 143, 145 (App. 1996)* (citing *HRS §§ 708-814(1) (b)* (1993), 708-814(2) (1993), and 706-663 (1993)). *See also State v. Lindsey, 77 Haw. 162, 165, 883 P.2d 83, 86 (1994)* (ruling that, "if the maximum authorized term of imprisonment for a particular offense does not exceed thirty days, it is presumptively a petty offense to which the right to a jury does not attach.")

[***23] *Article XII, section 7 of the Hawaii Constitution* expressly 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.

This court has consistently recognized that "the *reasonable* exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7." *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Haw. 425, 442, 903 P.2d 1246, 1263 (1995)* (hereinafter "PASH") (emphasis in original). *See also Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982)* (recognizing Hawaii's constitutional mandate to protect traditional and customary native Hawaiian rights); *Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992))* (upholding the "*Kalipi* rights" defining the "rudiments of native Hawaiian rights protected by article XII, § 7" of the Hawai'i Constitution). In *PASH,* we further examined the legal developments of land [***24] tenure in Hawai'i and concluded that "the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property." *Id.*

Although *PASH* did not discuss the precise nature of Hawaii's "limited property interest," one limitation would be that constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes.

In the instant case, Hanapi attempted to meet his burden of proof by requesting that [*185] [**493] the district court allow him to introduce: (1) evidence and testimony relating to the COE's finding of a wetlands violation on Galiher's property; and (2) Louise Hanapi's testimony concerning the native Hawaiian rights asserted by Hanapi at the time of his arrest.

As a general rule, "all relevant evidence is admissible. . . . Evidence which is not relevant is not admissible." *HRE Rule 402. HRE Rule 401* defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

As [***25] to Hanapi's claim that the district court erred in excluding evidence of a wetlands violation on Galiher's property, a review of the trial transcripts reveals that Hanapi clearly testified to a wetlands violation on the property:

> There was something that Mr. Galiher and Ms. Hono had -- were found in violation of the wetlands area; in other words, they filled in this area which had fish living in there at the time[.]

Hanapi also elicited testimony from Galiher, Demello, and his wife concerning the wetlands violation. Despite these testimonies, Hanapi claims that the court erred in excluding further detailed evidence of a wetlands violation which was relevant to "establish[] the nature, scope and circumstances of [Hanapi's] native Hawaiian rights[.]" We disagree.

The court permitted Hanapi to offer evidence that he was on Galiher's property due to a wetland's violation. Hanapi testified that his purpose for being on Galiher's property was "to participate in [the wet lands] restoration as [a] monitor[] and consultant[]." Any further details of the wetlands violation were of no consequence to Hanapi's claimed native Hawaiian right. Accordingly, the district [***26] court correctly excluded additional evidence of a wetlands violation as irrelevant.

Next, Hanapi contends that the district court excluded, as irrelevant, testimonial evidence tending to support his claim that he had a privilege, as a native Hawaiian, to be on Galiher's property to engage in a constitutionally protected activity. Without this evidence, Hanapi appears to argue that the court could not have concluded that he was not exercising a protected constitutional right at the time of his arrest. The record indicates that Hanapi advised the court that he was "trying to establish [his] rights [as a native tenant] . . . on the land regardless of whether Mr. Galiher . . . owned it or not[.]" Thereafter, the district court dismissed Hanapi's constitutional claim as a "circuit court matter" unrelated to his trespass charge. Despite this initial ruling, the district court permitted Hanapi to substantiate his claimed constitutionally protected right by eliciting testimony that: (1) he was a native Hawaiian ahupua'a tenant; (2) he had "a moral responsibility and obligation to protect our natural resources[;]" (3) the property he was on at the time of his arrest was undeveloped; [***27] and (4) he was on Galiher's property to "perform . . . religious and traditional ceremonies of healing the land[,]" and "make sure the restoration was done properly." This being the case, we can discern no prejudice to Hanapi's substantial rights as a result of the district court's initial rejection of his claimed constitutional privilege to be on Galiher's property. We therefore hold that the court's errors were harmless.

B. *Hanapi Failed To Establish That His Claimed Native Hawaiian Right Was a Customary and Traditional Practice, and There Was Sufficient Evidence in the Record To Sustain His Conviction.*

Hanapi's second point of error asserts that there was insufficient evidence to support a conclusion that he knowingly entered or remained unlawfully on Galiher's property in violation of *HRS § 708-814 (1) (a).* In particular, Hanapi contends that he presented credible evi-

dence establishing that he was exercising a constitutionally protected native Hawaiian right at the time of his arrest, and "the trial court was compelled as a matter of law to acquit [him]."

In order for a defendant to establish that his or her conduct is constitutionally protected as a native [***28] Hawaiian right, he or she must [*186] [**494] show, at minimum, the following three factors. First, he or she must qualify as a "native Hawaiian" within the guidelines set out in *PASH. PASH* acknowledged that the terms "native," "Hawaiian," or "native Hawaiian" are not defined in our statutes, or suggested in legislative history. *PASH,* 79 Haw. at 449, 903 P.2d at 1270. *PASH* further declined to endorse a fifty percent blood quantum requirement as urged by the plaintiffs. *Id. at 448, 903 P.2d at 1269.* Instead, *PASH* stated that "those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778,' and who assert otherwise valid customary and traditional Hawaiian rights are entitled to [constitutional] protection *regardless of their blood quantum." Id. at 449, 903 P.2d at 1270* (quoting *Haw. Const. art. XII, § 7*) (emphasis added)). [8]

8 In *PASH,* we also reserved the right to comment on the questions of (1) "whether descendants of citizens of the Kingdom of Hawai'i who *did not* inhabit the islands prior to 1778 may also assert customary and traditional rights[;]" and (2) whether "non-Hawaiian" members of an "ohana" may legitimately claim native Hawaiian rights. *Id. at 449 n.41, 903 P.2d at 1270 n.41.* Here, because Hanapi represented that he was a native Hawaiian ahupua'a tenant, we do not reach the issues left open in footnote 41.

[***29] Second, once a defendant qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. Some customary and traditional native Hawaiian rights are codified either in *art. XII, section 7 of the Hawai'i Constitution* or in *HRS §§ 1-1* and *7-1* (1993). [9] The fact that the claimed right is *not* specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed. *Id. at 438, 903 P.2d at 1259.*

9 *HRS § 1-1* states:

> The common law of England as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by *Hawaiian usage;* provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States of the State.
>
> (Emphasis added).

HRS § 7-1 states:

> Where landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have the right to take such articles to sell for profit. The people shall also have the right to drinking water, and roads shall be free to all on all lands granted in fee simple; provided that this shall not be applicable to well and watercourses, which individuals have made for their own use.

Together, *HRS §§ 1-1* and *7-1* represents the codification of traditional and customary native Hawaiian rights which provide the basis for a claim of a constitutionally protected native Hawaiian right.

[***30]

Finally, a defendant claiming his or her conduct is constitutionally protected must also prove that the exercise of the right occurred on undeveloped or "less than fully developed property." *Id. at 450, 903 P.2d at 1271.* In *PASH,* we reaffirmed the *Kalipi* court's nonstatutory "undeveloped land" requirement. *Id.* We noted that "the *Kalipi* court justified the imposition of . . . [such a requirement] by suggesting that the exercise of traditional gathering rights on fully developed property 'would conflict with our understanding of the traditional Hawaiian way of life in which *cooperation and non-interference with the well-being of other residents were integral parts of the culture.'" Id.* (quoting *Kalipi 66 Haw. at 9, 656 P.2d at 750* (emphasis in original)). We also acknowledged that "depending on the circumstances of each case, once land has reached the point of 'full development' it *may* be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property. " *Id.* (emphasis added). Our intention in *PASH* was to examine the degree of development of the property, including its current uses, to determine whether [***31] the exercise of constitutionally protected native Hawaiian rights on the site would be inconsistent with modern reality. To clarify *PASH,* we hold that if property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings, [*187] [**495] improvements, and infrastructure, [10] it is *always* "inconsistent" to permit the practice of traditional and

customary native Hawaiian rights on such property. In accordance with *PASH,* however, we reserve the question as to the status of native Hawaiian rights on property that is "less than fully developed." *Id. at 450, 903 P.2d at 1271.*

> 10 We cite property used for residential purposes as an example of "fully developed" property. There may be other examples of "fully developed" property as well where the existing uses of the property may be inconsistent with the exercise of protected native Hawaiian rights.

In this case, it is uncontroverted that Hanapi is a "descendant[] of native Hawaiians who inhabited the islands prior [***32] to 1778." Thus, the primary issue is whether Hanapi *proved* that his conduct, at the time of his arrest, represented the exercise of a traditional or customary native Hawaiian right deserving of constitutional protection. [11]

> 11 Despite Hanapi's uncontested testimony that Galiher's property was undeveloped, we need not discuss the degree of development on Galiher's property because the dispositive issue in the instant case is based on the constitutionality of Hanapi's claimed native Hawaiian right.

At trial, Hanapi adduced no evidence establishing "stewardship" or "restoration and healing of lands" as an ancient traditional or customary native Hawaiian practice. Instead, Hanapi reiterated his responsibility and sense of obligation to the land, as a native Hawaiian tenant, to justify his privileged access to Galiher's property. This evidence assumed, rather than established, the existence of a protected customary right. *See PASH,* 79 Haw. at 449, 903 P.2d at 1270 (specifying that, "'usage must [***33] be based on actual practice' and not assumptions or conjecture") (quoting *State v. Zimring, 58 Haw. 106, 117, 566 P.2d 725, 733 (1977)).*

To establish the existence of a traditional or customary native Hawaiian practice, we hold that there must be an adequate foundation [12] in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice. Here, Hanapi did not offer any explanation of the history or origin of the claimed right. Nor was there a description of the "ceremonies" involved in the healing process. Without this foundation, the district court properly rejected, albeit inartfully, Hanapi's claim of constitutional privilege.

> 12 A defendant may lay an adequate foundation by putting forth specialized knowledge that the claimed right is a traditional or customary native Hawaiian practice. This specialized knowledge may come from expert testimony, pursuant to *HRE Rule 702* (1993). *HRE Rule 702* states:
>
> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.
>
> In this jurisdiction, we have also accepted kama'aina witness testimony as proof of ancient Hawaiian tradition, custom, and usage. *See Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968)* (holding that testimony from kama'aina witnesses were sufficient to find the existence of an ancient Hawaiian right of way); *Application of Ashford, 50 Haw. 314, 316, 440 P.2d 76, 78, 50 Haw. 452, reh'g denied, 50 Haw. 314, 50 Haw. 452, 440 P.2d 76 (1968)* (recognizing that Hawai'i "allow[s] reputation evidence by kama'aina witnesses in land disputes"); *In re Boundaries of Pulehunui, 4 Haw. 239 (1879)* (permitting kama'aina witnesses to testify about the location of ancient Hawaiian land boundaries).

[***34] Inasmuch as Hanapi failed to adduce sufficient evidence to support his claim of constitutional privilege, we must next decide whether substantial evidence existed in the record to support Hanapi's conviction of criminal trespass in the second degree.

As noted earlier, *HRS § 708-814(1)* states that "a person commits the offense of criminal trespass in the second degree if . . . the person knowingly enters or remains unlawfully in or upon premises which are enclosed in a manner designed to exclude intruders or are fenced[.]" The facts in this case reveal that: (1) Galiher's property was fenced in a manner to exclude intruders; (2) Hanapi knowingly entered Galiher's property on the date of his arrest; and (3) when Galiher's foreman, Demello, ordered Hanapi off the property, he refused to leave. Based on these facts, the judge, as the trier of fact, had sufficient evidence to conclude that Hanapi [*188] [**496] was unlawfully on Galiher's property, in violation of HRS

§ 708-814(1).

IV. *CONCLUSION*

For the above reasons, we affirm Hanapi's conviction of and sentence for criminal trespass in the second degree.

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KA PA'AKAI O KA'AINA, an association of KA LAHUI HAWAI'I, a Hawaiian nation, KONA HAWAIIAN CIVIC CLUB, a Hawaii nonprofit corporation, and PROTECT KOHANAIKI OHANA, a Hawaii nonprofit corporation, KA LAHUI HAWAI'I, KONA HAWAIIAN CIVIC CLUB and PROTECT KOHANAIKI OHANA, Plaintiffs-Appellants/Appellants vs. LAND USE COMMISSION, STATE OF HAWAI'I; OFFICE OF STATE PLANNING, STATE OF HAWAI'I; COUNTY OF HAWAI'I PLANNING DEPARTMENT; KA'UPULEHU DEVELOPMENTS, Appellees/Appellees, and PLAN TO PROTECT, a Hawaii nonprofit corporation, Appellees/Cross-Appellants/Appellants/Appellants; PLAN TO PROTECT, Appellant/Cross-Appellants, vs. STATE OF HAWAI'I, LAND USE COMMISSION, Appellees/Appellees

NO. 21124, NO. 21162

SUPREME COURT OF HAWAI'I

94 Haw. 31*; *7 P.3d 1068*; *2000 Haw. LEXIS 302

September 11, 2000, Decided

SUBSEQUENT HISTORY: [***1] Case Name Amended January 24, 2001.

PRIOR HISTORY: APPEALS FROM THE THIRD CIRCUIT COURT. (CIV. NOS. 96-189K & 96-190K).

DISPOSITION: LUC's grant of KD's petition for land use boundary reclassification vacated and remanded to the LUC for the limited purpose of entering specific findings and conclusions, with further hearing if necessary.

COUNSEL: Michael J. Matsukawa for Plaintiff-Appellant/Appellant Ka Paakai O Ka Aina, an association of Ka Lahui Hawaii, Kona Hawaiian Civic Club and Protect Kohanaiki Ohana.

Jon S. Itomura and Russell A. Suzuki, Deputy Attorneys General, for Appellee/Appellee Land Use Commission.

Robert D.S. Kim and John P. Powell, for Appellee/Cross-Appellant/ Appellant/Appellant Plan to Protect, Inc.

Frederick Giannini, Deputy Corporation Counsel, for Appellee/Appellee County of Hawaii.

R. Ben Tsukazaki, Of Counsel: Menezes Tsukazaki Yeh & Moore and Michael W. Gibsen and James K. Mee, Of Counsel: Ashford & Wriston, for Petitioner-Appellee Kaupulehu Developments.

JUDGES: MOON, C.J., LEVINSON, NAKAYAMA, RAMIL, AND ACOBA, JJ.

OPINION BY: RAMIL

OPINION

[*34] [**1071] OPINION OF THE COURT BY RAMIL, J.

