

NO. CAAP-11-0000611

IN THE INTERMEDIATE COURT OF APPEALS

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
(DECLARATORY RELIEF)

APPEAL FROM:

(1) FINAL JUDGMENT FILED ON
AUGUST 8, 2011

(2) 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

(3) JULY 5, 2011 ORDER GRANTING
CERTAIN STATE APPELLEES'
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

(4) JULY 5, 2011 ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF THE COURT'S
MARCH 23, 2011 ORAL RULINGS FILED
APRIL 4, 2011

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAI'I

HON. GARY W.B. CHANG

CITY DEFENDANTS-APPELLEES' ANSWERING BRIEF

APPENDICES A-B

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(3) JULY 5, 2011 ORDER GRANTING CERTAIN STATE APPELLEES' 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

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CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII

HON. GARY W.B. CHANG

CITY DEFENDANTS-APPELLEES'¹ ANSWERING BRIEF

¹ City Defendants-Appellees are 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, and will be referred to collectively throughout this Answering Brief as "City Appellees." As of July 1, 2011, the Honolulu Authority for Rapid Transportation assumed all lawful obligations and liabilities owed by or to the City related to the Project pursuant to Section 16-129.2 of the Revised Charter of the City and County of Honolulu, 1973, as amended; and this brief is filed in accordance with and pursuant to that authority to the extent appropriate.

Defendants-Appellees WILLIAM J. AILA, 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, and NEIL ABERCROMBIE, in his official capacity as Governor will be referred to collectively herein as "State Appellees."

City Appellees and State Appellees may be referred to collectively herein as "Appellees."

O'AHU ISLAND BURIAL COUNCIL, who was named only as an "interested party," will be referred to herein as "OIBC."

Plaintiff-Appellant PAULETTE KA'ANOHIOKALANI KALEIKINI will be referred to herein as "Appellant."

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CITY DEFENDANTS-APPELLEES' ANSWERING BRIEF

I. INTRODUCTION AND NATURE OF THE CASE

This case involves a legal process challenge to the Honolulu High-Capacity Transit Corridor Project, otherwise known as the Rail Project (“Project”), co-sponsored by the City and County of Honolulu Department of Transportation Services (the “City”) and the United States Department of Transportation, Federal Transit Administration (“FTA”). Appellant, a cultural descendant of the Kaka‘ako area, seeks to halt the entire Project based on policy differences about when to conduct pre-construction invasive ground-disturbing surveys called an archaeological inventory survey (“AIS”) to locate any presently unknown burials along a portion of the route through the Kaka‘ako area. As set forth below, City Appellees and State Appellees have fully complied with all statutory requirements set forth in Hawai‘i Revised Statutes (“HRS”) Chapters 6E (“Chapter 6E”) and 343 (“Chapter 343” or “HEPA”), and given appropriate “consideration” to the impact of the Project on cultural and historic resources and values, including presently unknown native Hawaiian burial sites that may be encountered along the Project’s planned alignment.

The Project is a 20-mile fixed guideway transit alternative that will run from West O‘ahu to Ala Moana Center. It was described, evaluated and approved as the preferred alternative in the *Honolulu High-Capacity Transit Corridor Project Final Impact Statement/ Section 4(f) Evaluation*, dated June 2010 (“FEIS”). The Project, which will be built in four linear construction phases (“Phases”) over ten years, is an important public works project, intended to improve transit in the highly congested East-West corridor of O‘ahu.

To comply with state and federal environmental laws, the Project underwent an extensive environmental review process, during which the City and the FTA evaluated the Project’s potential impacts to the environment, including those on historical, archaeological and cultural resources, and developed plans to mitigate those impacts. The Project’s environmental impacts and related mitigation measures are set forth in the FEIS, a full-blown environmental disclosure document, which was reviewed and accepted by Governor Neil Abercrombie, the accepting authority for the State of Hawai‘i, on December 16, 2010.

Approval of the Project was conditioned upon, *inter alia*, the development, execution and implementation of an agreement, known as the Programmatic Agreement (“PA”), which sets forth a plan for investigating and handling historic properties, including burials and other

archaeological sites, that may be impacted by the Project. (See Appendix A.) The PA was developed in consultation with the State Historic Preservation Division (“SHPD”) of the State Department of Land and Natural Resources (“DLNR”), other state and federal government agencies and consulting parties, and provides for a “phased approach” to the handling of further investigative work for unknown burials that may be encountered along the proposed alignment. Specifically, the PA requires the City to perform an AIS within each of four distinct construction phases and to implement all necessary data recovery and/or mitigation plans required by HRS Chapter 6E and Title 13 of the Hawai‘i Administrative Rules (“HAR”) before final design is completed. As set forth in the PA, construction cannot commence in any given Phase until the AIS reports are completed and approved by SHPD. Accordingly, the PA ensures that historic resources, including burials and other archaeological resources that may be impacted by the Project, are investigated in accordance with, and afforded the full protections of Chapter 6E, as the applicable state law that regulates projects that could impact burials.

Despite the foregoing, Appellant alleges that Appellees have violated state law in allowing the Project to proceed in accordance with the terms and conditions of the PA. Appellant’s principal disagreement concerns the *timing* and sequence of when SHPD and other governmental agencies determined the AISs for the Project will be performed. The lawsuit fundamentally challenges agency decisions regarding the interpretation of the applicable statutes and implementing regulations based solely on policy arguments that improperly seek to read non-existent requirements into these laws.

Appellant cannot demonstrate: 1) that the potential presence of burials along the Project’s alignment has been ignored has not been given due consideration; 2) that the agency decisions concerning how to address the investigation and handling of these potential burial sites were arbitrary and capricious; 3) that the Project threatens to expose any burial to irreparable harm or risk; or 4) that the Appellees have otherwise violated any statute or rule. Indeed, based on extensive archaeological and historical studies performed to date, there are presently no known burials anywhere along the Project’s alignment. More importantly, the PA requires that the Project proceed in a manner that affords any currently unknown burials that may be discovered along the alignment all of the requisite protections for their handling as expressly set forth in Chapter 6E.

