

OFFICE OF PLANNING

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235 South Beretania Street
Honolulu, Hawaii 96813

Telephone: (808) 587-2846

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2015 SEP 28 P 12:30

LAND USE COMMISSION
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition: KAOHANA O)	DOCKET NO. DR15-53
KALAUPAPA, for Declaratory Order Under)	
§§ 15-15-98 <i>et seq.</i> of the Land Use)	OFFICE OF PLANNING, STATE OF
Commission Rules and Hawaii Revised)	HAWAII'S RESPONSE TO PETITION FOR
Statutes § 91-8)	DECLARATORY ORDER;
	EXHIBITS A – B;
Affected Landowner and Property: Hawaii)	
Department of Land and Natural Resources)	CERTIFICATE OF SERVICE
Kalaupapa National Historical Park, Kalawao,)	
Molokai, Hawaii Tax Map Key No.:)	
(2) 6-1-001:002 (portion))	

**OFFICE OF PLANNING, STATE OF HAWAII'S
RESPONSE TO PETITION FOR DECLARATORY ORDER**

I. INTRODUCTION

Petitioner Ka Ohana O Kalaupapa ("Petitioner") filed the present Petition for Declaratory Order asking whether the construction of a proposed memorial on agricultural land was a permitted use. Under the particular facts and circumstances of this case, the Office of Planning concurs that it is a permitted use.

II. BACKGROUND

Petitioner is proposing to construct the Kalaupapa Memorial, located within the boundaries of the Kalaupapa National Historical Park, on the island of Molokai, Hawaii. See

Petitioner's Exhibits 10-13 for the location of the project site. The purpose of the memorial is to honor and perpetuate the memory of the thousands of individuals who were forcibly relocated to the Kalaupapa Peninsula from 1866 to 1969 due to government policies regarding leprosy, now also called Hansen's disease.

The proposed memorial will be located on the historic Old Baldwin Boys Home site, near the historic St. Philomena and Siloama churches. It will include a wall, no greater than 10 feet high, with the names of the 8,000 individuals who died at Kalaupapa. It will occupy less than 10 percent of the 5.9-acre site, and will be accessed by a pedestrian walkway extending from the existing Damien Road. The memorial is intended for passive use. The proposed project does not include the construction or use of any buildings for residential or commercial purposes.

The project site is located within the boundaries of the 10,725-acre Kalaupapa National Historical Park. The majority of the lands within the park are owned by the Department of Land and Natural Resources (DLNR) and the Department of Hawaiian Home Lands (DHHL), but managed by the National Park Service (NPS) and other parties through cooperative agreements. The park is administered by the Department of Health (DOH), whose Director serves as the Mayor of the County of Kalawao.

The project site is located within the State Agricultural District. See Petitioner's Exhibit 14 for the State Land Use District Map. According to a satellite image of the project site and vicinity, there does not appear to be any agricultural activity in the area, and the site is buffered by dense vegetation. See Exhibit C for a satellite image of the project area. Soils within the proposed site are rated by the Land Study Bureau (LSB) as either Class C, D, or E. See Petitioner's Exhibit 15 for a map of the LSB classification.

The Old Baldwin Boys Home is listed on the National Register of Historic Places. The home was relocated to another area in the park in the 1930s, and all that remains today at the original site are the bulldozer push piles of remnants of the building. According to the petition, historic and cultural resources on the site continue to be degraded by the encroachment of invasive vegetation (p. 8).

On March 30, 2009, President Barack Obama signed into law the Kalaupapa Memorial Act of 2009 (Act), which was made Section 7108 of H.R. 146, the Omnibus Public Land Management Act of 2009. The Act authorized the Petitioner to establish the Kalaupapa Memorial within the boundaries of Kalaupapa National Historical Park.

OP solicited comments on the petition from DOH, DLNR, and the State Historic Preservation Division (SHPD). Their comments are as follows:

- The attached DOH letter supports the proposed project. See Exhibit A. The letter references the 2014 DOH Executive Order which provides the Petitioner with a physical location within the Kalaupapa National Historical Park for the creation of the Kalaupapa Memorial and other legitimate activities of the Petitioner, Ka Ohana O Kalaupapa. See Petitioner's Exhibit 4 for a copy of the Executive Order.
- DLNR verbally informed OP that it supported the proposed project, and had no objections to the Petitioner's request. SHPD stated that it was premature to reach any conclusions until a concrete proposal was submitted, but looked forward to continuing discussions as the design process moved forward. See Exhibit B.

