SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

PAULETTE KA`ANOHIOKALANI KALEIKINI, Plaintiff-Appellant, vs. WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and state historic preservation officer, PUAALAOKALANI AIU in her official capacity as administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O`AHU ISLAND BURIAL COUNCIL, Defendants-Appellees.	CIVIL NO. 11-1-0206-01 GWBC APPEAL FROM: A) Final Judgment, filed on August 8, 2011; B) July 5, 2011 Order Granting DEFENDANTS WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, and CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING's Motion to Dismiss Complaint and/or for Summary Judgment filed February 9, 2011; C) July 5, 2011 Order Granting Certain State Defendants' Substantive Joinder in Defendants WAYNE YOSHIOKA, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, and CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING's Motion to Dismiss Complaint and/or for Summary Judgment filed February 9, 2011 [Joinder Filed

	)	February 18, 2011]; D) Denial of Plaintiff's
	)	Hawai`i Rules of Civil Procedure Rule 56(f)
	)	request; E) July 5, 2011 Order Denying
	)	Plaintiff's Motion for Reconsideration of this
	)	Court's March 23, 2011 Oral Rulings, Filed
	)	on April 4, 2011
	)	
	)	
	)	FIRST CIRCUIT COURT
	)	
	)	HONORABLE GARY W.B. CHANG
____	)	Judge

PETITIONER/PLAINTIFF-APPELLANT PAULETTE KA`ANOHIOKALANI KALEIKINI'S MEMORANDUM IN **OPPOSITION** TO FAITH ACTION FOR COMMUNITY EQUITY AND PACIFIC RESOURCE PARTNERSHIP'S AMICUS CURIAE BRIEF IN SUPPORT OF CITY DEFENDANT'S MOTION FOR RECONSIDERATION

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Faith Action for Community Equity and Pacific Resource Partnership ("**FACE/PRP**") play fast and loose with this honorable Court. The supplemental declaration filed by FACE/PRP on September 5, 2012 – without authorization and in flagrant violation of the Hawai`i Rules of Appellate Procedure[1] -- demonstrates that FACE/PRP have no interest whatsoever in the protection of iwi. They are concerned with jobs and affordable housing. Ignoring the record in this case, distorting documents, and misrepresenting the law, FACE/PRP disingenuously complain that this Court's correct reading of the plain language of the law will somehow jeopardize burials. Maha`oi!

FACE/PRP claim that the State Historic Preservation Division (**SHPD**) gave a reason for phasing the archaeological inventory survey (**AIS**) when nothing in the record supports this claim. They misread documents to falsely claim that preparation of an AIS prior to construction will involve "ten times larger" sub-surface testing. They misrepresent the effect of federal regulations. They ignore the impact to iwi from the preparation of an AIS after decisionmaking and construction has commenced. And they overlook the fact that these issues were all previously raised to this Court.

I. SHPD Did Not Decide To Defer Sub-Surface Testing To Protect Iwi.

Without any factual support, FACE/PRP allege that SHPD deferred the AIS process "**in order to** protect iwi from unnecessary disturbance." FACE/PRP can point to no document in which SHPD determined that the rail project should be phased **in order to** protect iwi from

[1] Plaintiff hereby gives notice that if FACE/PRP file any other papers in this case in violation of court rules, she will file a motion to strike and for sanctions.

unnecessary disturbance.

Rather, FACE/PRP point to a document produced by the Federal Transit Administration (**FTA**) – not SHPD. JEFS #50 RA:206-216. The FTA asserts that the consulting parties – including SHPD – agreed that the programmatic agreement is appropriate to comply with state law. *Id.* at 212.[2] Even if the hearsay statement were true, it does **not** say that SHPD made any sort of determination as to why the AIS was being deferred. The FTA unilaterally suggests a reason for deferral was "to limit disturbance of potential resources during the surveys." *Id.* at 213. This assertion is made by the FTA, however, and not SHPD.

FACE/PRP point to declarations of Pua`alaokalani Aiu and Hallett Hammatt. Not only did Plaintiff timely object to the statements of Aiu and Hammatt as inadmissible, JEFS #50 RA:68-9, but nowhere in their declarations do they say that the reason that SHPD agreed to phase the AIS was to provide better protection of iwi.