This consolidated appeal [1] arises from the Land Use Commission's (LUC) grant of a petition to reclassify approximately [***2] 1,009.086 acres of land in the ahupua'a [2] of Ka'upulehu on the Big Island of Hawaii from a State Land Use "Conservation District" to a State Land Use "Urban District." Plaintiff-appellant/appellant Ka Pa'akai O Ka 'Aina, an association of Ka Lahui Hawaii (Ka Lahui), Kona Hawaiian Civic Club (KHCC), and Protect Kohanaiki Ohana (PKO) (collectively "Ka Pa'akai" or the "Coalition") and Appellee/cross-appellant/ appellant/appellant Plan to Protect (PTP) appeal from the third circuit court's September 30, 1997 judgment affirming the Land Use Commission's (LUC) June 17, 1996 findings of fact, conclusions of

law, decision, and order granting Kaupulehu Developments' (KD) petition for land use boundary reclassification.

1 By order dated January 9, 1998, this court consolidated Nos. 21124 and 21162 under 21124.

2 "An 'ahupua'a' is a land division usually extending from the mountains to the sea along rational lines, such as ridges or other natural characteristics." *Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425, 429 n.1, 903 P.2d 1246, 1250 n.1 (1995)* (quoting *In re Boundaries of Pulehunui, 4 Haw. 239, 241 (1879)* (emphasis and internal quotations deleted)), certiorari denied, *517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996)*.

[***3] On appeal, Ka Pa'akai contends that the circuit court erred in: (1) failing to address errors that Ka Pa'akai assigned to the LUC's decision below; (2) concluding that the LUC could consider the Department of Land and Natural Resources' (DLNR) comments; (3) ruling that the LUC properly "delegated" its authority to KD and KD's landlord; (4) ruling that the LUC's findings were supported by reliable, probative, and substantial evidence; (5) concluding that the LUC's decision complied with *Hawaii Revised Statutes (HRS) § 205-17* (1993); and (6) determining that Ka Pa'akai failed to make a convincing showing that the LUC's decision was unjust or prejudicial to Ka Pa'akai.

PTP argues that: (1) the LUC failed to discharge its obligation to ensure that legitimate customary and traditional practices of native Hawaiians be protected to the extent feasible; (2) the LUC's findings dealing with the demand for the project are clearly erroneous in light of KD's failure to establish that, without the fee title, its proposed project would not be economically viable; (3) the LUC's decision was erroneous or entailed an abuse of discretion in light of KD's failure to provide a concise statement of [***4] the means by which the project will be financed; and (4) the LUC's findings that KD's management plan and the landlord's "ahupua'a plan" would reasonably protect cultural resources are clearly erroneous because these plans were presented only in conceptual form.

In addition to challenging Ka Pa'akai's and PTP's contentions, KD, the LUC, and the County of Hawaii (the County) allege that neither Ka Pa'akai nor PTP possessed standing to appeal the LUC's decision under *HRS § 91-14* (1993). [3]

3 *HRS § 91-14(a)* provides:

> **Judicial review of contested cases.** (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

[***5] For the reasons explained below, we hold that: (1) the circuit court did not err in concluding that Ka Pa'akai and PTP had standing to appeal under *HRS § 91-14*; (2) the LUC did not err in relying on KD's financial disclosure; (3) the LUC did not err in relying on the comments of the DLNR; and (4) the circuit court did not err in failing to specifically rule on four of Ka Pa'akai's [*35] [**1072] points of error on appeal. We hold, however, that the LUC's findings of fact and conclusions of law are insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians. The LUC, therefore, must be deemed, as a matter of law, to have failed to satisfy its statutory and constitutional obligations.

We therefore vacate the LUC's grant of KD's petition for land use boundary reclassification and remand to the LUC for the limited purpose of entering specific findings and conclusions, with further hearing if necessary, 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 [***6] 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 LUC to reasonably protect native Hawaiian rights if they are found to exist.

This court -- in seeking to maintain a careful balance between native Hawaiian rights and private interests -- has made clear 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. Public Access Shoreline Hawaii v. Hawaii County Planning Commission (hereinafter "PASH"), *79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995)*, certiorari denied, *517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996)*. Today, we provide an analytical framework, discussed below, to help ensure the enforcement of traditional and customary native Hawaiian rights while reasonably accommodating compet-

ing private development interests. This urgent need to reach a better balance is underscored by the Hawaii State legislature's recent finding that, "although [***7] the Hawaii State Constitution and other state laws mandate the protection and preservation of traditional and customary rights of native Hawaiians," those rights have not been adequately preserved or protected:

> The past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature further finds that due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.
>
> Act 50, H.B. NO. 2895, H.D. 1, 20th Leg. (2000). [4]

4 See infra note 28 (describing Act 50 in further detail).

I. BACKGROUND

On December 13, 1993, KD filed a petition for boundary amendment with the LUC to reclassify approximately 1,009.086 acres in the ahupua'a of Ka'upulehu, North Kona, State of Hawaii, from a State Land Use "Conservation District" [***8] to a State Land Use "Urban District" (hereinafter the "petition area"). The entire petition area is situated within Hawaii County's Special Management Area. [5]

5 The petition area surrounds a 65-acre portion of land previously reclassified into the urban district in 1979. There is also a 37.064-acre exclusion located in the property, which will remain within the conservation district for archaeological preservation purposes.

Owned by Kamehameha Schools/Bishop Estate (KS/BE) and leased to KD, the crescent-shaped petition area is located at the base of the western slopes of Hualalai and consists largely of pahoehoe [6] and a'a [7] lava flows. Two well-known physical features of the petition area associated with native Hawaiian culture and history are the coastal point known as Kalaemano and the historic 1800-1801 Ka'upulehu Lava Flow (the "1800-1801 lava flow"), which covers about one-half of the petition area. Among the well-known [*36] [**1073] individuals associated with the area are King Kamehameha [***9] I, Kame'eiamoku, and his twin brother, Kamanawa. [8]

6 "Phoehoe" is a "smooth, unbroken type of lava." Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 300 (1986) [hereinafter Pukui & Elbert, Hawaiian Dictionary].

7 "A" is a "stony" type of lava. Pukui & Elbert, Hawaiian Dictionary, at 2.

8 Kame'eiamoku, chief of Ka'upulehu, and Kamanawa, chief of the adjacent ahupua'a, Pu'uwa'wa'a, were esteemed advisers to Kamehameha I. Kame'eiamoku is noted for his capture of the ship, the Fair American, at K'upulehu. According to tradition, the twin chiefs were so highly valued that their likenesses appear on the coat of arms of the Kingdom of Hawaii.

As the LUC's findings reveal, the subject property was originally ruled and controlled by early Hawaiian chiefs who passed on the property to their heirs in the line of alii (chiefs) that succeeded Kamehameha I, including Kameeiamoku and Kamanawa. Following the Mahele of 1848, the subject property came under the ownership of King Kamehameha V. Kamehameha V's half-sister, Ruth Ke'elikolani, subsequently inherited the property, which, upon her death, was bequeathed to Princess Bernice Pauahi Bishop. Upon Bernice Pauahi Bishop's death in 1884, the property was included in the Bernice Pauahi Bishop Estate.

[***10] KD seeks to develop the "Kaupulehu Resort Expansion" (hereinafter the "Resort Expansion" or the "proposed development"), a luxury development consisting of 530 single family homes, 500 low-rise multi-family units, a 36-hole golf course, an 11-acre commercial center, a 3-acre recreation club, a golf clubhouse, and other amenities for the development's residents.

On January 13, 1994, and by written order filed on January 31, 1994, the LUC required KD to prepare an environmental impact statement (EIS), pursuant to *HRS chapter 343* and *Hawaii Administrative Rules (HAR) chapter 11-200*. On September 22, 1994, and by order dated October 5, 1994, the LUC accepted KD's final EIS for the proposed project.

On October 26, 1994, PTP petitioned to intervene in the proceedings, citing its interests, as recreational users of the petition area, in the protection of its natural environment, its scenic, aesthetic, historic, and biological resources -- the "Kona Nightingales" and the unique scenic resource of the Ka'uplehu lava flow and the Kalaemano area. The LUC granted PTP's intervention status on November 25, 1994. [9]

9 Kona Village Associates was granted permission to intervene on November 16, 1994, and by written order dated November 25, 1994. On December 20, 1994, the LUC granted Kona Vil-

lage Associates' request to withdraw its petition for intervention.

[***11] On November 28, 1994, Ka Lahui and KHCC separately filed petitions to intervene and requested a contested case hearing. Two days later, PKO filed a similar petition. All three groups asserted that their native Hawaiian members' traditional gathering, religious, and cultural practices would be adversely affected by the proposed development. On December 1, 1994, and by written order dated December 20, 1994, the LUC consolidated the petitions and granted the groups' requests for intervention and for a contested case hearing.

The hearings commenced on December 1, 1994. During the course of approximately twenty hearings extending through March 1996, the LUC received testimony from approximately forty witnesses and seventy exhibits pursuant to the contested case provisions of *HRS chapter 91.* [10] Midway through the proceedings, this court issued its decision in PASH.

10 Under *HRS § 205-4(e)(1)* (1993), the State Office of Planning and the County of Hawaii Planning Department were automatically made parties to the agency hearing.

[***12] At the close of oral argument, the LUC voted 6-2 to approve KD's petition. On June 17, 1996, the LUC filed its findings of fact, conclusions of law, decision, and order approving KD's petition, which provided in relevant part as follows:

FINDINGS OF FACT

. . . .

48. As part of the proposed Project, Petitioner will develop and implement a Resource Management Plan ("RMP") which would coordinate development with native Hawaiian rights to coastal access for the purpose of traditional cultural practice, West Hawaii's demand for new coastal recreational opportunities, and the creation of a buffer for Kona Village Resort. Under Petitioner's concept of the RMP, the goals of the RMP are to provide for resource management and ensure public access [*37] [**1074] to the coastal area which balances Petitioner's needs with the traditional needs of native Hawaiians and the recreational needs of the public. Under Petitioner's concept of the RMP, the objectives of the RMP are:

1. To preserve and protect the physical attributes of the coastal area, including the natural topography, geological forms, vegetation, archaeological and cultural resources, trails, intertidal region, and ocean [***13] water quality;

2. To develop appropriate lands within the coastal area in a manner that is compatible with an open space character and sensitive to the sustained use of neighboring areas for traditional cultural practices;

3. To preserve and manage sustainable resources within the area to ensure their availability to future generations;

4. To provide access to the coastal area for the recreational use of the community; and

5. To protect fragile and sensitive areas and sustainable resources from overuse and degradation.

49. Petitioner's concept for an RMP establishes five subzones which are based upon the valued resources and activities which are known to exist on and makai [11] of the Property. The subzones differ in the degree of restriction of uses. The subzones will be linked by the historic trail which meanders over the shorefront of the Property and new pedestrian paths.

11 "Makai" is defined as "on the seaside, toward the sea, in the direction of the sea." Pukui & Elbert, Hawaiian Dictionary, at 114, 225.

[***14] 50. The five subzones constitute a 235-acre resource management area. Excluding the approximately 37.064-acre archaeological preserve which is proposed to be retained in the State Land Use Conservation District, the resource management area encompasses approximately 198 acres.

54. The proposed project can be financed through alternative means. Petitioner may form a joint venture with an independent developer, as Petitioner did in the initial increment of Kaupulehu Resort. In the alternative, Petitioner will fund the initial development itself or will obtain conventional financing. Initial sales revenues will be used to finance subsequent development phases.

. . . .

73. The shoreline portion of the Property is used for fishing and gathering of limu, [12] []opihi, [13] and other resources, and for camping. The area closest to Kalaemano was traditionally used for salt gathering. Hannah Springer, a kama'aina [14] of the mauka [15] portion of Kaupulehu, and her ohana [16] have traditionally gathered salt in this area on an occasional basis.

12 "Limu" is "[a] general name for all kinds of plants living under water, both fresh and salt, also algae growing in any damp place in the air, as on the ground, on rocks, and on other plants[.]" Pukui & Elbert, Hawaiian Dictionary, at 207.

[***15]

13 "'Opihi" are "limpets. Hawaiians recognize three kinds[.] . . . For some persons, opihi are an aumakua, [a family or personal god]." Pukui & Elbert, Hawaiian Dictionary, at 32, 292.

14 "Kama'aina" is defined as "native-born, one born in a place, host[.]" Pukui & Elbert, Hawaiian Dictionary, at 124.

15 "Mauka" is defined as "inland, upland, towards the mountain[.]" Pukui & Elbert, Hawaiian Dictionary, at 242, 365.

16 "'Ohana" means "family, relative, kin group; . . . extended family, clan." *PASH, 79 Haw. at 449 n.41, 903 P.2d at 1270 n.41* (quoting Pukui & Elbert, Hawaiian Dictionary 276 (2nd ed. 1986)).

74. The areas for fishing, limu, ['Jopihi, and salt gathering, and general recreation are to be preserved and managed as part of Petitioner's RMP, thus perpetuating these activities on and makai of the Property.

. . . .

78. The proposed Project will not have a significant adverse impact on archaeological or historic resources. An archaeological inventory survey was conducted on the Property by Paul H. Rosendahl, Inc. Based upon consultation [***16] with the State [*38] [**1075] Historic Preservation Division ("SHPD") and a final survey report, 193 sites were identified, and 65 sites have been recommended for some form of preservation. Thirty-eight of those recommended for preservation are contained within a designated preserve area.

79. The identified archaeological sites were assessed for significance, based upon the National Register Criteria for Evaluation, as outlined in the Code of Federal Regulation (*36 CFR, Part 65*). The SHPD uses these criteria for evaluating such sites.

. . . .

85. Except for certain archaeological sites which are within a preserve area located inland and to the east of Kona Village Resort, cultural resources are found near the shoreline of the Property.

86. Wahi pana are the storied, remarkable places, the legendary places of significance in native Hawaiian culture.

87. While the ahupua'a of Ka'upulehu is by story and the history of its name a wahi pana, there are no specific wahi pana which are definitely known to be within the Property, based on historical documentary research and interviews.

88. The proposed Project will reasonably preserve and perpetuate cultural resources such as [***17] archaeological sites, the coastal trail, areas of fishing, ['Jopihi, and limu gathering, salt gathering, and general recreation in the proposed areas within Petitioner's RMP. Petitioner's RMP area totals approximately 235 acres.

89. KS/BE has formulated a plan to manage and protect cultural resources within the entire ahupua'a of Ka'upulehu. Petitioner's RMP will be consistent with and further the objective of the ahupua'a plan. KSBE's ahupuaa plan includes designated geographic zones that define the natural, cultural, and historic resources of Ka'upulehu from the mountain to the sea. The ahupua'a plan will involve native Hawaiians, particularly the 'ohana who are kama'aina to the subject Property, to relink the traditions and practices that are rooted in that Property. KSBE will form a non-profit entity in perpetuity to oversee the formulation and implementation of the Ka'upulehu ahupua'a plan.

