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 RESPONDENTS/DEFENDANTS-APPELLEES CITY DEFENDANTS' MOTION TO RECONSIDER, MODIFY AND/OR CLARIFY OPINION FILED AUGUST 24, 2012

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Petitioner/Plaintiff-Appellant Paulette Ka`anohiokalani Kaleikini ("**Appellant**" or "**Plaintiff**") opposes the motion for reconsideration filed by Respondents/Defendants-Appellees 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 (collectively "**City Defendants**").

This Court, in relevant part and in summary, held that the plain language of Hawai`i Administrative Rules (**HAR**) title 13 chapters 275 and 284 establish a sequential approach under which an archaeological inventory survey (**AIS**) must precede permit approval and project commencement. Because the sequential approach and the broad definition of "project area" bar phasing, the defendants failed to comply with HRS chapter 6E and its implementing rules.

In their motion for reconsideration, the City Defendants repackage the arguments they have already made and which this Court rightfully rejected. As such, the City Defendants fail to meet the test for reconsideration. To bolster their arguments, they present a distorted presentation of the facts. Furthermore, the plain language demonstrates that the Court's interpretation of "project area" is correct. The Court's construction of the plain language of the rules is consistent with the policies of the statute and does not produce an absurd or unjust result. There is no basis for deferring to the State Historic Preservation Division's (**SHPD**) interpretation of its rules in this case. It is telling that William J. Aila, Jr. in his official capacity as Chairperson of the Board of Land and Natural Resources and as state historic preservation officer and Puaalaokalani Aiu in her

official capacity as administrator of the SHPD have **not** requested reconsideration of this Court's August 24, 2012 opinion.

I. THE CITY DEFENDANTS PRESENT NO BASIS TO RECONSIDER THIS COURT'S WELL-REASONED OPINION.

"[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).

In their motion, the City Defendants argue that the definition of "project" allows the SHPD the authority to break a project into phases and that this Court must defer to SHPD's interpretation of HRS chapter 6E and its rules. The City Defendants had previously made these precise arguments – and to the extent the arguments are new, they could easily have been made earlier.

A. The Parties Have Discussed the Meaning of "Project" and "Project Area".

The City Defendants argue that this Court's interpretation of the word "project" and "project area" are erroneous. Not only are the City Defendants incorrect as will be discussed below, but the City Defendants had ample opportunity to argue this issue earlier. The meaning of the term "project" was specifically discussed by the parties before Judge Chang on March 15, 2011:

> THE COURT: And you know that Mr. Frankel made a very interesting argument and he tied the interpretation of the phrase "which may affect a burial site" to the definition, the statutory definition of the word "project." And I didn't hear you respond at all to that very interesting argument about the definition – statutory definition of "project." Would you address the statutory definition of "project" as it relates to the phrase "which may affect a burial site"?

JEFS #34 TRANS: 31. The Court kept pressing: "Where is the – the phasing concept embodied in the definition of the word project in Chapter 6E?" *Id.* at 33. Again the Court asked counsel for the City Defendants, "Other than your argument, do you have any authority that supports the analysis that they word 'project' in 6E-2 can be interpreted to mean each of the four phases of an extended project?" *Id.* at 34; *see also id.* at 48. Furthermore, the issue was specifically discussed in Plaintiff's Memorandum Regarding Illegal Segmentation Under HRS Chapter 6E and 343 filed on March 18, 2011, JEFS #50 RA: 17-18, as well as the Plaintiff's reply to the City Defendants' opposition to Plaintiff's motion for preliminary injunction filed on March 21, 2011. *Id*. at 70. Appellant discussed this specific issue on page 20 of her opening brief as well. JEFS # 68 OB:30. The City Defendants specifically addressed this issue on pages 21-22 of their answering brief (some of which are copied and pasted into their memorandum in support of the pending motion). JEFS #96 AB:31-2. The City Defendants' arguments for reconsideration are a rehash of their prior arguments.