III. ARGUMENT

A. Jurisdiction.

The LUC has jurisdiction over this matter. Although the County of Kalawao is under the jurisdiction and control of DOH, such control is neither exclusive nor absolute. Compare HRS § 326-34(b) with Section 206 of the Hawaiian Homes Commission Act. Nothing in Chapter 326 excludes the County of Kalawao from the requirements of chapter 205. Accordingly, Chapter 205 is applicable to the lands within the County of Kalawao as they are applicable to all other counties in the State, and the LUC has jurisdiction to interpret the applicability of HRS § 205-4.5 to the proposed Kalaupapa Memorial. See H.A.R. § 15-15-98(a).

B. Land Use Classifications and Agricultural Ratings.

The State Land Use Law, enacted in 1961, authorized the Land Use Commission to classify all lands in the State as either Urban, Rural, Agricultural, or Conservation. When the land use boundaries were first established in the early 1960s, uses that were not clearly Urban or Conservation were placed in the Agricultural District, as the Agricultural District specifically allowed areas not used or suited for agricultural activities. Thus, the district became a catch-all for other open, transitional, and sparsely developed areas. Today, approximately 47 percent of all lands in Hawaii are classified as Agricultural.

The Overall Productivity Ratings, Detailed Land Classification system, developed by the Land Study Bureau (LSB), groups soils into land types based on soil and productive capabilities. In developing this system, the LSB evaluated several land types based on factors including soil profile, slope, erosion, and rainfall to determine its overall or general productive capacity and not

for any specific crop. Under this system, lands are classified into one of five categories from “A” to “E,” with “A” being the most productive and “E” being least productive. Lands rated “U” are unclassified.

Section 205-2 sets forth permissible uses on all agricultural lands. Section 205-4.5, at least in theory, sets forth a more restrictive list of permissible uses on A and B lands. The concept of creating a separate category for A and B lands is to recognize that significant acreages of land classified as agricultural cannot actually be used for crops or animal husbandry, and to try and limit these lands with better soils to uses which are more closely related to “true” agricultural uses, like crops and livestock. We acknowledge that there are actually a number of other uses actually allowed in Section 205-4.5. Nevertheless, if Section 205-4.5 permits a use on A or B lands, then it appears logical and consistent with the structure of Chapter 205 that such use should also be permissible on C, D, E, or U lands.

C. Improvement of Historic Sites.

In this case, we note that section 205-4.5(a)(8) states as follows:

Within the agricultural district all lands with soil classified by the land study bureau’s detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:

* * *

(8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest.

As stated above, the Old Baldwin Boys Home is listed on the National Register of Historic Places. The construction of a 10-foot wall at this site which recognizes the names of the approximately 8,000 Kalaupapa residents who died at Kalaupapa is consistent with HRS § 205-4.5(a)(8) which allows the improvement of sites of historic interest. The wall will be a passive

use. The wall will improve the historic site by providing a personal context through which visitors can better understand the site and area. There are no additional commercial or residential uses proposed such as a gift shop, restaurant, or caretaker home.¹

IV. CONCLUSION

Based upon the particular facts and circumstances of this case, OP recommends that the LUC declare that the proposed construction of the Kalaupapa Memorial is a permitted use under HRS § 205-4.5(a)(8).

DATED: Honolulu, Hawaii, this 28th day of September 2015.

OFFICE OF PLANNING
STATE OF HAWAII



RODNEY FUNAKOSHI
Planning Program Administrator

¹ A more urban use of the land could result in a different conclusion.

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition: KAOHANA O)	DOCKET NO. DR15-53
KALAUPAPA, for Declaratory Order Under)	
§§ 15-15-98 <i>et seq.</i> of the Land Use)	CERTIFICATE OF SERVICE
Commission Rules and Hawaii Revised)	
Statutes § 91-8)	
)	
Affected Landowner and Property: Hawaii)	
Department of Land and Natural Resources)	
Kalaupapa National Historical Park, Kalawao,)	
Molokai, Hawaii Tax Map Key No.:)	
(2) 6-1-001:002 (portion))	
)	

CERTIFICATE OF SERVICE

I hereby certify that due service of a copy of the OFFICE OF PLANNING, STATE OF HAWAII'S RESPONSE TO PETITION FOR DECLARATORY ORDER was made by depositing the same with the U. S. mail, postage prepaid, on September 28, 2015, addressed to:

TOM PIERCE, ESQ.
PETER N. MARTIN, ESQ.
P. O. Box 798
Makawao, HI 96768
Attorneys for Petitioner

VIRGINIA PRESSLER, M.D.
Director, Department of Health
State of Hawaii
1250 Punchbowl Street
Honolulu, HI 96813

ANDREA J. ARMITAGE, ESQ.
Dept. of the Attorney General
425 Queen Street
Honolulu, HI 96813
Attorney for State of Hawaii
Department of Health

DATED: Honolulu, Hawaii, this 28th day of September 2015.

OFFICE OF PLANNING
STATE OF HAWAII

A handwritten signature in cursive script, appearing to read "Rodney Funakoshi".