Appellant admits that the statutes upon which she seeks relief are reasonable regulations by the state of the constitutional interests Appellant claims are at issue. Indeed, Appellant has not challenged the applicability or the constitutionality of either Chapter 6E or Chapter 343, but rather, she contends Appellees have failed to comply with the protections afforded burials under these statutes. Appellant, however, has not presented any credible evidence to show that a single burial faces imminent harm or irreparable injury. As such, Appellant cannot make the necessary showing to maintain a private cause of action for injunctive relief under Chapter 6E. Aware of this fatal shortcoming, Appellant ignores the irreparable injury requirement for seeking judicial relief under HRS § 6E-13(b) and turns to policy arguments that improperly seek to expand on the procedures and protections set forth in the governing statutes, or otherwise seeks to create new or alternative causes of action based on her own personal policy preferences. There is no rational basis to create new law in such a manner. The existing statutes provide more than adequate protections for handling unknown burials. No separate or independent cause of action exists or should be legislated through judicial interpretation that circumvents or expands upon the reasonable regulations contained in Chapters 6E and 343. Appellees have complied with all mandatory requirements under these statutes. Appellees have also ensured that no ground-disturbing construction work will start in any Phase before the AIS process is complete, in accordance with the terms of the PA, and have thus ensured that burials discovered during this process will receive all protections under Hawai'i law. Accordingly, the Circuit Court's grant of summary judgment in favor of Appellees was proper and should be affirmed on appeal.

II. MATERIAL FACTS

A. THE HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT

The Project consists of a 20-mile fixed guideway rail system that begins at the University of Hawai'i-West O'ahu by Kapolei, and proceeds east via Farrington Highway and Kamehameha Highway (adjacent to Pearl Harbor), to Aolele Street to serve the Honolulu International Airport, to Dillingham Boulevard, to Nimitz Highway, to Halekauwila Street, and ending at Ala Moana Center. (See SR.66 at S-1, 2-23 to 2-24, Fig. 2-8 to 2-11; R.40 at 94 at ¶ 3.)² The system will

² The Record on Appeal was filed electronically in seven parts on October 3, 2011 as JEFS Document Nos. 40, 42, 44, 46, 48, 50 and 52. References to the Record on Appeal will be provided in the following format: "R.[JEFS Doc. No] at [PDF page number]." A Supplemental Record on Appeal was filed electronically on October 20, 2011 as JEFS Document No. 66,

operate in an exclusive, elevated guideway, except in an area near Leeward Community College where it will be at-grade in an exclusive right-of-way. (See SR.66 at 2-24, 2-29; R.40 at 94, ¶ 3.) The elevated rail course will be supported by columns placed in drilled shafts between 6 and 10 feet in diameter, the exact locations of which will be finally determined in subsequent design efforts for each of the Phases. (See R.42 at 212.) The pillars and column supports that will touch the ground will be spaced about 120 to 150 feet apart along the route's alignment. (See *id.* at 211.) The Project will be built in four construction Phases over ten years: (a) Phase 1: East Kapolei to Pearl Highlands; (b) Phase 2: Pearl Highlands to Aloha Stadium; (c) Phase 3: Aloha Stadium to Middle Street; and (d) Phase 4: Middle Street to Ala Moana Center. (See SR.66 at 2-46 to 2-47; Fig. 2-41 at 2-46; R. 40 at 94, ¶ 4.) As set forth in the FEIS and PA, construction cannot commence in any given Phase until the requirements of the PA are satisfied for that specific construction Phase. This includes consulting with and receiving comments from SHPD through the AIS process, and receiving SHPD's final approval for each Phase before ground-disturbing construction activity can commence in a construction phase. (See SR.66 at S-10, 4-176 to 4-196, § 4.16; R.40 at 112-115; R.40 at 98-100, ¶¶ 6(m)-12.)

B. THE PROJECT'S ENVIRONMENTAL REVIEW PROCESS

In accordance with their obligations under the Hawai'i Environmental Policy Act ("HEPA") and the National Environmental Policy Act ("NEPA") to evaluate and disclose potential environmental effects of the Project, the City and FTA undertook a comprehensive environmental review process between 2006 and 2010. (See SR.66 at S-1 to S-12; R.40 at 95-98, ¶¶ 6(a)-(m); R.44 at 152-155, ¶ 15(a)-(n).) In June 2010, the City and FTA completed the environmental review process for the Project by approving the joint NEPA-HEPA FEIS. (See *generally* SR. 66) The FEIS addresses agency and public comments to the Draft Environmental Impact Statement ("DEIS"), documents the Project's potential impacts on the natural and human environment (including archaeological and cultural resources), and identifies measures for mitigating these impacts. (See *generally* SR.66; *see also* R.40 at 97 ¶ 6(j); R.44 at 154, ¶ 15(k).) Following the period for public comment on the FEIS, the State Office of Environmental Quality

noting the transfer of a hard copy of the FEIS, dated June 2010 to the appellate Court. References to the Supplemental Record on Appeal will be provided as: "SR.66 at [FEIS page or section number]." Four transcripts of hearings held on 3/14/11, 3/15/11, 3/23/11 and 4/29/11, were also filed as JEFS Document Nos. 32, 34, 36 and 38. These transcripts will be referenced as follows: "Tr.[JEFS No.] at [PDF page number]:[Relevant transcript lines]."

Control (“OEQC”) found the FEIS acceptable and recommended its acceptance by Governor Neil Abercrombie of the State of Hawai‘i, who is the accepting authority under HEPA for the Project. (R.48 at 268-272.) On December 16, 2010, the Governor found the FEIS acceptable under HEPA and its implementing regulations. (R.48 at 273-288.)

As part of the environmental review process, Cultural Surveys Hawaii, Inc. (“CSH”), a prominent and reputable archaeological consulting firm, was retained to evaluate, among other things, the potential impacts of the Project on archaeological resources, including native Hawaiian burials. (See R.44 at 150, ¶ 8; R.48 at 322-323, ¶¶ 3, 8.) To accomplish this, CSH: 1) consulted with SHPD and other knowledgeable stakeholders; 2) conducted an extensive review of existing archaeological documentation, geological and depositional characteristics, and some field inspections within the study corridor; and 3) developed a qualitative rating system for evaluating and describing the potential archaeological impacts. (R.42 at 254-257; R.48 at 323, ¶¶ 8-9; SR.66 at 4-178.) The results of these studies are set forth in CSH’s August 15, 2008 *Archaeological Resources Technical Report* (“Archaeological Report”). (R.42 at 219-428.)

