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April 16, 2003

MEMO TO: Michael W. Foley, Director of Planning
F R O M: Blaine J. Kobayashi, Deputy Corporation Counsel
SUBJECT: **MOLOKAI CRUISE SHIP AND LETTER FROM EARTH JUSTICE**

This responds to your memorandum dated February 10, 2003, requesting a legal opinion as to "whether the arrival and unloading of passengers from large cruise ships at Kaunakakai Harbor is a 'development' and thus requires a Special Management Area ("SMA") permit."¹ Attached to your request was a letter dated January 9, 2003, from Isaac Moriwake, an attorney for Earth Justice and Hui Ho'opakele Aina (a community group of concerned Molokai residents).

In his letter addressed to the Molokai Planning Commission ("Commission"), Mr. Moriwake contended that the cruise ship visits will result in "mass floods of visitors entering and using the lands" within the SMA, and will thereby effect changes in the intensity of the use of land within the SMA. Consequently, Mr. Moriwake urged the Commission to require the cruise ships to apply for SMA permits.

FACTUAL BACKGROUND

The anticipated arrival of large cruise ships to the island of Molokai has generated significant controversy over the last several months. On December 3, 2002, Hui Ho'opakele Aina (hereafter "Hui"), a group opposing the cruise ship visits, filed an injunctive action by filing a lawsuit (Civil No. 02-1-0574(2)) against the Departments of Land and Natural Resources ("DLNR") and Transportation ("DOT") of the State of Hawaii, Holland America

¹It should be noted that this opinion does not address whether an SMA permit is required. Procedurally, the issue of whether an SMA permit is required can be made only after an assessment and determination is made by the director of the department of planning ("director") pursuant to section 12-302-12 of the Molokai Planning Commission's SMA Rules ("Rules").

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Line, Inc. ("Holland America") and Princess Cruise Lines, LTD ("Princess Cruise").

Among other things, the Hui sought a declaratory judgment from the circuit court finding that DLNR and DOT violated the Hawaii Environmental Protection Act by failing to complete an environmental review process pursuant to HRS § 343. The Hui also filed a motion for preliminary injunction to prevent the cruise ships from visiting Molokai.

On March 6, 2003, the circuit court denied the Hui's motion for preliminary injunction. The circuit court ruled that the permits or bookings of DLNR and DOT were ministerial actions rather than discretionary, and that there was insufficient evidence to establish either a breach of duty to protect Hawaiian traditions and practices or the public trust.

The circuit court also concluded that the possibility of irreparable damage to the Hui was speculative at best, and that there was an insufficient showing that the public interest supported the granting of an injunction.

At the present time, due in part to the Hui's protest of the cruise ship's arrival, Holland America and Princess Cruise have temporarily canceled cruise ship visits to the island of Molokai. Representatives of the cruise ships have indicated that they will seek to have a public meeting in the future to gain input from the public before scheduling any calls to Molokai in the future. See Maui News article dated February 20, 2003.

It is this office's understanding from discussions with staff planners of your department that no county in the State of Hawaii (including, in particular, the County of Maui) has ever required arriving cruise ships to apply for SMA permits.

LEGAL ANALYSIS

In order to properly address the issues raised in your request, as well as Mr. Moriwake's letter to the Commission, this advisory opinion will attempt to isolate different aspects of the cruise ship visit and the issues raised thereto which directly pertain to the Commission.

A. The Arrival of the Cruise Ship.

The first aspect of the cruise ship's visit entails the arrival and anchoring of the cruise ship itself. Based on discussions with staff planners of your department and review of the file in Civil No. 02-1-0574(2), it is this office's

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understanding that the arrival and anchoring of the cruise ship will not be occurring at the dock of Kaunakakai Harbor.²

Pursuant to HRS § 205A-27, the Molokai Planning Commission is the designated "special management authority" for the island of Molokai, and has jurisdiction over any development within the SMA. HRS § 205A-22 defines "special management area" as "**the land extending inland from the shoreline. . . .**" (Emphasis added). In turn, "shoreline" is defined in HRS § 205A-1 as "the upper reaches of the wash of the waves"

Based on the foregoing definitions and facts previously stated, the arrival and anchoring of the cruise ship itself will not be occurring within the SMA of Molokai. Consequently, it is this office's opinion that the Commission does not have jurisdiction over the mere arrival and anchoring of a cruise ship in offshore waters.

