CAAP-11-0000611

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

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

PLAINTIFF-APPELLANT'S BRIEF IN REPLY TO THE CITY DEFENDANTS-APPELLEES' ANSWERING BRIEF

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PLAINTIFF-APPELLANT'S BRIEF IN REPLY TO THE CITY DEFENDANTS-APPELLEES' ANSWERING BRIEF

I. INTRODUCTION

In its Answering Brief, the City (collectively: Defendants-Appellees Peter Carlisle, Wayne Yoshioka, City and County of Honolulu, Honolulu City Council, City and County of Honolulu Department of Transportation Services, and City and County Department of Planning and Permitting) argues that (1) complete deference should be given to government officials; (2) there is no harm from their premature decisions and the construction; (3) phasing of the archaeological inventory survey (AIS) is permissible; (4) sufficient consideration has been given to burials; and (5) Plaintiff was not entitled to any discovery responses prior to a hearing on a summary judgment motion less than 45 days after the complaint was filed. The first issue (as to why deference is not appropriate in this case) is fully addressed in Plaintiff-Appellant's Brief in Reply to State Defendants and is not repeated here. That reply brief is incorporated by reference.

II. HARM

The City asks this Court to read new language into HRS § 6E-13(b) that is not found in that provision. There is no requirement that Plaintiff prove an "immediate threat" or "imminent harm" as the City argues. Answering Brief ("Answ Br") at 3 and 17. Nor must the irreparable injury already have occurred. HRS § 6E-13(b) authorizes any person to sue when an alleged violation has occurred "or is likely to occur" that may irreparably alter an historic property or burial site. It would be absurd and unreasonable to limit HRS § 6E-13(b) to only those situations where the historic property or burial site have already been damaged.

Plaintiff has described two types of injury.

A. Procedural Injury

The first type of irreparable injury is procedural. *Sierra Club v. DOT,* 115 Hawai`i, 299, 322-5, 167 P.3d 292, 315-8 (2007). The injury takes place when an agency acts without considering potentially significant effects of its actions that it is required by law to consider. *Id.* at 323, 167 P.3d at 316. "After major investment of both time and money, it is likely that more environmental harm will be tolerated." *Citizens for the Protection of the North Kohala Coastline v. County of Hawai`i*, 91 Hawai`i 94, 105, 979 P.2d 1120, 1131 6 (1999)(quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir.)). Allowing 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. *Ka Pa`akai O Ka `Āina v. Land Use Comm'n*, 94 Hawai`i 31, 52 7 P.3d. 1068, 1089 (2000). An uninformed decision increases the risk that the rail project will adversely impact numerous burial sites along the transit corridor. As noted by one federal district court,

> a potential harm exists that the continued implementation of the Records of Decision (through ongoing construction of the pipeline) **will effectively result in a bureaucratic momentum** such that, if the BLM is ultimately required to correct its FEIS and re-consider its decision to grant the rights-of-way in light of that corrected FEIS, then the fact that the pipeline has already been constructed through the requested rights-of-way **will blind the BLM to the additional information** provided in the corrected FEIS. Stated otherwise, a significant difference exists between a decision whether to grant a right-of-way to permit the construction of a water pipeline and a decision whether to allow water to flow through a pipeline that crosses public lands when a decision to not allow the water to flow means that the pipeline (and all efforts and sums expended to construct it, and the incurred disturbance to public lands) will be wasted. The Ninth Circuit has recognized that, in such a situation, "[i]f a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the . . . substantive provisions will not result." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). As noted by the First Circuit, "[t]he difficulty of stopping a bureaucratic steam roller, once started, [is] a perfectly proper factor to take into account in assessing that risk [of irreparable harm], on a motion for a preliminary injunction." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989). The court notes that, in *Natl. Audubon Soc. V. Navy*, 422 F.3d 174 (4th Cir. 2005), the Fourth Circuit imposed a modified injunction that permitted steps prefatory to possible construction, but enjoined any actual construction of a proposed project.

Pyramid Lake Paiute Tribe of Indians v. BLM of the United States DOI, 2007 U.S. Dist. LEXIS 31766, 4-5 (D. Nev. Apr. 29, 2007) (emphases added). Courts have also acknowledged that,

> when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. . . . Moreover, to set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information -- a new EIS -- may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up. . . .
>
> [A] plaintiff seeking an injunction cannot be stopped at the threshold by pointing to additional steps between the governmental decision and environmental harm.
>
> In the present case plaintiffs would suffer harm if they were denied an injunction, if the lease sale took place, and if the court then held that a supplemental EIS was required. In that event, the successful oil companies would have committed time and effort to planning the development of the blocks they had leased, and the Department of the

> Interior and the relevant state agencies would have begun to make plans based upon the leased tracts. Each of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues. Once large bureaucracies are committed to a course of action, it is difficult to change that course -- even if new, or more thorough, NEPA statements are prepared and the agency is told to "redecide." It is this type of harm that plaintiffs seek to avoid, and it is the presence of this type of harm that courts have said can merit an injunction in an appropriate case.

Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. Me. 1989). *See also Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. Idaho 2000); *United States v. Diapulse Corp.*, 457 F.2d 25, 27-8 (2nd Cir. 1972). An AIS is essential to determine the impact of proposed development on historic sites and to devise mitigation commitments. *See* HAR §§ 13-284-6(e) and 13-275-6(e). If Defendants are not enjoined from proceeding with construction of the rail project without an AIS, the Court may later be unable to fashion an equitable remedy.

Furthermore, Plaintiff's ability to consult and obtain information before decisionmaking on the rail project has been irreparably injured. JEFS #42 RA: 44 ¶ 8-10. HRS Chapter 6E and its rules establish procedural and informational requirements. *Cf. Kepo'o v. Kane*, 87 Hawai`i 91, 101, 952 P.2d 379, 389 (1998) ("Both HRS ch. 343 and HAPA primarily establish procedural and informational requirements."). HRS sections 6E-42(a) and 6E-8(a) and HAR Title 13 Chapters 284, 275 and 276 specifically mandate procedures be followed to analyze the effects upon historic resources. They also allow the public to participate in these processes. 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. Injunctive relief ensures that proper procedures are followed so that decisionmakers can make informed decisions and so that Plaintiff can use that information to protect historic sites.[1]

By failing to ensure preparation and review of an AIS along the entire transit corridor, the City and Certain State Defendants (Department of Land and Natural Resources (DLNR), Board of Land and Natural Resources (BLNR), Willliam Aila, Puaalaokalani Aiu and Neil

[1] Following proper procedures prevents the irretrievable expenditure of public funds and irreversible progress of the project toward completion.

Abercrombie in their official capacities) failed to give full consideration of the impact of the rail project on iwi and cultural and historic values prior to decisionmaking. An AIS prepared after decisionmaking significantly increases the likelihood that burials will be disturbed and removed. JEFS #50 RA: 151-52. JEFS #42 RA: 47 ¶ 37 and at 60.

B. Injury to Burials

The second type of irreparable injury is the injury to the burials and/or Plaintiff's interest in protecting these burials. The U.S. Supreme Court recognized the value of injunctive relief to protect burials long ago. *Beatty v. Kurtz*, 27 U.S. 566, 584-585 (1829) (upholding an injunction to protect burials and observing that "the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded"). Plaintiff is a recognized cultural descendant to iwi found in Kaka`ako. JEFS #42 RA: 44 ¶ 6. The unnecessary removal of iwi causes Plaintiff great pain and suffering. *Id.* ¶ 7. Plaintiff will be injured by the unauthorized disturbance of iwi. *Kaleikini v. Thielen*, 124 Hawai`i 1, 26, 237 P.3d 1067, 1092 (2010). "After all, once a project begins, the pre-project cultural resources and practices become a thing of the past." *Ka Pa`akai*, 94 Hawai`i at 52 7 P.3d. at 1089.

The Hawai`i Supreme Court observed, "it seems probable that iwi will continue to be unearthed at future construction projects." *Id.* at 13, 37 P.3d at 1079. The threat is very real here. JEFS #46 RA: 205, 222; JEFS #48 RA: 27; JEFS #50 RA: 10 ¶ 4; JEFS # 42 RA: 360, 362. Plaintiff's expert, Dr. Abad, pointed out that the uncovering of burial remains is an alteration of a burial site. JEFS #44 RA: 60 ¶ 23. That alteration causes irreparable harm. JEFS #42 RA: 44. The improperness of the alteration (uncovering burials after decisionmaking rather than before) is discussed with respect to Counts 1 – 4. The improper alteration of a burial site after the City had decided to proceed with the rail project is an irreparable harm.

The City argues that there are presently no known burials along the rail project's alignment. Answ Br at 2. The only reason the City can make this argument is that it has not bothered to look.[2] It knows that the rail project had a high likelihood of affecting burial sites in Kaka`ako. JEFS #46 RA: 205, 222; JEFS #48 RA: 27; JEFS #50 RA: 10 ¶ 4; JEFS # 42 RA: 360, 362. According to the City, "it is understood that the Project would have an adverse effect on known and as yet undetected archaeological resources." JEFS # 42 RA: 367.

