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RE: COMMENTS ON DEIS FOR SEA MOUNTAIN AT PUNALU'U

Dear

Ka`u Preservation has retained the services of the Native Hawaiian Legal Corporation to review Sea Mountain's Draft Environmental Impact Statement (DEIS). These comments are sent on Ka`u Preservation's behalf.

The DEIS is filled with meaningless buzzwords, insufficient detail, empty promises, shoddy analysis, unsupported conclusions, errors and omissions. It is clear that the consultant did not bother to turn in a readable product; did not seriously review the 1988 FEIS that was completed for a similar project; and disregarded public comments it solicited.

The Hawai'i County Planning Department should not accept a final environmental impact statement (FEIS) that resembles anything like this document. The county has a responsibility pursuant to both HRS chapter 343 and the public trust doctrine to ensure that it thoroughly and completely assesses the impacts of projects requiring county approval. HRS § 343-5(c) provides that the "authority to accept a final statement shall rest with the agency receiving the request for approval"; it is not the applicant's decision as to whether the FEIS is sufficiently detailed and complete. The fact that the agency has to make an independent decision is re-enforced by decisions of the Hawai'i Supreme Court: *Ka Pa`akai O Ka`aina v. Land Use Commission*, 94 Hawai'i 31, 51, (2000) and *Kelly v. 1250 Oceanside Ptnrs*, 111 Haw. 205 (2006). In *Kelly*, the Hawai'i Supreme Court held that

the plain language of article XI, section 1 mandates that the County does have an obligation to conserve and protect the [S]tate's natural resources. Coupled with the State's power to create and delegate duties and responsibilities to the various counties through the enactment of statutes, the County's duty to conserve and protect is clear.

Id. at 224-225. Thus,

an affirmative duty to ensure that conditions designed for effective soil erosion control is being met by a land developer is imposed upon the County. . . . Contrary to the County's position, therefore, a duty "to take affirmative action to make pre-permit or post-flood event assessments of the specific effect of development on coastal resources" exists under the HRS.

Id. at 227. The public trust doctrine requires that the county

must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process. Thus, the state [and county] may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state. Such a duty requires DOH [and the county] to not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources.

Id. at 231 (internal citations and marks omitted)

The applicant likewise has important duties. It must adhere to the EIS rules. These rules provide that an "EIS is meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." HAR § 11-200-14. It is clear that the applicant has not taken its responsibilities seriously. The DEIS is so deficient that the

county should require that the applicant re-write the DEIS and put the DEIS out for public comment once again. The applicant has simply refused to address many of the questions asked by Ka`u Preservation, the Planning Director, the Coalition for Environmental Quality Control, Protect Keopuka Ohana and many other consulted parties. What purpose is consultation if these questions are going to be ignored? The analysis of the significance criteria and the review of state planning objectives read more like a public relation statement than a serious analysis. The county should not endorse this analysis.

These comments specifically incorporate by reference the comments Ka`u Preservation made on the EISPN, as well comments made by Protect Keopuka Ohana (January 19, 2005[sic]), the Sierra Club (January 19, 2005 [sic]), the Planning Director (January 11, 2006), the Coalition for Environmental Quality Control (January 9, 2006), and Sterling Robbins (Jan. 12, 2006) herein. It also specifically incorporates herein the comments being made on the DEIS by Peter Mills, Ph.D., adjoining landowner Pele Hanoa, County Councilmember Bob Jacobson, Jared Bernard, Jim Speilman, Robert Domingos, Jason Turner and Ralph Roland.

Mitigation

The mitigation presented is plainly insufficient. For example:

- “Tree stands provided Hawaiian hoary bat habitat identified in the Hart study will be preserved as much as possible.” 1-19
- “Landscaping within Sea Mountain will use native species to the extent practicable.” 1-19
- “County beach park will be upgraded and possibly expanded.” 1-20.
“Expansion of the park is being considered.” 2-19
- “The project will include waling trails and possibly a new recreational area at Nīnole cove.” 1-20
- “Sea Mountain will encourage recycling. . .” 1-21
- “Materials will efficiently during construction.” 5-17
- “If during monitoring, information is obtained that suggests that the environmental impact has occurred, appropriate actions will be taken.” (Appendix H at 27)

Who decides whether the developer’s activities satisfy the criteria in these empty phrases? Who is in charge of ensuring implementation?