DLNR and DOT concurred with this position by admitting in their answer to the complaint in Civil No. 02-1-0574(2) that "the State and federal government have joint jurisdiction over the waters and submerged lands in and on which anchorage would occur."

Mr. Moriwake's attempt to analogize the Hawaii Supreme Court's decision in Young v. Planning Commission, 89 Hawai'i 400 (1999) with the instant case is unavailing as the facts in Young are clearly distinguishable. In Young, it was an undisputed fact that Young's tour boat uses, activities, and operations were all occurring within the boundaries of the SMA of Hanalei. Id. at 404. That fact, coupled with Young's own admission that he substantially changed and expanded his tour boat business by adding numerous boats, led the Hawaii Supreme Court to conclude that this effected a change in the intensity of the use of water within the SMA of Hanalei, and therefore constituted a "development" under HRS § 205A. Id. at 409 (emphasis added).

Unlike Young, the cruise ships in the instant case are not conducting any use, activity, or operation on land or water within the SMA of Molokai. Young, therefore, is inapplicable to the instant case.

²In their answer to the complaint, DLNR and DOT admitted that "the cruise ship would be anchoring approximately **one mile offshore.**" The cruise ship's company, Holland America Line, Inc. and Princess Cruise Lines, LTD, also admitted in their answer to the complaint that "the cruise ship *ms Statendam* would **anchor offshore** from Kaunakakai Harbor in territorial waters of the State of Hawaii." (Emphasis added).

B. Ferrying and Arrival of Passengers from the Cruise Ship to the Dock at Kaunakakai Harbor.

The next aspect of the cruise ship's visit involves the ferrying of passengers from the cruise ship to the dock at Kaunakakai Harbor. Based on discussions with staff planners of your department and review of the file in Civil No. 02-1-0574(2), it is this office's understanding that the passengers will be transported from the large cruise ship to the dock at Kaunakakai Harbor by 38' tender vessels.³

Like the waters offshore, the dock at Kaunakakai Harbor is not located within the SMA of Molokai as shown on the designated SMA maps on file with the department of planning. Consequently, it is this office's opinion that the Commission does not have jurisdiction over the ferrying and disembarking of passengers at Kaunakakai Harbor.

In their answer to the complaint in Civil No. 02-1-0574(2), DLNR and DOT acknowledged that "Kaunakakai Harbor serves as both a commercial harbor and a recreational small boat harbor and **falls under the jurisdiction of both the Harbors Division of the Department of Transportation, State of Hawaii, and the Division of Boating and Recreation of the Department of Land and Natural Resources.**"⁴ (Emphasis added).

³In their answer to the complaint, DLNR and DOT admitted that "smaller tender vessels would be used to shuttle the passengers between the cruise ship and Kaunakakai Harbor." Holland America Line, Inc. and Princess Cruise Lines, LTD, also admitted in their answer to the complaint that, "passengers in four small tenders of approximately 38' in length with a capacity of 80 persons would each ferry passengers from the ship to the pier at Kaunakakai Harbor."

⁴Since DLNR and DOT acknowledged that part of Kaunakakai Harbor is a "commercial harbor falling under the jurisdiction of . . . the Department of Transportation," DOT would appear to be exempt from needing any approval of county agencies, as HRS § 266-2(b) states in pertinent part that, "[n]otwithstanding any law or provision to the contrary, the department of transportation is authorized to **plan, construct, operate, and maintain** any commercial harbor facility in the State . . . **without the approval of county agencies.**" (Emphasis added). Moreover, HRS § 266-3(a) authorizes the director of transportation to adopt rules to: "(1) Regulate the manner in which all vessels may enter and moor, anchor or dock in the commercial harbors, ports, and roadsteads of the State . . . (3) The embarking or disembarking of passengers;" Further, HRS § 266-3(b) authorizes the director to adopt, amend, and repeal such rules as are necessary: "(1) For the proper regulation and

C. Visitors Entering and Using Lands Within the SMA of Molokai.

It is anticipated that upon arrival at Molokai, cruise ship passengers, like other tourists visiting a destination, will travel and engage in a variety of activities, such as sightseeing and other types of tours offered on the island by various companies.