B. The Parties Argued About Whether Deference Should be Afforded to SHPD's Interpretation.

Similarly, the level of deference that should be given to SHPD has been fully argued. Plaintiff pointed out why no deference should be given in the circuit court, JEFS #50 RA: 74-80, and here. JEFS #100 RB. In their answering brief, the City Defendants argued that deference should be given to SHPD's interpretation of its rules. JEFS #96 AB:22 and 31. Naturally, SHPD made the same arguments. JEFS #94 AB. The City Defendants' motion for reconsideration contains no new arguments.

II. THE CITY DEFENDANTS' RECITATION OF "FACTS" IS INACCURATE.

To support their motion, the City Defendants present an inaccurate version of facts that suggest that SHPD determined that, in order to best protect iwi, it had no choice but to phase the

AIS. The City Defendants' scenario is far from the truth.

First, the City Defendants, on page three of their memorandum, describe the rail project as simply an elevated guideway that only touches "ground in discrete areas at approximately every 100 to 150 feet by support columns." Their own record citation, JEFS #48 RA:214, disproves the point they attempt to make. In fact, the City Defendants have admitted that "[g]round disturbing work for the Honolulu High-Capacity Transit Corridor Project would include (a) ground work for the main support pillars; (b) groundwork related to the stations; and (c) redirection of underground infrastructure (electrical lines, water lines, sewage lines, etc.) affected by the rail project's construction." JEFS #50 RA: 111; *see also id*. at 138-9; JEFS #40 RA 112; JEFS #44 RA:61. The rail project involves more than a few "touch-down" points.

Second, on page four the City Defendants mischaracterize their own technical report. That report does **not** say that the chances of encountering a burial in Kaka`ako "would actually be much lower." It states:

> A High rating indicates a reasonable expectation of potential impacts along more than 50 percent of that subarea. A High rating does not mean that, based on background archaeological research, at least 50 percent of that sub-area will encounter archaeological deposits. Rather, this rating means that, based on archaeological research, there is a reasonable potential to encounter archaeological deposits over at least 50 percent of that sub-area. The actual percentage of the proposed sub-area where archaeological resources are encountered will undoubtedly be small.

JEFS #42 RA:254. Simply because the percentage of the area where the archaeological resources will be found will be small, that does not mean that the chance of finding burials is small – or even "much lower."

Third, the City Defendants argue on page four – without citation to any evidence in the record – that the programmatic agreement was designed to maximize protection of iwi by phasing or segmenting the AIS. There is no evidence that this was the reason a phased approach was taken.

Nor is there any evidence in the record that SHPD determined that a phased approach would maximize protection of burials. As will be discussed below, in fact, delaying the archaeological work places iwi at far greater risk.

Fourth, the City Defendants assert on page four that performing an AIS for phase four prior to decisionmaking "could have exposed burials outside" the rail project's footprint. This speculative statement was made in a City report; it was not an SHPD conclusion. Furthermore, the City Defendants' reasons for delaying preparation of an AIS for the whole project prior to decisionmaking are that the AIS would cost money, take time, and result in inconvenience. JEFS #40 RA: 263. Finally, preparation of the AIS for the entire project after both the federal record of decision was issued and design work was completed (and prior to the granting of the SMA permit and prior to construction) would not have exposed any more burials than the City's desired approach.

Fifth, the City Defendants mention that the programmatic agreement calls for relocation of columns but fail to mention that the programmatic agreement does not call for a completely different route or technology if necessary to avoid harm to burials.

Sixth, the City Defendants raise fears of an "urban conundrum" but ignore the evidence that this "conundrum" has not been problematic in Kaka`ako. JEFS #50 RA:151.

Seventh, the City Defendants suggest that an AIS can only be prepared in phases for linear transit projects. They ignore the evidence in the record. In fact, the miles and miles long Saddle Road Project included an AIS as a part of the final environmental impact statement (FEIS) (*i.e.*, before commencement of construction and before a record of decision was issued). JEFS #50 RA:151.

