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C. GANZALIRA, CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

WALTER JOHN KELLY, et al.,

Plaintiffs,

vs.

1250 OCEANSIDE PARTNERS, a Hawaii
limited partnership, et al.,
Defendants.

) CIVIL NO. 00-1-0192K
) (Other Civil Action)
)
) FINDINGS OF FACT; CONCLUSIONS OF
) LAW; AND ORDER AS TO COUNT V
) REGARDING PARAGRAPHS 138(b),
) 139(a) and 139(b) and COUNT VI (BURIAL
) SITES)
)
) JUDGE: Hon. Ronald Ibarra
)
) Trial Dates: September 3, 4, 5, 10, 11, 2002

FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER

A non-jury trial on claims by Plaintiff Protect Keopuka Ohana ("PKO") in its Fifth Amended Complaint filed November 8, 2001, in Counts VI (Haw. Rev. Stat. Chapter 6-E) and VII (grave desecration against Defendant 1250 Oceanside Partners ("Oceanside") was held before the Honorable Ronald Ibarra, Judge of the above-entitled Court, on September 3, September 4, September 5, September 10, and September 11, 2002. Plaintiff Protect Keopuka Ohana ("PKO") was represented by Native Hawaiian Legal Corporation, by Alan Murakami, Esq.; Plaintiffs Walter John Kelly, Charles Ross Flaherty, Jr., Patrick M. Cunningham and Michele Constans Wilkins were represented by Robert D.S. Kim, Esq.; Defendant 1250

I hereby certify that this is a full, true and correct copy of the original on file in this office.

Clerk, Third Circuit Court, State of Hawaii

Oceanside Partners ("Oceanside") was represented by Carlsmith Ball, LLP, by Robert D. Triantos, Esq., Brooks Tom Porter & Quitiquit, LLP by S.V. (Bud) Quitiquit, Esq., and John L. Olson, Esq.; Michael S. Kagami, Esq., attorney for Defendants, County of Hawaii, Christopher Yuen and Dennis Lee, Dawn S. Shigezawa, Esq., attorney for Defendant State of Hawaii, Department of Land and Natural Resources ("DLNR"), and Laurence K. Lau, Esq., attorney for Defendants State of Hawaii, Department of Health and Bruce Anderson.

The Court, has considered Plaintiff Protect Keopuka Ohana's Proposed Findings of Fact, Conclusions of Law and Order (Burials Trial) filed September 30, 2002, Defendant 1250 Oceanside Partner's Proposed Findings of Fact and Conclusions of Law and Order filed September 30, 2002, County of Hawaii's Findings of Fact and Conclusions of Law Regarding the Trial on Counts II and V filed September 30, 2002, Defendants Department of Health, Bruce Anderson and State of Hawaii's Proposed Trial Findings of Fact, Conclusions of Law, and Order filed September 30, 2002; Plaintiff Protect Keopuka Ohana's Memorandum Re: Constitutional Protection for Exercise of Burial Customs filed September 30, 2002; Defendant 1250 Oceanside Partners' Memorandum of Law Regarding Native Hawaiian Burial Practices filed September 30, 2002; Post-Trial Memorandum of Defendants Department of Health, Bruce Anderson and State of Hawaii on the Hawaii Constitution and Native Hawaiian Burials filed September 30, 2002; and Defendants Christopher Yuen in his official capacity as the Planning Director for the County of Hawaii, Dennis Lee, in his official capacity as the Chief Engineer, County of Hawaii, and County of Hawaii's Memorandum Re: Constitutional Protection of Burial Sites and Burial Practices filed September 30, 2002.

The Court having judged the credibility of witnesses; having reviewed the evidence and

all reasonable inferences finds and concludes as follows:

FINDINGS OF FACT

If it should later be determined that any of these findings of fact should be properly deemed conclusions of law, they shall be deemed as such.

1. On October 30, 2000, Kelly Plaintiffs filed a complaint for injunctive and other relief. The complaint was filed against defendants 1250 Oceanside Partners (Oceanside), Department of Health (DOH), and the County of Hawaii ("County") primarily alleging water pollution claims. On November 14, 2000, Kelly plaintiffs filed a first amended complaint for injunctive relief and other relief and a demand for jury trial. The amended complaint added plaintiff PROTECT KEOPUKA 'OHANA ("PKO") as a Plaintiff. Subsequently Plaintiffs were allowed to amend their complaint 4 additional times. The Fifth Amended Complaint ("Complaint") was filed on November 8, 2001.

2. The only claims remaining against Oceanside in this phase of the trial are contained in Counts VI and VII of the Complaint.

3. Upon motion by Oceanside pursuant to HRCP Rule 52(c) at the close of PKO's case in chief, the Court dismissed the claims in Count VII; therefore, only remaining claims and issues against Oceanside are contained in Count VI of the Complaint. The claims stated in Count VI relate to alleged violations of HRS Chapter 6E. Count VI is being addressed in this order.

4. The claims in Count V against Defendants Dennis Lee, County of Hawaii, DOH, Anderson, DLNR, Agaran, and Wabilani in paragraphs 138(b), 139(a) and 139(b) are being addressed in this order.

5. The Findings of Fact and Conclusions of Law; Orders filed on October 9, 2002, and

filed on October 21, 2002, are incorporated herein. It was agreed by all parties that the evidence introduced in each prior phase of trial may be considered in each succeeding phase.

A. Parties

6. DLNR/SHPD is a state agency.

7. PKO is a Hawaii non-profit corporation. PKO's president and director, Jim Medeiros, Sr. is a lineal and cultural descendant of the Hokuli'a property. Jim Medeiros, Sr. worships his descendant's burial site. Wayne Leslie, PKO sergeant at arms is a lineal and cultural descendant of the Hokuli'a property.