RODNEY FUNAKOSHI
Planning Program Administrator

From: "McIntyre, Laura" <Laura.McIntyre@doh.hawaii.gov>
To: "kathryn.mineo@dbedt.hawaii.gov" <kathryn.mineo@dbedt.hawaii.gov>
Cc: "Narimatsu, Noella" <Noella.Narimatsu@doh.hawaii.gov>, "Rodrigues, Darlene L." <darlene.rodrigues@doh.hawaii.gov>, "Kitkowski, Patricia Y" <patricia.kitkowski@doh.hawaii.gov>

Date: Wednesday, September 16, 2015 03:22PM
Subject: Land Use Commission Docket No. DR15-53, Ka Ohana O Kalaupapa (EPO 15-234)

History: ↪ This message has been forwarded.

Aloha Ms. Mineo,

The Environmental Planning Office appreciates your request for comments on the LUC Docket No. DR15-53 regarding a Kalaupapa Memorial.

DOH will follow the Exhibit 4 – DOH Executive Order by the previous Director – “Providing for the Future Kalaupapa Memorial and Activities...”.

EPO confirms DOH’s continued supportive position on this proposed project. We reiterate (from Exhibit 4, 2nd page last 3 paragraphs) that:

Employees and volunteers of Ka 'Ohana O Kalaupapa, approved by a current or former Hansen's disease patient of Kalaupapa, will be allowed to travel within the Settlement of Kalaupapa and Kalawao County without the requirement of being physically accompanied by a patient.

Ka 'Ohana O Kalaupapa will be provided Bernard Punikai'a's former residence or other similar sized and centrally located usable dwelling for their sole use in pursuing the creation of the Kalaupapa Memorial and other legitimate activities of Ka 'Ohana O Kalaupapa.

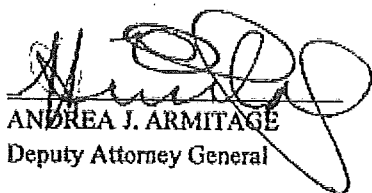
This permission is granted to conduct the aforementioned responsibilities towards the Kalaupapa Memorial and fulfill Ka 'Ohana O Kalaupapa's mission to assist the State of Hawaii, the County of Maui, the National Park Service, patients, relatives of former and current patients, and visitors to perpetuate the history of the struggles of the patients sent to Kalaupapa for the benefit of all future generations. IN WITNESS WHEREOF, I have hereunto set my hand. Done at the Department of Health, Kinau Hale at Honolulu this 28th day of November, 2014.



LINDA ROSEN, M.D., M.P.H.

Director of Health of the State of Hawaii

APPROVED AS TO FORM:



ANDREA J. ARMITAGE
Deputy Attorney General

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

September 24, 2015

Dept. of Business, Economic Development & Tourism
Land Use Division
Attention: Ms. Kathryn Mineo
P.O. Box 2359
Honolulu, Hawaii 96804-2359

via email: Kathryn.mineo@dbedt.hawaii.gov

Dear Ms. Mineo:

SUBJECT: Land Use Commission (LUC) Proposed Declaratory Order, Regarding the
Kalaupapa Memorial

Thank you for the opportunity to review and comment on the subject matter. The Department of Land and Natural Resources' (DLNR) Land Division distributed or made available a copy of your report pertaining to the subject matter to DLNR Divisions for their review and comments.

At this time, enclosed are comments from the (a) State Historic Preservation Division and (b) Engineering Division the subject matter. Should you have any questions, please feel free to call Lydia Morikawa at 587-0410. Thank you.

Sincerely,

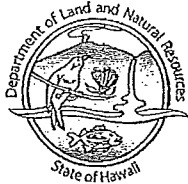
A handwritten signature in black ink, appearing to read "Russell Y. Tsuji".

Russell Y. Tsuji
Land Administrator

Enclosure(s)
cc: Central Files

Received email 7/21/2015

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE HISTORIC PRESERVATION DIVISION
KAKUHIHEWA BUILDING
601 KAMOKILA BLVD, STE 555
KAPOLEI, HAWAII 96707

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

W. ROY HARDY
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

June 22, 2015

Clarence "Boogie" Kahilihiwa, President
Ka 'Ohana O Kalaupapa
PO Box 1111
Kalaupapa, Hawaii 96742

Log No: 2015.00984
Doc No: 1506MD30
Archaeology

Aloha Mr. Kahilihiwa:

SUBJECT: Chapter 6E-8 and National Historic Preservation Act (NHPA) Section 106 Consultation – Early Consultation, Preparation of a Draft Environmental Assessment Kalaupapa Ahupua'a, Kalawao District, Island of Moloka'i TMK: (2) 6-1-001:002 (por.)