[2] This Court should ignore the City's unsupported allegations in Answ. Br. at footnote 3.

Plaintiff's expert, Dr. Abad, pointed out[3] that: (1) early identification of burial sites allows for all options to be considered (including scope, size, location and design) so that burial sites can be protected; (2) there is a very high likelihood of discovering burials in the urban portions of the rail project; (3) an AIS provides information to decisionmakers to enable them to preserve burial sites; (4) early preparation of an AIS allows for a better informed and meaningful process of addressing potential finds; (5) given the number of burials likely to be encountered and the extent of excavation, the relocation of piers will not adequately protect burials; (6) more fundamental options – including the route and the technology – need to be considered to protect burials; and (7) significant negative consequences have resulted when an AIS was not completed before decisionmaking – including limiting options available for the protection of burials. JEFS #44 RA: 60-63; JEFS #50 RA: 151-52.

Dr. Abad's analysis reveals the irreparable harm faced in this case. The City's proclamation of its "extensive protections" is the empty rhetoric developers customarily employ. *Cf. Ka Pa`akai*, 94 Hawai`i at 48 7 P.3d. at 1085.

As shown by Plaintiff's expert's testimony, an alteration of the route or technology is essential in order to protect burials. JEFS #44 RA: 63 ¶ 37. The City has clearly abandoned the no-build option. It has also rejected alteration of the route. JEFS #48 RA: 333. Nothing in the PA or the final environmental impact statement (FEIS) supersedes the City's declaration on September 25, 2007 that moving the alignment to a different street or area is not possible (as the City argues, Answ Br at 19). The City's determination of the route and technology (before attempting to identify the location of burials) significantly increases the risk of harm to burials.

C. It Cannot Be Assumed that the Programmatic Agreement Mitigates Any Harm.

The programmatic agreement (PA) touted by the City does nothing more than require the City to do after decisionmaking what it is already required to do before decisionmaking. Mitigation is not a promise to subsequently follow the law. Furthermore, the PA's requirement to prepare an AIS is not mitigation. Mitigation comes in completely different forms, such as preservation and data recovery. *See* HAR §§ 13-284-2 ("mitigation"), 13-275-2 ("mitigation") 13-284-8(a)(1), and 13-275-8(a)(1). A promise to look for burials is not mitigation. As the City

[3] The City did not refute Dr. Abad's testimony. Defendant Pua`alaokalani Aiu and Hallatt Hammatt offer legal opinion, to which Plaintiff objected, JEFS #50 RA: 68-9, and offer no contradiction of Dr. Abad's testimony.

itself discloses in its own archaeological report:

> Both State and Federal historic preservation legislation discuss mitigation to alleviate a project's effect on significant cultural resources. Mitigation can only be initiated following: 1) the Project's identification effort, 2) the significance assessment of a project's cultural resources, and, 3) the determination of a project's effect on significant cultural resources. **Only after these steps in the historic preservation review process have been completed can appropriate mitigation measures be developed and implemented.**

JEFS # 42 RA: 367 (emphasis added). This mitigation must take place before project decisionmaking and commencement. HRS §§ 6E-8(a), 6E-42(a) and HAR §§ 13-284-10, 13-275-10.

The PA does not allow for the no-build option, or alternative technologies or routes – all of which may have fewer impacts on burial sites. JEFS #44 RA: 60-63; JEFS #50 RA: 151-52.

Furthermore, it cannot be assumed that the City will abide by its promises. *Hawaii's Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1396 (D. Haw. 1993) ("The city made no good faith effort to comply with the NPDES permit or internal reporting procedures[.]"); *Save Our Bays & Beaches v. City & County Honolulu,* 904 F. Supp. 1098 (D. Haw. 1994) (holding that the City committed a grand total of 13,792 violations of its permit conditions at the Kailua and Kaneohe wastewater treatment plants including 11,095 secondary treatment violations, 406 bypass violations, 76 failures to report bypass incidents, 1,088 failures to monitor water quality and 18 failures to report failures to monitor effluent flow, 1,110 failures to monitor).