Although the word "travel" is not found in the text of the United States Constitution, the constitutional right to travel is firmly embedded in jurisprudence. In Saenz v. Roe, 526 U.S. 489, 499, 119 S.Ct. 1518, 1525 (1999), the United States Supreme Court held that:

The "right to travel" . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

The Court in Saenz further pointed out that not only does this protect an individual's right to go from one place to another, it also "affords protection to . . . use highway facilities and other instrumentalities of interstate commerce within the State. . . ." Id (quoting United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170 (1966)).

The reasons for bringing the "right to travel" to the attention of the department is not only to demonstrate that passengers of the cruise ship have a constitutional right to travel and use highway facilities and other instrumentalities of interstate commerce within the State of Hawaii, but also to point

control of all shipping in the commercial harbors belonging to or controlled by the State, and of the entry, departure, mooring, and berthing of vessels therein, and for the regulation and control of all other matters and things connected with such shipping; (2) To prevent the discharge or throwing into commercial harbors of rubbish, refuse, garbage, or other substances likely to affect water quality or that contribute to making such harbors unsightly, unhealthful, or unclean, or that are liable to fill up shoal or shallow waters in, near, or affecting the commercial harbors; and (3) To prevent the escape of fuel or other oils or substances into the waters in, near, or affecting commercial harbors from any source point, including, but not limited to, any vessel or pipes or storage tanks upon the land."

out that the mere entry and use of lands within the SMA of Molokai by passengers, visitors or tourists to the island simply does not fall within the definitions of either "development" under HRS § 205A-22 or "proposed action" under § 12-302-5 of the Rules.

HRS § 205A-22 defines "development" as:

[A]ny of the **uses, activities, or operations** on land or in or under water within the special management area that are included below:

* * *

(3) Change in the density or intensity of use of land. . . .

(Emphasis added).

Section 12-302-5 of the Rules defines "proposed action" as:

[A]ny **use, activity, or operation proposed by an applicant** on land within the special management area.

(Emphasis added).

Here, neither the cruise ship nor its passengers are conducting, or proposing to conduct, any use, activity, or operation on land within the SMA. The passengers of the cruise ships are merely exercising their right to travel by visiting the island of Molokai and enjoying the same freedom of movement afforded disembarking airline passengers and members of the general public.

It is a fundamental precept of statutory construction that courts are to construe statutes so as to avoid absurd results. Keliipuleole v. Wilson, 85 Hawai'i 217 (1997). A "rational, sensible and practicable interpretation of a statute is to be preferred to one which is unreasonable, impracticable, inconsistent, contradictory, and illogical." Id. at 221.

By its plain words, the passengers' entry onto lands within the SMA does not fall within the definitions of "development" or "proposed action." Further, to conclude that the mere incidental entry of visitors or tourists into the SMA constitutes a "development" thereby requiring an SMA permit would lead to unintended and extreme results.⁵

⁵Such a strict reading of the statute would open a Pandora's box by raising the possibility that every visitor arrival to the island could potentially be treated as a "change in the density or intensity of use of land" within an SMA and therefore requiring an

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It is also significant that, since the enactment of the state coastal zone management law in 1975 (including its provisions relating to SMA permits)⁶, substantial numbers of cruise ships have docked or anchored in Hawaiian waters and ports, and discharged passengers thereto, without any governmental authority describing such operations as a "development" for purposes of HRS chapter 205A. Further, since the enactment of the coastal zone management law, neither the state nor any county has ever interpreted and applied the law to require cruise ships to apply for an SMA permit. See Arrington v. Wong, 237 F.3d 1066 (9th Cir. 2001) (holding that administrative interpretation of regulations are highly relevant); U.S. v. Matsumaru, 244 F.3d 1092 (9th Cir. 2001) (holding that courts must give substantial deference to an agency's interpretation of its regulations); Maha'uilepu v. Land Use Comm'n, 71 Haw. 332 (1990) (holding that deference is accorded to an administrative agency's interpretation of its rules unless decision is clearly erroneous or inconsistent with underlying legislative purpose).

Based on the foregoing, it is this office's opinion that the Commission does not have jurisdiction or authority over the arrival and anchoring of cruise ships in offshore waters and the ferrying and disembarking of passengers at Kaunakakai Harbor. Further, the mere entry into, and traversing of lands within, the SMA by cruise ship passengers do not constitute a "development" under HRS § 205A or "proposed action" under § 12-302-5 of the Rules.