The City also retained Ku‘iwalu LLC to perform a cultural impact assessment for the Project that involved: 1) identifying and consulting with individuals and groups with expertise on cultural resources, practices, and beliefs within the study corridor; 2) conducting field surveys by canvassing select areas of the corridor; 3) conducting semi-focused interviews of cultural experts or people familiar with details of cultural practices that would be adversely impacted; 4) making site visits; and 5) reviewing pertinent archival documents. (See R.42 at 438, 455-59; R.44 at 151, ¶ 9; SR.66 at 4-179 to 4-180.) The results of this study are set forth in Ku‘iwalu’s August 15, 2008 *Cultural Resources Technical Report* (“Cultural Report”) (the Archaeological Report and Cultural Report are referred to herein collectively as the “Technical Reports”). (R.42 at 429-739.) These Technical Reports were fully considered during the environmental review process, were made available for agency and public review and comment and were among the studies expressly incorporated into the FEIS. (See SR.66 at 4-176 to 4-196, § 4.16; R.44 at 150-52, ¶¶ 8-13; R.48 at 323-24, ¶¶ 10-12.)

Based on the findings in the Archaeological Report, the FEIS, as an environmental disclosure document, fully disclosed the presence of archaeological resources documented by previous studies within the area of potential effect (“APE”) for the whole Project. (See SR.66 at 4-183, § 4.16.2; *id* at 4-185, § 4.16.3; *see generally* R.42 at 219-428.) However, the FEIS

discloses that “subsurface cultural layers related to Native Hawaiians [] may include religious or cultural artifacts and resources, including iwi kupuna or Hawaiian burials.” (SR.66 at 4-183; *see also id.* at 4-185.) The FEIS further identifies and discloses three general categories of archaeological resources that could be affected by the Project: *burials*, pre-contact archaeology and post-contact archaeology. (*Id.*) The FEIS also discloses that the probability of encountering burials within the Phase 4 developed sub-areas of Dillingham, Downtown and Kaka‘ako is “High.” (*Id.* at 4-184, Fig. 4-73.) Given the likelihood of encountering burials, the FEIS then identifies appropriate mitigation measures and procedures for protecting historic resources, including burials in a particular Phase, before any ground-disturbing construction activity commences in that Phase. (*Id.* at 4-178 to 4-179, 4-191 to 4-196; R.48 at 252-267.) As set forth in the FEIS, these mitigation measures and procedures in the PA contractually bind the City and SHPD. The PA was developed in consultation with SHPD and numerous other governmental consulting agencies at the state and federal levels. (SR.66 at 4-178, 4-183, 4-195.)

C. THE PROJECT’S PROGRAMMATIC AGREEMENT AND PLAN FOR AISs

In accordance with Hawai‘i State Historic Preservation and Burial laws, as set forth in Chapter 6E and HAR Title 13, the City consulted with SHPD during its evaluation of the Project’s potential impacts to historic, archaeological and cultural resources. (*See* R.42 at 256.) Because the City determined that the Project would have impacts on certain historic and archaeological properties, and that the Project would likely have impacts on presently unknown burials, SHPD was provided an opportunity to review and comment on the Project’s potential impacts to these resources in accordance with HRS § 6E-42. (R. 48:315-320, ¶¶ 5-9; R.40 at 98, ¶ 6(m); R. 44 at 155, ¶17.) SHPD also participated as a consulting party in the required consulting process under Section 106 of the National Historic Preservation Act (“Section 106”). (R.40 at 103; R.48 at 315-320, ¶ 5.) As part of these processes, the City and FTA coordinated and consulted extensively with SHPD and the other Section 106 consulting parties, including the Oahu Island Burial Council (“OIBC”), to determine how to minimize, mitigate or avoid effects that the Project may or will have on historic resources. (*See* R.40 at 103-104; R.40 at 98, ¶ 6(m); R.44 at 155, ¶¶ 17; R.48 at 311-314.) This led to the development of the PA, which provides, *inter alia*, procedures to identify, evaluate and protect historic properties, including archaeological resources and native Hawaiian burials along the Project’s 20-mile alignment.

(R.40 at 103-143; R.44 at 163-265, continued in R.46 at 6-48; R.48 at 315-320, ¶ 5, 9(e); R.44 at 155-158, ¶¶ 17-25.)

As set forth in the PA, the FTA, SHPD and others determined that a “phased approach” to more detailed and intrusive ground-disturbing investigation of burials by an AIS was appropriate for this Project. (R.40 at 112-115; *see* R.48 at 315-332, ¶¶ 10, 13, 16.) Under this “phased approach,” an AIS for each construction Phase of the Project will be performed and approved by SHPD before ground-disturbing construction work begins in that particular Phase. (*See* R.40 at 112-115; SR.66 at 4-178 to 4-179; R.40 at 98-100, ¶¶ 7-10; R.48 at 319-320, ¶¶ 13-23.) More specifically, Section III of the PA addresses “Identification and Protection of Archaeological Sites and Burials,” and provides that the City, in consultation with SHPD will develop an AIS plan, following the requirements of HAR 13-276 for the APE within each construction Phase of the Project. (*Id.* at 112.) The APE for subsurface resources is defined under the PA as “all areas of direct ground disturbance by the Project.” (*Id.*) The City is then required to perform the AIS fieldwork contemplated by the approved AIS plan for each Phase, and submit a final report to SHPD for approval summarizing the results of the fieldwork for each construction Phase. (*Id.* at 113-114.)

The PA provides that any native Hawaiian burials (*iwi kupuna*) discovered during the AIS process will be considered “previously identified” burial sites, as defined under HRS Chapter 6E and its regulations. (R.40 at 112, § III(A)(3).) *See* HAR § 13-300-2. Thus, OIBC will have jurisdiction to determine their treatment pursuant to HAR 13-300 (*i.e.*, whether the burial should be preserved in place or relocated). *Id.* The PA further provides that if OIBC determines that a burial should be preserved in place, available avoidance measures include modifying column locations, design and span length, or finding alternative utility locations. (*Id.* at 112, § III(B)(4); *id.* at 114, § III(D)(2).) If presently unknown burials are identified by the AIS investigation, the City must develop and implement a treatment plan, in consultation with SHPD and in accordance with Chapter 6E and HAR 13-300, to avoid, minimize or mitigate adverse effects upon these resources. (*Id.* at 114, § III(D).) The City is also required to develop and implement, in consultation with SHPD, additional approved mitigation plans. (*Id.* at 114-115, § III(E).) The AIS fieldwork, along with any necessary resulting treatment plans or mitigation plans for each Phase, must be completed and approved by SHPD prior to completion of final design and commencement of ground-disturbing construction activities in each

respective Phase. (*See id.* at 112-115; *id.* at 98-100, ¶¶ 7-10.) This ensures that the presence of any identified burials can be considered during final design for each Phase and measures taken to avoid and/or minimize adverse effects to these resources. (*Id.* 113, § III(C).)