Eighth, the City Defendants claim that federal policy bars the City from engaging in final

design before the issuance of a record of decision after completion of an FEIS. Federal law, however, does **not** require the City to commence construction before completion of an AIS for the whole project. Federal law does **not** require issuance of the special management area permit before completion of an AIS for the whole project. Federal law does **not** require that federal money be used for the rail project. Federal law does **not** bar the City from using its own money for final design and engineering for the rail project. Federal law does **not** prohibit the City from engaging in design work before completing an AIS. Federal law does **not** prohibit the City from completing an AIS on the entire rail project to aid in its decision as to what route to choose, what technology to pick and whether to proceed with the project at all.[1]

Finally, the City Defendants, on pages seven and eight, misread and misinterpret language found on page 4-179 of the FEIS, from which the Court quotes on pages 8-9 and 79 of its opinion. The FEIS does **not** say that postponing completion of the AIS for phase four will result in less disturbance of archaeological sites – as the City Defendants would have this Court believe. Nor does the FEIS say that archaeological subsurface would be done for 100 percent of the alignment (whether done prior to construction of the whole rail project or prior to construction of phase four). In fact, the law does not require a 100 percent subsurface archaeological investigation of the entire

[1] Furthermore, in *N. Idaho Cmty. Action Network v. United States DOT*, 545 F.3d 1147, 1158-1159 (9th Cir. Idaho 2008) the Ninth Circuit held that archaeological work for all phases of a project are required **prior** to the issuance of a record of decision (or ROD) for the purposes of § 4(f) of the Department of Transportation Act – even though the National Historic Preservation Act would have allowed the archaeological work to be phased. If federal law requires archaeological work to be prepared prior to the issuance of the ROD for the purposes of 4f analysis, there is no reason that such a requirement cannot be imposed for the purposes of HRS chapter 6E analysis. *See also 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).

project area. HAR §§ 13-284-5(c)(2)(D) and 13-276-5(c)(3). The City Defendants take a sentence out of the FEIS out of context to create an inappropriate comparison and misleading impression. Furthermore, by emphasizing a "focused evaluation of touch-down points", the City Defendants completely ignore the impacts to burials from the construction of stations and redirection of underground infrastructure (electrical lines, water lines, sewage lines, etc.). JEFS #50 RA: 111; *see also id*. at 138-9; JEFS #40 RA 112; JEFS #44 RA:61.

In short, there is no evidence that issuing the SMA permit or commencing construction before completion of the AIS for the entire project was impossible. Nor is there any evidence that preparing the AIS before the issuance of the SMA permit and commencement of construction of the rail project jeopardizes burials.

III. THIS COURT REJECTED THE CITY'S ARGUMENTS FOR GOOD REASONS.

The City Defendants argue that SHPD has the discretion to break a project into phases and that this Court must defer to SHPD's interpretation of HRS chapter 6E and its rules. The Court's August 24, 2012 opinion specifically addresses the points raised by the City Defendants. In any case, Appellant addresses them again here. First, the Court's interpretation of "project area" is correct. Second, there is no basis for deferring to SHPD's interpretation of its rules in this case.

A. This Court Correctly Interpreted the Broad Definition of "Project Area."

This Court has recognized:

> The general principles of construction which apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of the City & County of Honolulu, 114 Hawai'i 184, 194, 159 P.3d 143, 153 (2007) (citations omitted). The City Defendants do not argue

that this Court has improperly read the plain language of the rules. Nor is the Court's construction of the plain language of the rules inconsistent with the policies of the statute or likely to produce an absurd or unjust result.

1. The plain language demonstrates that a "project" cannot be phased.

The plain language – and context – of the terms "project" and "project area" as well as the sequential nature of the historic review process demonstrate that an AIS for a project cannot be phased.

a. SHPD cannot re-define a "project."