The EIS authors should use the active voice rather than the passive voice so that we know who is responsible for fulfilling promises.

We specifically inquired about government staffing levels to ensure that promises are kept. At a minimum, the *Kelly* decision requires such discussion and consideration. In your June 26, 2006 letter to us, you said that you would be discussing this issue. You have failed to do so.

Is a restriction on the use of chemical applications the same thing as a prohibition?

Cultural Impacts

The most complete and researched part of the DEIS is found in Appendix F. While this Cultural Impact Study/Assessment does not thoroughly assess all the cultural impacts that would be created by Sea Mountain's proposed development, it concludes that "it would be irresponsible to say that any future development of the property could not have any adverse effects or impact." Curiously, however, very little of what is produced in Appendix F made it into the main body of the DEIS. Nor is there much analysis of the cultural impacts that this project is likely to have. A cultural impact study must not only disclose the cultural practices of an area, but also the impacts to these practices from a proposed development.

The DEIS fails to acknowledge that the proposed development is the antithesis of what Punalu'u is. It is antithetical to the traditions and customs practiced by many Native Hawaiians who live here. Traditions and customs are supposed to be practiced – not simply displayed in some museum. Establishing a cultural center to provide a place to display culture cannot come close to the replacing the cultural landscape of this area that would be lost to this development.

The remainder of this letter raises numerous issues, many of which should be classified as cultural impacts. Nevertheless, in order to assist the reader, these comments are placed in discrete categories.

Burials

One of the stunning omissions of the DEIS is a discussion of how burials will be treated. The protection of burial sites is deeply engrained in Hawaiian culture. The need to protect such sites is also deeply entrenched in the law. Hawai'i Revised Statutes of 1905 § 3196 provided:

If any person, not having any legal right to do so, shall willfully dig up, disinter, remove or convey away any human body from any burial place, or shall knowingly aid in such disinterment, removal, or conveying away, every such offender and every person accessory thereto, either before or after the fact, shall be punished by imprisonment at hard labor for not more than two years, or by a fine not exceeding one thousand dollars.

See also today's HRS Chapter 6E. In *Sylva v. Wailuku Sugar Co.*, 19 Haw. 602, 609 (1909), the Hawai'i Supreme Court held that a jury could award punitive damages for the desecration of graves. In *Neighbors v. Neighbors*, 65 S.W. 607, 607-08 (Ky. Ct. App. 1901), the Kentucky court held that under "current authority in this country ... the courts of law will recognize and protect [a burial]."

It is well documented through out the DEIS, as well as the 1988 FEIS, that many burials were desecrated by prior development of the property. The restaurant was built on top of burials. Given the cavalier treatment by C. Brewer and others, it is certain that any redevelopment activity will uncover burials. On January 21, 1988 Sam Kaluna and Chris Bengay identified burials under existing structures at Sea Mountain (page XII-153 of the 1988 FEIS). The DEIS fails to acknowledge this fact. It fails to discuss how these burials will be respected and protected. It fails to discuss redevelopment plans for the structures covering the burials. Such discoveries would not be “inadvertent.” They are certain to occur. We know that the burials are there. Nevertheless, the developer fails to provide any assurance whatsoever that such burials will be left in place, or protected, or respected. Rather, the developer hopes to use loopholes in the law to remove such burials to accommodate its development.

Old government road and trails

The DEIS fails to disclose the location of recognized roads and trails owned by the public and fails to map them in relation to its proposed development. The DEIS should discuss court decisions that have guaranteed continued public use of these resources.

The FEIS should also disclose (and map) all roads owned by the government and all roads that the landowner or developer is obligated to keep open through conditions, covenants, or other restrictions.

Archaeological sites

The DEIS fails to fully discuss the cumulative impact of (1) past actions that have destroyed archaeological sites; (2) this proposal’s plan to destroy three pre-contact sites and (3) constructing near remaining sites in a manner that affects their integrity.

The applicant fails to acknowledge that construction fifty feet from a heiau, burial, or ancient trail can irreparably damage the integrity of the archaeological site.