The PA, in Section XII, also addresses “Post Review Discoveries,” or archaeological resources that, notwithstanding the completion of the AIS process, may be discovered during the course of construction. (R.40 at 128-130.) Consistent with HRS § 6E-43.6 and its implementing regulations, in the event of any such “inadvertent discoveries of burials,” all work in the vicinity must immediately stop and the area must be secured to avoid any additional disturbance to the burial. (*Id.* at 129, § XII(B).) HRS § 6E-43.6, HAR § 13-300-2, -40. SHPD, in consultation with the landowner, OIBC, and any recognized cultural or lineal descendants or Native Hawaiian Organizations for the Project, will determine whether the burial should be relocated or preserved in place. (*Id.* at 129, § XII(B).) If SHPD determines that a burial should be preserved in place, the City can modify the column construction to allow for this. (*Id.* at 129, § XII(C)(1).) Work shall remain halted until the treatment plan is completed or any other requirements of law have been met. (*Id.* at 129, § XII(B).)

Because construction within a given Phase of the Project cannot commence until the AIS process is completed and approved by SHPD in accordance with the terms of the PA, the PA expressly preserves all protections afforded historic properties and burials under Chapter 6E and its regulations. (*See* R.48 at 318-320, ¶¶ 10-24; R.48 at 324-329, ¶¶ 13-32.) SHPD has concurred and provided its written approval to this process under HRS § 6E-8. (R.40 at 142; R.48 at 319, ¶ 13.) The plan itself was developed in consultation with SHPD, who *considered* the impacts of the Project as a whole and determined that given the Project’s length, timeline and construction phases, that performing AISs on a Phase-by-Phase basis was not only permissible under Chapter 6E, but an appropriate way to address and mitigate potential impacts to archaeological resources along the Project’s alignment. (R.48 at 318-320, ¶¶ 10-24.) Accordingly, on January 13, 2011, William J. Aila, Jr., the State Historic Preservation Officer (“SHPO”) and Interim Chairperson of the Board of Land and Natural Resources executed the PA, thereby providing SHPD’s written concurrence to the phased approach to the Project as

provided in HRS § 6E-8(a). (R.40 at 142; R.48 at 319, ¶¶ 12-13.) The Project is currently on track to complete the AISs for all Phases by early 2013.³

III. COURSE AND DISPOSITION OF PROCEEDINGS APPEALED FROM

On January 31, 2011, Appellant filed a Complaint for Declaratory and Injunctive Relief asserting that Appellees violated Chapter 6E, Chapter 343 or HEPA, and Chapter 205A.⁴ (R.40 at 21-34.) The material facts relevant of this case are incontrovertible. (*See id.*) Appellant's Complaint raises questions of law (premised on policy arguments) regarding the AIS process and scope of disclosure required in an EIS. City Appellees filed a Motion to Dismiss Complaint and/or for Summary Judgment ("City Appellees' Motion") on February 9, 2011. (R.40 at 64-416.) City Appellees' Motion sought dismissal on the following three grounds: 1) Counts 1 through 4 of Appellant's Complaint fail because the City, having consulted with SHPD about the Project and its potential impacts to archaeological resources, and having obtained SHPD's written concurrence to the phased approach to the investigation and treatment of archaeological resources set forth in the PA, fully complied with the mandates of Chapter 6E; 2) Count 5 fails because Chapter 343 does not require that an EIS include a completed AIS, and the FEIS for the Project adequately discloses the potential impacts to presently unknown burials and identifies appropriate mitigation measures to satisfy the *Price v. Obayashi* sufficiency requirement as a matter of law; and 3) Count 6 fails because Appellant has not and cannot identify any legal basis for her claim that Appellees failed to "consider" the impact of the Project on burials, and the

³ The City has already begun the process of developing and performing AISs for the four construction Phases. An AIS for Phase 1 has already been completed and its final report was approved by SHPD on April 19, 2010. (*See* R.40 at 99, ¶¶ 8-9; R.40 at 360.) The AIS fieldwork for Phase 2 is complete, and the AIS Report is being finalized for submittal to SHPD. The AIS plan for Phase 3 was submitted to and approved by SHPD. Fieldwork for the Phase 3 AIS is expected to begin in January 2012. In accordance with the PA, the City initiated the AIS process for Phase 4 within 60 days of execution of the PA, and held a meeting with OIBC, lineal and cultural descendants, Native Hawaiian Organizations, and other interested parties identified in discussions with OIBC, on March 16, 2011 to discuss the AIS plan for Phase 4. Following significant consultation regarding the scope of the AIS for Phase 4, SHPD approved an AIS Plan for this Phase that requires the digging of 232 trenches. As of December 19, 2011, approximately 10% of these trenches were completed and no *iwi kupuna* had been discovered.

⁴ Appellant's Complaint asserted claims against Appellees. Appellant also named the OIBC, but only as an "interested party," whose interests are "more properly aligned with Plaintiffs." (R.40 at 27-28, ¶¶ 42, 51.) The Complaint does not assert any claims against OIBC (*see generally* R.40 at 21-34); nor have any other claims otherwise been asserted against OIBC, or by OIBC.

record otherwise shows that there are no genuine issues of material fact as to whether cultural and historical rights were properly *considered* by Appellees or the oversight process was never surrendered by the responsible governmental agency (*i.e.*, SHPD).

On February 18, 2011, State Appellees filed a Substantive Joinder to the City Appellees' Motion. (R.42 at 14-15.) Appellant filed her Memorandum in Opposition ("Opposition") on March 2, 2011. (R.44 at 9-41.) Appellant's Opposition did not include any admissible evidence, but rather, made a general request for a continuance pursuant to Haw. R. Civ. P. 56(f) ("Rule 56(f)") for the purpose of discovery. (R.44 at 21, 41.) OIBC subsequently filed a Statement of No Position to the City Appellees' Motion on March 3, 2011. (R.44 at 44-47) Concurrently, on February 23, 2011, Appellant filed a motion for preliminary injunction, which was set for hearing on March 23, 2011. (R.42 at 18-69.)