A careful examination of the manner in which the word "project" is used in the context of HRS § 6E-42 reveals that SHPD cannot unilaterally redefine a project into segments. HRS § 6E-42(a) requires that before any agency **approves any project**, the agency shall give the department an opportunity to review and comment on the effect of the proposed project. The "project" is the one being approved (or denied) by the agency – not just a portion or a phase of the project being approved. Thus, SHPD cannot re-define the "project" that is any way different than the "project" as defined by the agency undergoing HRS§ 6E-42(a) historic preservation review. In this case, the City Defendants have admitted that "[a]ll four phases of the [rail project] are connected and part of **a single project**." JEFS #50 RA: 111 ¶ 3. The special management area permit was for one project. JEFS #48 RA:201. Moreover, both the City Defendants and William J. Aila, Jr. in his official capacity as Chairperson of the Board of Land and Natural Resources and as state historic preservation officer and Puaalaokalani Aiu in her official capacity as administrator of the State Historic Preservation Division stipulated that the rail project is one project. JEFS #50 RA: 10 at ¶B(1); JEFS #40 RA:103.

b. The term "project area" bars phasing.

Assuming *arguendo* that SHPD could define the project as merely phases of the project, the City Defendants gloss over the precise definition of the critical term "project area." As Appellant explained in her opening and reply briefs and as this Court discussed in its August 24, 2102 opinion, the term "project area" is the key definition. HAR § 13-284-2 defines "project area" to mean "the area the proposed project may potentially affect, either directly **or indirectly**. It includes not only the area where the proposed project will take place, but also the proposed project's area of **potential** effect." Even if SHPD had the discretion to define phase one as a project, the project area includes those areas "directly or indirectly" affected and those areas of potential effect. The area impacted by a later phase of a project must be studied not only because the entire project itself will directly affect it, but also because the area affected by the later phase is one that will be potentially affected by an earlier phase. In other words, the area of potential effect is **not** confined to areas within a particular phase. A phased approach would violate the requirement to identify historic sites in the project area. Finally, all the Defendants have stipulated that the area of potential effects for archaeological resources is defined as "all areas" of direct ground disturbance by the rail project. JEFS #50 RA: 11-12 ¶ 10(b).

c. <u>Because the historic preservation review process is sequential, an AIS for the entire project must precede decisionmaking.</u>

The City Defendants concede that the historic preservation review process is sequential (page 5 and footnote 5 of their memorandum in support). Yet, they continue to reveal a fundamental misunderstanding of how the historic preservation review process works. The sequential historic preservation review process is intended to assist the decisionmakers **prior to any permit approval** – including the special management area permit. HRS § 6E-42. The sequential process precedes approval of the project itself. In other words, an AIS not only informs SHPD, but it also informs the agency that is approving or commencing a project. If SHPD is to be

given an opportunity to review and comment on the effect of the proposed project on burial sites prior to approval, HRS § 6E-42(a), and if HAR chapter 13-284 defines how agencies meet this requirement, HAR § 13-284-1(a), and itemizes the review process that the SHPD shall follow, HAR § 13-284-1(b), then SHPD and the agencies must have the information from an AIS before rendering a decision. Historic preservation information needs to be conveyed to a decisionmaker on a project **prior** to any decision to approve the project. HRS § 6E-42. After an AIS is complete and the impact on burials is fully understood, the City Defendants may well decide to choose a different route, a different technology, or the no-build alternative. The historic preservation review process must be completed so that adequate information is provided to the decisionmaker.

The AIS includes a "consultation process" that involves "notifying interested organizations and individuals that a project could affect historic properties of interest to them; seeking their views on the identification, significance evaluations, and mitigation treatment of these properties; and considering the views in a good faith and appropriate manner during the review process." HAR §§ 13-276-2, 13-276-5(a), 13-275-2, 13-284-2. If consultation involves "considering the views in a **good faith** and appropriate manner during the review process," HAR §§ 13-276-2, 13-284-2, 13-275-2 (emphasis added), then decisionmaking must take place **after** such consultation has taken place. Providing comments on a later phase of the project **after** decisionmaking for the project is inconsistent with the plain language of the statute and the plain language and structure of the rules.

