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Supreme Court
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NO. SCWC-12-0000061

IN THE SUPREME COURT OF THE STATE OF HAWAII

DANA NAONE HALL,

Plaintiff-Appellant,

vs.

DEPARTMENT OF LAND AND NATURAL RESOURCES, BOARD OF LAND AND NATURAL RESOURCES, WILLIAM AILA, JR. in his official capacity as chairperson of the Board of Land and Natural Resources and as the State Historic Preservation Officer, PUAALAOKALANI AIU in her official capacity as administrator of the State Historic Preservation Division, DEPARTMENT OF HEALTH, LORETTA FUDDY in her official capacity as the director of the Department of Health, ALVIN ONAKA in his official capacity as State Registrar of Vital Statistics and Chief of the Department of Health's Office of Health Status Monitoring, KAWAIAHA 'O CHURCH, WILLIAM HAOLE in his official capacity as the Chair of the Board of Trustees and Chair of the Board of Directors of Kawaiaha'o Church, John Does 2-10, Jane Does 1-10, and Doe Partnerships, Corporations, Trusts, Governmental Units or Other Entities 3-20,

Defendants-Appellees.

) CIVIL No. 09-1-1828-08 (KKS)
)
) PETITIONERS-DEFENDANTS-APPELLEES
) DEPARTMENT OF LAND AND NATURAL
) RESOURCES, BOARD OF LAND AND
) NATURAL RESOURCES, WILLIAM AILA, JR.,
) IN HIS OFFICIAL CAPACITY AS
) CHAIRPERSON OF THE BOARD OF LAND
) AND NATURAL RESOURCES AND AS THE
) STATE HISTORIC PRESERVATION OFFICER,
) PUAALAOKALANI AIU IN HER OFFICIAL
) CAPACITY AS ADMINISTRATOR OF THE
) STATE HISTORIC PRESERVATION DIVISION,
) DEPARTMENT OF HEALTH, LORETTA
) FUDDY IN HER OFFICIAL CAPACITY AS THE
) DIRECTOR OF THE DEPARTMENT OF
) HEALTH, AND ALVIN ONAKA, IN HIS
) OFFICIAL CAPACITY AS STATE REGISTRAR
) OF VITAL STATISTICS AND CHIEF OF THE
) DEPARTMENT OF HEALTH'S OFFICE OF
) HEALTH STATUS MONITORING'S
) APPLICATION FOR WRIT OF CERTIORARI IN
) THE HAWAII SUPREME COURT TO REVIEW
) DECISION BY THE HAWAII INTERMEDIATE
) COURT ISSUED ON DECEMBER 14, 2012, AND
) JUDGMENT ON APPEAL BY THE HAWAII
) INTERMEDIATE COURT OF APPEALS
) ENTERED ON MARCH 20, 2013, AND ORDER
) GRANTING IN PART PLAINTIFF-
) APPELLANT'S REQUEST FOR ATTORNEY'S
) FEES AND COSTS ENTERED ON MARCH 20,
) 2013
)
) HONORABLE KARL K. SAKAMOTO, Judge
) HONORABLE ROM A. TRADER, Judge
)

PETITIONERS-DEFENDANTS-APPELLEES DEPARTMENT OF LAND AND NATURAL RESOURCES, BOARD OF LAND AND NATURAL RESOURCES, WILLIAM AILA, JR. in his official capacity as chairperson of the Board of Land and Natural Resources and as the State Historic Preservation Officer, PUAALAOKALANI AIU in her official capacity as administrator of the State Historic Preservation Division, DEPARTMENT OF HEALTH, LORETTA FUDDY in her official capacity as the director of the Department of Health, ALVIN ONAKA in his official capacity as State Registrar of Vital Statistics and Chief of the Department of Health's Office Of Health Status Monitoring's APPLICATION FOR WRIT OF CERTIORARI IN THE HAWAII SUPREME COURT TO REVIEW DECISION BY THE HAWAII INTERMEDIATE COURT ISSUED ON DECEMBER 14, 2012, AND JUDGMENT ON APPEAL BY THE HAWAII INTERMEDIATE COURT OF APPEALS ENTERED ON MARCH 20, 2013, AND ORDER GRANTING IN PART PLAINTIFF-APPELLANT'S REQUEST FOR ATTORNEY'S FEES AND COSTS ENTERED ON MARCH 20, 2013