The Circuit Court held oral hearings on the City Appellees' Motion on March 14, March 15 and March 23, 2011. (*See* Tr. 32, 34, 36.) During the course of these hearings, the Court sought supplemental briefing regarding whether and to what extent the principle of "segmentation" applied to matters before the Court under Chapter 343 and/or Chapter 6E. (*See* R.50 at 15-21, 22-49.) On March 23, 2011, the Court ruled that: 1) having considered exhibits outside the pleadings, the Court was required to treat the City Appellees' Motion as one for summary judgment; 2) Appellant failed to make the requisite showing to warrant a continuance under Rule 56(f); 3) there were no genuine issues of material fact; and (4) City Appellees and State Appellees were entitled to summary judgment as a matter of law on all claims and counts. (*See* Tr.36 at 50-76.) Accordingly, the Court granted the City Appellees' Motion in full, granted State Appellees' Substantive Joinder, and denied Appellant's pending motion for preliminary injunction as moot. (Tr.36 at 76-77.)

On April 4, 2011, prior to the entry of any written orders, Appellant filed a motion for reconsideration with 17 supporting exhibits, alleging "newly discovered and previously unavailable evidence." (R.50 at 88-316.) The City Appellees opposed the motion for reconsideration on the grounds that Appellant's evidence was not "new" and Appellant did not raise any genuine issues of fact as to any matter material to the *legal* issues before the court. (*See* R.52 at 8-31.) The Circuit Court considered the evidence, and denied the motion stating it "was unable to find any new evidence or law of significance that would alter the Court's ruling." (Tr. 38 at 6.) Thus, the Circuit Court "maintain[ed] its conclusion that there are no genuine

issues of material fact as to any claims asserted in the complaint, and that the defense has established that they are entitled to judgment as a matter of law.” (Tr.38 at 6.)

On July 5, 2011, the Court entered four orders: 1) granting the City Appellees’ Motion; 2) granting State Appellees’ Joinder to that motion; 3) denying Appellant’s motion for preliminary injunction as moot; and 4) denying Appellant’s motion for reconsideration. (R. 52 at 273-277, 278-281, 282-285, and 286-289, respectively.) Final Judgment was entered in favor of Appellees on August 8, 2011. (R.52 at 290-293.) On August 11, 2011, Appellant timely filed her notice of appeal. (R.52 at 297-316.)

IV. STANDARDS OF REVIEW

A. REVIEW OF SUMMARY JUDGMENT ON APPEAL

This court reviews the Circuit Court’s grant of summary judgment *de novo*. See *O’ahu Transit Servs., Inc. v. Northfield Ins. Co.*, 107 Hawai’i 231, 234, 112 P.3d 717, 720 (2005). Summary judgment should be granted where the record indicates “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Haw. R. Civ. P. 56(c); see, e.g., *Stanford Carr Dev. Corp. v. Unity House, Inc.*, 111 Hawai’i 286, 295, 141 P.3d 459, 468 (2006).

A party seeking summary judgment may discharge its burden by showing that if the case went to trial, there would be no competent evidence to support a judgment for its opponent. See *First Hawaiian Bank v. Weeks*, 70 Hawai’i 392, 396, 772 P.2d 1187, 1190 (1989); see generally *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986) (moving party “entitled to judgment as a matter of law” because nonmoving party failed to make sufficient showing on essential element of its case where it had burden of proof). A party opposing a summary judgment motion who cannot show that countervailing evidence will be available at trial is not entitled to denial of the motion for summary judgment “on the basis of a hope that [the party] can produce some evidence at [trial].” *Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc.*, 107 Hawai’i 432, 429, 114 P.3d 929, 935 (App. 2005.)

“[W]here the circuit court’s decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling.” *Reyes v. Kuboyama*, 76 Hawai’i 137, 140, 870 P.2d 1281, 1285 (1994). “This court may affirm a grant of summary judgment on any ground appearing in the record, even if the circuit court did not rely on it.” *Id.*

B. SHPD'S INTERPRETATION OF ITS IMPLEMENTING RULES AND REGULATIONS IS ENTITLED TO DEFERENCE AND A PRESUMPTION OF VALIDITY

“[A]n administrative agency’s interpretation of its own rules is entitled to ‘deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose.’” *Lee v. Elbaum*, 77 Hawai‘i 446, 457, 887 P.2d 656, 667 (App. 1993) (alternatively: “great deference.”); *see also Dir. Dept. of Labor and Indust. Relations v. Kiewit Pacific Co.*, 104 Hawai‘i 22, 29-30, 84 P.3d 530, 537-538 (App. 2004) (“reviewing court deference is especially due in the discrete context of an agency’s interpretation of its own administrative rules...”); *Keliipuleole v. Wilson*, 85 Hawai‘i 217, 226, 941 P.2d 300, 309 (1997) (“In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears ‘the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.’”)

C. THE ADEQUACY OF AN FEIS UNDER CHAPTER 343 IS A QUESTION OF LAW

Hawai‘i law is clear about the standard for challenging the legal sufficiency of an EIS: “the sufficiency of an environmental impact statement is a question of law, which is properly addressed through the summary judgment procedure.” *Price v. Obayashi*, 81 Hawai‘i 171, 182, 914 P.2d 1364, 1375 (1996). “This is because the only question presented is whether the EIS complies with applicable statutory mandates, such as Chapter 343 and EIS rules under HAR Chapter 11-200. There are no factual determinations to be made regarding EIS adequacy.” *Id.* Ultimately, a Court does “not wish to substitute its judgment for that of an agency within the executive branch of government....” *Id.* Citing *Stop H-3 Ass’n v. Lewis*, 538 F. Supp. 149, 159 (D. Haw. 1982), the Hawai‘i Supreme Court has emphasized:

A court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a “hard look” at environmental factors.

If the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be “arbitrary and capricious,” given the known environmental consequences.

The court should not be used as a quasi-legislative or quasi-executive forum by those who are dissatisfied with policy decisions made by governing bodies. The environmental laws were neither meant to be used as a “crutch” for chronic fault-finding, nor as a means of delaying the implementation of properly [accepted] projects.