8. Kala'au Wahilani is an employee of the Burial Sites Program, State Historic Preservation Division with the Department of Land and Natural Resources, State of Hawaii. Wahilani is sued in his individual and official capacity. Wahilani was the Burial sites specialist assigned to the Hokuli'a project prior to January, 2001. Since 2001 he has not worked as a Burial site's specialist on the Hokuli'a project.

9. Defendant Bruce Anderson is sued in his official capacity.

10. Defendants Christopher Yuen and Dennis Lee are sued in their official capacities.

11. Defendant Gilbert Agaran is sued in his official capacity.

12. The Hokuli'a project is being developed by Oceanside, a Hawaii limited partnership, on approximately 1,550 acres identified in the Development Agreement between Oceanside and the County as TMK Nos. (3)7-9-012:03, 7-9-012:04, 7-9-012:11, and 8-1-004:003 (por.) which extends mauka from the ocean almost to Mamalahoa Highway and straddles the boundaries of North and South Kona. The project when "built out" is a billion-dollar project and is proceeding

in phases of more than ten years.

B. Background

13. Historically, Hawaiians have traditionally used the 1,550 acres comprising the Hokuli'a property in burying and caring for the iwi of their dead. (Wayne Leslie Test., Jim Medeiros, Sr. Test., Dr. Davianna McGregor Test., Dr. Ross Cordy Test. and Dr. Michael Graves Test.)

14. This is one of the largest projects SHPD has ever been involved. SHPD and other state agencies lack the "manpower" and resources to adequately supervise the project.

15. The presence of numerous burials, some of which included multiple bodies, and heiaus indicate that residents within the various ahupua'a of Hokuli'a utilized the mauka and makai lava tubes, caves, and subsurface area on these lands for burying their dead and worshipping the iwi of their ancestors in the tradition of ancient Hawaiians. (Kepa Maly and Ross Cordy Test.; DO 65; DO 87).

16. The lands of the Hokuli'a project served as the residences for a population estimated to be 2,000 to 3,000 which is based upon the number of kuleana claims and awards involving these lands. (*Id.*; Robert Spear Test; DO 605; Kepa Maly Test.)

17. Pu'u Ohau is a significant spiritual and cultural feature on the property that has served as a traditional resting place for numerous Hawaiians buried on its slopes. (*Id.*; Ross Cordy Test.)

C. Archaeological Inventory Survey (AIS) Approval Process

18. The County of Hawaii ("County") required Oceanside to conduct an archaeological

inventory survey ("AIS") as a condition of County land use approvals.

19. On behalf of Oceanside, Cultural Surveys Hawaii ("CSH") conducted an AIS of the Hokuli'a property and reported its findings to the State Department of Land and Natural Resources/Historic Preservation Division ("DLNR/SHPD") for its review and approval in 1994. (Robert Stuit and Ross Cordy Test.; DO-63; DO-37; DO-36.)

20. During the review stage in 1995 and 1996, the DLNR/SHPD informed Oceanside about (a) the desirability to inform the Hawaii Island Burial Council ("HIBC") of Oceanside's plans to submit a burial treatment plan ("BTP") early in the process of obtaining approvals for its project, and (b) the need to obtain approval of its BTP by a vote of the HIBC prior to beginning construction. (Ross Cordy Test.; DO-27; DO-57).

21. The DLNR/SHPD approved the AIS after 4 drafts and 2-3 days of field checks to sample the accuracy of the survey over 1540 acres. (Ross Cordy and Michael Graves Test.) DLNR/SHPD has spent more time on this project than on any other project. The oversight nevertheless is inadequate given the size of this project and the numerous historic properties.

22. The purpose of an AIS is to: (a) identify all historic sites on a development project; (b) interpret the nature of these sites; (c) assess the significance of these sites; and (d) provide mitigation measures for these sites. (*Id.*; Robert Spear and Ross Cordy Test.)

23. The original AIS identified 408 historic sites, including 31 burial sites in the development area mauka of the Shoreline Park, all of which were deemed significant. (*Id.*, DO 63; DO 36, DO 37).

24. During the cultural monitoring phase of the project, Scientific Consulting Services ("SCS") hired by Oceanside realized it was encountering numerous sites not previously

inventoried, so it began to conduct a series of archaeological "sweeps" to identify sites missed in the original AIS. (Ross Cordy and Robert Spear Test.)

25. There is no difference between the function of an AIS and that of a "sweep." (Lei Benson, Ross Cordy and Robert Spear Test.) Aside from the additional costs a "sweep" could have been performed at the time the AIS was being prepared.

26. All sweeps were conducted after design of the project was completed and construction had begun. (Robert Stuit and Robert Spear Test.)

27. After construction began, the sweeps identified either 200 or 100-150 new multi-featured sites. (Compare Robert Stuit and Robert Spear Test.)

28. SCS has conducted sweeps in five areas that comprise the project. The DLNR/SHPD has reviewed and approved reports on two of those five areas. (*Id.*)

29. According to Oceanside records, as of October 10, 2001, the "sweeps," SCS' data recovery work, and construction activity also accounted for an additional 40 inadvertently discovered burial sites containing the skeletal remains of at least 73 individuals in the development area mauka of the Shoreline Park. Pursuant to statute, burial sites discovered during the "sweeps" are treated differently than those identified in the AIS. (Robert Stuit Test.; DO 368).