The DEIS fails to map the location of historic sites in relation to specific development plans.

The DEIS fails to undertake a serious effort to discover archaeological sites. It failed to rely on subsurface investigations, remote-sensing studies, or investigation of kama`āina statements to identify other buried archaeological sites and human burials.

Ponds

The DEIS fails to discuss the ownership of the pond behind Punalu`u beach. The maps found on page 11 and 26 showing that the pond connected to the ocean – as well as established law -- suggest that the pond is owned by the state.

Similarly, the EIS should discuss the ownership of the other ponds. It is Ka`u Preservation's opinion that all these ponds are owned by the public.

The DEIS fails to discuss the dumping of gravel into Nīnole Cove by C. Brewer – simply attributing the filling of the pond to runoff sedimentation.

What will the impact be on freshwater flows into the ponds if increasing amounts of groundwater are pumped to serve this new development? At one time, apparently streams flowed in this area. p. 4-3. The more groundwater that is used, the less that will be available to flow into streams and ponds.

How far is the setback proposed to be from each pond?

Limu

Limu is an important resource that native Hawaiians, green sea turtles and other marine life depend upon. The DEIS fails to recognize that there are dozens of varieties of limu. Some are edible; some are medicinal. Some are native and some are invasive. Some limu benefit turtles while others are harmful. In one sweeping statement, the DEIS proclaims that increasing nutrient levels will benefit limu and turtle (p. I-18). Such a conclusionary statement not only is unsupported, but also neglects to assess which limu will prosper with this development and which will be damaged.

Punalu`u Beach

The DEIS puts off for another day any serious discussion regarding the carrying capacity of the beach. After surveying five people, Group 70 throws in the towel.

It is ridiculous to suggest that Punalu`u Beach can accommodate more people. It is the only truly accessible sandy beach in Ka`u – serving a region larger than the island of O`ahu. Nevertheless, the developer proposes to transform Punalu`u from a beach used by the community into the equivalent of Waikiki Beach.

The EIS must acknowledge that by dumping hundreds more tourists and new residents on the beach per day, the development will destroy the beach experience for all Ka`u residents. This fact cannot be sugar-coated.

As it is, far too many tourists ruin the beach experience for residents on a daily basis. The beach has exceeded what the community has determined is an acceptable beach population. The EIS must acknowledge that residents' beach experience will be irrevocably destroyed.

How exactly does Sea Mountain propose to enforce warning signs regarding the rough ocean currents? 5-71

Water quality

The water quality analysis in the DEIS fails to meet minimum scientific standards. It fails to:

- disclose whether testing was done while the golf course was still operating and still applying fertilizers and pesticides;
- seriously analyze the fact that according to Table 4 of Appendix J, water flows into Nīnole Spring and well far exceed the levels of total nitrogen and total phosphorous found in the groundwater located away from the golf course.
- compare groundwater quality above the golf course and sewage ponds with the groundwater quality flowing into the ponds and coastal waters;
- include water quality data from Honu`apo or Kawa as baseline comparisons;
- explain how it is that groundwater is not good enough for irrigating the golf course (Appendix H p. 5), but is good enough to still be used as drinking water;
- include a detailed water quality analysis of the pond behind Punalu`u beach;
- discuss the water quality data from the 1988 FEIS (p. IV-62);
- acknowledge the discussion of nitrogen from the 1988 FEIS (e.g., p. IV-69 – 71);
- seriously consider the impact of the extensive amount of nutrients that this project will contribute to groundwater and the nearshore environment;
- disclose how long it takes for water to travel through the highly permeable lava and get to the ocean

Why does the DEIS fail to discuss the results of water quality tests of the pond behind Punalu`u beach, the degree to which runoff from the existing golf course has affected the water quality of the pond, and the extent to which this proposed development will further affect water quality – when Ka`u Preservation and others asked for this specific information?

The applicant assumes that erosion and sedimentation will not be a problem because the grading ordinance will be complied with. Not only does such a statement ignore what happened with the Hokulia development, it ignores that the county has admitted that the existing grading ordinance does not adequately prevent erosion into coastal waters. The county has pledged to re-write the ordinance. The county's "strict erosion control measures" do not protect water quality. Nor does the public have any opportunity to participate in the review of erosion and sedimentation plans.