Accordingly, courts are reluctant to “second guess” the decision-making body regarding the sufficiency of an EIS.

Price, 81 Hawai‘i at 182-83 n.12, 914 P.2d 1375-76 n. 12; *see also Citizens for Protection of N. Kohala Coastline v. County of Hawaii*, 91 Hawai‘i 94, 107, 979 P. 2d 1120, 1133 (1999) (court will not substitute its judgment for agency’s determination of sufficiency of an EIS).

D. DENIAL OF REQUEST FOR RULE 56(F) CONTINUANCE AND MOTION FOR RECONSIDERATION

“A trial court’s decision to deny a request for a continuance pursuant to Haw. R. Civ. P. 56(f) will not be reversed absent an abuse of discretion.” *Josue v. Isuzu Motors America, Inc.*, 87 Hawai‘i 413, 416, 958 P.2d 535, 538 (1998). A trial court’s ruling on a motion for reconsideration is similarly “reviewed under the abuse of discretion standard.” *Cho v. State*, 115 Hawai‘i 373, 381, 168 P.3d 17, 25 (2007). An abuse of discretion occurs “where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. *Josue*, 87 Hawai‘i at 416, 958 P.2d at 538; *see also Cho*, 115 Hawai‘i at 381, 168 P.3d at 25.

V. COUNTER-STATEMENT OF POINTS OF ERROR

A. Whether Appellees are entitled to summary judgment on Counts 1-4 of Appellant’s Complaint because Appellant is able to make the requisite “showing” of irreparable injury required to assert and maintain a private cause of action under Chapter 6E, given the protections afforded to unknown burials in the PA, including the fact that no ground-disturbing construction will commence in a given Phase of the Project until after the AIS process for that Phase has been completed and approved by SHPD.

B. Whether the Circuit Court properly concluded that Appellees are entitled to summary judgment on Counts 1-4 of Appellant’s Complaint because the Project’s phased approach to AISs, as set forth in the PA, is not unlawful because it is incontrovertible that the City Appellees: 1) consulted with SHPD regarding the Project’s potential impacts to historical and archaeological

resources; 2) obtained SHPD's written concurrence to the phased approach to AISs set forth in the PA; and 3) are required to obtain further written concurrence from SHPD following the completion of the AIS process for each Phase before ground-disturbing construction activity can commence; and therefore, the City Appellees have complied with both the spirit and express requirements of Chapter 6E.

C. Whether the Circuit Court properly concluded that Appellees are entitled to summary judgment on Count 5 because Chapter 343 does not require an EIS to include a completed AIS, and the FEIS for the Project otherwise adequately discloses the potential impacts of the Project on archaeological resources, including unknown burials, and identifies appropriate mitigation measures for handling unknown burials that may be encountered, thus satisfying the standard for EIS sufficiency set forth in *Price v. Obayashi*.

D. Whether the Circuit Court properly concluded that Appellees are entitled to summary judgment on Count 6 because there are no genuine issues of material fact as to whether Appellees gave appropriate "consideration" to cultural and historic resources, as evidenced by *inter alia* the Technical Reports, the DEIS, the FEIS, and the PA.

E. Whether the Circuit Court abused its discretion in denying Appellant's request for a Rule 56(f) continuance where Appellant failed to show how a continuance would enable her, by discovery or other means, to rebut the City Appellees' showing of the absence of a genuine issue of fact.

F. Whether the Circuit Court abused its discretion, in denying Appellant's motion for reconsideration, where Appellant failed to provide any *new* legal argument or evidence or otherwise raise any genuine issues of material fact.

VI. ARGUMENT

Appellant challenges the determination by the City, state and federal agencies, as well as the accepting authorities, that the phased approach to the AIS process, as set forth in the PA, is appropriate and lawful for the Project. Appellant contends that Chapters 6E, 343 and 205A "require" the preparation of a single AIS for the entire Project before any construction on the Project commences. (Appellant's Opening Brief ("Op. Br.") at 1, 10.) No such explicit "requirement" exists in any statute, regulation, case, or otherwise (as Appellant tacitly concedes

by failing to cite to any authority in support of this proposition). (*Id.*) Appellant, nonetheless, implores the Court to read such a requirement into the applicable laws, arguing that a phased approach is impermissible because no statute expressly authorizes this approach. Appellant further claims that this approach is inconsistent with the public policy of preserving, restoring and maintaining historic and cultural property and demonstrates that appropriate consideration was not given to burials that may exist along the Project's alignment. (*See generally* Op. Br. at 14-31.) As discussed below, Appellant's positions are unsupported.

Chapter 6E, which sets forth the procedures for identifying and handling archaeological resources, including ancient burials, is a reasonable regulation of Constitutional rights recognized in Article XII of the Hawai'i Constitution. Chapter 6E provides general enforcement powers to the DLNR and Attorney General, and provides a limited private right of action for injunctive relief when a party can show that a burial is at risk of irreparable injury. Absent a threat or risk of irreparable injury, there is no right for a private citizen to sue to challenge agency decisions regarding the timing or procedure SHPD has determined is appropriate for handling and protecting unknown burials that may be impacted by a proposed project.

The phased approach to the AIS process in the PA is a reasonable method for identifying and protecting burials that may exist along the Project's alignment and is consistent with the protective goals and principles of Chapter 6E. SHPD did not violate or misinterpret its own rules and regulations by executing the PA and approving a phased AIS approach. This approach ensures that ground-disturbing construction will not commence in a given construction Phase until and AIS is completed and approved by SHPD for that Phase. This phased approach protects potential unknown burials from irreparable harm, and is therefore entirely consistent with the purpose and spirit of Chapter 6E. Even if Appellant could show that the phased approach was somehow at odds with the requirements of Chapter 6E and/or its implementing regulations -- which is wholly denied here -- such procedural violations are not actionable by a private person under HRS § 6E-13(b), without a showing of irreparable harm to a specific burial. No such evidence has been presented. SHPD cannot be found to have abused its discretion in approving this approach for the Project. SHPD's interpretation and application of its own rules are entitled to deference and a presumption of validity. In sum, SHPD's approval of the PA pursuant to Chapter 6E cannot be shown to be unreasonable, arbitrary or capricious and should not be second guessed on appeal.