Thank you for the opportunity to comment on the proposed undertaking which we received on March 12, 2015. We apologize for the delay in our reply. The Ka 'Ohana O Kalaupapa (Ohana) is preparing a draft environmental assessment (DEA) for the development of a memorial, the Kalaupapa Memorial (Memorial), within the boundaries of Kalaupapa National Historical Park. Because this will be located on State land, the need for an Environmental Assessment has been triggered pursuant to the Hawaii Environmental Policy Act, Chapter 343, Hawaii Revised Statutes. Although State owned, the land is managed as part of the Kalaupapa National Historical Park (Kalaupapa). Thus, this project is a federal undertaking as defined by 36 CFR 800.16(y), requiring historic preservation review under Section 106 of the National Historic Preservation Act (NHPA) and compliance with the National Environmental Policy Act (NEPA).

The proposed Memorial will be located within a 100 square foot area of the 5.9 acre portion of Kalaupapa defining the prior location of the Old Baldwin Home. Kalaupapa overall encompasses the entire 8,725-acre Kalaupapa Peninsula. The Memorial is intended to honor and perpetuate the memory of approximately named 8,000 individuals who were sent to Kalaupapa from 1866 to 1969 because of government policies regarding leprosy. The Old Baldwin Home is located close to two historic churches, St. Philomena and Siloama, as well as the grave of Saint Damien and within view of a field east of St. Philomena Church where an estimated 2,000 individuals lie in unmarked graves. Less than 1,000 of the approximately 8,000 individuals who died at Kalaupapa have a marked grave.

The Memorial structure will be limited in height to no more than 10 feet in order to facilitate the reading of the names of those being honored by the Memorial and also to minimize impacts on any existing historic view sheds. A pedestrian walkway will be constructed to access the Memorial from the existing Damien Road and will be accessible to those with disabilities. Both the Memorial and the access walkway will be designed to limit ground and resource disturbance. The National Park Service (NPS) previously issued a NEPA Finding of No Significant Impact for a Federal EA prepared for the Memorial. The FONSI acknowledges that although the Memorial's final design would not be known until a design process is completed, it concluded that there would not be any adverse effect to cultural resources, given the required subsequent completion of ongoing Section 106 reviews.

The Ohana has requested review and comment on the proposed Memorial. Based on this submission, and prior and continuing consultation between the NPS and SHPD, the State Historic Preservation Officer (SHPO) believes that it is premature to reach a conclusion on the potential effect of the proposed memorial until concrete designs alternative are available for review. The SHPO looks forward to continuing discussion with the Ohana and NPS as the design process moves forward.

Ka 'Ohana O Kalaupapa
June 22, 2015
Page 2

Please contact Morgan Davis, Maui Lead Archaeologist at (808) 243-4641 or at Morgan.E.Davis@hawaii.gov if you have any questions regarding this letter.

Aloha,



Alan S. Downer, PhD
Administrator, State Historic Preservation Division
Deputy State Historic Preservation Officer

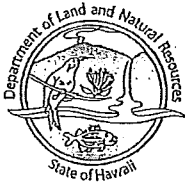
cc: Caroline D. Hall, Assistant Director
Office of Federal Agency Programs, Federal Property Management Section
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Washington, DC 20004

Erika Stein Espaniola, Superintendent
Kalaupapa National Historical Park
PO Box 2222
Kalaupapa, Hawaii 96742

Most Reverend Larry Silva, Bishop of Honolulu
Diocese of Honolulu, Office of the Bishop
1184 Bishop Street
Honolulu, Hawaii 96813

Charles Buck, Conference Minister
Hawaii Conference, United Church of Christ
1848 Nuuanu Avenue
Honolulu, Hawaii 96817

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU HAWAII 96809

September 21, 2015

MEMORANDUM

TO: *PK:*

DLNR Agencies:

- Div. of Aquatic Resources
- Div. of Boating & Ocean Recreation
- Engineering Division
- Div. of Forestry & Wildlife
- Div. of State Parks
- Commission on Water Resource Management
- Office of Conservation & Coastal Lands
- Land Division – Maui District
- Historic Preservation

FROM: *P:*

R Russell Y. Tsuji, Land Administrator

SUBJECT:

Land Use Commission (LUC) Proposed Declaratory Order, Regarding the Kalaupapa Memorial

LOCATION:

Kalawao, Island of Molokai; TMK: (2) 6-1-001:002 (por.)

APPLICANT:

Ka 'Ohana O Kalaupapa

Transmitted for your review and comment on the above referenced document. We would appreciate your comments on this document. Please submit any comments by **September 24, 2015**.

If no response is received by this date, we will assume your agency has no comments. If you have any questions about this request, please contact Lydia Morikawa at 587-0410. Thank you.

Attachments

additional

- We have no objections.
- We have no comments.
- Comments are attached.

Signed:

[Signature]

Print Name: Mr. Carty S. Chang, Chief Engineer

Date:

9/22/15

cc: Central Files