APPENDIX A

CERTIFICATE OF SERVICE

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official capacities, DEPARTMENT OF HEALTH, LORETTA
FUDDY and ALVIN ONAKA in their respective official capacities

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DANA NAONE HALL,

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) HONORABLE KARL K. SAKAMOTO, Judge
) HONORABLE ROM A. TRADER, Judge

PETITIONERS-DEFENDANTS-APPELLEES DEPARTMENT OF LAND AND NATURAL RESOURCES, BOARD OF LAND AND NATURAL RESOURCES, WILLIAM AILA, JR. in his official capacity as chairperson of the Board of Land and Natural Resources and as the State Historic Preservation Officer, PUAALAOKALANI AIU in her official capacity as administrator of the State Historic Preservation Division, DEPARTMENT OF HEALTH, LORETTA FUDDY in her official capacity as the director of the Department of Health, ALVIN ONAKA in his official capacity as State Registrar of Vital Statistics and Chief of the Department of Health's Office Of Health Status Monitoring's APPLICATION FOR WRIT OF CERTIORARI

IN THE HAWAII SUPREME COURT TO REVIEW DECISION BY THE HAWAII INTERMEDIATE COURT ISSUED ON DECEMBER 14, 2012, AND JUDGMENT ON APPEAL BY THE HAWAII INTERMEDIATE COURT OF APPEALS ENTERED ON MARCH 20, 2013, AND ORDER GRANTING IN PART PLAINTIFF-APPELLANT'S REQUEST FOR ATTORNEY'S FEES AND COSTS ENTERED ON MARCH 20, 2013

Petitioners-Defendants-Appellees DEPARTMENT OF LAND AND NATURAL RESOURCES, BOARD OF LAND AND NATURAL RESOURCES, WILLIAM AILA, JR. in his official capacity as chairperson of the Board of Land and Natural Resources and as the State Historic Preservation Officer, PUAALAOKALANI AIU in her official capacity as administrator of the State Historic Preservation Division, DEPARTMENT OF HEALTH, LORETTA FUDDY in her official capacity as the director of the Department of Health, ALVIN ONAKA in his official capacity as State Registrar of Vital Statistics and Chief of the Department of Health's Office Of Health Status Monitoring (hereinafter the "State") by and through their attorneys, David M. Louie, Attorney General, and Marie Manuele Gavigan and William J. Wynhoff, Deputy Attorneys General, pursuant to Rule 40.1, Hawaii Rules of Appellate Procedure, respectfully apply to this Court for a writ of certiorari.

I. QUESTIONS PRESENTED

Defendant-Appellee Kawaiaha'o Church (the "Church") is attempting to construct a multi-purpose building ("MPC Project") on its grounds for use in furtherance of its religious mission. The site of the MPC Project is located on cemetery grounds of the Church property. The Intermediate Court of Appeals ("ICA") ruled that regardless of whether the site was considered a cemetery, an archaeological inventory survey ("AIS") was required; therefore, the Court ruled that the Department of Land and Natural Resources' ("DLNR") State Historic Preservation Division ("SHPD") "violated its own rules in failing to require an AIS before permitting the project to go forward." In reaching its decision, the ICA relied in large part on this Court's recent decision in *Kaleikini v. Yoshioka*, 128 Haw. 53, 283 P.3d 60 (2012).