The City Defendants argue that final design and preliminary engineering are needed before the AIS can be done. Their premise gets to the heart of the City Defendants' misunderstanding of the law. The historic preservation review process is **not** a process of seeking to accommodate historic properties after fundamental decisions about a project have already been made. The

consideration of the preservation of historic sites is not just an after-thought. Rather, the issue of historic sites is central to decisionmaking regarding a project. The historic preservation review process must take place before fundamental decisions are made.

2. <u>The Court's construction of the rules is consistent with the policies of the statute.</u>

There is no dispute that the legislative intent in enacting HRS chapter 6E is articulated in HRS § 6E-1 and that a primary reason for the historic review process is to protect Native Hawaiian burials. HRS § 6E-1; Conf. Com Rep. No. 168, 1988 Senate Journal 650; 1990 Haw. Sess. Laws Act 306 §§ 1 and 12. Ensuring the completion of an AIS prior to decisionmaking and construction of the project is consistent with these policies.

Delaying information gathering until after a decision is made is inconsistent with "the public policy of this State to provide leadership in preserving, restoring and maintaining historic and cultural property." HRS § 6E-1. The government does not provide leadership in preserving and maintaining historic and cultural property by postponing investigation until after decisionmaking. A "comprehensive program of historic preservation" cannot preserve historic property by delaying efforts to identify and protect those sites until after decisions regarding the scope and location of a project are set in concrete. Similarly, the purpose of the rules is to "conserve" historic properties with the goal "to preserve, restore and maintain historic properties for future generations." HAR §13-284-1(a). This goal is turned on its head when historic sites are identified **after** decisions are made to approve the project. The legislature intended that the State treat historic property "in a spirit of stewardship and trusteeship." *Id.; see also* HRS § 6E-13(b) ("for the protection of an historic property or a burial site and the **public trust** therein") (emphasis added); 1990 Haw. Sess. Laws Act 306 ("The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a **sacred trust** for the

benefit of all[.]") (emphasis added). A trustee must act with "a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *In Re Water Use Permit Applications*, 94 Hawai`i 97, 143, 9 P.3d 409, 455 (2000). A trustee must take a "global, long-term perspective" and consider cumulative impacts. *Id.* Identifying historic properties that may be affected by a project **after** approval of the project is inconsistent with the principle of administering "historic and cultural property in a spirit of stewardship and trusteeship for future generations." HRS § 6E-1.

Courts across the country have concluded that segmentation, piecemealing or phasing undermine the reason and spirit of preservation and protection laws. In 1973, the Court of Appeals of Washington examined the recently enacted State Environmental Policy Act of 1971 and the Shoreline Management Act of 1971 and concluded that dividing up a project into segments would have a "frustrating effect . . . upon the vitality of these acts." *Merkel v. Port of Brownsville*, 509 P.2d 390, 395 (Was. App. 1973). In *Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Department*, 446 F.2d 1013, 1023 (5th Cir. 1971), the Fifth Circuit Court of Appeals ruled that a highway project could not be segmented. The Court recognized that "[t]he frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see." *Id.* Soon after the National Environmental Policy Act's was enacted and before the code of federal regulations explicitly barred segmentation, federal courts barred segmentation because segmentation would result "in the subversion of the announced Congressional policy." *Thompson v. Fugate*, 347 F. Supp 120, 124 (VA 1972). Similarly, focusing on the purpose and spirit of the Endangered Species Act, federal courts have barred the incremental-step evaluation of a project's impacts on endangered species. *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1142

(S.D. Cal. 2006). These decisions demonstrate that it is piecemealing that undermines the vitality of the law, that piecemealing is inconsistent with the reason and spirit of the law, and that this Court's approach is consistent with the policies of HRS chapter 6E.