. . . .

114. The proposed reclassification of the Property generally conforms to the following State functional plans, as defined in *chapter 226, HRS*:

. . . .

e. Historic Preservation Functional Plan.

The objective, policies, and implementing actions of this functional plan are supported [***18] through Petitioner's compliance with all applicable State, County, and Federal requirements concerning historic sites.

. . . .

116. The proposed reclassification of the Property is in general conformance with the following elements of the Hawaii County General Plan: economic, environmental quality, flood control and drainage, historic sites, housing, natural beauty, natural resources and shoreline, recreation, and land use.

. . . .

117. The proposed reclassification of the Property is in general conformance with the objectives and policies in *section 205A-2, HRS*, in the following ways:

. . . .

b. Historic Resources Objective: Protect, preserve, and where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture. All significant archaeological resources identified on the Property are proposed for preservation by Petitioner.

CONCLUSIONS OF LAW

Pursuant to *chapter 205, HRS*, and the Hawaii Land Use Commission Rules under *chapter 15-15, HAR*, and

upon consideration of the Land Use Commission decision-making criteria under *section 205-17, HRS*, this Commission [***19] finds upon a clear preponderance of the evidence that the [*39] [**1076] reclassification of the Property, consisting of approximately 1,009.086 acres of land in the State Land Use Conservation District at Ka'upulehu, North Kona, Island, County, and State of Hawaii, identified as TMK No. 7-2-03: por. 1, into the State Land Use Urban District, is reasonable, conforms to the standards for establishing the Urban District boundaries, is non-violative of *section 205-2, HRS*, and is consistent with the Hawaii State Plan as set forth in *chapter 226, HRS*, and with the policies and criteria established pursuant to section *§ 205-17* and *205A-2, HRS*.

DECISION AND ORDER

IT IS HEREBY ORDERED that . . . Kaupulehu Developments . . . is hereby reclassified into the State Land Use Urban District, and the State land use district boundaries are amended accordingly, subject to the following conditions:

. . . .

18. Petitioner shall preserve and protect any gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural and religious practices on the subject property.

. . . .

19. In developing and operating the golf course and residential [***20] development in the Kaupulehu Resort Development Project, Petitioner shall at a minimum protect public access along the accessible coastline by the following:

. . . .

19b. Petitioner shall develop and implement the Resource Management Plan as represented to the LUC and which shall be consistent with and further the objectives of KSBE's ahupuaa plan. Petitioner shall develop the Resource Management Plan in consultation with the Department of Land and Natural Resources and the Office of State Planning. A copy of the Resource Management Plan shall be filed with the LUC prior to filing any request for zoning amendment with the County. In developing the Resource Management Plan and operating the golf course and any future residential development in the Kaupulehu Development Petition Area, Petitioner shall maintain and protect the public's right of access along the shoreline especially at the 1800-1801 a'a lava flow where the existing trail is near the same level as the proposed dwelling units.

(Emphases added.)

KHCC, PKO, Ka Lahui, and PTP filed separate timely agency appeals from the LUC's order to the third circuit court. By stipulation, the circuit court consolidated the agency appeals [***21] on September 14, 1996.

The circuit court heard oral arguments on the consolidated appeals on July 7, 1997. On August 20, 1997, the circuit court entered its findings of fact, conclusions of law, decision, and order. On August 29, 1997, the circuit court entered its amended findings of fact and conclusions of law, providing in pertinent part the following:

CONCLUSIONS OF LAW

. . . .

2. In light of the threatened destruction of the cultural resources and historic properties in the petition area, Appellants are "aggrieved" as a result of the LUC's Order and also have standing to obtain judicial review of the LUC's Order under Hawaii Revised [Statutes] Sections *§ 91-14* and *§ 205-4(i)*.

3. In the absence of a statute requiring the agency to promulgate specific rules, an agency has discretion to proceed by rule-making or, alternatively by adjudication, as was done here. *Application of Hawaiian Electric Company, Inc., 81 Haw. 459, 918 P.2d 561 (1996)*.

4. There has been no showing by Appellant that the LUC abused its discretion by electing to consider the subject of "cultural resources" by adjudication, rather than rule-making. It is also noted that the LUC does have [***22] rules which conform to the statutory criteria in *HRS § 205-17(3)(B)* [*40] [**1077] and which require it to consider the impact of the proposed reclassification on, inter alia, "maintenance of valued cultural, historical, or natural resources." *Hawaii Administrative Rules § 15-15-77*.

6[sic]. As to the issue of whether the LUC improperly considered comments from another agency, the Department of Land and Natural Resources ("DLNR"), because DLNR has allegedly failed to promulgate specific rules on cultural resources pursuant to *HRS Chapter 6E*, the record reveals no error or impropriety.

. . . .

8. *Hawaii Revised Statutes § 205-17* states that in its review of any petition for reclassification of district boundaries pursuant to this chapter, the commission shall specifically consider the following:

. . . .

(3) The impact of the proposed reclassification on the following areas of state concern:

. . . .

(B) Maintenance of valued cultural, historical, or natural resources[.]

9. The LUC's Findings of Fact, Conclusions of law, and Decision and Order comply with *HRS § 205-17.*

10. The LUC's Decision includes requisite findings which are supported by substantial evidence.

[***23] 11. The Court has reviewed the record and determined that the LUC's findings of fact are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and are supported by a clear preponderance of the evidence.

12. *Hawaii Revised Statutes § 91-14(g)* provides that even assuming error, the LUC's Decision may only be modified or reversed if the substantial rights of the Appellants have been prejudiced. Appellants have not discharged their burden of making a convincing showing that the decision is unjust and unreasonable in its consequences. *In re Hawaiian Electric Light, Co., 60 Haw. 625, 630, 594 P.2d 612, 617 (1979).*

Based on the foregoing, and pursuant to *HRS [§] 91-14(g)* and *HRS § 205-4(i)*,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the LUC's Findings of Fact, Conclusions of Law, Decision and Order issued June 17, 1996, is hereby affirmed in all respects.

On September 30, 1997, the circuit court entered judgment affirming the LUC's decision.

Ka Pa'akai and PTP timely appealed.

II. STANDARDS OF REVIEW

Review of a decision [***24] made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in *HRS § 91-14(g)* to the agency's decision.

Curtis v. Board of Appeals, County of Hawaii, 90 Haw. 384, 392, 978 P.2d 822, 830 (1999) (quoting *Konno v. County of Haw., 85 Haw. 61, 77, 937 P.2d 397, 413* (citations omitted)). This court's review is further qualified by the principle that decisions of administrative bodies acting within their sphere of expertise are accorded a presumption of validity. *Southern Foods Group, L.P. v. State of Hawaii, DOE, 89 Haw. 443, 453, 974 P.2d 1033, 1043 (1999)* (citing *In re Application of Hawaii Electric Light Co., Inc., 60 Haw. 625, 630, 594 P.2d 612, 617 (1979)).*

HRS § 91-14(g) (1993) enumerates the standards of review applicable to an agency appeal and provides: [***25]

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

[*41] [**1078] (2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Curtis, 90 Haw. at 392-93, 978 P.2d at 830-31 (quoting *GATRI v. Blane, 88 Haw. 108, 112, 962 P.2d 367, 371 (1998)* (citing *Poe v. Hawaii Labor Relations Board, 87 Haw. 191, 194-95, 953 P.2d 569, 572-73 (1998))).

[***26] "An agency's findings of fact are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record." *Id. at 393, 978 P.2d at 831* (quoting *Alvarez v. Liberty House, Inc., 85 Haw. 275, 277, 942 P.2d 539, 541 (1997)*; *HRS § 91-14(g)(5).* "An agency's conclusions of law are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law." Id. (quoting *Hardin v. Akiba, 84 Haw. 305, 310, 933 P.2d 1339, 1344 (1997)* (citations omitted); *HRS §§ 91-14(g)(1), (2),* and *(4)*).

"The interpretation of a statute is a question of law reviewable de novo." *Amantiad v. Odum, 90 Haw. 152, 160, 977 P.2d 160, 168-69 (1999)* (quoting *Franks v. City & County of Honolulu, 74 Haw. 328, 334, 843 P.2d 668, 671 (1993)).*

[***27] When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must

read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Id. (quoting *Gray v. Administrative Dir. of the Court, 84 Haw. 138, 148, 931 P.2d 580, 590 (1997)* (internal citations, quotation marks, brackets, ellipses, and footnote omitted)). This court may also consider "the reason and spirit of the law, and the cause which induced the legislature to enact it[] . . . to discover its true meaning." Id. (quoting *Gray, 84 Haw. at 148 n.15, 931 P.2d at 590 n.15*; *HRS § 1-15(2)* (1993)).

Although judicial deference to agency expertise is generally accorded where the interpretation and application of broad or ambiguous statutory language by an administrative tribunal are subject to review, "this deference is constrained by [our] obligation to honor the clear meaning of a statute, as revealed by its [***28] language, purpose, and history." *Armbruster v. Nip, 5 Haw. App. 37, 43, 677 P.2d 477, 482* (quoting *International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20, 58 L. Ed. 2d 808, 99 S. Ct. 790 (1979))*, reconsideration denied, *5 Haw. App. 682, 753 P.2d 253*, certiorari denied, *67 Haw. 685, 744 P.2d 781 (1984)*. Furthermore, "where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." *Brown v. Thompson, 91 Haw. 1, 18, 979 P.2d 586, 602 (1999)* (quoting *Keliipuleole v. Wilson, 85 Haw. 217, 226, 941 P.2d 300, 309 (1997)* (quoting *Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 424, 653 P.2d 420, 426 (1982))*, certiorari denied, *120 S. Ct. 511, 145 L. Ed. 2d 395, 68 U.S.L.W. 3326 (1999)*. See also *Aio v. Hamada, 66 Haw. 401, 407, 664 P.2d 727, 731 (1983)*.

[***29] We answer questions of constitutional law by exercising our own "'independent constitutional judgment [based] on the facts of the case.'" *State v. Sua, 92 Haw. 61, 68, 987 P.2d 959, 966 (1999)* (quoting *State v. Lee, 83 Haw. 267, 273, 925 P.2d 1091, 1097 (1996)*(quoting *Crosby v. State Dep't of Budget & Fin., 76 Haw. 332, 341, 876 P.2d 1300, 1309 (1994)* (citation omitted)). We have long recognized that this court is the "ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution." *State v. Quitog, 85 Haw. 128, 130 n.3, 938 P.2d 559 n.3 (1997)* (quoting *State v. Arceo, 84 Haw. 1, 28,* [*42] [**1079] *928 P.2d 843, 870 (1996)* (citation omitted)).

III. DISCUSSION

A. The circuit court did not err in concluding that Ka Pa'akai and PTP had standing to appeal under *HRS § 91-14*.

KD and the LUC argue that the circuit court lacked jurisdiction to consider Ka Pa'akai's and PTP's appeals because neither Ka Pa'akai's nor PTP's interests were injured by the LUC's decision. KD specifically contends that, because Ka Pa'akai's and PTP's interests "have been served, not injured, [***30] " inasmuch as the LUC's decision was a "favorable" one, Ka Pa'akai and PTP lack standing to appeal. This argument is untenable.

The appeal of the LUC's action on a boundary amendment petition is governed by *HRS § 91-14*. See *HRS § 205-4(i)* (1993). Under *HRS § 91-14*, a "person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review[.]" In PASH, we stated that, in order to establish standing for purposes of *HRS § 91-14*, a party must, inter alia, "demonstrate [that its] . . . interests were injured[.]" [17] *PASH, 79 Haw. at 434, 903 P.2d at 1255* (citing *Pele Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 69, 881 P.2d 1210, 1215*

> 17 As we articulated in PASH, four requirements must be met in order to appeal from an agency's decision under *HRS § 91-14*: "first, the proceeding that resulted in the unfavorable agency action must have been a 'contested case' hearing . . .;second, the agency's action must represent 'a final decision and order,' or 'a preliminary ruling' such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved 'in' the contested case; and finally, the claimant's legal interests must have been injured -- i.e., the claimant must have standing to appeal." *79 Haw. at 431, 903 P.2d at 1252*. There is no dispute that Ka Pa'akai and PTP participated in the contested case hearing and that the LUC's action was a final decision and order.

[***31] (1994)). The demonstration is evaluated via a three-part "injury in fact" test requiring: "(1) an actual or threatened injury, which, (2) is traceable to the challenged action, and (3) is likely to be remedied by favorable judicial action." *Citizens for the Protection of the North Kohala Coastline v. County of Haw., 91 Haw. 94, 100, 979 P.2d 1120, 1126 (1999)* (citing *PASH, 79 Haw. at 434 n.15, 903 P.2d at 1255 n.15* (citation omitted)).

With regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii." *Pele Defense Fund v. Paty, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992)*, certiorari denied, *507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993)*. Our "fundamental policy [is] that Hawaii's state courts should provide a forum for

cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the [***32] "needs of justice" would be best served by allowing a plaintiff to bring claims before the court." *73 Haw. at 614-15, 837 P.2d at 1268-69* (citing *Life of the Land v. The Land Use Comm'n, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981))*.

We have also noted that, "where the interests at stake are in the realm of environmental concerns[,] 'we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.'" *Citizens, 91 Haw. at 100-01, 979 P.2d at 1126-27* (quoting *Mahuiki v. Planning Commission, 65 Haw. 506, 512, 654 P.2d 874, 878 (1982)* (quoting *Life of the Land, 63 Haw. at 171, 623 P.2d at 438*))). Indeed, "one whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal." *Mahuiki, 65 Haw. at 512-13, 654 P.2d at 878* (quoting *East Diamond Head Association v. Zoning Board of Appeals, 52 Haw. 518, 523 n.5, 479 P.2d 796, 799 n.5 (1971)* [***33] (citations omitted)). See also *Mahuiki, 65 Haw. at 515, 654 P.2d at 880* (those who show aesthetic and environmental injury are allowed standing to invoke judicial review of an agency's decision under *HRS chapter 91* where their interests are "personal" and "special," or where a property interest is also affected) (citing *Life of the Land v. Land Use Commission, 61 Haw. 3, 8,* [*43] [**1080] *594 P.2d 1079, 1082 (1979))*; *Akau v. Olohana Corporation, 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982)* (an injury to a recreational interest is an injury in fact sufficient to constitute standing to assert the rights of the public for purposes of declaratory and injunctive relief); *Life of the Land, 63 Haw. at 176-77, 623 P.2d at 441* (group members had standing to invoke judicial intervention of LUC's decision "even though they are neither owners nor adjoining owners of land reclassified by the Land Use Commission in [its] boundary review"); *Life of the Land, 61 Haw. at 8, 594 P.2d at 1082* (group members who lived in vicinity of reclassified properties and used the subject area for "diving, swimming, hiking, camping, sightseeing, [***34] horseback riding, exploring and hunting and for aesthetic, conservational, occupational, professional and academic pursuits," were specially, personally and adversely affected by LUC's decision for purposes of *HRS § 91-14*).