The State requests that this Court review the following issues:

1. That the ICA gravely erred when it ruled that an AIS was required before SHPD could concur in the MPC Project.

2. That the ICA gravely erred in ruling that it was irrelevant whether the MPC Project site was a cemetery.

3. That the ICA gravely erred when it ruled that *Kaleikini v. Yoshioka*, 128 Haw. 53, 283 P.3d 60 (2012) was applicable to the instant case.

4. That the ICA gravely erred by failing to recognize the State's sovereign immunity (and failing to follow this Court's controlling ruling on the issue¹) when it granted attorney's fees and costs in favor of Respondent-Plaintiff-Appellant Dana Naone Hall ("Plaintiff") and against the Church and the State jointly and severally pursuant to the private attorney general doctrine.

II. PRIOR PROCEEDINGS

A. Circuit Court

Plaintiff instituted the underlying civil action on August 6, 2009, with the filing of a ten-count complaint seeking declaratory and injunctive relief. On December 1, 2010, Plaintiff filed her Second Amended Complaint asserting the following claims: (1) Violation of HAR 13-284 By Failing to Require an Archaeological Inventory Survey; (2) The Burials at Kawaiaha'o May Not Be Disinterred and Relocated Through the Approval of a DOH Disinterment Permit Because the Project Site is not a "Known, Maintained, Actively Used Cemetery"; (3) The issuance of the disinterment permit pursuant to HRS §338-25.5 is Unconstitutional; (4) The issuance of the disinterment permit pursuant to HRS § 6E-41 is Unconstitutional; (5) The Burials at Kawaiaha'o Are Previously Identified and Require O'ahu Island Burial Council Determination Prior to Any Action; (6) Violation of HRS 6E-43 and HAR Chapter 13-300; (7) Failure to Perform an Environmental Assessment; (8) Defendants Have Failed to Obtain Required Permits; (9) Breach of public trust; (10) Failure to investigate and protect Native Hawaiian Rights; (11) Failure to prepare an Archaeological Inventory Survey.[ROA, Doc. 121, at 744 - 787]²

On November 12, 2010, Plaintiff filed her Motion for Preliminary Injunction. [ROA, Doc. 121, at 95 - 333] The trial court held a full evidentiary hearing on the motion for

¹ The ICA's ruling as to attorneys' fees was issued shortly before this Court's controlling decision on the private attorney general doctrine in *Kaleikini v. Yoshioka*, 2013 WL 1844892 (May 2, 2013).

² Citations to the record on appeal are in the following format: [ROA, Doc. X, at Y] where X refers to the document number on the JEFS system, and Y refers to the PDF page number or numbers.

preliminary injunction on December 6, 8, 9, and 13, 2010, and January 4 and 5, 2011. **[ROA, Doc 113, at 22 – 32]** At the conclusion of the hearing, having taken testimony from twelve witnesses and admitting numerous exhibits into evidence, the Court denied the motion for preliminary injunction. **[ROA, Doc. 113, at 32]** On October 11, 2011, the Court filed its Findings of Fact and Conclusions of Law and Order denying the motion for preliminary injunction. **[ROA, Doc. 131, at 391 - 425]**

On December 2, 2011, Plaintiff, the Church, and the State each filed their respective motions for summary judgment. The Church's and the State's motions were granted and Plaintiff's motion was denied. On January 31, 2012, the Court entered Final Judgment in favor of the Church and the State and against Plaintiff. **[ROA, Doc. 135, at 1056 - 1058]**

B. Intermediate Court of Appeals

On January 31, 2012, Plaintiff timely filed her Notice of Appeal. **[JEFS, Doc. 1]** On February 1, 2012, Plaintiff filed her Motion for Injunctive Relief Pending Appeal. **[JEFS, Docs. 10 –84]** On March 9, 2012, the ICA denied Plaintiff's Motion for Injunctive Relief Pending Appeal. **[JEFS, Doc 164]**