D. Interim Preservation Plan (IPP)

30. Ross Cordy is the head of the Archaeology Branch, one of several administrative branches within the SHPD. He authored the proposed Rules "Protecting our Past: The Historic Preservation Development Review Process." These proposed rules followed since 1987, have not been formally adopted. (Ross Cordy Test.)

31. The Burial Sites Program ("BSP") is under the SHPD's Culture and History Branch. (*Id.*)
32. In late 1998, the Archaeology Branch reviewed a proposed grubbing permit for the Hokuli'a golf course without informing the BSP. This notification is required by statute because the AIS contained previously identified burial sites on the project property. (*Id.*; PKO 13 at pp. 14-15).
33. After the SHPD approved an interim preservation plan of Oceanside in December 1998, it authorized Marc Smith of its Hilo office to sign off on the grubbing permit for the golf course. (Ross Cordy and Marc Smith Test.; PKO 427A.
34. Knowing what Marc Smith knows now about the failure to notify the BSP, Smith would not have signed off on the grubbing permit. (*Id.*)
35. The SHPD has never before allowed its representative to sign off on the grubbing permit before BSP was informed or before the HIBC could properly consider a burial treatment plan. (Ross Cordy and Kai Markel Test.)
36. Prior to the issuance of the grubbing permit for the golf course, Oceanside had not submitted a burial treatment plan to the DLNR/BSP or informed its staff that the Hokuli'a project contained burials, and had not yet published notice to potential lineal/cultural descendants to the Hokuli'a site. (Robert Stuit and Ross Cordy Test.)
37. Dr. Don Hibbard, head of the SHPD, authorized the approval of the grubbing permit for the subdivision and the grading permits for the golf course before the HIBC could develop all of its recommendations for burial treatment and approve the BTP. (Marc Smith Test.; Compare PKO 427B, 427C and 427D with PKO 13, 34, and 35.

38. On April 3, 2000, Dr. Hibbard also approved the grading permit for all of the subdivision lots without giving prior notice of this action to either the BSP or the public. (Kai Markell and Marc Smith Test.; PKO 427D.)

E. Failure to Cease All Activity After Burial Discovery

39. After the discovery of Site 21818 and Site 21833, Oceanside failed to obtain authority from the DLNR/SHSPD prior to removing burial remains from these sites. (Kala'au Wabilani and Robert Spear Test.)

40. After the discovery of Site 21821, an Oceanside employee continued to trench past the location of the burial site around a tree that he was excavating. (Kalaau Wabilani Test.)

41. At site 21821, backhoe excavation of a tree being removed caused the removal of a femur from the burial site 30 minutes before construction activity stopped. (Mandy Toyomura Test.; PKO 415)

42. On the day of discovery, observers noted that someone had removed and replaced a femur at site 21821 in a position that was the reverse of its natural position in a human skeleton without reporting the replacement to SHPD. (Curtis Tyler, Kala'au Wabilani and Marc Smith Test.)

43. SCS proceeded with the sifting of burial remains from soil removed from the site before receiving any authority to do so from the DLNR/SHPD. (Kala'au Wabilani and Curtis Tyler Test.)

44. By September 21, 2001, the buffer walls of burial sites 10292 and 21764 were less than the required 20 feet from the outer perimeter of these burials. (Jim Medeiros, Sr., Curtis Tyler and Michael Graves Test.; PKO 511, PKO 512 and PKO 513.)

45. At sites 21816 and 21834, there is evidence of work being done in violation of the 70-foot construction buffer before erection of the 20-foot permanent buffer. (PKO 514, PKO 515, and PKO 516).

46. Burial site 21834 was discovered on September 1, 2000; burial site 21821 was discovered on June 8, 2000; burial site 21833 was discovered on August 31, 2000, and burial sites 10286 and 16478 were previously identified burial sites. Protective buffer fences were not erected for each of these sites until January 18, 2001, and only because of a scheduled site visit by descendants the next day. (Randy Ogg Test.; PKO 475, pp. 13-14; DO 368; PKO 415).

47. SHPD failed to cite or fine Oceanside for these violations. (Kai Markell Test.)

F. Penetration of Lava Tubes Containing Burials

48. On November 18, 1999, the HIBC (1) voted to treat the entire length of lava tubes containing human skeletal remains as burial sites, (2) recommended the imposition of 20 foot permanent and 70 foot temporary construction buffers for all burial lava tubes, and (3) recommended that no activity other than re-vegetation of native plants could occur within the 20-foot buffer. (PKO 35)

49. Oceanside accepted this recommendation and agreed to abide by it in its March 2000 BTP.

50. In November 2000, Oceanside employees punctured the top of the lava tube containing human burials at site 16478 and unilaterally filled it in with soil and rocks. (Robert Stuit, Kai Markel Test.; PKO 385, pp. 39 and 41; PKO 389, pp. 33, 34, 36, and 37).

51. On February 28, 2001, Oceanside employees punctured the top of the lava tube containing human burials at site 10293. (PKO 411, p. 21).

52. In both instances, the failure to map the tubes accurately caused the damage to these burial sites and the remains therein. (Robert Stuit and Kai Markell Test.)

53. Site 10293, a burial cave was punctured by construction within 33 feet of the burial. The portion of the ceiling that collapsed fell onto burial remains not previously identified within the cave. (Randy Ogg Test.; PKO 214).

54. The DLNR/SHPD failed to cite or fine Oceanside for the violation of the buffer protecting site 16478 and is still investigating that incident. (Kai Markell Test.)