1. Ka Pa'akai

In the instant case, Ka Pa'akai sufficiently demonstrated that the LUC's June 13, 1996 decision would adversely affect its native Hawaiian members' traditional gathering, religious, and cultural practices within the petition area. Ka Pa'akai's members averred that they, their ancestors, friends, and families have crossed the 1800-1801 lava flow to gather salt for subsistence and religious purposes on and around the petition area over a long period of time. They further asserted that "the petition area is associated with important personages and events in Hawaiian history, contains well-known physical entities (such as the shoreline, Ka Lae Mano and the 1800-1801 lava flow) and remnants of the native tenants' lateral shoreline and mauka-makai trail system, living areas and burials. Reports of a kii[18] being found in the petition area were also confirmed by Petitioner's landlord and expert."

18 A "ki'i" is an "image, statue, picture, photograph, drawing, diagram, illustration, likeness, cartoon, idol, doll, petroglyph[.]" Pukui & Elbert, Hawaiian Dictionary, at 148.

[***35] Ka Pa'akai further argued that its members' interests as native Hawaiians, and as tenants of the ahupua'a of Ka'upulehu, would be impaired by the proposed development regarding the use of ancient trails and the shoreline area to practice traditional and customary gathering rights. The group generally contended that its members use the petition area for fishing, gathering salt, opihi, limu, kupee, [19] Pele's Tears, [20] and ha'uke'uke, [21] and that the 1800-1801 lava flow held special religious significance for Hawaiians. It specifically argued, inter alia, that the LUC's illegal delegation of the protection and preservation of cultural resources and native Hawaiian rights to the developer endangered its members' gathering activities and negatively impacted their access rights.

19 "Kupe'e" are "edible marine snails [whose] shells are used for ornaments; the rare ones by chiefs." Pukui & Elbert, Hawaiian Dictionary, at 185.

20 "Pele's tears" are described as "tear drops made from pahoehoe lava. They usually have a point on each end. . . . They're lava formations." [LUC TR 1/18/96, at 104]

[***36]

21 "Ha'uke'uke" is "an edible variety of sea urchin [whose] teeth were used for medicine." Pukui & Elbert, Hawaiian Dictionary, at 60.

Ka Pa'akai's members -- as native Hawaiians who have exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes --sufficiently demonstrated injury to their interests for purposes of appeal under *HRS chapter 91*. The circuit court thus properly concluded that Ka Pa'akai had standing to invoke judicial resolution of the LUC's decision.

2. PTP

PTP likewise established personal and special interests sufficient to invoke judicial review under *HRS § 91-14*. PTP alleged facts to show that its members were recreational users of the petition area, using it for "hiking, fishing, and other food gathering, and camping[,]" and that the LUC's action would "diminish" such use. Its members also asserted their interests in protecting the natural environment of West Hawaii, its scenic, aesthetic, historic, and biological resources --the protection of the "Kona Nightingales" [*44] [**1081] and the preservation [***37] of Hawaiian archaeological sites, the Ala Kahakai, and the unique scenic resource of the Ka'upulehu lava flow and the Kalaemano area.

PTP additionally contended that the proposed development would adversely affect the pristine nature, scenic views, and open coastline of the area now enjoyed by its members. Like Ka Pa'akai, PTP submitted that the LUC's improper delegation of its authority to KD, in violation of PASH, would impair its members' use and enjoyment of the petition area.

Based on our review of the record, PTP sufficiently demonstrated an "injury in fact." *As in Citizens and Mahuiki, supra*, we perceive no sound reason to foreclose PTP's challenges through a restrictive application of standing requirements. We therefore hold that, because both Ka Pa'akai and PTP are "persons aggrieved" within the meaning of *HRS § 91-14*, the circuit court did not err in concluding that both groups had standing to seek judicial review of the LUC's decision. [22]

> 22 Accordingly, we note that KD's contention that Ka Pa'akai's and PTP's interests have been "served" is wholly immaterial to a determination of standing.

[***38] B. The Land Use Commission's obligations to preserve and protect customary and traditional practices of native Hawaiians

PTP asserts that the LUC failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected "to the extent feasible." Correlatively, Ka Pa'akai contends that the LUC abused its discretion in arbitrarily and capriciously delegating its authority to consider the effect of the proposed development on such rights to KD and its landlord. We agree with both contentions and, in vacating and remanding the LUC's order, take the opportunity to review the LUC's obligations when acting upon a petition for land use boundary reclassification.

1. The LUC's obligations to independently assess the impact of the proposed reclassification on traditional and customary practices of Hawaiians

Under *HRS § 205-17(3)(B)*, "in its review of any petition for reclassification of district boundaries pursuant to this chapter, the [Land Use C]omission shall specifically consider the following: . . . The impact of the proposed reclassification on the following [***39] areas of state concern: . . . Maintenance of valued cultural, historical, or natural resources[.]" (Emphases added.) *HRS § 205-4(h)* mandates that "no amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is . . . consistent with the policies and criteria established pursuant to sections 205-16 and 205-17."

In accordance with those statutory directives, *Hawaii Administrative Rule (HAR) § 15-15-77* provides that the LUC, "in its review of any petition for reclassification of district boundaries . . . shall specifically consider the following; . . . the impact of the proposed reclassification on the following areas of state concern: . . . maintenance of valued cultural, historical, or natural resources." *HAR § 15-15-77* (1986). In order to comply with *HRS § 205-4(h)*'s mandate, the LUC is required [***40] to enter specific findings that, inter alia, the proposed reclassification is consistent with the policies and criteria of *HRS § 205-17(3)(B)*. Such findings "are subsidiary findings of basic facts and are necessary to support the ultimate finding" that the criteria of *HRS § 205-17* have been met. See *Kilauea Neighborhood Ass'n v. LUC, 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (1988)* ("Under $ *(HRS] § 205-4(g)*, the LUC is required to file findings of fact and conclusions of law when acting upon a petition for reclassification. . . . In order to allow [an appellate] court to track the steps by which the LUC reached its finding that a land use boundary amendment complies with the provisions of $ *(HRS] § 205-16.1*, . . . it [is] necessary for the LUC to make findings on the pertinent criteria established there. Such findings are subsidiary findings of basic facts and are necessary to support the ultimate finding that the criteria of *§ 205-16.1* [*45] [**1082] have been met."). [23] See also *Hui Alaloa v. Planning Commission of the County of Maui, 68 Haw. 135, 136, 705 P.2d 1042, 1044 (1985)* ("The planning commission, in order to comply with the CZMA [***41] mandate, is required to make findings that the proposed development projects are consistent with [the CZMA's] policies and objectives.")

> 23 Additionally, because the petition area lies in the special management area, the LUC was required to implement the objectives and policies of the Coastal Zone Management Act (CZMA). *HRS § 205A-4* specifically requires that all agencies within their scope of authority "give 'full consideration . . . to cultural . . . [and] historic . . . values as well as to needs for economic devel-

opment'" when implementing the objectives and policies of the *Coastal Zone Management Program. PASH, 79 Haw. at 435, 903 P.2d at 1256* (citing *HRS § 205A-4(a)*) (emphasis deleted).

In addition to its specific statutory obligations, the LUC is required under the Hawaii Constitution to preserve and protect customary and traditional practices of native Hawaiians. [***42] Under *Article XII, section 7 of the Hawaii Constitution,*

> 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.

This provision places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies "the power to protect these rights and to prevent any interference with the exercise of these rights." Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 639 (1980). See also *PASH, 79 Haw. at 437, 903 P.2d at 1258*; *HRS §§ 1-1* [24] and *7-1* [25] (providing two additional sources from which gathering rights are derived). Article XII, section 7's mandate grew out of a desire to "preserve the small remaining vestiges of a quickly disappearing [***43] culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights." Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 640. The Committee on Hawaiian Affairs, in adding what is now article XII, section 7, also recognized that "sustenance, religious and cultural practices of native Hawaiians are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems." Comm. Whole Rep. No. 12, in 1 Proceedings of the Constitutional Convention of 1978, at 1016.

24 *HRS § 1-1* provides:

> The common law of England as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States of the State.

[***44]

25 *HRS § 7-1* states:

> Where landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have the right to take such articles to sell for profit. The people shall also have the right to drinking water, and roads shall be free to all on all lands granted in fee simple; provided that this shall not be applicable to well and watercourses, which individuals have made for their own use.

In the judicial decisions following its enactment, this court reemphasized that "the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7." See *PASH, 79 Haw. at 442, 903 P.2d at 1263*. See also *Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982)* (recognizing Haw.'s constitutional mandate to protect traditional and customary native Hawaiian rights); *Pele Defense Fund, 73 Haw. at 620, 837 P.2d at 1272* [***45] (reaffirming the "rudiments of native Hawaiian rights protected by article XII, § 7" of the Hawaii Constitution). In PASH, we stated that "the State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights . . . necessarily allows the State to permit development that interferes [*46] [**1083] with such rights in certain circumstances . . . . Nevertheless, the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." *PASH, 79 Haw. at 450 n.43, 903 P.2d at 1271 n.43* (emphasis added). As such, state agencies such as the LUC may not act without independently considering the effect of their actions on Hawaiian traditions and practices. See *id. at 437, 903 P.2d at 1258.*

This court has also continued to recognize the powerful historical basis for ensuring the protection of traditional and customary Hawaiian rights. We have observed, for example, that the introduction of Western private property concepts profoundly limited native Hawaiians' traditional system of land tenure and subsistence. See *Kalipi, 66 Haw. at 6-7, 656 P.2d at 749* [***46] ("In ancient times . . . the native people existed by a subsistence economy and the division of land . . . enabled persons within it to obtain virtually all things necessary to survival. . . . With the coming of the influence of the west, the traditional system became increasingly less viable. A trading economy gradually replaced the subsistence economy and the land and its resources came to have a value apart from the labor of those who worked it."). See also *Pele Defense Fund v. Paty, 73 Haw. 578 at 618-621, 837 P.2d 1247 at 1270-72* (discussing historically exercised access and gathering rights

for subsistence, cultural or religious purposes); *PASH, 79 Haw. at 445-447, 903 P.2d at 1266-68* (describing relevant legal developments in Hawaiian history regarding land tenure). [26]

26 See also Native Hawaiian Rights Handbook 223 (1991) (Melody Kapilialoha MacKenzie, ed.) (recognizing that "the tension between Western private property concepts and the exercise of native gathering rights has resulted in increasing limitations on those rights"); D. Kapua Sproat, The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights, *20 U. Haw. L. Rev. 321 (1998)* (describing, among other things, the historical basis for traditional and customary practices).

[***47] In PASH, this court had occasion to address, inter alia, whether the Hawaii Planning Commission was required to protect the traditional and customary practices of the nature asserted by *PASH. 79 Haw. at 439, 903 P.2d at 1260*. In this case, the LUC's duty to protect the traditional and customary practices asserted by the native Hawaiian members of Ka Paakai and PTP is undisputed. We are therefore called on to determine whether the LUC discharged that duty.

2. Analytical framework

Article XII, section 7 of the Hawaii Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians to the extent feasible when granting a petition for reclassification of district boundaries. See *PASH, 79 Haw. at 450 n.43, 903 P.2d at 1271 n.43* (emphasis added). In order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable. In order for native Hawaiian rights to be enforceable, an appropriate analytical framework for enforcement is needed. Such an analytical framework [***48] must endeavor to accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other. See *PASH, 79 Haw. at 447, 903 P.2d at 1268* ("A community development proposing to integrate cultural education and recreation with tourism and community living represents a promising opportunity to demonstrate the continued viability of Hawaiian land tenure ideals in the modern world."); *Kalipi, 66 Haw. at 7, 656 P.2d 749* ("Our task is thus to conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title."); Comm. Whole Rep. No. 12, in 1 Proceedings of the Constitutional Convention of 1978, at 1016 (1980) ("it is possible, with work, to both protect the rights of private landowners and allow for the preservation of an aboriginal people").

We therefore provide this analytical framework in an effort to effectuate the State's obligation to protect native Hawaiian [*47] [**1084] [***49] customary and traditional practices while reasonably accommodating competing private interests: In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must -- at a minimum -- make specific findings and conclusions as to the following: (1) the identity and scope of "valued cultural, historical, or natural resources" [27] 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 LUC to reasonably protect native Hawaiian rights if they are found to exist. [28]

27 We decline to define the term, "cultural resources." "Cultural resources" is a broad category, of which native Hawaiian rights is only one subset. In other words, we do not suggest that the statutory term, "cultural resources" is synonymous with the constitutional term, customary and traditional native Hawaiian rights.

[***50]

28 Importantly, we note that the 2000 Hawaii State legislature passed H.B. No. 2895, H.D. 1, entitled, "A Bill for an Act Relating to Environmental Impact Statements." It amends *HRS § 343-2* to include the effects of economic development on cultural practices:

> "Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.
>
> . . . .
>
> "Significant effect" means the sum of effects on the quality of the environment, including actions that . . . adversely affect the economic wel-

fare, social welfare, or cultural practices of the community and State.

In enacting the provision, the legislature found that "there is a need to clarify that the preparation of environmental assessments or environmental impact statements should identify and address effects on Hawaii's culture, and traditional and customary rights." (Emphasis added.) It recognized that "the native Hawaiian culture plays a vital role" in the preservation of Hawaii's "aloha spirit" and that "Articles IX and XII of the state constitution, other state law, and the courts of the State impose on government agencies a duty to promote and protect cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups." Most importantly, it observed that the past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature further finds that due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.

(Emphasis added.) See also Stand. Comm. Rep. No. 3298 (observing that, "although the Hawaii State Constitution and other state laws mandate the protection and preservation of the traditional and customary rights of native Hawaiians, the failure to require environmental impact statements to disclose the effect of a proposed action on cultural practices has resulted in the loss of important cultural resources. Your Committee believes that this measure will result in a more thorough consideration of an action's potential adverse impact on Hawaiian culture and tradition, ensuring the culture's protection and preservation.") (Emphasis added.) The bill was subsequently signed into law by Governor Benjamin Cayetano as Act 50.

We note that, while H.B. 2895 does not apply retroactively to the case at hand, its requirements and purposes provide strong support for the framework we have articulated herein.