On March 16, 2012, Plaintiff filed her Application for Transfer of this case to the Supreme Court. **[JEFS, Doc 1 in SCAP 12-1-0000061]** On April 25, 2012, this Court filed its Order Denying Plaintiff's Application for Transfer. **[JEFS, Doc 12 in SCAP 12-1-0000061]**

The ICA issued its decision in this case on December 14, 2012, **[JEFS, Doc. 190]**. On January 7, 2013, Plaintiff moved for an award of attorneys' fees and costs. **[JEFS, Docs. 294 – 300]** The ICA granted Plaintiff's motion in part by an Order filed on March 20, 2013. **[JEFS, Doc 319]** On that same date, the ICA entered the Judgment on Appeal. **[JEFS, Doc 321]**

This Petition is timely filed because the State requested and received an extension of time to file pursuant to HRAP 40.1(a). **[JEFS, Docs 332 and 334]**

III. STATEMENT OF THE CASE

Kawaiaha‘o Church is a historic Congregational church located in Honolulu. In 1940, in a section of the church cemetery, the Church built Likeke Hall. In 2002, the Church began planning for the construction of a new Multi-Purpose Center (“MPC”) to replace Likeke Hall. **[ROA, Doc. 131, at 399, paragraph 41]** The Church planned to build this new building on the site of the then-existing Likeke Hall, which was located on the Church grounds amid the Church cemetery. The Church’s cemetery is shown on Church maps dated 1912 and 1920. **[ROA, Doc 131, at 398, paragraph 33 [Doc 121 at 1353 and 1354]]** In addition, the Church is registered with the State of Hawaii as an exempt cemetery³. **[ROA, Doc 131, at 398, paragraph 34 [Doc 133, at 1007 (Tr. 92:5-9) and 1008 (Tr. 98:3-8)]]**

Initially SHPD determined that an AIS should be completed for the project. **[ROA, Doc 131, at 403, paragraph 66]** However, the Church subsequently modified its plans for this project and presented the modified plans to SHPD. It was later determined that instead of an AIS, an Archaeological Monitoring Plan (“AMP”) would suffice. **[ROA, Doc. 131, at 404, paragraph 75]** The AMP was submitted to SHPD in August, 2006, and accepted by SHPD on September 28, 2006. **[ROA, Doc. 131, at 404, paragraphs 77, 79]** On November 12, 2007, construction of the MPC project officially began with the demolition of Likeke Hall. **[ROA, Doc 131, at 405, paragraph 84]**

In early 2009, the Church began trenching to install utilities for the new building. **[ROA, Doc. 131, at 406, paragraph 90]** During this trenching work the Church discovered human remains. 117 burials had been disinterred from the section of the cemetery where Likeke Hall was constructed in 1940. The Church therefore believed that no burials remained in the area. The remains found during this 2009 trenching work were western-style burials (primarily coffin). There were no fetal position burials and hence no indication that any of the burials were

³ An exempt cemetery is one that is free from the bonding requirement and the fee requirements for license, renewal and reinstatement upon proof satisfactory to the director of the Department of Commerce and Consumer Affairs that it does not sell for financial profit. HRS, §441-22.1.

traditional cultural native Hawaiian burials. **[ROA, Doc. 131, at 407, paragraph 101]** During this time, SHPD assumed jurisdiction over these discovered remains determining that the remains were “inadvertent discoveries.” However, due to the number of these discovered remains, DLNR and SHPD determined that the discovered remains were in fact burials from a cemetery and notified the Church that the matter would now be addressed pursuant to Hawaii Revised Statutes (“HRS”) §6E-41. Thus, based on this determination, DLNR set forth the specific conditions under which the Church could proceed with its project. These conditions were set forth in a letter from DLNR to the Church dated June 11, 2009. In this letter, DLNR clarified that the MPC Project site was part of the cemetery and advised the Church that after all remains had been disinterred, the Church was required to change the metes and bounds of the cemetery. Basically, the Church had to decertify the area of the MPC Project site as a cemetery. **[ROA, Doc. 123, at 58-62]** These conditions were further refined in subsequent letters between DLNR/SHPD and the Church, dated June 19, 2009, June 29, 2009, and September 13, 2010. DLNR then notified the State Department of Health (“DOH”) that DLNR was satisfied that the Church had complied with the DLNR requirements (except for those conditions that required future compliance). On October 22, 2010, DOH issued a blanket disinterment permit to the Church. **[ROA, Doc. 131, at 409-410]** This disinterment permit allowed for the disinterment of the remains so that the Church could decertify the area as a cemetery.