G. Failure to Follow Procedures for Protecting, Respecting and Removing Burials

55. Burial remains were removed from sites 21818, 21821, 21822, 21834, 21833. SHPD, Oceanside and SCS did not establish that there was imminent harm to these burials which warranted the removal of burial remains. Descendants were not allowed the opportunity to conduct cultural ceremonies during the removal of remains. (Robert Spear, Robert Stuit, Kala'au Wahilani, Jim Medeiros, Sr., and Violet Mamac Test.)

56. SCS did not follow explicit DLNR/SHPD investigative policy when teeth were recovered in data recovery excavations. DLNR/SHPD policy requires investigation when teeth are recovered and procedural protections implemented prior to determination of origins. (PKO 699; Robert Spear Test.)

57. Several instances of late reporting of inadvertently discovered human remains by SCS occurred and were documented in SCS field archaeologist field books. (Randy Ogg Test.; PKO 86, PKO 87 PKO 407 and PKO 408).

58. On at least one occasion, bone fragments found on the project site were thrown away

when they could not be positively identified. (Mandy Toyomura, Tomasi Patolo Test.; PKO 414, p. 36).

59. The Project Director Tomasi Patolo was unaware of the unprofessional work of SCS archaeologist Dr. Kyle Latinas because he had not seen or reviewed any of Dr. Latinas' prior work. (Tomasi Patolo Test.; PKO 216, PKO 217, PKO 218, PKO 219, PKO 220, PKO 221, and PKO 222.)

60. Despite testimony that SCS never transported human remains to its Honolulu office, bones later identified to be human remains were found in bags transported to Honolulu by SCS beginning in December 1999; these remains were not tested until the BSP became involved after this lawsuit was filed. (Tomasi Patolo, Robert Spear, Dr. Michael Pietrusewsky and Kai Markell Test.; PKO 253; and PKO 693).

61. On or about January 7, 2002, a significant portion of the skeletal remains of a single human infant, wrongly identified as pig remains, were disinterred, placed in a brown paper bag inside a larger plastic zip lock bag and transported to Honolulu. These were not tested until the BSP became involved after this lawsuit was filed. (Dr. Michael Pietrusewsky and Kai Markell Test.)

H. Penetrations at Pu'u Ohau

62. On November 18, 1999, the HIBC voted to protect all of Pu'u Ohau as one burial site and to require Oceanside to build a 6 foot high wall around the base of the pu'u. (PKO 35 at p. 10).

63. By letter dated February 17, 2000, SHPD informed Oceanside of this recommendation. (DO 164).

64. Oceanside apparently realizing that some of its planned home sites and a portion of the golf course encroached onto the pu'u, objected to the recommendation, but nevertheless made the protective measure a part of its own BTP, which provided for implementing all protective measures "as soon as possible." (PKO 475, at p. 23).

65. Oceanside has not built the wall over the past 2 ½ years; Oceanside built a portion of the 2nd fairway and sand traps and other improvements on the pu'u slope . (PKO 376; PKO 15A; Jim Medeiros, Sr., Curtis Tyler and Robert Stuit Test.)

66. Oceanside contends that the base of Pu'u Ohau roughly follows the 120 foot elevation conservation district boundary line and the shoreline park boundary, rather than at the 30 foot elevation of pu'u, which follows much of the southern boundary of the 2nd fairway. (Robert Stuit Test.; DO 605)

67. Oceanside has designated 4 to 5 lots for subdivision approval on the northern slope of Pu'u Ohau above its base but below the Conservation District Boundary, which it intends to sell. (Robert Stuit Test.; DO 605).

68. There are numerous platforms and terraces on a plateau on the northern slope of Pu'u Ohau which SCS did not identify as possible burials and Oceanside continues to treat as non-burials and will be conducting testing on these sites. (Robert Spear, Ross Cordy and Kai Markell Test.)

69. These sites were once marked in the field with archaeological flagging tape, but never placed on an archaeological site map, nor identified in any reports prior to trial. (Marc Smith and Kai Markell Test.)

70. The BSP staff believes these sites may contain burials, but they are not protected by

any buffers and have been altered in the past by clearing activity. (*Id.*)

71. Because Oceanside contests the location of the wall on the physical base of the pu'u to protect the pu'u, the SHPD Chairperson has issued a cease and desist order to stop work on the pu'u until the issue of the location of the base is resolved. (PKO 343; Curtis Tyler Test.)

72. DLNR has not yet made a decision on the wall.

I. Conduct Between DLNR, County and 1250 Oceanside Partners

73. A pattern of conduct has emerged between Oceanside and DLNR/SHPD, which allowed for: (a) the failure to identify more burial sites and historic sites during the AIS preparation despite the purposes for an AIS and the use of archaeological "sweeps" to justify the prior failure to locate previously identified burial sites in the AIS¹; (b) the unjustified compromise of professional archaeological and regulatory standards in favor of allowing construction work to proceed before the accumulation of the data contemplated by the law and before burials could be timely protected by the HIBC; (c) the failure to require timely identification of and notice to descendants so that the more timely procedure for protecting previously identified burials could be implemented; (d) the unauthorized substitution of an interim preservation plan without BSP input and review for compliance with proper procedure, despite prior explicit advice to Oceanside of that procedure; (e) the continuation of behavior without involuntary sanctions being imposed by the DLNR/SHPD for violations of protective measures, (f) financial influence and improper socializing with SHPD regulator Kala'au

¹Pursuant to Chapter 6E Haw. Rev. Stat. previously identified burial sites fall within the jurisdiction of HIBC and any action to relocate requires a public hearing. Burial sites inadvertently discovered (not on the AIS) falls under the jurisdiction of DLNR and decisions to relocate are made without public hearings.