The applicant's assumes that "percolation through such thick soil and lava layers will effectively remove most pollutants from the storm water before it reaches groundwater." (p. 1-18) Not only is there no data to support this statement, it is contradicted by the 1988 FEIS. Moreover, removing most pollutants (51%) does not protect groundwater, the ponds, or the nearshore environment.

The DEIS discloses that the amount of impervious area will triple with this development (5-14). Nevertheless, the DEIS suggests that drainage from the project is not expected to be significantly different from the existing conditions. 2-10. That unsubstantiated statement is hard to accept. More analysis is necessary to determine how much more runoff there will be.

Surface water has reached the ocean more often than the years 1978, 1982 and 2006. 4-19. Where is the DEIS getting its information?

The DEIS asserts that 10-year storm flows will be retained on site. But given the intensity – and frequency – of storms that exceed the statistical 10-year storm, what will be the impact from these inevitable runoff events?

Presenting new homeowners with brochures about household hazardous waste at closing, while the purchasers are signing a flurry of documents (5-33) does nothing to mitigate the impacts from the misuse of household hazardous waste (such as solvents, paints, pesticides, oil etc.).

Results from Waikoloa studies show gradients of inorganic nutrients that do not fall to low oceanic levels until 100 meters of the shoreline. Imposed on this area are apparent anthropogenic inputs related to golf course, resort and residential development. To what extent has the existing golf course at Punalu`u and related development affected water quality of the pond and nearshore waters? Why has the DEIS failed to answer this question?

Why is the plan to mitigate water quality impacts so vague? Please provide a specific, enforceable plan.

Why is there no discussion of the impact from anticipated termite treatment of the new development?

The EIS should include any calculations or models used to support any conclusion regarding runoff and drainage into nearshore waters.

The FEIS should fully address all the questions raised by Protect Keopuka Ohana and the Sierra Club in their comments on the EISPN with regard to water quality (and all other issues) as well as those of Professor Turner.

The UIC rules are intended to protect drinking water quality, but were not established to protect coastal water quality.

The EIS should disclose what previous what the EIS' water quality consultants have in Hawai`i.

Once a serious, objective analysis is completed regarding water quality impacts, a more thorough assessment of biological impacts can begin.

Sewage

Is the applicant proposing to treat the sewage with chlorine or ultraviolet light? What is the applicant currently using? What impact does chlorine have on nearshore waters?

What impact has the current “obsolete” “old and deteriorated” wastewater plant had on coastal water quality? Whose obligation is it to ensure that the wastewater plant functions properly?

Impacts from the golf course

The DEIS contains valuable information such as that found in Volume II, Appendix H pages 4-7:

Todd: Fill in the blanks here

...

The hydrogeology, surface and groundwater hydrology of the site has been characterized (Huntsaker, 2006 and 2006a). Jim and Tommy: Need some information here on depth to water, percolation rates, etc

...

Parking lot runoff will be pretreated through an oil/grease separator, fossil filter or similar filter/absorbent prior to discharge to the Course Jim: Has this been decided?

The discussion in Appendix H regarding the seasons suggests that the consultant’s experience is focused on the mainland and not Hawai`i. The EIS should disclose the consultant’s experience and successes working in Hawai`i.

The DEIS failed to engage in any meaningful analysis of the impacts that the golf course has had on the water quality of the ponds and nearshore areas. Why is there no comparison of groundwater in wells above the golf course with the groundwater flowing out into the ponds and nearshore?

Are golf course holes 8 and 9 in the conservation district? They appear to be from the map. Golf courses are not allowed in the conservation district pursuant to HAR § 13-5-25(c).

How far is the closest green and tee from the water?

Nearshore area

The DEIS declares that “no construction will occur within the ‘native plant’ subzone within Zone A . . .” The wording of this paragraph is confusing. While there is a map of Zone A, there does not appear to be a map that shows a native plant subzone within Zone A. Appendix C contains GPS coordinates for Zone A, but not for a subzone. Is the proposal to bar construction in the entire Zone A, or not? The report by Patrick Hart, Ph.D. calls for no construction within Zone A. He does not discuss a subzone within Zone A.