Should you have any further questions or concerns, please feel free to contact me at my office.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

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SMA permit. Absent clear legislative history or case law to the contrary, we do not believe that this was the statute's intent or purpose.

⁶In 1975 the State Legislature enacted interim controls on coastal areas and provided for the establishment of special management areas and permit systems. Act 176. In 1977 the State Legislature enacted Act 188 establishing the Hawaii State Coastal Zone Management program.

Cruise ships nix all scheduled Molokai stops for this year

By VALERIE MONSON
Staff Writer

HONOLULU — Cruise ships have ceased plans for all scheduled calls on Molokai through the end of the year — and possibly later — while officials wait to see what happens during discussions with the community.

Rose Abello, vice president of public relations for Holland America, said Wednesday that company officials expanded on the requests of Maui state Rep. Joe Souki and Oahu Sen. Cal Kawamoto. Last week, Souki and Kawamoto asked industry officials to cancel an April 15 stop at Kaunakakai so a public meeting could be held later in the summer.

"At this point we don't have any calls to Molokai scheduled," said Abello. "We would consider scheduling calls in the future."

John Hansen, president of the North West Cruiseship Association, which represents all the ocean liners that come to Hawaii, said Princess Cruises had agreed to follow Holland America's lead. Princess had at least one visit on tap.

"I think it's important to have that kind of public meeting to get some input," said Hansen.

For more than two months, a Molokai community group, Hui Ho'opakele 'Aina ("Rescue the Land") has been protesting proposed visits by the massive ocean liners to its island. Members

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Cruise ships

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have raised concerns about possible environmental damage and social impacts that would result from the occasional flood of visitors. Supporters of the ships have argued that the stops would boost the local economy without requiring a lot of additional infrastructure.

"I'm terribly disappointed and I think it's really sad that something which would have been for the good of the community as a whole has been stopped," said Sandy Beddow, executive director of the Molokai Visitors Association. "There's only a few of us here who can catch fish for a living or work in the shrimp ponds. What's the rest of the island supposed to do?"

Beddow said she had even heard that the much-publicized community meeting was also going to be canceled, putting the entire future of Molokai port calls in jeopardy.

Two previously scheduled calls by Holland ships were thwarted, by bad weather in December and

were suspicious at the motives that resulted in the action and said they feared the community was still being manipulated. Earlier this month, Souki and Kawamoto were responsible for killing a bill that would have regulated discharge from the ships; the industry does not want the legislation.

Earthjustice attorney Isaac Moriwake, who represents the Molokai hui, found it odd that Souki and Kawamoto would ask cruise ship leaders to cancel Kaunakakai visits until a community meeting could be held at the same time they were burying legislation that would hold the industry accountable.

"From the face of things, it looks like some kind of horse trade," said Moriwake. "I hope no one's under the delusion that this will make people forget the cruise ship issues statewide."

Souki could not be reached for comment, but Rep. Sol Kaho'ohalahala, whose 13th District includes Molokai, said the Legislature needs to address the questions

He cited the problem occurring at Lake Wilson in Wahiawa on Oahu, where an introduced aquatic weed has taken over the entire 300-acre lake. There is a concern that cruise ships can introduce alien species that can become established in the reefs and ocean around the islands, he said.

"It's not just about Molokai. We want to talk about what a ship might bring to the islands, through its wastes, its bilge water, whatever may be growing on its hull," he said. "Nobody seems to want to think about the impact of that."

"I think that Molokai has raised the bar on what are the issues that need to be discussed. I think that is legitimate," he said.

"It's not a case of being for or against cruise ships. The people of Molokai are asking, 'What about the impacts on our natural and cultural resources?' That is a question that should be asked statewide."

Moriwake and members of the hui are also concerned that, without ground rules, the community

and Kaho'ohalahala, but English said, so far, he's been left out of discussions by Souki and Kawamoto.

"I haven't seen any of the letters (sent by Souki and Kawamoto)," said English. "Nobody has come to me, but I've read about it in the Oahu newspapers."

English said he would attend a public meeting on Molokai about the cruise ships if he's asked. He said he and Kaho'ohalahala want only "to honor the place and the will of the people and protect the environment."

Kaho'ohalahala said he intended to press for hearings on the bills that were introduced in both the House and Senate seeking to provide more authority for the state to oversee cruise ship operations that may impact the ocean environment.

Although both Kawamoto and Souki said they would not hold hearings on the bills but would participate in meetings on Molokai