III. PHASING OF THE AIS IS IMPERMISSIBLE.

The City suggests that the Court look to federal law for guidance in interpreting HRS Chapter 6E and its rules. Considering analogous federal law makes sense – when provisions are indeed analogous. There is no reason to do so with respect to section 106 of the National Historic Preservation Act because HAR Title 13 chapters 275 and 284 do not contain the explicit provision allowing phasing contained in 36 CFR § 800.4(b)(2). In fact, the absence of such a provision in the state rules indicates an intent not to allow phasing. More specifically, the definition of "project area" as that term is used in HAR §§ 13-284-5 and 13-275-5 prohibits segmentation. The "project area" which must be assessed includes 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." HAR

§§ 13-284-2 and 13-275-2 (emphases added). This language is comparable to the definition of "secondary impact" in HAR § 11-200-2 pursuant to HRS Chapter 343.

The City argues that each phase of the rail project is a separate project. Answ Br at 21. Yet, the City has already admitted that all four phases of the Honolulu High-Capacity Transit Corridor Project are connected and part of a single project. JEFS #50 RA: 111 ¶ 3. The Certain State Defendants have not referred to the separate phases as separate projects. JEFS #50 RA: 10-12 ¶¶ 2, 9, 10b, 11 and 12.

The City also argues that "illegal segmentation" is purely a creature of specific statutory provisions. Answ Br at 23. Actually, the courts have prohibited segmentation where doing so would undermine the vitality of the legislation – even where segmentation has not been specifically addressed in any provision. *Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Department*, 446 F.2d 1013, 1023 (5th Cir. 1971) (prohibiting segmentation under NEPA and section 4(f) of the Federal Aid to Highway Act when it would frustrate the vitality of the act); *Thompson v. Fugate*, 347 F. Supp 120, 124 (VA 1972) (prohibiting segmentation under NEPA prior to today's regulations because it would result in the subversion of the announced Congressional policy); *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1142 (S.D. Cal. 2006) (prohibiting segmentation under the Endangered Species Act); *Merkel v. Port of Brownsville*, 509 P.2d 390, 395 (Was. App. 1973) (prohibiting segmentation under Washington's State Environmental Policy Act and the Shoreline Management Act of 1971 when it would frustrate the vitality of the acts).

Even when the Hawai`i Supreme Court has struck down segmentation under HRS Chapter 343, it has looked to the act's purpose. The Court has looked to the "spirit and intent of HEPA," relying on the legislative "findings and purpose" articulated in HRS 343-1. *Citizens*, 91 Hawai`i at 104, 979 P.2d at 1130. *See also Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai`i 66, 71, 947 P.2d 378, 383 (1997) ("This court must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose."); *Sierra Club v. Office of Planning*, 109 Hawai`i 411, 418 126 P.3d 1098, 1105 (2006) ("[R]equiring early environmental assessment comports with the purpose of HEPA[.]"). The Court recognized that "to function practically as an input into the decision making process," environmental review would need to take place early. *Citizens*, 91 Hawai`i at 105, 979 P.2d at 1131. Citing other courts, the Hawai`i Supreme Court noted that, "[a]fter major investment of both time and money,

it is likely that more environmental harm will be tolerated," and, as such, "the appropriate time for preparing an EIS is prior to a decision, when the decisionmaker retains a maximum range of options[.]" *Id.* (internal citations and quotation marks omitted). *See also Kahana Sunset*, 86 Hawai`i at 72, 947 P.2d at 384 ("[I]n the absence of the preliminary environmental assessment, the legislative intent that potential effects be studied and the public be notified is undercut."). Early preparation of an environmental assessment "provides a safeguard against a '*post hoc* rationalization to support action already taken.'" *Sierra Club*, 109 Hawai`i at 418, 126 P.3d at 1105 (internal citation and brackets omitted).

Finally, the City argues that HRS Chapter 6E's scope is so narrow that segmentation *ipso facto* makes sense. HRS Chapter 6E is not as narrow as the City believes. *See* HRS §§ 6E-1 ("comprehensive program of historic program at all levels of government" "in a spirit of stewardship and trusteeship"), 6E-2 (definitions of "historic property" and "project"), 6E-8, and 6E-42; HAR §§ 13-284-1, 13-284-2 ("project area"), 13-284-7(b) ("effects include . . . alteration of the properties' surrounding environment, detrimental visual, spatial, noise or atmospheric impingement. . ."), 13-275-1, 13-275-2, 13-275-7(b). The City's argument makes no sense.