The main body of the DEIS should be consistent with the consultant’s expert’s recommendation that a 20 meter buffer zone mauka of zone A be free of development.

Similarly, the DEIS states that the “coastal zone will remain largely undeveloped.” What does largely undeveloped mean? How far inland does this coastal zone go? Where is the no construction – and no fertilizer and pesticide -- area and how big is it? If “on average most of our structures are more than 200-300 feet away from the shoreline,” 49% of the structures may be closer than 200 feet from the shoreline. Please do not use throw-away rhetoric like this. Be precise.

Biological Resources

The FEIS should reference information found in the National Park’s 2006 Survey of the Ka`u coast. The coastal area supports a diverse population of flora and fauna.

Why is there no serious discussion of the turtle population and possible impacts to it? Polluted runoff, reductions in groundwater inflow, beach overcrowding and night lighting will all affect turtle habitat and the turtle population.

The DEIS fails to include a serious inventory of marine resources found nearshore and off-shore. It should examine limu, corals, benthic organisms, the Hawaiian monk seal, the orange-black damselfly and the spinner dolphins. After completion of such an inventory, the EIS should provide a serious analysis of the impacts to these resources from various aspects of the development.

These studies should be done by a qualified marine biologist. The EIS should disclose how many other such analysis this biologist has preformed and in which ones of these has this biologist concluded that development has had (or will have) an adverse impact on marine ecosystems or species.

The EIS should include inventories of biological species that are done in more than three seasons.

Scenic Impacts

Three story buildings in this area will not create a low profile. p. I-20.

The visual simulation should reveal what will be seen before the trees grow out, or if they die. In other words, we should see an unvarnished view of the area.

The visual impact from the highway must be thoroughly disclosed, as required by HRS § 205A-26.

The visual impact must be assessed given the developer's plan to build ten foot sound attenuation walls. 5-74

If houses mauka of the highway are sited to "maximize views" what will people along the shoreline see when they look mauka? How will that affect the shoreline and wilderness experience of those who fish, explore, and hike along the coast?

In the EISPN, we noted – as did others:

The EIS should use both of the two most useful methodologies of Visual Impact Analysis:

- 1) Given a structure at point x, where will it be seen from; and
- 2) From point y, what can you see of the development?

Where will lights be seen from? What will be the impact of these lights on seabirds and threatened and endangered turtles? (Please note that simply saying that the project will comply with all laws does not answer these questions.)

Why were our questions ignored?

Only the lights right behind Punalu`u Bay will be hooded using low intensity down lighting?

Social impacts

The DEIS ignores the issues of social stratification created by the development of upscale housing in a community comprised of native Hawaiians who live a different lifestyle.

The DEIS fails to disclose the impact of transforming an area with a rural atmosphere into an urban resort.

Hotel

According to the Hawaii Tourism Authority's own survey, 72% of residents oppose more hotel construction. The applicant was informed of this fact in response to the DEIS, but failed to include that information in the text – other than reproducing comment letters it received. The EIS should disclose this fact. The EIS should also

disclose the current occupancy rate on Hawai`i Island – and compare the vacancy rate of the island with that of other counties. Your June 26, 2006 letter says that you will be discussing occupancy rates. Where? What page?

Maps

Many of the photos and maps found in the 1988 FEIS are better than those found in this document. *See, e.g.*, II-3 and II-5 of the 1988 FEIS.

Furthermore, the 1988 FEIS included maps with far more specificity regarding flooding: IV-6 and IV-7. Why does the FIRM map in the DEIS not show the AE and VE areas mentioned on page 4-24 (and mapped in 1988)?

How high have tsunamis reached in the area? The line should be clearly indicated on a map.

What structures are proposed to be built within flood zones – and why? (5-10)

A map should be produced showing the location of historic sites in relation to the proposed development.

There are inconsistencies between the zoning map and the LUPAG map. These inconsistencies suggest that this project requires both zoning changes and LUPAG changes makai of the highway.

A map should be produced that shows the zoning laid over the proposed project. Similarly, a map should be produced that shows the LUPAG laid over the proposed project.

The DEIS should include topographic maps that reveal the existing topography and how that topography will change with this development.

A map should show where existing trails and roads are in relation to proposed ones as well as the “no construction” line.