HAR title 13 chapters 275 and 284 lay out the process by which SHPD and agencies comply with the historic preservation review process and make determinations. An agency's determinations must be reasonably clear. *Gray v. Administrative Dir. of the Court*, 84 Hawai`i 138, 145, 931 P.2d 580, 587 (1997); *In Re Water Use Permit Applications*, 94 Hawai`i 97, 157-8 and 163-4, 9 P.3d 409, 469-70 and 475-6 (2000); *In re Water Use Permit Applications*, 105 Hawai`i 1, 27, 93 P.3d 643, 669 (2004). FACE/PRP can point to no document that SHPD prepared pursuant to these rules in which it determined that deferral of the AIS was needed to protect burials. To support its claim, it is FACE/PRP's burden to prove that SHPD actually determined (before signing the programmatic agreement) that its only choice to protect burials was to phase the AIS. They point to nothing because SHPD did not do so.

[2] It then says, however, "the Agreement addresses HRS Chapter 6E but does not replace HRS Chapter 6E compliance." *Id.*

II. An AIS Prior To Construction Does Not Involve Testing an Area "Ten Times Larger."

FACE/PRP assert that "prior to the availability of preliminary engineering plans, the area of sub-surface testing would have been ten times larger." FACE/PRP's claim is based upon a distortion of two sentences from the final environmental impact statement (**FEIS**) taken out of context and premised upon several false assumptions. Page 4-179 of the FEIS, from which the Court quotes on pages 8-9 and 79 of its opinion, states that "conducting archaeological investigations in locations where foundations will be placed . . . would limit the area disturbed for archaeological investigations and construction to potentially less than 10 percent of what would be disturbed if archaeological investigations were conducted for 100 percent of the alignment."

First, the FEIS does **not** say that "conducting archaeological investigations in locations where foundations will be placed . . . would limit the area disturbed for archaeological investigations and construction to potentially less than 10 percent of what would be disturbed if archaeological investigations were conducted <u>prior to the availability of preliminary engineering plans</u>."

Second, FACE/PRP fail to cite to anything in the record that suggests that (a) preliminary engineering plans have not been completed or (b) anything prevented the City from completing preliminary engineering plans prior to January 2011.

Third, no one has suggested that an AIS done prior to the availability of preliminary engineering would involve subsurface archaeological investigations for 100 percent of the alignment. An AIS generally involves sampling. The law does not require a 100 percent subsurface archaeological investigation of the entire project area. HAR §§ 13-284-5(c)((2)(D) and 13-276-5(c)(3). In other words, the comparison offered in the FEIS is irrelevant.

Fourth, the programmatic agreement does not limit subsurface investigations to the location

of foundations. Subsurface investigation includes the area of utility relocation. JEFS #40 RA:112. Thus, the comparison in the final environmental impact statement is also irrelevant.

Fifth, as will be discussed further below, there is no reason – and certainly no law requiring the City – to grant a special management area permit and commence construction until after the preliminary engineering work was completed.

Thus, FACE/PRP draw a sweeping and inaccurate conclusion from a gross misreading of the record. It is simply not true that preparing an AIS for the entire project would require ten times more subsurface investigation than if the AIS were to be prepared in phases.

III. The City Was Not Prevented From Completing Preliminary Engineering Designs.

FACE/PRP assert that "the City cannot request approval to begin preliminary engineering until very late in the process" FACE/PRP fail to cite to anything in the record that suggests that (a) preliminary engineering plans have not been completed or (b) anything prevented the City from completing preliminary engineering plans prior to January 2011. In fact, federal law has not prevented the City from completing preliminary engineering work. Preliminary engineering work can commence long before the record of decision is issued. 49 CFR § 611.7 and 23 CFR § 771.123(j). It is final design work that must await a record of decision after the National Environmental Policy Act process has been completed. 49 CFR § 611.7(c). Thus, before completion of the record of decision in January 2011, there were no legal constraints preventing the completion of both preliminary engineering work and archaeological work.

Furthermore, to the degree the City wanted to spend its own money on final design work, FACE/PRP point to no law that would have prevented the City from doing so.

IV. Federal Law Does Not Mandate Delaying An AIS.

FACE/PRP claim that federal regulations essentially require that archaeological work be

delayed. Their argument is premised on their assumptions that subsurface testing cannot possibly be done before (a) the record of decision by the federal government has been made, (b) the granting of the special management area (**SMA**) permit, (c) commencement of construction or (d) final design work has been done. They are wrong.

Subsurface archaeological work can precede the federal government's issuance of record of decision. Numerous federal courts have required that the identification of historic properties, including sub-surface sites, be completed prior to the issuance of a record of decision pursuant to § 4(f) of the Department of Transportation Act. *N. Idaho Cmty. Action Network v. United States DOT*, 545 F.3d 1147, 1158-1159 (9th Cir. Idaho 2008); *Corridor H Alternatives, Inc. v. Slater*, 334 U.S. App. D.C. 240, 166 F.3d 368 (D.C. Cir. 1999);; *Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis*, 701 F.2d 784, 788-89 (9th Cir. 1983).