For EIS purposes, under HEPA potential impacts to burials along the Project's alignment were evaluated through extensive archaeological and cultural studies and were fully disclosed in the FEIS. The FEIS further sets forth a plan for mitigating these impacts in the PA. These disclosures are plainly sufficient to satisfy the requirements for HEPA. Absent a constitutional challenge to Chapter 6E or Chapter 343, there is no other basis to second guess the agencies' decisions. Moreover, Appellant's claim, purportedly addressing Chapter 205A, alleging a failure to give due consideration to burial issues during the review process is meritless as full consideration was given, as confirmed by the Technical Reports, FEIS and the PA, and SHPD has not surrendered its oversight responsibilities.

In sum, Appellant cannot show, in light of existing law and the undisputed facts of this case, that the phased AIS approach is unlawful under Chapters 6E, 343 or 205A. Because there is no harm threatened to any burial by this reasonable process, Appellees were entitled to summary judgment on all claims in Appellant's Complaint.

A. SUMMARY JUDGMENT ON COUNTS 1-4 WAS PROPER BECAUSE THERE IS NO THREAT OF IRREPARABLE HARM, THE PHASED APPROACH TO THE ARCHAEOLOGICAL INVENTORY SURVEYS APPROVED IN THE PA IS NOT UNLAWFUL, AND APPELLEES OTHERWISE COMPLIED WITH CHAPTER 6E

1. Appellant Has Not Made the Necessary "Showing" of "Irreparable Injury" to Give Rise to a Private Right of Action Under HRS § 6E-13(b)

a. Chapter 6E Contains a *Limited* Private Right of Action

Appellant acknowledges that the legislature enacted Chapter 6E to facilitate the constitutional mandates of Article XI § 7 and Article XII § 7 relating to conserving and developing historic and cultural property, including burials. (Op. Br. at 10.) Appellant concedes that Chapter 6E sets forth the legal framework for the protection of burials. (*Id.* at 10-12.) Indeed, nowhere does Appellant challenge the constitutionality or adequacy of Chapter 6E. Chapter 6E, however, clearly sets forth limited circumstances under which a private party may seek judicial relief. Importantly, HRS § 6E-13(b) expressly provides:

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.

It is clear from the plain text of HRS § 6E-13(b) that the legislature did not intend for an unbridled or limitless private right of action that would permit persons to sue any time a personal concern regarding burials arises or a possible violation of Chapter 6E is alleged. Rather, the legislature has specifically charged the Board of Land and Natural Resources and the Attorney General with general enforcement of Chapter 6E. *See* HRS §§ 6E-10.5 to 13 (outlining the procedures related enforcement of Chapter 6E and the penalties and remedies available for violations). The circumstances that give rise to a private right of action are limited to those where a plaintiff can bring forth admissible evidence to “show” an immediate threat of irreparable harm to a burial or other historic property. *Compare* HRS § 6E-13(a) (giving the Attorney General broad enforcement power to seek injunctive relief for “violations and threatened violations”) *with* HRS § 6E-13(b) (limiting the circumstances under which a private person may seek injunctive relief to those where the party can make a “showing of irreparable injury”). Appellant has not challenged HRS § 6E-13(b) as an unreasonable state regulation of the public’s right to assert a private cause of action by its defined limits on applicability and enforcement.⁵ Rather than challenge the constitutionality of HRS § 6E-13 as an unreasonable state regulation, Appellant failed to assert and prove a threat of harm to a burial anywhere in the Project. Unless and until such a showing can be made, there is no basis to sue under Chapter 6E.

b. Appellant Cannot Demonstrate any Irreparable Injury to a Burial Site

Appellant has not identified any specific burial that is currently threatened by the Project. Nor has she shown that there is any threat of irreparable injury in the form of improper demolition, alteration or transfer of any burial along the Project’s corridor. Further, Appellant cannot show that the PA itself creates a threat of irreparable injury by SHPD’s requirement that an AIS be completed for each construction Phase before any ground-disturbing construction activity can proceed in a given construction Phase. Even if there were some minor procedural misstep in the review process under Chapter 6E or its implementing regulations (which, as set

⁵ This is distinguishable from *County of Hawai‘i v. Ala Loop Homeowners* where, because no statutory provision provided an express private right of action in HRS Chapter 205, the Court affirmed a direct cause of action under the Constitution, based on the absence of existing statutory basis to assert a claim. *See* 123 Hawai‘i 391, 235 P.3d 1103 (2010). Here, Chapter 6E is a reasonable state regulation of a private right of action pertaining to burials.

forth below, City Appellees wholly deny), Appellant has nonetheless failed to show an actionable claim to sue.

Nevertheless, Appellant has disregarded the standard set forth in HRS § 6E-13(b), completely ignored the protections set forth in the PA, deliberately mischaracterized information and evidence, and relied on conclusory assertions of possible harm that are nothing more than unfounded speculation. Appellant seeks to halt the entire Project based on personal policy preferences that have nothing to do with demonstrating any actionable harm to a burial. For example, in Appellant's Opposition to the City Appellees' Motion, Appellant argued that she satisfied HRS § 6E-13(b) because she experienced procedural injuries due to alleged violations of Chapter 6E. (R.44 at 34-35.) However, as set forth above, alleged procedural violations of Chapter 6E are not sufficient to assert a private right to seek injunctive relief, but rather are the responsibility of DLNR and the Attorney General to enforce. *See* HRS §§ 6E-10.5 to 13; *compare* HRS § 6E-13(a) with HRS § 6E-13(b).

Appellant has also argued that she was harmed because she was denied the ability to "consult and obtain information before decision-making" as provided in HAR 13-276. (*See* Tr.36 at 20:3-6, 32:2-15, 34:6-20.) According to Appellant, however, she is a cultural descendant of the Kaka'ako area. (Op. Br. at 4; R.42 at 44, ¶ 6.) This status allows her a right to participate as an interested party in the "consultation" pertaining to archaeological studies that may impact Kaka'ako, not necessarily the whole 20-mile Project. In accordance with the PA, those consultations have occurred and are ongoing (in connection with Phase 4 of the Project). Appellant has been invited to and has participated in these efforts. (*See* Tr.36 at 34:22-35:16.) Accordingly, Appellant did not and cannot *show* any harm in this respect.