IV. THE FEIS IN THIS CASE IS INADQUATE WITHOUT AN AIS.

Given the specific facts in this case, the FEIS for the rail project required an AIS. "The EIS process shall involve at a minimum . . . conducting necessary studies." HAR § 11-200-14. The City and Certain State Defendants admit that an AIS is a necessary study, JEFS #50 RA: 11-12 ¶ 9, 11 and 12; JEFS #50 RA: 124 ¶36. Furthermore: EISes often include AISes, JEFS #42 RA: 46-47; JEFS #50 RA: 13 ¶ 21; the City has prepared EISes for other projects that include AISes, JEFS #42 RA: 46-47; in the course of other projects, hundreds of burials have been found in the downtown and Kaka`ako areas that the rail project will cross, JEFS #44 RA: 61-62 ¶¶ 28, 29; and the City acknowledges the likelihood of encountering burials in the course of the project is high, JEFS #46 RA: 205, 222, JEFS #48 RA: 27 and JEFS #50 RA: 10 ¶ 4.

Plaintiff does **not** seek to contradict a conclusion in the FEIS. Rather, she seeks to ensure that the FEIS discloses information now rather than after decisionmaking. Plaintiff and Defendants **all** agree that an AIS should be conducted. The only question is when this AIS should be done: before or after substantive decisions have been made?

The City calls its promise to prepare an AIS after decisionmaking "mitigation." Answ Br at 28. Under state law, however, mitigation measures are those that avoid, minimize, rectify or

reduce the impact. HAR § 11-200-17(M). Studying where burials are located and their density does not "avoid, minimize, rectify or reduce impact."

V. THE DEFENDANTS FAILED TO GIVE FULL CONSIDERATION OF BURIAL ISSUES.

The City violated its duties pursuant to HRS Chapter 205A, Hawai`i Constitution Article XII § 7 and trust obligations by not **fully** considering burials issues **before** decisionmaking. The City did not fully consider burial issues, but rather punted the issue down the road. It made its decision to issue a permit and commence construction – and will address impacts of the rail project on burials later. As the Hawai`i Supreme Court held in a similar case:

> Specific considerations regarding the extent of customary and traditional practices and the impairment and feasible protection of those uses **must first be made before a petition for a land use boundary change is granted**. . . . 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.**

*Ka Pa`akai*, 94 Hawai`i at 52, 7 P.3d at 1089 (emphases added). Burials are in fact jeopardized when archaeological investigations are delayed:

> 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.

VI. SUMMARY JUDGMENT IS INAPPROPRIATE 45 DAYS AFTER A COMPLAINT IS FILED AND DISCOVERY HAS BEEN PROMPTLY REQUESTED.

The City overlooks the declaration submitted by counsel in support of the Hawai`i Rule of Civil Procedure Rule 56(f) request. The City confines itself to quoting from Plaintiff's memorandum, but ignores the declaration. In his declaration, Plaintiff's counsel pointed out that

> 3. In order to authenticate documents, we have sent four sets of admissions to the various Defendants, responses to which are not due until after the March 14, 2011 hearing on the

City's motion to dismiss complaint and/or for summary judgment.

4. We have sent two requests for production of documents, responses to which are not due until after the March 14, 2011 hearing on the City's motion to dismiss complaint and/or for summary judgment.

5. The deputy attorneys general representing the O`ahu Island Burial Council have informed me that we will not be able to sit down and meet with Dr. Abad, one of our expert witnesses, to begin working on her declaration until March 3, 2011 at noon.

6. We are unable to present the essential facts necessary to oppose a motion for summary judgment by the time our memorandum in opposition to the motion is due.

JEFS #44 RA: 41; *see also* JEFS #42 RA: 7-13, 70-3, 80-1. Given the Court's insistence upon authenticated documents, Plaintiff had no opportunity to complete even the first round of timely requested discovery prior to the summary judgment hearing.[4]

VII. CONCLUSION

This Court should reverse the Circuit Court's decision granting summary judgment to the Defendants – when reviewing all the evidence that the Court had before it, including the evidence that Plaintiff submitted in her motion for reconsideration. This Court should hold that summary judgment should have been granted to Plaintiff pursuant to *Flint v. MacKenzie*, 53 Haw. 672, 501 P.2d 357. In the alternative, summary judgment should have been denied in order to give Plaintiff a reasonable opportunity to engage in discovery.

DATED: Honolulu, Hawai`i, January 11, 2012.

/s/ DAVID KIMO FRANKEL
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[4] Technically, the City is correct in stating on page 10 its Answering Brief that no evidence was attached to Plaintiff's memorandum in opposition. Plaintiff, however, referred to a declaration and exhibits that she had previously submitted. JEFS #44 RA: 21; JEFS # 42 RA: 43-67. Subsequently, Plaintiff submitted numerous documents, stipulated facts and expert declarations. JEFS # 44 RA: 55-65, JEFS #50 RA: 8-14, 107-312.