Wahilani and his girlfriend,² and (g) the continued inaction by DLNR/SHPD except upon notice or complaint given by descendants.

74. Despite the sloping terrain that characterizes much of the Hokuli'a property, the County Department of Public Works issued mass grubbing and grading permits to Oceanside that provided Oceanside with the unlimited ability to grub and grade the Hokuli'a site to build its project. (PKO 427A, PKO 427B, PKO 427C and PKO 427D).

75. The magnitude of this grubbing and grading, involving massive pieces of construction equipment and hundreds of acres of land simultaneously, stunned BSP staff; the County does not have sufficient manpower to adequately monitor this project.

76. The County of Hawaii and Oceanside entered into a development agreement that simultaneously obligates: (a) Oceanside to build the Mamalahoa Bypass Highway between Keauhou and Napo'opo'o Junction on Mamalahoa Highway and (b) the County to refrain from impeding Oceanside from developing its Hokuli'a project. (Development Agreement; PKO 428)

77. Under the Development Agreement the County is obligated to "not impede Oceanside in carrying out the transactions contemplated. . . [for the bypass highway] and in obtaining all required approvals, authorizations and clearances." (PKO 428 at p. 22). It also requires the county "to process in a timely manner, any and all construction, permit or other applications related to" its project, the bypass highway or the shoreline park. (*Id.* at p. 23).

² Oceanside 1250 Partners' former President gave Wahilani a \$1,000 check from Oceanside for Wahilani's church at which he is a pastor; 1250 Oceanside Partners sponsored Wahilani's girlfriend's canoe club; Wahilani drank beer with 1250 Oceanside Partners' Vice President on site; Wahilani has stated that he worked for the developer (Jim Medeiros, Robert Stuit and Kala'au Wahilani Test.) Although Wahilani has been reassigned after a hearing on this lawsuit, DLNR/SHPD still has not been proactive in overseeing that the constitution and laws are being followed on this project.

78. This agreement, which binds Oceanside to build the Mamalahoa Bypass Highway stretching from Keauhou to Napo'opo'o junction, as an exaction of the project, places the County in a position of supporting Oceanside's entire project and its activities. (John DeFries Test.; PKO 428).

79. The agreement compels Oceanside to advance costs of the highway, subject to a formula for reimbursement collected by the County from other landowners adjacent to the highway and paid to Oceanside. (*Id.* at 16).

80. The number of DLNR/SHPD and County regulators' site visits to the project sites are insufficient to effectively monitor compliance.

81. DLNR/SHPD's enforcement actions are the result of plaintiffs' complaints and by this lawsuit.

82. Oceanside's compliance with constitutional and statutory requirements have been largely based upon Plaintiff's complaints and by this lawsuit.

CONCLUSIONS OF LAW

If it should later be determined that any of these conclusions of law should be properly deemed findings of fact, they shall be deemed as such.

1. Haw. Const. Article XII, Sec. 7 provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Island prior to 1778, subject to the right of the State to regulate such rights.

2. This provision imposes a duty on all state and county agencies to protect and to reasonably accommodate the exercise of traditional and customary rights of Hawaiians when

issuing any permits or approvals of activities that could adversely impact those rights. *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425, 451 (1995) (hereafter referred to as "PASH").

3. More specifically, this duty requires state and county agencies reviewing a development project to (a) identify any traditional Hawaiian cultural practices that may continue to exist on the development; (b) assess the potential impact of the development on those practices; and (c) provide for reasonable protective measures for those practices. *Ka Pa'akai v. Land Use Commission*, 94 Haw. 3; 45 (2000). In *Ka Pa'akai* the Hawaii Supreme Court imposed duties on the Land Use Commission (LUC), but this case did not go before the LUC.

4. The Legislature has established that it is in the public interest to preserve and protect historic and cultural properties for the benefit of future generations. Haw. Rev. Stat. Sec. 6E-1. The State Constitution protects traditional and customary rights of native Hawaiians while Haw. Rev. Stat. Sec. 6E-1 protects historic and cultural properties.

5. Under HRS Sec. 6E-2, "historic property" is defined to include objects, such as heiau and ancient Hawaiian burials, which are over 50 years old.

6. The same statute defines "Historic preservation" to include the protection of burial sites. Haw. Rev. Stat. Sec. 6E-2. There is no dispute that the burial sites at issue are more than fifty years old.

7. After consultation with the SHPD, a landowner must develop and submit a BTP to trigger the procedures for burial protection outlined in Haw. Rev. Stat. Sec. 6E-43(b). This initiation of a request requires prior notice to and identification of potential descendants to known burials. Haw. Admin. Rule Sec. 13-300-33(b)(1) and (2).

8. Within 45 days of referral of a BTP to the island burial council, the council is given the authority to determine whether previously identified burial sites should be preserved. Haw. Rev. Stat. Sec. 6E-43(b); Haw. Admin. Rule Sec. 13-300-33(a) and (f).

9. Upon a burial council decision to preserve, it has 90 days to consult with the DLNR/SHPD before the latter approves the burial site component of a preservation plan for the burials. Haw. Rev. Stat. Sec. 6E-43(d); Haw. Admin. Rule Sec. 13-300-38(e).

10. The disposition of "inadvertent" discovered burials is made by DLNR without public hearing; the disposition of previously identified burials is made by the HIBC pursuant to public hearing.

11. Oceanside and DLNR circumvented Haw. Rev. Stat. Chapter 6E relying on an inaccurate initial AIS and not submitting updates from "sweeps" for the HIBC to consider.