IV. ARGUMENT

The ICA gravely erred in its decision that an AIS was required before SHPD could concur in the permit for the MPC Project. This error is based upon the ICA’s incorrect interpretation of Hawaii’s historic preservation law, HRS Chapter 6E. The ICA appears to consider the finding of any remains to be a “burial site.” Based upon the plain wording of the law and the legislative history, the ICA’s decision is an improper interpretation and expansion of the law.

A. The MPC Project Site is not a “Burial Site” as Defined in HRS §6E-2

The ICA appears to consider the finding of **any** remains (regardless of whether it is a complete skeletal remain or a bone fragment) to be a “burial site.” The term “burial site” is defined in HRS §6E-2:

§6E-2 Definitions. As used in this chapter:

* * *

“Burial site” means any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods are interred, and its immediate surrounding archaeological context, deemed a unique class of historic property and not otherwise included in section 6E-41.

HRS Chapter 6E was amended in 1990 by Act 306. One of the amendments of Act 306 included adding this definition of “burial site” which was not in the law prior to this amendment. This amendment to the law came immediately after the discovery of 1,100 remains in the sand dunes at Honokahua on Maui. **[ROA, Doc. 133, at 991-992]** The findings and purpose of Act 306 provided that:

The legislature further finds that native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance.

* * *

...this Act provides additional protection for native Hawaiian burial sites of high preservation value such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals or events, that are within a context of historic properties, or have known lineal descendants.

Act 306, H.B. No. 3296, Section 1, 1990.

The evidence in the record regarding “burial sites” was presented during the preliminary injunction hearing through David Shideler, an expert qualified in the areas of Hawaiian culture, cultural practices and Native Hawaiian religion. **[ROA, Doc. 133, at 853 (Tr. 8:22-25) and 854 (Tr. 9:1-2)]** Mr. Shideler testified that the Church cemetery is not a native Hawaiian burial site as defined under the law, which he believes “refers to something else entirely.” **[ROA, Doc 133, at 858 (Tr. 26:14-25) and 859 (Tr. 27:1-2)]** Again, Mr. Shideler’s opinion is consistent with the law.

HRS Chapter 6E is the law regarding preservation of historic and cultural property within the State. The law defines “historic property” as “any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old.” HRS, §6E-2. Burial sites and human skeletal remains are only one part of this law. The ICA decision takes this one segment of this law, misinterprets and expands its meaning such that it frustrates the intent of the law. To properly interpret and apply a law, the “statutory language must be read ‘in the context of the entire statute and construe[d] in a manner consistent with its purpose’.” *Kewalo Ocean Activities v. Ching*, 124 Haw. 313, 317, 243 P.3d 273, 277 (2010). The ICA’s decision ignores the intent and purpose of the statute (preservation of historic property, including native Hawaiian burial sites), and removes the discretion and expertise of SHPD in its regulation and preservation of historic property.