[***51] 3. The LUC's findings and conclusions are insufficient to allow a determination as to whether it fulfilled its constitutional obligation to preserve and protect customary and traditional rights of native Hawaiians.

In this case, the LUC entered a handful of findings potentially implicating native Hawaiian rights. In FOF No. 48, the LUC found that KD will, in the future, establish its RMP to, among other things, balance KD's interest with the "traditional needs" of Hawaiians:

48. As part of the proposed Project, Petitioner will develop and implement a Resource Management Plan ("RMP") which would coordinate development with native Hawaiian rights to coastal access for the purpose of traditional cultural practice, West Hawaii's demand for new coastal recreational opportunities, and the creation [*48] [**1085] of a buffer for Kona Village Resort. Under Petitioner's concept of the RMP, the goals of the RMP are to provide for resource management and ensure public access to the coastal area which balances Petitioner's needs with the traditional needs of native Hawaiians and the recreational needs of the public.

The LUC then identified some of the "resources" found within the [***52] petition area and observed, in particular, that Hannah Springer and her family have traditionally gathered salt in the Kalaeman area:

73. The shoreline portion of the Property is used for fishing and gathering of limu, ['Jopihi, and other resources, and for camping. The area closest to Kalaemano was traditionally used for salt gathering. Hannah Springer, a kama'aina of the mauka portion of Ka'upulehu, and her 'ohana have traditionally gathered salt in this area on an occasional basis.

The LUC found that these resources would be preserved as part of KD's 235-acre RMP. This RMP, according to the LUC's findings, would be consistent with KS/BE's ahupua'a plan, which would, in the future, involve native Hawaiians in its implementation:

74. The areas for fishing, limu, ['Jopihi, and salt gathering, and general recreation are to be preserved and managed as part of Petitioner's RMP, thus perpetuating these activities on and makai of the Property.

. . . .

88. The proposed Project will reasonably preserve and perpetuate cultural resources such as archaeological sites, the coastal trail, areas of fishing, '[]opihi, and limu gathering, salt gathering, and general recreation in the proposed [***53] areas within Petitioner's RMP. Petitioner's RMP area totals approximately 235 acres.

89. KS/BE has formulated a plan to manage and protect cultural resources within the entire ahupua'a of Ka'upulehu. Petitioner's RMP will be consistent with and further the objective of the ahupua'a plan. KSBE's ahupua'a plan includes designated geographic zones that define the natural, cultural, and historic resources of Ka'upulehu from the mountain to the sea. The ahupua'a plan will involve native Hawaiians, particularly the 'ohana who are kama'aina to the subject Property, to relink the traditions and practices that are rooted in that Prop-

erty. KSBE will form a non-profit entity in perpetuity to oversee the formulation and implementation of the Ka'upulehu ahupua'a plan.

Condition No. 18 of the boundary amendment provided that "Petitioner shall preserve and protect any gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural and religious practices on the subject property." The LUC also noted that KD "will develop and implement its RMP which would in the future coordinate development with native Hawaiian rights, recreational opportunities, [***54] and the creation of a buffer for Kona Village Resort."

A review of the record and the LUC's decision leads us to the inescapable conclusion that the LUC's findings and conclusions are insufficient to determine whether it discharged its duty to protect customary and traditional practices of native Hawaiians to the extent feasible. The LUC, therefore, must be deemed, as a matter of law, to have failed to satisfy its statutory and constitutional obligations.

First, apart from its finding that "Hannah Springer, a kama'aina of the mauka portion of Ka'upulehu, and her 'ohana have traditionally gathered salt in this area on an occasional basis," the LUC failed to enter any definitive findings or conclusions as to the extent of the native Hawaiian practitioners' exercise of customary and traditional practices in the subject area. [29] Instead, as discussed further [*49] [**1086] below, the LUC charged KD with blanket authority to "preserve and protect any gathering and access rights of native Hawaiians" without identifying those rights or providing any specificity as to the locations on which native Hawaiians could be expected to exercise them. See infra section III.B.4.

29 Although the LUC found that "the shoreline portion of the Property is used for fishing and gathering of limu, ['lopihi, and other resources, and for camping[,]" it did not indicate whether any of these uses were customarily and/or traditionally exercised by Hawaiians on the subject property.

Some group members also testified that they gathered ha'uke'uke, kupe'e and Pele's tears, and knew families who "[took] care of the resources in practicing their traditional culture" in the proposed project area. The LUC made no findings or conclusions whatsoever regarding these uses.

[***55] Moreover, none of the LUC's findings or conclusions addressed possible native Hawaiian rights or cultural resources outside of KD's 235-acre RMP, such as Ka Pa'akai's members' use of the mauka-makai trails to reach salt-gathering areas, the religious significance of the 1800-1801 lava flow, or the gathering of Pele's Tears. At the hearing, Hannah Springer testified that she and her family "utilize the mauka/makai trails as well as the lateral coastline trails" to reach the coastline, where they gather salt. She averred that "these trails are important to us to substantiate the continuity with the ancestors. . . . [and that she and her family] have a sincere appreciation for having the opportunity to literally walk the trails of the ancestors." [30] She also asserted that she, as part of Pua Kanahele's hula halau, gathered both kpee and Pele's Tears within the petition area. [31] The LUC did not articulate whether the area lying outside of the RMP lacked cultural resources or that the resources present lacked significance warranting protection or management. These omissions are of particular significance because these activities fall outside the "protection" of KD's conceptual RMP [***56] area.

30 Springer also testified that "we have particular examples with reference to this project as described being a part of Kalaemano, it is known that people from Mahai'ula, from Makalawena, from Kukio would travel down the coastline from their home ahupua'a to Kalaemano to gather salt."

31 Pua Kanahele likewise testified to the gathering of kupe'e.

Equally important, the LUC made no specific findings or conclusions regarding the effects on or the impairment of any Article XII, section 7 uses, or the feasibility of the protection of those uses. Instead, as mentioned, the LUC delegated unqualified authority to KD, by way of Condition No. 18, to assess what methods, if any, to employ to protect native Hawaiian rights. At the hearing, Springer testified that, "because of the quality of the salt for which Kalaemano is renowned is based upon the water quality, it becomes a water quality issue. If indeed a great amount of topsoil is imported and dry wells are utilized to accommodate runoff, we might [***57] assume that the quality of the waters off of Kalaemano may be subject to . . . degradation . . . and that would certainly have a detrimental impact upon the salt." [32] She further averred that, "particularly because members of our family and through [sic] our family friends utilize [the salt] for religious purposes, and because of the high quality with regard to cleanliness of that salt, anything that would tarnish or degrade the quality of that salt would degrade the quality of our religious practice."

32 Springer further testified that "in particular, if we are going to gather, say, salt, say, to give to the teachers who will be using it for ceremonial purposes, ease of access is not necessarily critical to the performance of the practice. What is criti-

> cal to the performance of the practice is that the body, and thus the spirit, becomes imbued with the character of the land; that by moving at a pace other than the pace of our workaday world, we are allowed to experience and be imbued with the characteristics of the land, the quiet, as well as what we see on our walk, all of which is setting the tone for the gathering that might occur."

[***58] Moreover, Leimana Damate, of KHCC, testified that "the area in question, if developed, will adversely affect the gathering activities and impact the access rights of Hawaiians, particularly in the area known as Kalaemano. . . ." She further asserted that "the area of Kalaemano was a source of gathering for the whole area of Kekaha and continues to be used by Hawaiians today. The development will compromise these gathering practices significantly." Finally, she submitted that she and others "embrace the practice of using the ahupua'a as a model for integrated planning. This planning includes the protection and conservation of all waters and other resources, embracing the ahupuaa custom and tradition from the mountains to the sea, including forest reserves, streams, anchialine ponds and coastal waters. This practice . . . would be curtailed by the Ka'upulehu Development." See also [*50] [**1087] Section III.A. (describing group members' testimony as to various cultural resources within the petition area). In rendering its findings and conclusions, the LUC failed to assess any of this potentially relevant testimony regarding possible effects on or impairment of Ka Pa'akai's [***59] members' traditional and customary practices. [33]

> 33 Aside from a finding on scientifically-identified archeological sites in the petition area, see FOF No. 78, the LUC's findings are, at best, ambivalent as to what the potential impact on valued cultural resources might be.

If the practice of native Hawaiian rights being exercised will be curtailed to some extent by the land use reclassification and the resulting development, the LUC is obligated to address this. Indeed, the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection. Requiring these minimal prerequisites facilitates precisely what the 1978 Constitutional Convention delegates sought: "badly needed judicial guidance" and the "enforcement by the courts of these rights[.]" See Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 640. See also *Pele Defense Fund, 73 Haw. at 619-20, 837 P.2d at 1271* [***60] ("In reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.") (Quoting Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 640.)

4. The LUC improperly delegated its duty to KD.

KD argues, however, that Hawaiian rights are adequately protected because the LUC's Condition No. 18 requires KD to "preserve and protect any gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural and religious practices on the subject property." KD further maintains that its conceptual RMP will adequately protect any such rights. This wholesale delegation of responsibility for the preservation and protection of native Hawaiian rights to KD, a private entity, however, was improper and misses the point. These issues must be addressed before the land is reclassified.

In Hui Alaloa, this court held that, contrary to statutory mandates, the Maui Planning Commission impermissibly delegated its authority to determine whether a development complied with the policies and objectives of [***61] the CZMA to the applicants for a special management area permit. In that case, following testimony on behalf of all the parties, the planning commission granted permits to two developers "conditioned upon retention of a qualified archaeologist to conduct a further survey and excavation of the area, and to 'prepare a written report to maximize information retention through preservation or salvage of significant archaeological sites and to provide a plan for protecting, restoring, interpreting, and displaying historical resources either preserved on or salvaged from the subject areas.'" *68 Haw. at 137, 705 P.2d at 1044*. The planning commission also directed one petitioner's archaeologist to determine the significance of various archaeological sites, and required both petitioners to "eliminate all grading or construction impact on any significant archaeological sites prior to salvage and preservation." Id.

On appeal, this court first identified the CZMA's objectives and policies of "identifying and analyzing significant archaeological resources; maximizing information retention through preservation of remains and artifacts or salvage operations; and supporting State goals [***62] for protection, restoration, interpretation, and display of historic resources." *Id. at 135, 705 P.2d at 1043* (citing *HRS § 205A-2(c)(2)(A)-(C)* (brackets added)). We emphasized that a specific finding -- that the developments are consistent with the CZMA's objectives of protecting and preserving historic and pre-historic resources -- must first be made before a SMA permit can be issued. Id. (citing *Mahuiki, 65 Haw. 506, 654 P.2d 874*). We therefore concluded that "the determination whether the development complies with the policies and objectives of the CZMA regarding historical [*51]

[**1088] and archaeological significance was, in essence, left to the applicants contrary to the statutory command governing the issuance of SMA permits." Id. See also *Idaho v. Interstate Commerce Comm'n, 308 U.S. App. D.C. 268, 35 F.3d 585, 596 (D.C. Cir. 1994)* (agency impermissibly abdicated its regulatory responsibility where it allowed a private licensee, alone, to assess the total environmental impact of its activities); *Sierra Club v. Sigler, 695 F.2d 957, 962 n.3 (5th Cir. 1983)* ("An agency may not delegate its public duties to private [***63] entities[.]") (Citing *Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974))*, rehearing denied, *704 F.2d 1251 (5th Cir. 1983)*; *Illinois Commerce Comm'n v. I.C.C., 270 U.S. App. D.C. 214, 848 F.2d 1246, 1258 (D.C. Cir. 1988)* (The Interstate Commerce Commission "may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it.") (Citations omitted.), certiorari denied, *488 U.S. 1004, 109 S. Ct. 783, 102 L. Ed. 2d 775 (1989)*.

Here, as in Hui Alaloa, the delegation of the protection and preservation of native Hawaiian practices to KD under KD's RMP was inappropriate. As noted above, the LUC found that KD "will develop and implement" its RMP, which "would in the future" coordinate development with native Hawaiian rights to coastal access for the purpose of traditional cultural practice. [34] The LUC's verbatim adoption of KD's conceptual RMP and KS/BE's future study, without any analysis of the project's impact, violates the LUC's duty to independently assess the impacts of the proposed reclassification on such customary and traditional practices. [***64] [35] Moreover, such balancing of the developer's interests with the needs of native Hawaiians should have been performed, in the first instance, by the LUC.

> 34 Leimana Damate, of KHCC, expressed concern that, although KHCC and other native Hawaiian groups were informed of the proposed project early on, KHCC was "concerned . . . to find out that the permitting process would be initiated a mere three months after we were approached. At this time there is no formal guarantee either in the environmental impact statement, in writing from the landowner, or any written document from the developer stating that the Kona Hawaiian Civic Club will be a part of any such plan."
>
> Moreover, as the testimony at the contested case hearings reveals, only a draft of KS/BE's ahupuaa plan was available at the time the LUC made its decision. The testimony of Robert Lindsay, representative of KS/BE, further illustrates the conditional and uncertain nature of the conceptual plans:
>
> [Lindsay]: If I may respond this way to your, Mr. Powell, I think that Ka'upulehu as -- or Ka'upulehu as an ahupua'a is a very very big place and, you know, I've talked with our lessee along the way about opportunities maybe where an Hawaiian place could be created within that ahupuaa at some point in time, perhaps not in this area but in another place within the ahupua'a.
>
> Q: Are there any other areas along the shoreline in the ahupua'a, assuming this project is approved, are there any other areas in the Ka'upulehu ahupua'a along the shoreline that will not be developed?
>
> [Lindsay]: We're looking at the salt area, Kalaemano, as an area that is to remain the way it is and possibly as an area which could be -- right now it's described as a recreation area. My thought is that it should be described as a pu'uhonua, a special refuge place for our people to come to practice the traditions that relate to salt gathering or other practices or traditions that could be appropriate for this place.
>
> [***65]
>
> 35 It is also important to note that neither the boundaries of the Resource Zones contained in the RMP, nor the specific uses in each zone have been established.

Second, as indicated, the LUC granted the boundary reclassification conditioned upon KD preserving and protecting "any gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural and religious practices on the subject property." Pursuant to our decision in PASH, the petitioner's obligation to allow access for traditional and customary practices continues to the extent that these practices can reasonably co-exist with the development of the property. *79 Hawaii at 451, 903 P.2d at 1272*. In the instant case, the boilerplate language in Condition No. 18 confers upon KD the unfettered authority to decide which native Hawaiian practices are at issue and how they are to be preserved or protected. Moreover, Condition No. 18 addresses only such native Hawaiian rights as are left enforceable after the development is complete, at some undetermined [*52] [**1089] [***66] time and under indeterminate circumstances. [36]

> 36 Equally problematic, the LUC did not establish a procedure by which native Hawaiians are able, before actual construction begins, (1) to obtain an indication from KD as to which native Hawaiian practices it considers "traditional or

customary" or (2) to enforce those rights once found.