It would help if the proposed development were overlaid on top of the aerial photo figure 4-12.

The maps should also disclose where the certified shoreline is.

Solid waste

The DEIS cavalierly asserts the impacts on solid waste will be minimal. It neglects to inform the reader that the garbage will not be trucked through Kona to Pu`uanahulu, but rather will go to Hilo. It neglects to inform the reader that the county is facing a solid waste crisis. The Hilo landfill is set to be closed in the next couple of

years. Data would be more meaningful if it compared the amount of waste to be generated with the amount of capacity remaining in the Hilo landfill rather than Pu`uanahulu.

Moreover, given that a significant percentage of the units will be sold to people moving to Hawai`i, the waste that is generated by Sea Mountain is new waste.

Where will greenwaste be composted?

Who is paying for implementation of Sea Mountain's solid waste plan – including the collection and transportation of recycled items?

Drinking water

How will the increased use of groundwater affect DHHL's reservation rights to water for future homesteaders?

Where will the new drinking water wells be located? On whose land?

How is it that water that residents currently drink (as provided by the landowner) is only of marginal quality for turf irrigation (p. 5 of Appendix H)?

Air quality

Although a natural phenomenon, why does the DEIS include such little information about the vog that will plague the development. Why is there no data taken on sulfur dioxide levels in the area to be developed?

Schools

If the DOE has no legal authority to require a fair share contribution, how does the applicant propose to address the impact it will have on community schools?

Police

The DEIS fails to recognize that the county police department's greatest need is not money; it is police officers. The county cannot recruit and retain enough officers to meet the county's existing needs. The Sea Mountain development will only increase these demands on the police department – without increasing the number of police officers available to protect the community. This development will only spread the police department thinner. A new substation, minutes away from an existing station, won't solve the underlying problem. It will only exacerbate it.

Project description

The DEIS fails to adequately describe the project that Sea Mountain Five, LLC wants proposed. It should show where specific features will be located and how big they will be. What is a “stacked flat”? How tall is it?

These features should be clearly mapped and not be hidden by enormous trees that have yet to be planted.

Other

Because this project requires an SMA permit, this project has no “entitlements” as asserted on page 2-4

The traffic study is inadequate as it lasted only 2 days (4-45) and does not discuss the effects of development traffic on the site and the island.

The DEIS should disclose how the Aspen Institute is currently used and how it would be affected.

The DEIS should disclose the sequence of its plans. When will the wastewater treatment plant be upgraded in relation to when the first units are built in relation to when trees will be planted in the gulch in relation to when construction housing units are built etc.?

The DEIS should disclose any and all covenants, conditions or restrictions that were entered into when the Colony I condominiums were built that impose any obligations on the landowner or developer (e.g., to operate a wastewater plant, to operate a golf course, to maintain roads etc.). The specific wording should be included.

Similarly, the DEIS should disclose all conditions that have been imposed on the landowner or developer pursuant to previous zoning approvals that have been granted. The specific wording should be included.

The failure to discuss where affordable housing will go is further proof that the DEIS fails to serve its role as a disclosure document.

Given the low unemployment rate on the island, where are construction workers going to come from?

The economic analysis should consider the Bank of America’s analysis on the financial costs of sprawl.

Who pays for lifeguards for the new residents and tourists?

How does significantly increasing the population in this part of Ka`u affect the county’s ability to evacuate when (not if) an eruption requires evacuation on a two-lane highway?

The EIS should disclose in detail whether there are any breaks in the chain of title.

The EIS should fully disclose the effects of secondary population growth.

The DEIS fails to explain or discuss its adverse effect on – and the cumulative affect of -- previously approved developments in the district of Ka`u. For instance, the district of Ka`u has over 17,000 empty lots in approved developments that include Hawaiian Ocean View Estates, Discovery Harbor, Green Sands and Mark Twain Developments.

Given the plethora of studies that have been done through out the state, the EIS should examine the impacts caused by similar resort communities. Waikoloa is one good example where resort urbanization completely transformed (and destroyed) a cultural resource and ecological community.

We look forward to receiving a copy of a new DEIS and the FEIS.

Sincerely,

David Kimo Frankel
Staff Attorney