Subsurface archaeological work can also precede granting of the SMA permit. FACE/PRP point to no law that required the City to grant the SMA permit before completion of the AIS. Even if the City wanted to wait until final design work had been completed to prepare the AIS, it could have waited until that was completed before issuing the SMA permit.

Subsurface archaeological work can also precede construction. FACE/PRP point to nothing in the record that suggests that the City was forced to commence construction prior to the completion of the AIS.

To the extent that FACE/PRP may be arguing that an AIS could not possibly be done until final design work was completed, they are wrong. As was more fully argued in Appellant's opening and reply briefs, archaeological information provided to decisionmakers allows fundamental decisions to be made, such as what routes are the best, what technologies are the most suitable, and whether the project should be built at all. Such an approach actually provides greater

protection of burials. According to expert testimony in the record:

> Significant negative consequences resulted when an AIS was not completed before decision making for H-3, the Wal-Mart site on Ke`eaumoku Street, General Growth's Ward Village Shops Project, and Kawaiaha`o Church's Multi-Purpose Center project. In each of these cases, archaeological investigations occurred when construction had already begun. Because burials were discovered in these projects late in the process, the burial finds created delays, redesign needs, and concomitant cost overruns. Most importantly, the late-stage finds limited the viable options of the developer, the State Historic Preservation Division, the O'ahu Island Burial Council, and cultural descendants in identifying and implementing cultural appropriate treatment of those burials.

JEFS #50 RA: 151-52.

> [E]arly identification of burial sites in the context of a development project allows for all options to be considered and for modification of a proposed project in many ways (including scope, size, location, design) so that the integrity of burial sites can be protected. When burials are identified later in the process, it often becomes very difficult for adjustments to be made, particularly when large sums of money have already been outlayed to forward construction plans that do not account for or appropriately anticipate the locations or numbers of burials within a project area.

JEFS #44 RA:61-62.

V. <u>Deference to SHPD is Not Warranted.</u>

This case called for the Court to interpret SHPD's rules. Deference to SHPD's interpretation of HRS chapter 6E and its rules is not warranted here because (a) SHPD lacks the authority to deviate from the plain language of the law, (b) this Court's interpretation is fully consistent with the purpose of HRS chapter 6E and its rules, and (c) the plain language does not lead to absurd or unjust results. Furthermore, SHPD's interpretation conflicts with that of the O`ahu Island Burial Council, which is also statutorily charged with assisting in the inventory of native Hawaiian burial sites. Finally, heightened scrutiny is warranted because burials must be treated in a spirit of trusteeship.

VI. <u>The Issues Raised by FACE/PRP Were Fully Argued.</u>

"[T]he purpose of a motion for reconsideration is to allow the parties to present new

evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai`i 92, 104, 176 P.3d 91, 103 (2008) (citing *Sousaris v. Miller*, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (2000) (quotation marks omitted). The issues that FACE/PRP brings before this Court are not new.

In support of its arguments, FACE/PRP on page five of its brief quotes from the City's own answering brief. If the City already made the argument, then FACE/PRP is simply rehashing old matters.

FACE/PRP dishonestly claim that "Plaintiff never argued that SHPD rules do not leave SHPD any discretion to defer the AIS process." Actually, Plaintiff made this argument repeatedly. JEFS #50 RA:16-18, 69 and 75-80, JEFS # 68 OB:30, JEFS #100 RB.

VII. Conclusion.

FACE/PRP present this Court with an inaccurate scenario, suggesting that SHPD's hands were tied and that it decided to enter into the programmatic agreement in order to best protect iwi. The evidence does not support FACE/PRP's argument. SHPD made no such determination. There is no evidence that more subsurface testing must occur if the AIS is not phased. The City had multiple options that could have allowed it to complete an AIS for the entire project before beginning construction and before granting an SMA permit.

This Court's reading of the plain language of SHPD's rules does not in any way impair SHPD's ability to protect burials. In fact, it will ensure that burials finally receive the protection originally envisioned in enacting the provisions that make up HRS chapter 6E. By ensuring that SHPD's comments are considered **prior to any approval**, SHPD's role will be enhanced.

Ua mau ke ea o ka `āina i ka pono.

DATED: Honolulu, Hawai`i, September 13, 2012.

/s/ DAVID KIMO FRANKEL
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