Delaying completion of the AIS by phasing or other means prevents the AIS from functioning practically. *Cf. Citizens for the Protection of the North Kohala Coastline v. County of Hawai`i*, 91 Hawai`i 94, 105, 979 P.2d 1120, 1131 (1999) (holding that environmental review must occur early enough to function practically as an input into the decision making process); *Ka Pa`akai O Ka `Āina v. Land Use Comm'n*, 94 Hawai`i 31, 52 7 P.3d. 1068, 1089 (2000) ("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."). An AIS prepared after some options are closed and agency commitments are set in concrete reduces its functionality, impairing the ability of decisionmakers to protect burial sites.

3. The Court's construction of the rules does not lead to an absurd or unjust result.

Nor would the Court's construction lead to an absurd or unjust result. In *Leslie v. Board of Appeals*, 109 Hawai`i 384, 393-94, 126 P.3d 1071, 1080-81, a government agency also argued that the literal application of the statute requiring that information be provided prior to decisionmaking would lead to an absurd and unjust result. The county argued that obtaining information prior to decisionmaking would be "an unnecessary waste of effort." *Id.* at 394, 126 P.3d at 1081. The Court in that case used a different standard (for determining whether the term "shall" was mandatory) than is applicable here but specifically considered whether strict compliance with the law would lead to an absurd or unjust result. After examining the record, the Court held that it was

not absurd or unjust to require that information be provided prior to decisionmaking – even if it involved an unnecessary waste of effort and expense. *Id.* at 395, 126 P.3d at 1082.

Nothing in the record here reveals that preparing an AIS before decisionmaking would lead to an absurd or unjust result.[2] The City Defendants suggest that SHPD determined that a phased approach would lead to less disturbance of iwi, but the evidence belies their claim. For their claim to be true, there would need to evidence in the record that:

(a) SHPD made a determination regarding the impact to iwi;

(b) the only, or greatest, threat to burials is from columns and not from the relocation of electrical lines, water lines, sewage lines;

(c) the City did not know the location of columns before issuance of the SMA permit and before construction commenced;

(d) final design work could only be done after the SMA work was issued and construction commenced;

(e) federal law required the City to commence construction before completion of an AIS for the whole project.

(f) the City could not have known the location of the columns before the record of decision was issued or before the SMA permit was issued;

(g) delaying preparation of the AIS until after decisionmaking on the SMA permit provides greater protection of burials;

(h) delaying preparation of the AIS until after commencement of construction provides greater protection of burials;

[2] On page 17 of their memorandum, the City Defendants make reference to a declaration of Thomas Willoughby without a JEFS citation. Appellant has never heard of or seen this declaration, cannot find one attached to the City's March 6, 2012 filing, and cannot find it anywhere in the record.

(i) it was impossible for the City to refrain from obtaining an SMA permit until after an AIS for the entire project had been completed; and

(j) it was impossible for the City to refrain from commencing construction until after an AIS for the entire project had been completed.

Each of these statements would have to be established in the record and be true. The City Defendants argument is simply unsupported.

On pages 14 and 17 of their memorandum, the City Defendants assert – without any evidence – that SHPD decided on a phased approach in order to avoid "unnecessarily disturbing iwi kupuna." There is no evidence that SHPD determined that the AIS should be delayed **in order to avoid disturbing iwi kupuna**. Nor is there any evidence that delaying the AIS in phase four until after construction of phase one and after granting the SMA permit would prevent unnecessary disturbance of iwi kupuna.

In fact, the record demonstrates that when burials are not identified in an AIS prior to decisionmaking, they are vulnerable to disinterment. JEFS #44 RA: 60-63, JEFS #50 RA: 151-52; JEFS #42 RA: 60 and 44-47 ¶ 8, 10, 37. As Plaintiff's expert pointed out:

> 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. *See also* JEFS #44 RA:60-63.