B. The MPC Project Site Is a Cemetery

The ICA gravely erred in ruling that HRS Chapter 6E applies to the MPC Project site “regardless of whether the site was considered a cemetery.” *Hall v. DLNR*, 128 Haw. 455, 470, 290 P.3d 525, 540 (2012). While the State agrees that Chapter 6E can apply to cemeteries, only §6E-41 applies to the cemetery in this case. When it became clear that the Project site area contained interments, SHPD required the Church to “remove the cemetery.” **[ROA, Doc. 123, at 58-62]** This cemetery was a Christian cemetery and not a burial site as contemplated by §6E-2. The human skeletal remains discovered in this cemetery, while unmarked, were not “a unique class of historic property” but were “otherwise included in section 6E-41.” The immediate surrounding archaeological context of the remains found indicated that these remains were in a cemetery and were not a “burial site.” The problem in this case is that the ICA has ruled, in effect, that any and all burials, constitute a “burial site.” This premise is incorrect, and therefore, it has led to an incorrect ruling in this case.

In the instant case, the trial court made specific findings of fact and concluded as a matter of law that “the burials discovered at Kawaiha‘o Church were in fact Christian burials within a Christian cemetery, rather than traditional Native Hawaiian burials.” **[ROA, Doc 131, at 414, paragraph 21]** This conclusion of law was based on the following specific findings of fact:

98. David Shideler testified as an expert for Kawaiaha‘o Church. The Court finds that David Shideler has extensive knowledge of the history of the Kawaiaha‘o Church, extensive knowledge of the practices that relate to burials and religious intent and that David Shideler was present during the excavation process and personally observed the findings of remains.

99. David Shideler testified that, in light of his professional training and experiences with the Kawaiaha‘o Church, the burials found within the Kawaiaha‘o Church property are Christian burials found within a Christian cemetery, rather than traditional Native Hawaiian burials. [Dec. 9, 2010 Transcript 6:10-14.]

100. David Shideler established that while the discovered burials contained remains that were ethnically Native Hawaiian, they were nonetheless Christian burials.

101. David Shideler established that there was no evidence of any pre-contact burials in the sense that there was no establishment of fetal position burials which constitute or reflect that they may be traditional cultural Native Hawaiian burials. [Dec.8, 2010 Transcript (Part II), 17:3-9; 20:19-24; 25:2-6; 27:4-9.]

102. David Shideler established that that [sic] the potential for human cultural deposits referred to as post-contact burials were consistent with the Church’s Christian philosophies and burial practices where they are buried in extended positions, and, therefore, also, were not traditional Native Hawaiian burial sites. [Dec 8, 2010 Transcript (Part II), 26:9-13; 27:4-9.]

103. The Court finds the testimony of David Shideler to be persuasive and credible.

[ROA, Doc 131, at 407]. There is absolutely nothing in this record to rebut or change the trial court’s conclusion that the burials at issue in this case are Christian burials in a Christian cemetery and are not traditional Native Hawaiian burial sites.

The ICA has ruled that regardless of whether the MPC Project site was considered a cemetery, the site was subject to the protections of HRS Chapter 6E. It is clear that this site was a cemetery. It is also clear that a cemetery is not a Native Hawaiian burial site as contemplated by Chapter 6E. SHPD recognized (as the parties also recognize) that the MPC Project site is a cemetery; therefore, SHPD required removal of the cemetery to allow the construction to go forward. This is a proper exercise of SHPD discretion, and a proper method in which to proceed in this case pursuant to HRS Chapter 6E.