In addition, we cannot discern from the LUC's decision any requirement that KD present to the LUC for final approval KD's completed and final RMP, including any proposal for protecting traditional and customary native Hawaiian rights.

Specific considerations regarding the extent of customary and traditional practices and the impairment and feasible protection of those uses must first be made before a petition for a land use boundary change is granted. The power and responsibility to determine the effects on customary and traditional native Hawaiian practices and the means to protect such practices may not validly be delegated by the LUC to a private petitioner who, unlike a [***67] public body, is not subject to public accountability. Allowing a petitioner to make such after-the-fact determinations may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self-serving actions on the petitioner's part. After all, once a project begins, the pre-project cultural resources and practices become a thing of the past.

With the aforementioned framework in mind, see supra Section III.B.2., and based on history and precedent, we hold that, insofar as the LUC allowed KD to direct the manner in which customary and traditional native Hawaiian practices would be preserved and protected by the proposed development -- prior to any specific findings and conclusions by the LUC as to the effect of the proposed reclassification on such practices -- the LUC failed to satisfy its statutory and constitutional obligations. In delegating its duty to protect native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority. We therefore remand this case to the LUC for the limited purpose of entering specific findings of fact and conclusions of law, with further hearing if necessary, regarding: (1) the identity [***68] 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 LUC to reasonably protect native Hawaiian rights if they are found to exist. [37]

37 PTP further contends that the LUC erred in relying on KD's financial disclosure under HAR § *15-15-50(c)(8). HAR* § 15-15-50(c)(8) requires that all petitions for boundary amendment by private entities and individuals provide "a clear description of the manner in which the petitioner proposes to finance the development, a statement of petitioner's current financial condition, including petitioner's latest balance sheet and income statement[.]"

From our view of the record, the LUC did not err in determining that KD had submitted the requisite evidence relating to the financing of the development. During the contested case hearing, Alex Kinzler, KD's president, testified to various alternative means of financing the initial phase (Phase I) of the proposed development. According to Kinzler's testimony, one alternative would be the formation of a joint venture with an independent developer. The other would be to obtain conventional financing, as is common practice in the development industry. Kinzler further testified that he expected that sales revenues from the initial phase to be used to finance subsequent development phases.

According to the LUC's findings, KD's managing partner's parent company filed consolidated financial statements showing its earnings, revenues, and cash flow. The LUC also entered a finding reflecting Kinzler's testimony as to the possible alternative means of financing the project. See supra Section I. Thus, in view of reliable, probative, and substantial evidence on the whole record, the LUC did not err in relying on KD's financial disclosure.

Ka Pa'akai submits that the LUC improperly relied on the DLNR's comments, which were based on unofficial standards and criteria. Ka Pa'akai specifically contends that the LUC improperly utilized the DLNR's October 4, 1995 comment on the petitioner's archaeological survey, the testimony of James Bell, Anne Mapes, and Paul Rosendahl, and archaeological reports, all of which were based on the DLNR's unpublished "draft" rules, because such evidence was not "reliable" or "probative." We disagree.

Ka Pa'akai has failed to demonstrate that the LUC improperly relied on the DLNR's comments based on unpublished "draft" rules. As the circuit court correctly recognized, "DLNR was merely one of a number of agencies and persons given an opportunity to comment during the LUC proceedings. *HRS § 6E-42*. The LUC is not required by law to give any specific deference, weight or exclusive consideration to DLNR's comments and, in the absence of such comments, would still be able to render a decision." Thus, the LUC permissibly relied on the comments of the DLNR.

Ka Pa'akai's final contention that the circuit court failed to specifically rule on four of its points of error on appeal is without merit. Contrary to Ka Pa'akai's argument, the circuit court sufficiently set forth the bases for its affirmance of the LUC's decision. For example, the circuit court stated in its conclusions of law that "there has been no showing by Appellant that the LUC abused its discretion by electing to consider the subject of 'cultural resources' by adjudication, rather than rule-making." Moreover, it concluded that, "as to the issue of whether the LUC improperly considered comments from another agency, the [DLNR,] because DLNR has allegedly failed to promulgate specific rules on cultural resources pursuant to *HRS Chapter 6E*, the record reveals no error or impropriety." See also supra Section I.

Accordingly, in view of the record before us, the circuit court's findings and conclusions are sufficient to disclose to this court the steps by which it reached its ultimate conclusion.

[***69] [*53]

[**1090] IV. CONCLUSION

The State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. *PASH, 79 Haw. at 450 n.43, 903 P.2d at 1271 n.43*. As the state legislature's recent observations make clear, this protection has not been ensured, resulting in both the loss of vital cultural resources and the interference with the exercise of native Hawaiian rights.

For the reasons set forth above, we hold that: (1) the circuit court did not err in concluding that Ka Pa'akai and PTP had standing under *HRS § 91-14*; (2) the LUC did not err in relying on

KD's financial disclosure; (3) the LUC did not err in relying on the comments of the DLNR; and (4) the circuit court did not err in failing to specifically rule on four of Ka Paakai's points of error on appeal. We hold, however, that the LUC's findings of fact and conclusions of law are insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians. The LUC, therefore, must be deemed, as a matter of law, to have failed to satisfy its statutory [***70] and constitutional obligations.

We therefore vacate the LUC's grant of KD's petition for land use boundary reclassification and remand to the LUC for the limited purpose of entering specific findings and conclusions, with further hearing if necessary, 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 LUC to reasonably protect native Hawaiian rights if they are found to exist.

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

LLOYD PRATT, Petitioner/Defendant-Appellant.

NO. SCWC-27897

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 27897; CR. NO. HC 04-147)
(ICA NO. 27898; CR. NO. HC 04-169)
(ICA NO. 27899; CR. NO. HC 04-229)

MAY 29, 2012

RECKTENWALD, C.J., NAKAYAMA, AND DUFFY, JJ.,
WITH ACOBA, J., CONCURRING AND DISSENTING,
WITH WHOM MCKENNA, J., JOINS

AMENDED OPINION OF THE COURT BY NAKAYAMA, J.

Article XII § 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.

Haw. Const. art. XII, § 7. Over the course of several cases,

this court has interpreted this provision, along with statutory sources of protections, in order to define the scope of the legal privilege for native Hawaiians to engage in customary or traditional native Hawaiian practices when such practices conflict with State statutes or regulations. The court has examined the privilege in the civil context, considering the right to enter private land to gather traditional plants (Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982)), the right to contest the State's sale of "ceded" lands (Pele Defense Fund v. Paty ("PDF"), 73 Haw. 578, 837 P.2d 1247 (1992)), and the right to participate in county-level Planning Commission hearings regarding land use (Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n ("PASH"), 79 Hawai'i 425, 903 P.2d 1246 (1995)). The court has also examined this privilege in the criminal context. In our most recent case on this topic, State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998), we held that a criminal defendant asserting this privilege as a defense to criminal charges must satisfy, "at minimum", the following three-prong test: (1) the defendant must be "native Hawaiian" according to the criteria established in PASH[1], (2) the claimed right must be "constitutionally protected as a customary or traditional native Hawaiian practice," and (3) the conduct must occur on

[1] PASH defines "native Hawaiians" as "descendants of native Hawaiians who inhabited the islands prior to 1778[.]" PASH, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995).

undeveloped property. Id. at 185-86, 970 P.2d at 493-94. In that case, we held that Hanapi had not satisfied this test, so the court's analysis stopped there. Id. at 187, 970 P.2d at 495.

Today's case picks up where Hanapi left off, and requires the court to articulate the analysis the courts must undertake when a defendant has made the "minimum" showing from Hanapi. The defendant in this case, Lloyd Pratt, received three citations[2] when he was found residing in a closed area of Nā Pali State Park on the island of Kaua'i. Pratt filed a motion to dismiss the charges, asserting as a defense that his activities were constitutionally-protected native Hawaiian practices, and citing Hanapi. The District Court of the Fifth Circuit ("trial court") denied his motion[3], held trial, and subsequently found Pratt guilty on all three charges. Pratt appealed to the Intermediate Court of Appeals ("ICA"); the ICA affirmed Pratt's conviction. State v. Pratt, 124 Hawai'i 329, 243 P.3d 289 (App. 2010). Pratt applied for a writ of certiorari, and we granted his application to clarify the law surrounding the assertion of native Hawaiian rights as a defense in criminal cases.[4]

I. BACKGROUND

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[2] The three cases (numbers 27897, 27898, and 27899) were consolidated into one case.

[3] The Honorable Frank D. Rothschild presided.

[4] Pratt's application for writ of certiorari presented a second question regarding the binding effect of a concession on appellate courts. Because the court is able to decide the case without resolving that question, the question is not discussed.

Pratt was cited for violating Hawai'i Administrative Rules ("HAR") § 13-146-4 on July 14, July 28, and September 28 of 2004, when he was found in a closed area of the Kalalau Valley in the Nā Pali Coast State Wilderness Park on Kaua'i. HAR § 13-146-4, Closing of Areas, states in pertinent part:

> The board [of land and natural resources] or its authorized representative may establish a reasonable schedule of visiting hours for all or portions of the premises and close or restrict the public use of all or any portion thereof, when necessary for the protection of the area or the safety and welfare of persons or property, by the posting of appropriate signs indicating the extent and scope of closure. All persons shall observe and abide by the officially posted signs designating closed areas and visiting hours.

HAR § 13-146-4(a) (1999).

A. Trial Proceedings

On September 21, 2005, Pratt filed a motion to dismiss arguing that the activity for which he received his citations is constitutionally privileged as a native Hawaiian practice.[5] At a hearing on Pratt's motion, the defense presented two witnesses: Pratt, and Dr. Davianna Pomaika'i McGregor, a professor of Ethnic Studies at the University of Hawai'i, Mānoa. The prosecution presented one witness: Wayne Souza, the Parks District Superintendent for Kaua'i for the Department of Land and Natural Resources.

Pratt testified that he was born in Waimea to parents from O'ahu and the island of Hawai'i. He presented a family tree

[5] In Hanapi, the court explained that "[t]he preferred method for a defendant to raise a constitutional right in a criminal prosecution is by way of a motion to dismiss." Hanapi at 184, 970 P.2d at 492.

and testified that he is 75% native Hawaiian. Pratt named Kupihea as a family line, though that name does not appear on his family tree. The defense then presented its Exhibit 4, a book published by the State of Hawai'i called "An Archaeological Reconnaissance Survey: Na Pali Coast State Park, Island of Kaua'i." The book lists a land grant sold to the Kupihea family for part of the ahupua'a for the Kalalau Valley. Pratt testified that this is his family's land, and that this is where he spends time in the Park.

Pratt learned huna, which he described as a native Hawaiian "spiritual living style" from two elders. Pratt is a kahu, which he translated as a minister, healer, or medicine man. In addition to healing people, Pratt described his practice of healing land:

> It's actually putting back into order again. But it was there by my ancestors because it has mana[6] in it. It's to clean up the rubbish that is in there, meaning it broke up the mana that is on the heiaus[7], and especially because my ancestors are all buried on it. They're the caretakers to it.

Pratt testified that he has practiced such healing in the Kalalau Valley approximately each month for over thirty years, and that he is responsible for the Kalalau Valley because his ancestors are buried there.

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[6] "Mana" means "Supernatural or divine power." Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 235 (rev. ed. 1986).

[7] A "heiau" is defined as "a Pre-Christian place of worship, shrine; some heiau were elaborately constructed stone platforms, others simple earth terraces. Many are preserved today." Pukui & Elbert, Hawaiian Dictionary 64.

Pratt said that he takes offense when people say he "camps" in Kalalau Valley because he actually lives there. Pratt testified that he has to spend the night in the valley to fulfill his responsibilities because hiking in to the valley takes eight to ten hours, and he needs two days to recuperate from the difficult hike. The defense offered a photograph as its Exhibit 2, which shows the area where Pratt lived. Pratt explained that he cleared the area in the picture of trash, brush, and overgrown java plum trees, an invasive species that prevents native plants from growing. He planted hasu, watercress, bananas, and twelve coconut trees. Exhibit 2 shows several tarps, which Pratt said covered his living area; it also shows a green hose, which Pratt used to water his plants. Pratt said that he knew of a government program whereby a private citizen can work with the DLNR to take care of the parks; he unsuccessfully applied to work with this program in Kalalau Valley in the early 1990s.

Dr. Davianna Pomaikaʻi McGregor is a tenured professor at the University of Hawaiʻi where she teaches classes on Hawaiians, land tenure use in Hawaiʻi, race relations, and economic change in Hawaii's people. She has taught the course on Hawaiians since 1974. Dr. McGregor testified as an expert in the area of customary and traditional native Hawaiian practices, as well as the source of protection of native Hawaiian rights.

Through her research, Dr. McGregor has developed a list

of the following six elements essential to traditional and customary native Hawaiian practices: (1) the purpose is to fulfill a responsibility related to subsistence, religious, or cultural needs of the practitioner's family; (2) the practitioner learned the practice from an elder; (3) the practitioner is connected to the location of practice, either through a family tradition or because that was the location of the practitioner's education; (4) the practitioner has taken responsibility for the care of the location; (5) the practice is not for a commercial purpose; and (6) the practice is consistent with custom. In preparation for her testimony, Dr. McGregor interviewed Pratt and determined that his daytime activities in Kalalau Valley meet these requirements of a traditional and customary practice. She testified that Pratt's activities are subsistence-related because he planted food plants, that they are religious because he performs ceremonies on the heiau, and that they are cultural because he learned them from the previous generations. Based on her interview with Pratt, Dr. McGregor believed that Pratt's activities satisfied every element of her test: Pratt learned the practices from elders, his ancestors lived in Kalalau Valley, he took responsibility for the Valley, his purpose was not commercial, and his practices were consistent with custom. Dr. McGregor further opined that Pratt's residence in the valley is a traditional practice because it was necessary to fulfill his

responsibilities to the land. McGregor testified that she believed these practices to be protected by Hawai'i law.

Mr. Wayne Souza, the Parks District Superintendent for Kaua'i for the Department of Land and Natural Resources ("DLNR"), testified for the prosecution. He stated that the purpose of the park regulations is to limit the number of people permitted in the park for health and safety reasons, and to protect vulnerable park resources. Souza testified that controlling the number of visitors is necessary because the self-composting toilets fail when too many people visit. The regulations also limit the number of people who visit in order to keep the area "low density" to provide a wilderness experience, and to protect plant and animal life. He testified that the park is home to native plant communities and native sea birds. Souza also testified that the State has established a curatorship program to manage cultural and archaeological resources, like the heiau in Kalalau Valley. Under the program, a curator works with the DLNR and the State Historic Preservation Division to manage the sites.