12. In view of the state constitution and the legislative intent of Haw. Rev. Stat. Chapter 6E, the effective enforcement of the constitution, statute and regulations by this court is in the public interest. The public interest would be promoted by the continued ability to exercise constitutional rights involving traditional and customary practices and preservation of historic sites on the Hokuli'a project.

13. Traditional worshiping at Native Hawaiian burial sites is a constitutionally protected traditional cultural and religious practice. The state or county agencies did not attempt to identify whether any of these traditional Hawaiian cultural practices practiced by Jim Medeiros, Sr. continue to exist on the development.

14. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private

interests are involved.” *Virginian Railway Co. vs. System Federation No. 40*, 300 U.S. 515, 552 (1937).

15. A court ordinarily will grant injunctive relief only if another adequate remedy at law is unavailable. Moore’s Federal Practice Civil Sec. 65.06; *Pullman v. Allen*, 466 U.S. 522, 537 (1984) (to obtain injunctive relief, plaintiff must show both inadequacy of legal remedies and risk of irreparable injury); see *Lopez v. Garriga*, 917 F. 2d 63, 68 (1st Cir. 1990) (injunction seeker must show continuing irreparable injury for which there is no adequate remedy at law).

16. The test for injunctive relief is threefold: (1) Is the plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a temporary injunction? (3) Does the public interest support granting the injunction? *Life of the Land v. Ariyoshi*, 59 Haw. 156 (1978).

17. In assessing whether to grant a request for injunctive relief, a court balances the hardship faced by the applicant for injunctive relief against the hardship the defendant would suffer if the relief were granted. *Mottl v. Miyahira*, 95 Haw. 381 (Haw. 2001).

18. In this instance, Plaintiffs will suffer irreparable harm because there is no adequate remedy at law and there is a substantial risk of further destruction or damage to Native Hawaiian burial remains and the attendant loss of worship as a cultural and religious practice thereto will continue in the absence of an injunction.

19. There is a substantial likelihood of future harm caused by the County and DLNR/SHPD’s failure to vigorously enforce the laws.

20. Oceanside’s harm, if any, is financial and is measured in terms of monetary damages and which may be addressed in legal proceedings.

21. None of the economic harms envisioned by Oceanside are irreparable.

A. Right of Action

22. Pursuant to Haw. Rev. Stat. 6E-13(b), "Any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person 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." Thus, Plaintiffs are persons who have properly filed and maintained this action pursuant to Haw. Rev. Stat. 6E-13(b); this court has jurisdiction over the parties and subject matter.

B. Violation of Haw. Rev. Stat. Sec. 6E-42

23. Pursuant to Haw. Rev. Stat. Sec. 6E-42, DLNR has review and comment power on approvals for any permit applications which would affect historic properties, including burial remains, and DLNR must inform the public when reviewing any proposals.

24. HIBC, and the public including lineal and cultural descendants were denied the advance opportunity to review and comment on (a) Oceanside's BTP; and (b) the January 9, 1999 grubbing permit for the golf course; and (c) the April 3, 2000 grading permit for the residential lots, as intended under Haw. Rev. Stat. Sections 6E-42, 6E-43, and Haw. Admin. Rule Sec. 13-300-33.

25. Cultural and lineal descendants were denied the timely opportunity to be involved in designing protective measures for previously identified burials which ultimately affected design decisions on the Hokuli'a project.

26. Oceanside's failure to seek timely review and approval for its BTP from the HIBC, despite having explicit notice of this requirement, was a significant and crucial factor in subverting the procedural steps required.

27. Oceanside's failure to submit a BTP for the previously identified burials before obtaining approval for its grubbing and grading permits violated at least the spirit, if not the letter, of Haw. Rev. Stat. Secs. 6E-42(a) and 6E-43.

28. The public and lineal descendants did not receive notice of the submission of these permits for its review and comment, in violation of the public notice required in Haw. Rev. Stat. Sec. 6E-42(b) and Haw. Admin. Rule Sec. 13-300-31(f).

29. The denial of the opportunity to review and comment on the impacts of the permitting for this project is not curable by the imposition of an interim preservation plan because it is not authorized under any properly promulgated rule of Defendant DLNR.

C. Violation of Hawaii Administrative Procedure Act

30. Haw. Admin. Procedures Act Sections 91-3 and 91-4 requires all state agencies to promulgate rules in accordance with a specified procedure designed to allow and incorporate public input into the formulation of regulations for any particular department.

31. In the absence of any properly promulgated rule, an agency decision made in reliance on a custom or practice not otherwise covered by that rule is invalid. *Aguilar v. Hawaii Housing Authority*, 55 Haw. 478 (1977).

32. Ross Cordy authored "Protecting Our Past THE HISTORIC PRESERVATION DEVELOPMENT REVIEW PROCESS." These proposed rules which provide for the interim preservation plan have not been lawfully adopted pursuant to Chapter 91, Hawaii Revised

Statues, but have been utilized since 1987.

33. The interim preservation plan is invalid.

D. Failure to Involve Burial Council and Descendants

34. As early as 1996, SHPD told Oceanside that it had to seek approval from the HIBC for a burial treatment plan immediately after the preparation and approval of the AIS.

35. Oceanside did not diligently initiate a good faith search for lineal and cultural descendants which is a required component for any burial treatment plan. Haw. Admin. Rule Sec. 13-300-37(c)(1).

36. Pursuant to Haw. Admin. Rule Sec. 13-300-33(b)(c), Oceanside was also required to do the following:

- (A) Research relevant land conveyance documents including identification of land commission awardees located at or near the burial site;
- (B) Inquire about any person who may have knowledge of families possibly affiliated with the Native Hawaiian remains;
- (C) Publish notice in a newspaper of general circulation in the county in which the burial site is located and a newspaper of statewide circulation for a minimum of three days, including Sunday and Wednesday. . . .