C. This Court’s Ruling in *Kaleikini v. Yoshioka* is Not Applicable to This Case

The ICA ruled that *Kaleikini v. Yoshioka*, 128 Haw. 53, 283 P.3d 60 (2012) was controlling for the instant case and concluded that SHPD's actions in this case "allowed construction on the MPC Project to commence, without identifying the significant historic properties at issue and evaluating the impact of the MPC Project on them." *Hall v. DLNR*, 128 Haw. 455, 469-70, 290 P.3d 525, 539-40 (2012). The underlying flaw in the ICA's ruling is that the ICA considers the finding of any human remains in the ground to be a "burial site." As stated above, a review of the law and the legislative history shows that such an interpretation is an improper interpretation and expansion of the law. Moreover, *Kaleikini* is distinguishable from the instant case. In *Kaleikini*, SHPD determined that an AIS for the rail project was required. The issue in *Kaleikini* was whether an AIS must be done for the whole project prior to the start of construction or whether the AIS could be completed in phases. In *Kaleikini*, it "was undisputed that the rail project had a high likelihood of having a potential effect on archaeological resources, **particularly native Hawaiian burial sites**, in its last phase, which included the Kaka'ako area." [emphasis added] *Kaleikini, supra*, at 463, 290 P.3d at 533. *Kaleikini* is distinguishable from the instant case as the MPC Project site is not a native Hawaiian burial site, but rather it is a cemetery. To determine that the cemetery on the grounds of the Church is a native Hawaiian burial site (or even a "burial site") is not only incorrect, but also ignores the evidence in the record of this case.

Once it is properly recognized that the MPC Project site is a cemetery, then *Kaleikini* is no longer applicable to the facts of this case. In addition, the ICA's decision improperly impacts SHPD's discretion with regard to AISs. *Kaleikini* is clear that HAR §§ 13-275-5(b) and 13-284-5(b) provide SHPD with the discretion to determine whether an AIS is necessary in each case. *Id.* at 76, 283 P.3d at 83. The practical effect of the ICA decision is to effectively remove the discretion from SHPD to make the determination of whether an AIS is necessary, based on the specific facts of each project.

The historic preservation regulations give SHPD the discretion to determine when an archaeological inventory survey must be conducted. The law is clear that the courts should give deference to "the administrative agency's expertise and experience in its particular field ... [and]

not substitute their own judgment for that of the administrative agency where mixed questions of fact and law are presented. This is particularly true where the law to be applied is not a statute but an administrative rule promulgated by the same agency interpreting it.” *Kaleikini v. Yoshioka*, *supra* at 67, 283 P.3d at 74.

The purpose of an archaeological inventory survey is to determine if historic properties are present at a particular site. In this case, it is expected that remains will be present at the Church’s project site because this site is a cemetery. HRS §6E-41 allows the removal or redesignation of cemeteries. In this case, SHPD required the Church to remove the cemetery before beginning construction. Thus, the requirement that an AIS be conducted on cemetery property would be an absurd undertaking for two reasons: (1) remains are expected to be found in a cemetery, and (2) the remains must be removed for decertification of the cemetery.

In addition to the factual distinction in this case that the project site is a cemetery, the other critical distinction of the *Kaleikini* rail lawsuit is that the project there was a phased project. Much of the Supreme Court’s decision dealt with the issue of a phased project. The issue of a phased project has no bearing on Appellant’s case. It appears that the ICA’s Order is based solely on the incorrect notion that *Kaleikini* requires an AIS in this case. For the ICA to jump to the conclusion that SHPD should have required an AIS in this case would clearly be contrary to the law, would be erroneous, and would usurp SHPD’s discretion.

D. The ICA Erred in Awarding Attorneys’ Fees Against the State

The ICA ruled on March 20, 2013, that the State was jointly and severally liable for Plaintiff’s attorneys’ fees. The ICA rejected the State’s argument that it was entitled to sovereign immunity as to the fees’ claim. **[JEFS, Doc. 319]**

Just a few weeks later, this Court, in *Kaleikini v. Yoshioka*, 2013 WL 1844892 (Haw. May 2, 2013) accepted the identical argument and ruled that the State had sovereign immunity as to a claim for attorneys’ fees pursuant to the private attorney general doctrine in a chapter 6E case.

As of May 16, 2013, this Court's ruling as to fees is subject to a motion for reconsideration. Unless and until it is reconsidered, however, the *Kaleikini* ruling is controlling law on the point. Therefore, the ICA gravely erred in awarding attorneys' fees against the State.

DATED: Honolulu, Hawaii, May 16, 2013.

/s/ Marie Manuele Gavigan

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