Following the hearing, the parties submitted briefing on the issue of the native Hawaiian practices defense. In its brief, the State conceded the following:

> In this case, based on Dr. Davianna Pomaikai McGregor's testimony, the State does not dispute that the activities described are traditional and customary Native Hawaiian practices.

The State argued that, even if Pratt's conduct is a native

Hawaiian practice, Pratt's right to engage in this practice is subject to the State's right to regulate. The State maintained that it is entitled to enforce its regulations restricting visitation of Kalalau Valley to protect the health and safety of the public, and to preserve the natural environment. The State also cited the curatorship program as an effort by the State to reconcile competing interests in managing the Park.

In his brief, Pratt contended that his motion to dismiss should be granted because he satisfied the three prongs of the Hanapi test.[8] Alternatively, Pratt argued that, while the State may regulate even customary and traditional practices, the State has the burden to prove that the regulation is reasonable and allows for the practice of native Hawaiian rights to the extent feasible. Pratt suggested that if the court applies a balancing test, that test should only permit the State to regulate if it shows that it would be "infeasible" to permit the native Hawaiian practice; Pratt argued that because the State has not made such a showing, the defense stands as a bar to conviction.

The trial court recognized that there was no dispute regarding whether Pratt satisfied the three prongs of the Hanapi test, but determined that further analysis was required. The trial court noted that the constitutional provision at issue

[8] Pratt also briefed a defense under the Federal Religious Freedom Restoration Act ("RFRA"), but that defense is not before this court.

explicitly states that the privilege is "subject to the right of the State to regulate such rights"; therefore the court determined that when a defendant claims a native Hawaiian privilege as a defense to criminal charges, the court must consider the State's interests in regulating the conduct. The trial court found that the State has a strong interest in controlling the Park, and that Pratt could exercise his rights within the boundaries of the law by obtaining permits to be in the park or applying to the curatorship program. In sum, the court found:

> that the State has a valid interest in protecting and preserving this valuable asset [the park], which means, among other things, controlling the amount of traffic, the length of stay for any one person, and the types of activities that are consistent with this stewardship. This interest when balanced against the rights expounded by Mr. Pratt weigh in favor of the State.

The trial court denied Pratt's motion to dismiss, and allowed the case to proceed to trial.

At trial, the parties stipulated to the essential facts sufficient to establish that Pratt had violated the Closed Areas regulation. The stipulation also permitted the trial court to treat the testimony from the hearing on the motion to dismiss as the testimony offered at trial. The document states the following:

> The STATE OF HAWAII and Defendant LLYOD [sic] PRATT stipulate that the following facts are true, accurate and correct.
>
> On July 14, 2004, July 28, 2004 and September 28, 2004, Lloyd Pratt was camping in Kalawao [sic] State Park.
>
> At each of the times that Lloyd Pratt was camping the Kalalau State Park location where he was camping was a closed area[.]

> Prior to each of the times when Lloyd Pratt camping [sic] in Kalalau State Park signs were posted stating that locations where Lloyd Pratt was camping was [sic] a closed area.
>
> Immediately prior to each of the times when camping, Lloyd Pratt, [sic] both saw the signs and had actual knowledge that the locations in Kalalau State Park where he was camping was [sic] a closed area.
>
> And that all times relevant, the entirety of Kalalau State Park was located in the County of Kauai, State of Hawaii.
>
> Additionally, the STATE OF HAWAII and LLYOD [sic] PRATT stipulate that the testimony contained in the November 4, 2005 transcript of proceedings shall be deemed to have been given at trial and that any objections and rulings thereon shall be deemed to have been as set forth in that transcript. This stipulation shall not constitute a waiver of any of the objections to or claims of error that either the STATE OF HAWAII or LLYOD [sic] PRATT may choose assert [sic] with respect to any rulings on objections or other orders of court as set forth in said transcript.

In its closing argument the State reiterated its position that if its regulations are reasonable, then the native Hawaiian privilege does not exempt anyone from compliance with those regulations. Pratt presented multiple defenses: he reiterated his position that he had satisfied the Hanapi test, and he presented several other defenses, arguing that a conviction would violate the Federal Religious Freedom Restoration Act ("RFRA"), the ex post facto clauses of the federal and state constitutions, the rule of lenity, and stare decisis.[9]

The trial court convicted Pratt of violating the Closed Areas regulation. The trial court's order included the following Findings of Fact ("FOF") and Conclusions of Law ("COL"):

> [FOF] 13. Based on the testimony elicited at the November 4

[9] Pratt does not pursue the RFRA, ex post facto, or stare decisis claims in his application for writ of certiorari, thus, this opinion does not fully articulate these arguments. Pratt's argument as to the rule of lenity is reviewed in Section III.B., infra.

hearing and concessions made by the State in its brief, the Court finds that Mr. Pratt is [1] a native Hawaiian, [2] that he carried out customary or traditional native Hawaiian practices in Kalalau at the time of the camping, and [3] that this exercise of rights occurred on undeveloped or less than fully developed land.

[. . .]

[FOF] 16. At trial, the parties stipulated that the evidence and issues offered at the hearing on the Motion to Dismiss were deemed to have been introduced at trial.

[. . .]

[COL] 4. The rights of Native Hawaiians to engage in customary or traditional Native Hawaiian practices, carried out on land that was undeveloped or less than fully developed, is not an absolute right, but is a right that needs to be balanced against the interest of the State of Hawaii in keeping the Kalalau State Park a wilderness area, protecting the area for all to enjoy, conserving park resources and providing for the health and safety of all who visit the area.

[. . .]

[COL] 6. DLNR Code LNR 13-146-04 is a reasonable regulation, both on its face and as applied to the heretofore described activities of Lloyd Pratt.

[. . .]

[COL] 8. The defendant satisfied all three prongs of the affirmative defense as set forth in State v. Hanapi.

[COL] 9. Case and statutory law all suggest that even with such a showing (under Hanapi), the Court must "reconcile competing interests," or stated another way "accommodate competing...interests" and only uphold such rights and privileges "reasonably exercised" and "to the extent feasible" and "subject to the right of the State to regulate such rights." See Article XII, section 7, Hawaii Constitution; Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Hawaii 425 (1995).

[COL] 10. The Court must balance the competing interests of Mr. Pratt's attempts to exercise certain Hawaiian native [sic] rights by setting up a residence and [heiau] in the Kalalau Valley with the State's interest in keeping this a wilderness area for all to enjoy and be safe in.

[COL] 11. The Court finds that the State has a valid interest in protecting and preserving this valuable asset, which means, among other things, controlling the amount of traffic, the length of stay for any one person, and the types of activities that are consistent with this stewardship. This interest when balanced against the rights expounded by Mr. Pratt weigh in favor of the State.

The court sentenced Pratt to 60 hours of community service, and stayed the sentence pending this appeal.

B. The ICA's November 18, 2010 Opinion

Pratt appealed his conviction to the ICA. The three ICA judges produced three separate published opinions. State v. Pratt, 124 Hawai'i 329, 243 P.3d 289 (App. 2010). Though they based their opinions on different reasoning, Judges Fujise and Leonard both concluded that Pratt's conviction should be affirmed. Chief Judge Nakamura concurred in part, but dissented from the portion of the opinion affirming Pratt's conviction. On December 17, 2010, the ICA filed its Judgment on Appeal. On March 15, 2011, Pratt filed a timely application for writ of certiorari. This court accepted Pratt's application on April 21, 2011 and heard oral argument on May 19, 2011.

II. STANDARD OF REVIEW

Pratt asserts a constitutional right. "We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Thus, we review questions of constitutional law under the right/wrong standard." Hanapi, 89 Hawai'i at 182, 970 P.2d at 490 (quoting State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998)) (internal quotations marks and citations omitted).

III. DISCUSSION

A. The Court Will Not Exercise Plain Error Review To Invalidate The Parties' Stipulation At Trial.

In this case, as in any criminal case, the burden of proof falls on the prosecution to prove each element of the crime for which the defendant is charged. It is only after the prosecution meets this burden that any offered affirmative defense becomes relevant. In this case, Pratt stipulated to all the essential facts necessary to warrant conviction. Therefore, this court must affirm the judgment below convicting Pratt, unless Pratt can prove his defense that the privilege for native Hawaiian practices applies in his case.

The dissent argues that the court should exercise plain error review to invalidate Pratt's conviction on grounds not raised by counsel, namely, that the court may not accept the stipulation agreed upon by Pratt and the prosecution in this case. The dissent reasons that because there is no on-the-record colloquy in which Pratt waives his right to have the prosecution prove each element of the offense for which he was charged, and because Pratt and defense counsel contradicted the stipulation on record, the case must be remanded for a new trial. Dissent at 20-22. The dissent cites as authority State v. Murray, 116 Hawai'i 3, 169 P.3d 955 (2007), a case which had not been decided at the time of Pratt's trial.

We respectfully disagree with the dissent's position

for several reasons. First, we note that the timing of the stipulation and Pratt's testimony indicate that the stipulation reflected a tactical decision not to dispute whether the prosecution satisfied its burden to secure conviction. The first step of Pratt's defense was to file a motion to dismiss, grounded in his affirmative defense that his activities in the park were protected as traditional and customary native Hawaiian practices, and that such protection precluded conviction. The District Court held a hearing on Pratt's motion on November 4, 2005. It was during this hearing that Pratt testified that he had not seen any "Closed Area" signs in the park. Following further briefing on the defense, the court issued an order denying Pratt's motion on March 10, 2006, and the case was scheduled for trial. Prior to trial on April 12, 2006, the parties executed a stipulation to satisfy the essential facts of the offense, thus narrowing the issues for trial to Pratt's several affirmative defenses. Pratt signed the stipulation, as did defense counsel and the prosecution.

The dissent would negate the parties' April 2006 stipulation, in part due to Pratt's November 2005 testimony that he did not see any of the posted signs in the park. However, the subsequent stipulation indicates that, at trial, the defense made a tactical decision to focus its energy on affirmative defenses,

rather than disputing the prosecution's prima facie case.[10] The dissent would also negate the stipulation because the record does not include any physical evidence of the signs. However, the absence of evidence to prove an element to which the opposing party has stipulated is to be expected; having executed the stipulation, the prosecution did not present its case in chief at trial.

The dissent cites State v. Murray as authority for discarding the stipulation. In Murray, the defendant was on trial for Abuse of a Family or Household Member. 116 Hawai'i at 5, 169 P.3d at 957. More specifically, prosecutors sought conviction under a subsection of the statute for defendants convicted of a "third or any subsequent offense that occurs within two years of a second or subsequent conviction." Id. In a motion in limine, defense counsel stipulated to the prior abuse convictions; this stipulation was read aloud to the jury at trial. Id. On writ, the court considered whether this stipulation was in error because it was "made solely by counsel." Id. at 6, 169 P.3d at 958. The court concluded that Murray was entitled to a new trial because his counsel was not permitted to make this stipulation without Murray's consent. Id. at 14, 169

[10] The dissent cites Briones v. State, 74 Haw. 442, 848 P.2d 699 (1993), for support of its argument that declining to refute the charges can not be tactical because it did not have an "obvious basis" in benefitting Pratt. Dissent at 12-13 n.4. Respectfully, this argument takes a myopic view of Pratt's case. From the very beginning, Pratt sought to establish a constitutional privilege to camp or reside in Kalalau Valley without a permit.

P.3d at 966. For support, the court cited State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993) for the proposition that "A knowing and voluntary waiver [. . .] must come directly from a defendant, either in writing or orally." Id. at 10, 169 P.3d at 962 (emphasis added). The court explained the requirement that the waiver be on the record, reasoning that "[w]ithout such a record it is difficult to determine whether the defendant personally waived such a right." Id. at 12, 169 P.3d at 964.

This main concern informing Murray is not present in Pratt's case because Pratt is on the record as personally admitting to the essential facts supporting conviction. The record in this case contains a written stipulation, signed by Pratt himself. With respect, we do not believe that the court should exercise plain error review to retroactively apply Murray when the concern addressed by Murray is not a factor. See, e.g., State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74 (1993) ("This court's power to deal with plain error is one to be exercised sparingly and with caution. . . ."). Furthermore, the contradictions on the record from Pratt's testimony were offered prior to the stipulation, and the fact that the record does not contain evidence of the signs is not unexpected, as the prosecution secured Pratt's admission before having an opportunity to present its case in chief. For these reasons, we disagree with the dissent, and give effect to the parties' stipulation.

B. The Courts Below Did Not Err In Utilizing A Balancing Test Or In Concluding That The Balancing Test In This Case Favors The State.

The first question presented by Pratt's application requires the court to consider whether it was proper for the trial court and ICA to undertake a balancing test after Pratt satisfied the three-factor Hanapi test.[11] We hold that it was, as explained below.

1. The Privilege For Native Hawaiian Practices Requires The Finder Of Fact To Balance Competing Interests.

The privilege afforded for native Hawaiian practices, as expressed in our State constitution and statute, is not absolute. The language of the provisions protecting customary native Hawaiian practices display a textual commitment to preserving the practices while remaining mindful of competing interests. For example, the constitutional language protecting the right to traditional and customary practices is qualified by the phrase "subject to the right of the State to regulate such rights." As a second example, HRS § 7-1, a statute protecting gathering rights, provides that native Hawaiians may gather traditional plants, but specifically exempts from protection the

[11] Pratt also argues that the rule of lenity precludes conviction. The rule of lenity is a rule of statutory construction. State v. Shimabukuro, 100 Hawai'i 324, 327, 60 P.3d, 274, 277 (2002) ("Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity."). Pratt does not argue that the regulation under which he was convicted is ambiguous, but rather that the constitutional privilege is ambiguous. Pratt does not cite, and the court was unable to find, any authority for applying that rule of statutory interpretation to constitutional affirmative defenses. The court therefore agrees with the conclusion of the trial court and ICA that the rule of lenity does not apply in Pratt's case.

gathering of these items for commercial purposes.

In our previous cases, this court has interpreted the constitutional and statutory language as requiring consideration of the facts and circumstances surrounding the conduct. Chief Justice Richardson explored this balance in Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982). The plaintiff in that case, William Kalipi, owned a taro patch in the Manawai ahupua'a and an adjoining houselot in Ohia ahupua'a, on the island of Moloka'i. Kalipi, 66 Haw. at 3, 656 P.2d at 747. He lived in a nearby ahupua'a called Keawenui. Id. For years, Kalipi and his family had entered Manawai and Ohia to gather ti leaf, bamboo, kukui nuts, kiawe, medicinal herbs, and ferns. Id. at 4, 656 P.2d at 747. When the Hawaiian Trust Company refused him the access to which he was accustomed, Kalipi brought suit alleging that he had a right to enter the property to gather the items as he wished. Id. Chief Justice Richardson's opinion acknowledged the tension between modern concepts of land ownership and native Hawaiian gathering rights. He explained that "any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail." Id. at 4, 656 P.2d at 748. Similarly, the court implicitly recognized that the bare assertion of this privilege is inadequate to defeat all property rights. That is, the two conceptions of property must coexist somehow, and the court saw its task as:

> to conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title.