The City Defendants argue in footnote 16 that delaying the AIS provided additional protections but fail to cite anything in the record that supports such an outlandish claim. The City

Defendants fail to acknowledge that they could have either:

(1) prepared the AIS concurrently with the FEIS, prior to decisionmaking on the SMA permit; or

(2) prepared the AIS after completion of the FEIS (given this Court's ruling) and after the federal record of decision and after the preliminary engineering work – but still prior to decisionmaking on the SMA permit.

Although the City Defendants claim that the first scenario would lead to unjust and absurd results, they do not argue that the second scenario is absurd. Given this Court's decision in *Leslie* and the lack of any evidence in the record to support the City Defendants' claims, there is no basis to claim that this Court's opinion is absurd or unjust.

Past practice has conclusively demonstrated that it is absurd and unjust to delay preparation of an AIS until after decisionmaking. The failure to prepare an AIS early in the process has led to massive disinterments of burials – particularly in Kaka`ako. JEFS #50 RA: 151-52. *See also* JEFS #44 RA:60-63. The Court's correct interpretation of the plain language of the rules does not impair SHPD's authority to protect iwi; rather, it enhances SHPD's ability to protect iwi and other historic sites.

B. No Deference to SHPD's Interpretation is Warranted.

When an agency's interpretation is contrary to the unambiguous language, no deference to the agency's reading is warranted. *Leslie*, 109 Hawai`i at 396, 126 P.3d 1083; *see also In re Wai`ola o Moloka`i, Inc.*, 103 Hawai`i 401, 425, 83 P.3d 664, 668 (2004). As this Court has noted:

> [I]n construing an administrative rule, general rules of statutory construction are applicable. *Mahiai v. Suwa*, 69 Haw. 349, . . . 358, 742 P.2d 359, 366 (1987). When a rule does not conflict with statutory and constitutional requirements, courts will ascertain and effectuate the intent of the agency which promulgated the rule. *Life of the Land, Inc. v. West Beach Dev. Corp*., 63 Haw. 529, 531, 631 P.2d 588, 590 (1981); *Mahiai*, 69 Haw. at 358, 742 P.2d at 366. "Courts strive to give meaning to all parts of an administrative rule and to

> avoid construing any part as superfluous." *Int'l Bhd. of Elec. Workers[, Local 1357] v. Hawaiian Tel. Co.*, 68 Haw. 316, 325, 713 P.2d 943, 951 (1986) *Bd. of Elec. Workers[, Local 1357] v. Hawaiian Tel. Co*., 68 Haw. 316, 325, 713 P.2d 943, 951 (1986). Courts will not construe rules in a manner which produces an absurd result. *Mahia*i, 69 Haw. at 358, 742 P.2d at 367.

Paul v. DOT, 115 Hawai`i 416, 426-427, 168 P.3d 546, 556-557 (2007).

Ignoring these standards, the City Defendants argue that the Court should simply defer to SHPD's interpretation of its rules. Doing so would – as discussed above – violate the plain language of the rules (specifically the definition of "project area"), run contrary to the legislative intent of HRS chapter 6E, and lead to absurd results. In addition, deference is not warranted here because it would overlook the interpretation of a sister agency, the O`ahu Island Burial Council (OIBC) and because heightened scrutiny is warranted when trust resources are implicated.

1. <u>OIBC's interpretation differs from SHPD's.</u>

The OIBC is statutorily charged with assisting SHPD "in the inventory and identification of native Hawaiian burial sites." HRS § 43.5(f)(2). This assistance is provided through the consultation process undertaken during an AIS. HAR § 13-276-5(a) and (g). "If identified unmarked burial sites are present, the relevant island burial council of the department must approve the proposed mitigation commitments" for "native Hawaiian burials, following chapter 6E-43, HRS, and section 13-300-33." HAR §§ 13-284-8(d), 13-275-8(d). The OIBC can also "make recommendations . . . on any . . . matters relating to native Hawaiian burial sites." HRS § 43.5(f)(3). Rules for the burial council adopted by Department of Land and Natural Resources (**DLNR**) provide that the "council shall be authorized to take any other appropriate actions in furtherance of this chapter." HAR § 13-300-24(h).