37. Oceanside failed to diligently perform the critical steps listed in Haw. Admin. Rule 13-300-33(b)(c)(A),(B) and (C) in a timely manner and relied on an invalid interim preservation plan procedure.

38. Oceanside's insufficient action denied the lineal and cultural descendants and the HIBC the opportunity to timely affect the design of the burial treatments that were being fashioned to protect human burials on the project site.

E. Prohibition Against Moving Remains

39. Haw. Rev. Stat. Sec. 6E-43(a) prohibits the moving of human skeletal remains over

50 years old and their associated burial goods without DLNR's approval.

40. Haw. Admin. Rule Sec. 13-300-40(k) provides as follows:

Intentional removal of inadvertently discovered human skeletal remains or burial goods is prohibited until a determination to relocate is made by the department pursuant to Section 6E-43.6, HRS, and this chapter, except that the department shall be authorized to allow temporary removal of the remains or burial goods to protect from imminent harm, until a determination is made.

41. Oceanside removed burial remains over 50 years old at site 21821 located in the C-3 cul-de sac, and at site 21833 located in the pathway of the bypass highway, without DLNR's approval or determination to relocate in violation of Haw. Rev. Stat. Sec. 6E-43(a).

42. Oceanside with DLNR's knowledge removed these remains in the absence of DLNR's determination of imminent harm to the remains. This was in violation of Haw. Rev. Stat. Sec. 13-300-40(k).

43. The remains that were removed from sites 21822 and 21834 are no longer in danger of imminent harm, and accordingly, there is no legal basis for continuing to maintain these remains at the SCS field house.¹

F. Oceanside Waived Objections

44. Haw. Rev. Stat. Sec. 6E-43(b) provides that the appropriate island burial council has the power to determine whether the preservation in place or relocation of previously identified native Hawaiian burial sites is warranted.

45. Pursuant to Haw. Rev. Stat. Sec. 6E-43(b), a council's determination must be rendered within forty-five days from the date of referral by the department unless otherwise extended by agreement between the landowner and the department.

¹The remains were reinterred after this lawsuit was filed.

46. Haw. Rev. Stat. Sec. 6E-43(c) provides that council determinations may be administratively appealed to a panel composed of three council chairpersons and three members from the board of land and natural resources as a contested case pursuant to Haw. Rev. Stat. Chapter 91.

47. Haw. Administrative Rule Sec. 13-300-52 implements this provision, and provides as follows:

(a) A written petition for a contested case hearing shall be filed, i.e., mailed and postmarked, within forty-five days following receipt of written notification of the council determination except that whether a request for reconsideration of a council determination is made, the forty-five day period to file a petition shall commence following action by the council to either deny the request for reconsideration or reaffirm its original decision following reconsideration.

48. Defendant Oceanside did not appeal HIBC's determination, as communicated in the February 17, 2000 letter from Dr. Hibbard to Oceanside, within the forty-five day window as provided in Haw. Admin. Rule Sec. 13-300-52. Therefore, Oceanside is bound to HIBC's decision to preserve in place all burial remains referred to and listed in the February 17, 2000 letter.

49. Pursuant to Haw. Rev. Stat. Sec. 6E-43(d), within ninety days following the final council's determination, a preservation or mitigation plan shall be approved by the department in consultation with any lineal descendants, the respective council, other appropriate Hawaiian organizations, and any affected property owner.

50. In order to give meaning to these provisions, this determination must precede any construction activity that could damage, alter, destroy or desecrate any burial remain previously identified in the archaeological inventory survey.

51. DLNR/SHPD's and Oceanside's agreement to extend the time for consideration of the BTP and the mitigation or preservation plan, based on the assumption that the interim preservation plan allows them to proceed with construction violates Haw. Rev. Stat. Sec. 6E-43.

G. Invalid Procedure to Justify Construction

52. SCS has not filed a report on its archaeological sweeps and resurvey of areas of the Hokuli'a project that it has conducted, leaving DLNR/SHPD as well as the HIBC and lineal/cultural descendants, without any supplemental information on the context in which it may evaluate the significance of preserving archaeological and burial sites.

53. DLNR's Archaeology Branch of the SHPD wrongly relied on a "interim preservation plan" to subvert and usurp the legislative scheme giving: (a) the HIBC the right to review a comprehensive burial treatment plan which incorporated all the relevant input of the lineal and cultural descendants and the power to make its preservation determination timely before construction began on January 6, 1999 and (b) the DLNR the power to craft a comprehensive preservation plan for the burial sites.

54. There is no legal authority for allowing an interim preservation plan to substitute for the mitigation or preservation plan required by Haw. Rev. Stat. Sec. 6E-43(c).

55. Reliance on the interim preservation plan to sign off on grubbing and grading permits is not in conformance with Haw. Rev. Stat. Sec. 6E-42.

56. The BTP, which serves as the application for a determination by the HIBC provided by Haw. Admin. Rule Sec. 13-34-300(b), requires the applicant to show *inter alia*: (a) "[e]vidence of a good faith search for lineal and cultural descendants" specifying how this evidence may be gathered; (b) "Names of any known lineal or cultural descendants recognized by

the department, and their respective positions regarding burial site treatment".

57. Oceanside did not follow the process of identifying descendants in the BTP prior to construction and also prior to the review of any proposal for burial treatment. Thus, Oceanside and DLNR improperly excluded the lineal and cultural descendants as required in Haw. Rev. Stat. 6E and Haw Admin. Rules.