Id. at 7, 656 P.2d at 749. The court in Kalipi "struck" a "balance" in its interpretation of HRS § 7-1, which at the time of the Kalipi opinion stated:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, housetimber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

Id., HRS § 7-1 (1976).[12] In construing this statute, the court articulated two standards: one for developed land, and one for undeveloped land. Id. at 8, 656 P.2d at 750. The court held that there is no right to exercise native Hawaiian practices on developed land because it "would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers." Id. at 8-9, 656 P.2d at 750. Second, for undeveloped land, the court instructed that land use should be determined on a case by case basis, and that traditional rights "should in each case be

[12] The current version of the statute includes two small modifications: the word "housetimber" is now written as "house-timber," and the word "water-courses" is now written as "watercourses." HRS § 7-1 (2009).

determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." Id. at 10, 656 P.2d at 751 (emphasis added). In Kalipi's case, the court did not proceed to the balancing test because it held that the statutory provisions he cited did not protect the rights of non-residents of an ahupua'a. Id. at 9, 12, 656 P.2d at 750, 752.

Kalipi also cited HRS § 1-1 as a source of his right of entry. At the time of Kalipi's case, that statute provided:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage. . . .

HRS § 1-1 (1955).[13] The court determined that this provision sought to permit native Hawaiian practices "which did not unreasonably interfere with the spirit of the common law." 66 Haw. at 10, 656 P.2d at 751. The court again held that the practice must be considered on a case by case basis. This court has since read Kalipi as "merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner." PASH, 79 Hawai'i at 442, 903 P.2d at 1263 (emphasis added).

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[13] This exact statute remains in effect. HRS § 1-1 (1999).

Following Kalipi, the next main case to consider native Hawaiian rights was Pele Defense Fund v. Paty ("PDF"), 73 Haw. 578, 837 P.2d 1247 (1992). In that case, PDF, a non-profit corporation whose stated purpose is to perpetuate Hawaiian religion and culture, challenged the constitutionality of a land transfer in which the State traded public land, including the Wao Kele ʻO Puna Natural Area Reserve, in exchange for land that had been privately held. Id. at 584, 837 P.2d at 1253. PDF asserted, among other claims, that the transfer violated Article XII, § 7 of the State constitution because it denied access into Wao Kele ʻO Puna for PDF members who wished to exercise their traditional practices. Id. at 613, 837 P.2d at 1268. In analyzing this claim, this court first distinguished the residency requirement holding of Kalipi because Kalipi's claims had been based on a claim of ownership, while PDF's claims were constitutional and founded in custom. Id. at 618-19, 837 P.2d at 1271. After determining that the constitutional provision at issue was intended to protect "the broadest possible spectrum of native rights," the court held that it may protect rights that extend beyond the ahupuaʻa of residence because the purpose of Article XII, § 7 was to reaffirm "all rights customarily and traditionally held by ancient Hawaiians." Id. at 619-20, 837 P.2d at 1271-72 (emphasis in original). The court limited practices on others' ahupuaʻa to situations "where such rights have been customarily and traditionally exercised in this

manner." Id. at 620, 837 P.2d at 1272. The court remanded, and wrote that in addition to proving that the practice is traditional and customary, PDF must also show that it meets "the other requirements of Kalipi." Id. at 621, 837 P.2d at 1272.

In a subsequent case, PASH, this court identified the "other requirements" as referring to the requirements that the land be undeveloped and that the activity cause no actual harm. PASH, 79 Hawai'i 425, 439-40, 903 P.2d 1246, 1260-61. The question presented in PASH was whether Public Access Shoreline Hawai'i, a public interest organization, had standing to participate in a contested land use case hearing regarding a proposed development on the island of Hawai'i. Id. at 429, 903 P.2d at 1250. This court held that the group had standing to participate in such a hearing, and proceeded to articulate the constitutional analysis for the case on remand. Id. at 435, 903 P.2d at 1256. First, the court noted that the constitutional protection is not absolute; it only protects the "reasonable" exercise of native Hawaiian rights. Id. at 442, 903 P.2d at 1263. Then, the court pointed out that the constitution gives the State the "power to regulate the exercise of customarily and traditionally exercised Hawaiian rights," and that the same provision obligates the State to protect the exercise of those rights "to the extent feasible." Id. at 450 n.43, 903 P.2d at 1271 n.43.

A common thread tying all these cases together is an

attempt to balance the protections afforded to native Hawaiians in the State, while also considering countervailing interests. In the criminal context, one countervailing interest of particular importance, and explicitly stated in the constitutional provision, is "the right of the State to regulate such rights." In the first case examining the native Hawaiian privilege as a defense to a criminal conviction, State v. Hanapi, Alapai Hanapi was convicted of trespass after he entered his neighbor's land to observe the restoration of the Kihaloko and Waihilahila fishponds. 89 Hawai'i 177, 178, 970 P.2d 485, 486 (1998). Hanapi argued that his trespass was constitutionally protected because he went to the property to "perform our religious and traditional ceremonies of healing the land" and "to make sure that restoration was done properly." Id. at 181, 970 P.2d at 489. The court articulated the three-point test, holding that a criminal defendant asserting this privilege as a defense to criminal charges must, "at minimum", prove the following: (1) the defendant must be "native Hawaiian" according to the criteria established in PASH[14], (2) the claimed right must be "constitutionally protected as a customary or traditional native Hawaiian practice," and (3) the conduct must occur on undeveloped property. Id. at 185-86, 970 P.2d at 493-94. The court affirmed

[14] PASH defines "native Hawaiians" as "descendants of native Hawaiians who inhabited the islands prior to 1778[.]" PASH, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995).

Hanapi's conviction, holding that Hanapi did not satisfy his burden to prove that he was engaged in a traditional practice while on his neighbor's land. Id. at 187, 970 P.2d at 495.

2. In Balancing Interests, The Court Must Consider The Totality Of The Circumstances.

All four of the Judges to consider Pratt's case have agreed that once a criminal defendant satisfies the three-prong showing required by Hanapi, there remains a balancing test before the defendant's assertion of the native Hawaiian privilege negates any possible criminal conviction. They have, however, differed in their views of what factors the test should consider. The trial court reached the following conclusions of law in its articulation of the balancing test:

> [COL] 9. Case and statutory law all suggest that even with such a showing (under Hanapi), the Court must "reconcile competing interests," or stated another way "accommodate competing...interests" and only uphold such rights and privileges "reasonably exercised" and "to the extent feasible" and "subject to the right of the State to regulate such rights." See Article XII, section 7, Hawaii Constitution; Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Hawaii 425 (1995).
>
> [COL] 10. The Court must balance the competing interests of Mr. Pratt's attempts to exercise certain Hawaiian native [sic] rights by setting up a residence and [heiau] in the Kalalau Valley with the State's interest in keeping this a wilderness area for all to enjoy and be safe in.
>
> [COL] 11. The Court finds that the State has a valid interest in protecting and preserving this valuable asset, which means, among other things, controlling the amount of traffic, the length of stay for any one person, and the types of activities that are consistent with this stewardship. This interest when balanced against the rights expounded by Mr. Pratt weigh in favor of the State.

Thus, it appears that the trial court considered the defendant's stated intention, balanced against the State's offered

legislative prerogatives.

At the ICA, Judge Leonard's opinion concluded that the balancing test in this case weighed in favor of the State, in part because there was no evidence that the State's regulation was unreasonable. Pratt at 356, 243 P.3d at 316. This articulation of the balancing test necessarily places a burden of proof on the defendant to show unreasonableness of the regulation. Judge Fujise likewise placed the burden of proof on the defendant, but articulated the test as requiring the defendant to show the reasonableness of his conduct under the circumstances. Id. at 357, 243 P.3d at 317. Chief Judge Nakamura contended that the State carries the burden of proof to show that the defendant's conduct resulted in actual harm. Id. at 363-64, 243 P.3d at 323-24.

We respectfully decline Chief Judge Nakamura's articulation of the test, finding the test to be too narrow. The facts of this case provide apt illustration. The harm against which the park's regulation seeks to protect is the harm caused by too many visitors in Kalalau Valley; by definition, one person could never cause that harm. But this does not mean that the government may not seek to protect against overuse. In fact, user permits are a common and effective government tool in situations where outlawing the threatening activity is not necessary, but where the government seeks to control against overuse of a limited resource.

We likewise reject the other ICA Judges' articulations of the test because of this court's practice of applying totality of the circumstances tests, as opposed to legal presumptions, in the context of native Hawaiian rights. For example, in Kalipi, the plaintiff asserted that HRS § 1-1 established certain native Hawaiian customary rights as the law of the State. Kalipi at 9, 656 P.2d at 750. In response, the defendants contended that any rights that may have been retained had been abrogated by an early case suggesting that HRS § 7-1 contained an exhaustive list of native Hawaiian rights, and that all other customary practices could be freely regulated by the State. Id. Finding the plaintiff's contention too broad and the defendants' too narrow, this court rejected both views, stating, "[r]ather, we believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." Id. at 10, 656 P.2d at 751 (emphasis added). This court has since interpreted Kalipi as "informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner." PASH, 79 Hawai'i at 442, 903 P.2d at 1263.

Likewise, in PDF, the court acknowledged the balancing requirement implicit in the constitutional language, writing that

the provision both "reaffirm[ed] customarily and traditionally exercised rights of native Hawaiians, while giving the State the power to regulate these rights." PDF at 619, 837 P.2d at 1271 (emphasis added). Then, after determining that non-residence was not a bar to plaintiffs' claims of a native Hawaiian right, the court wrote,

> If it can be shown that Wao Kele 'O Puna was a traditional gathering area utilized by the tenants of the abutting ahupua'a, and that the other requirements of Kalipi are met in this case, then PDF members such as Ms. Naeole may have a right to enter the undeveloped areas of the exchanged lands to exercise their traditional practices.

Id. at 621, 837 P.2d at 1272 (emphasis added). In using the word "may"—as opposed to "must"—the court left room for the courts to implement the constitutional language by considering all the circumstances of the case on remand.

The importance of considering the totality of circumstances is also reflected in this court's discussion of developed and undeveloped lands in Hanapi. There, the court reiterated PASH's holding that it is "always 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such [developed] property. In accordance with PASH, however, we reserve the question as to the status of native Hawaiian rights on property that is 'less than fully developed.'" Hanapi at 187, 970 P.2d at 495 (quoting PASH at 450, 903 P.2d at 1271). The court refused to validate a bright-line test whereby native Hawaiian practices on undeveloped lands are always permitted.

The dissent argues against utilizing a totality of the circumstances test in this context, in part because "settled criteria" already exist. Dissent at 30. It further argues that a totality of the circumstances test is "imprecise" and "invites consideration of matters beyond the benchmarks." Dissent at 30. We disagree with each of these points. First, as explained above, we read the cases cited in this opinion as underscoring the importance of the court's careful judgment in resolving cases involving traditional and customary native Hawaiian rights; we do not read them as providing a limited set of "settled criteria" to evaluate in every case. Second, we do not share the dissent's concerns that the court should avoid utilizing a totality of the circumstances test because it is "imprecise." Rather, we note that it is the very flexibility ensured by this test that makes it appropriate to use in this context. Review of this jurisdiction's cases involving native Hawaiian practices shows how varied the scenarios are in which native Hawaiian rights arise. Because the constitutional provision at issue applies in several contexts, and because we cannot anticipate which factors may be relevant in all contexts, we decline to articulate a test that could preclude consideration of important factors.

In applying the totality of the circumstances test to the facts of this case, the balancing of interests weighs in favor of permitting the park to regulate Pratt's activity, his argument of privilege notwithstanding.

Souza testified that the regulation serves several important purposes. The DLNR manages the park so "people can have a wilderness type of experience." He described the Kalalau Valley as "one of the most scenic areas," and noted that it is "rich in cultural resources," including native plant communities and native sea birds. He testified that the DLNR requires visitors to obtain permits in an effort to limit visitors for health and safety reasons, and to protect park resources. One concern is that the self-composting toilets fail when they are overused, another is that they must keep the area "low density" to protect the fragile ecosystem.

The record also shows that Pratt has an interest in going to Kalalau Valley. As the ICA wrote, "Pratt clearly cares for and feels a spiritual connection to Kalalau and the ancient Hawaiians that once occupied the valley." Pratt at 311, 243 P.3d at 351. Pratt is a kahu; he has studied native Hawaiian practices and goes to the valley as part of his practice.

However, according to his testimony, his actions in Kalalau Valley go beyond stewardship. Pratt testified that he took care of some of the heiau, but also that he established a residence in Kalalau Valley, and cleared entire areas of the valley in order to replant them with other species. He undertook this work without consultation with the DLNR, and without an effort to comply with the DLNR's permit requirements. Aside from an unsuccessful application to work with the DLNR in the 1990s,

Pratt did not show any attempts to engage in his native Hawaiian practice within the limits of state law.

In this case, the trial court did not err in considering all of the facts and circumstances surrounding Pratt's activities, and then balancing the parties' interests. While Pratt has a strong interest in visiting Kalalau Valley, he did not attempt to visit in accordance with the laws of the State. Those laws serve important purposes, including maintaining the park for public use and preserving the environment of the park. The outcome of this case should not be seen as preventing Pratt from going to the Kalalau Valley; Pratt may go and stay overnight whenever he obtains the proper permit. He may also apply to the curatorship program to work together with the DLNR to take care of the heiau in the Kalalau Valley. The trial court did not err in determining that Pratt's interest in conducting his activities without a permit did not outweigh the State's interest in limiting the number of visitors to Kalalau Valley; Pratt's activities, therefore, do not fall under constitutional protection.

As always in a criminal case, the prosecution bears the burden of proving the defendant guilty of the charged offense. In this case, Pratt admitted to violating the regulation at issue: he stipulated that he was in a closed area of Kalalau State Park on the three dates of his citations. Therefore, this

court must affirm Pratt's convictions for violating HAR § 13-146-4.

IV. CONCLUSION

As explained above, we affirm the December 17, 2010 Judgment of the ICA, which affirmed the District Court of the Fifth Circuit's June 16, 2006 Judgments convicting Pratt of violating HAR § 13-146-4.

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