On October 14, 2009, the OIBC voted unanimously to point out to the City and the FTA that an AIS needed to be completed before acceptance of the final EIS and to outline its

objections to the programmatic agreement for the rail project. JEFS #50 RA: 236 and 241. On October 27, 2009, the OIBC presented testimony to the Honolulu City Council, which included correspondence to the FTA that highlighted the importance of early identification of iwi through an inventory survey prior to decisionmaking. *Id.* at 257-272. On April 14, 2010, the OIBC unanimously adopted a resolution in which it took the position that HRS title 13 chapters 6E-8 and 6E-42 preclude a phased approach to AISs. *Id.* at 252. Undue deference to SHPD is inappropriate where the OIBC, which has a statutory role to play in identifying, inventorying, and preserving burial sites, disagrees with SHPD's approach to the identification and protection of burial sites.

2. <u>Heightened scrutiny is needed when considering burial issues.</u>

Where trust resources are involved, Hawai`i courts take a "close look" to ensure compliance with public trust principles and "will not act merely as a rubber stamp for agency or legislative action." *Waiāhole*, 94 Hawai`i at 144, 9 P.3d at 456; *see also Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982).

Hawaiian burial sites and remains are part of the public trust. The Legislature has declared that

> it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and **trusteeship** for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property."

HRS § 6E-1 (emphasis added). HRS § 6E-13(b) states in relevant part:

> Any person may maintain an action in the trial court . . . for restraining orders or injunctive relief . . . upon a showing of irreparable injury, for the protection of an historic property or a burial site and the **public trust therein** from unauthorized or improper demolition, alteration or transfer of the property or burial site.

(Emphasis added). In amending HRS Chapter 6E to provide further protection of burials, the legislature observed: "The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of **a sacred trust** for the benefit of all[.]" 1990 Haw. Sess. Laws Act 306 (emphasis added). As the DLNR proclaims in its very own rules, "burials are held in **trust** for their descendants. Treatment of burials must meet this **trust** with the utmost sensitivity." HAR § 13-283-1(a) (emphases added). DLNR declares that its mission is to "enhance, protect, conserve and manage Hawaii's unique and limited natural, **cultural and historic resources held in public trust**[.]" JEFS #50 RA: 229 (emphasis added).

The State Legislature's conclusions are supported in other jurisdictions. A Texas appeals court held:

> No particular instrument or ceremony is required to dedicate a tract of land to cemetery purposes. Actual use of land for burial purposes is a sufficient dedication. Property once dedicated to cemetery purposes and in use as a burial ground for the dead may not be sold either voluntarily or through judicial proceedings in such a manner as to interfere with the uses and purposes to which it has been dedicated and devoted. When once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust.

Davis v. May, 135 S.W.3d 747, 749-750 (Tex. App. 2003) (citations omitted). Similarly, the Tennessee Supreme Court observed:

> When once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust. The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.

Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911).

Because burials are trust resources, this Court must take a "close look" at SHPD's determination and not simply rubber stamp its action. Furthermore, the court "must ensure that the agency has taken a 'hard look' at environmental factors." *Sierra Club v. DOT*, 115 Hawai`i

299, 342, 167 P.3d 292, 335 (2007). The "environment" includes objects of historic significance. HAR §§ 11-200-2 (definition of "environment"); *see also* HAR § 11-200-12(B)(1).

IV. Conclusion

The City Defendants re-hash the argument that they have already made and repackage them in ways that they could have made when they filed their answering brief. Requiring an AIS before the issuance of the SMA permit and the start of construction does **not** place burials at greater risk. There is no need to deviate from the plain language of HRS chapter 6E and its rules. SHPD seems to agree, as it did not file a motion for reconsideration.

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

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