58. Recognized lineal and cultural descendants were denied their due process rights to participate in HIBC's formulation of the treatment plan and preservation determination.

59. Oceanside and DLNR's continued reliance on the interim preservation plan, without the full implementation of the provisions for processing and treatment of previously identified human remains is an irreparable injury for which injunctive relief is appropriate.

H. Procedure for Inadvertently Discovered Burials

60. The procedures for dealing with inadvertently discovered burial remains are governed by Haw. Rev. Stat. Sec. 6E-43.6.

61. Pursuant to Haw. Admin. Rule Sec. 13-300-40(c)(4), when a burial is inadvertently discovered, DLNR must "gather sufficient information, including oral tradition, by seeking individuals who may have knowledge about the families possibly connected lineally or culturally with the inadvertently discovered human skeletal remains to help document the nature of the burial context and determine appropriate treatment. . . ."

62. The BSP staff identified a number of cultural and lineal descendants at the time of the inadvertent discovery of burial remains by July 22, 1999, but failed to initiate the gathering of sufficient information from these descendants who would likely know about the "families possibly connected lineally and culturally with the inadvertently discovered human skeletal

remains," to assist in determining the appropriate treatment of those remains.

I. Failure to Accurately Account for Burials

63. The failure to properly and accurately account for all inadvertent burial remains is a continuing irreparable injury so long as lineal/cultural descendants and the HIBC are uncertain as to the full extent and condition of the burial remains located on the Hokuli'a project site.

J. Jurisdiction of Burial Council

64. Haw. Admin. Rule Sec. 13-300-31(a)(4) provides that a burial site recognized by the department based upon oral or written testimony shall be classified as previously identified.

65. Pursuant to Haw. Admin. Rule 13-300-31(b), burial sites discovered during an archaeological inventory survey that appear to be over fifty years old shall be classified as previously identified for which the council or department, whichever is applicable, shall determine appropriate treatment.

66. Haw. Admin. Rule Sec. 13-300-33(a), provides that the respective island burial council shall have jurisdiction over all requests to preserve or relocate previously identified Native Hawaiian burial sites.

67. The AIS is inadequate necessitating sweeps and resurveys.

68. Archaeological sweeps and resurveys conducted by SCS that resulted in the "inadvertent" discovery of burial remains are functionally no different from those previously identified in the AIS conducted in 1997.

69. HIBC has jurisdiction over all such burial sites recognized by DLNR or discovered during the prior archaeological sweeps and resurveys conducted by SCS.

K. County and DLNR/SHPD Enforcement

70. The County's execution of the Development Agreement places it in a conflict of interest as the regulator of Oceanside and compromises its ability to implement the law in guarding against violations of the County's grubbing and grading ordinances and land use restrictions as regulated by Haw. Rev. Stat. Chapter 205.

71. The evidence also showed that DLNR/SHPD continued to inappropriately rely upon information supplied by Oceanside's archaeologists and employees, rather than on independent inspections and investigations conducted by DLNR/SHPD staff after receiving notice of discrepancies in reports submitted by Oceanside.

72. DLNR/SHPD's inactions have allowed Oceanside to avoid sanctions and penalties of what appears to be clear violations of the burial protection law and regulations.

73. DLNR/SHPD's enforcement actions have been limited and appear to be based upon concurrence with the developer, rather than having an independent analysis and decision by the DLNR/SHPD

74. DLNR's enforcement actions have been influenced by inappropriate financial and social conduct between Oceanside and SHPD regulator.

ORDER

IT IS HEREBY ORDERED that injunction relief be granted as follows:

A. All "inadvertent discoveries" discovered pursuant to "sweeps" shall immediately be treated as previously identified under Haw. Rev. Stat. Sec. 6E. Oceanside shall submit a burial treatment plan to the HIBC within 30 days from the date of this order (January 27, 2003).

B. The DLNR/SHPD shall within sixty days from the date this order (February 26, 2003): (a) identify any traditional Hawaiian cultural practices that may continue to exist on the

development pertaining to the grave sites; (b) assess the impact of the development of those practices and (c) provide reasonable protective measures for those practices. This report shall also be provided to the Plaintiffs.

C. All ground alteration activity shall cease within 21 days from the filing date of this order (January 17, 2003) and no further permits of any kind shall be issued by the DLNR/SHPD and County (Planning Department and Public Works) until the requirements of Paragraphs A and B are complied with.

D. The President, 1260 Oceanside Partners, shall certify monthly:

1. All human bones discovered;
2. All bones removed from the property for further testing; and
3. All inadvertent discovered iwi which has been relocated pursuant to SHPD's authorization.

This list shall be provided to all parties not later than the tenth day of each month covering the prior month. The first list shall be due not later than February 10, 2003.

E. The Plaintiffs shall be allowed access to the property to monitor the compliance of these conditions and all regulatory statutory and constitutional requirements until the County and DLNR/SHPD provide sufficient staff without conflict of interest to monitor compliance. A certification providing the names of these staff shall be provided to all parties. This certification shall be executed by the appropriate agency head.

F. The DLNR/SHPD and County (Planning Department and Public Works) shall inform their staff and agent(s) of any applicable Ethics Code and any conduct relating to conflict of interest.

G. The Court reserves jurisdiction regarding attorneys' fees and costs to be determined at a later date.

H. All other relief requested is hereby denied.

IT IS SO ORDERED.

DATED: Kealahou, Hawaii

26 Dec 2002

[Handwritten Signature]

JUDGE OF THE ABOVE-ENTITLED COURT