Appellant has also argued that there is potential harm in the form of "improper alteration of the burial site" due to "bureaucratic inertia." (*See* Tr.36 at 20:7-11.) As the Court properly found following Appellant's offers of proof on this issue: "[n]otwithstanding the well-recognized concern over the potential for administrative or bureaucratic inertia, the record does not show any actual manifestation of such inertia. At this time, the danger of bureaucratic inertia is nothing more than pure conjecture." (Tr.36 at 74:11-15.) Appellant nonetheless continues to make this unsupported argument. (*See* R.50 at 98-101; Op. Br. at 5-6.) Specifically, Appellant relies on: 1) a declaration of Dr. Abad that Appellant disingenuously contends was provided

“without contradiction;”⁶ 2) a document Appellant claims establishes that “the City has already rejected alteration of the route” as an avoidance measure; and 3) a circular argument that the route cannot be changed because the Project was approved as it presented in the FEIS and any changes to the alignment would require further approvals. (Op. Br. at 5-6.) None of this satisfies the requirement to “show” the existence of a present threat of “irreparable injury” to a burial under HRS § 6E-13(b).

First, Dr. Abad’s statements are merely policy driven expressions of *opinions* about the *potential* for harm, which are largely based on previous projects that were entirely factually inapposite for a number of reasons, the most significant of which was the absence of anything remotely resembling the PA and its extensive protections.⁷ Dr. Abad’s speculation about harm contrasts with the hard evidence embodied in the PA, confirming that no ground-disturbing construction work will commence in a Phase until the AIS process is completed and SHPD approval is received for that Phase. Second, Appellant’s argument that the minutes from a SHPD meeting held on September 25, 2007 establish that “the City has already rejected alteration of the route,” completely ignores the fact that this SHPD meeting occurred over three and a half years ago, represented early stage discussions about the Project, and is plainly superseded and supplanted by the express commitments set forth in the subsequent finalized FEIS and PA. These documents specifically provide that the Project has retained flexibility in design to ensure that changes can be made, if need be, and that the City is bound to comply with any burial treatment plans developed in response to the discovery of burials. (R.40 at 113-14 and 128-130, §§ III(B)(4), III(D)(2), § XII(A)-(C)(1); *see also* Tr.36 at 42:3-18.) Third, Appellant’s

⁶ Appellant’s statement that Dr. Abad’s testimony is “unrefuted” is unfounded given that this declaration was submitted in support of Appellant’s motion for preliminary injunction, which never came before the Court. As such, City Appellees did not have the opportunity cross-examine Dr. Abad or otherwise proffer evidence to refute the opinions stated in her declaration. City Appellees did, however, submit declarations in opposition to Appellant’s motion for preliminary injunction, which do counter Dr. Abad’s testimony. (R.48 at 315-20; *id.* at 231-329.)

⁷ Appellant also attempts to mislead the Court by asserting that harm is inevitable by referring to previous projects where challenges arose because “archaeological investigations occurred when construction had already begun.” (Op. Br. at 22.) However, *none* of those projects had anything like the governmental oversight assured by the PA. Accordingly, any harm that may have been articulated in those cases based on the government being disengaged or uninvolved has no application here. As the Circuit Court found, “At this time, the danger of administrative or bureaucratic inertia is nothing more than pure conjecture.” (Tr.36 at 74:11-15.)

arguments that the Project's approvals establish that alteration of the alignment is not possible are unsupported and illogical. It is axiomatic that, because the Project is a regulated undertaking, the City Appellees cannot make significant changes to it at will; but rather, in order to comport with all applicable state and federal laws, the City must likewise seek and receive all necessary governmental approvals if significant changes are made. This, however, does not obviate the City Appellees' legal obligation to comply with the express contractual commitments set forth in the PA, or otherwise establish that changing the support columns or alignment is not possible. Appellant's *fears* to the contrary are not supported by any admissible evidence.

Based on the foregoing, Appellant cannot be found to have articulated any actionable harm. Given the extensive procedural protections afforded to burials under the PA, Appellant simply cannot make the showing of irreparable harm necessary to bring an action under HRS § 6E-13(b). Chapter 6E does not permit Appellant to bring claims based on speculative future harm which are otherwise premature and unripe. Accordingly, Appellant cannot state a cause of action under HRS § 6E-13(b) for injunctive relief for any alleged violations of Chapter 6E, as asserted in Counts 1 through 4 of her Complaint.

2. Phasing the AIS Process is Not Unlawful Where Appropriate Procedures Are In Place to Ensure the Protection of Burials
 - a. Chapter 6E Does Not Expressly Prohibit a Phased Approach to the Historic Preservation Process

Appellant attempts to argue that phasing the historic preservation process is *per se* unlawful because it is not explicitly *authorized* under Hawai'i law. (*See* Op. Br. at 20-21.) In support of this, Appellant points to the implementing regulations for the historic review process under the National Historic Preservation Act of 1966 (16 U.S.C. § 470f), which explicitly allows for a phased approach,⁸ and argues that because Hawai'i does not have a similar express *authorization* for phasing, it is therefore *prohibited* under state law. (Op. Br. at 20.) Appellant's argument is fatally flawed given the well established principle that where Hawai'i case law and statutes are silent, the court can look to federal law for guidance. *See Price v. Obayashi*, 81 Hawai'i at 181, 914 P.2d at 1375. Indeed, given this principle and the fact that federal law

⁸ *See* 36 CFR 800.4(b)(2) (authorizing a phased approach to federal highway projects or other lengthy corridor or large land area developments constructed over many miles and long lengths of time where adequate protections for historic resources are in place).

expressly *permits* a phased approach to a review of historic properties, had the legislature intended for there to be an absolute prohibition on phasing the AIS process, it could have and should have passed such a restriction. However, no such prohibition exists.

- b. Chapter 6E Gives SHPD Discretion to Determine What Constitutes a “Project” Under this Statute and SHPD’s Approval of the Phased Approach is not Arbitrary and Capricious

Chapter 6E delegates authority over the state historic preservation program to the SHPO, who carries out this mandate through SHPD. *See* HRS § 6E-5; HAR § 13-275-1(b). Thus, when “projects” may impact historic properties, including Native Hawaiian burials, SHPD must be consulted, have an opportunity to review and comment on the “project” (HRS § 6E-42; HAR § 13-284-3) and provide its written concurrence to the “project” (HRS § 6E-8; HAR § 13-275-3). All of Appellant’s arguments in support of Counts 1 through 4 are premised on the flawed assumption that the term “project” *must* be construed to mean the whole 20-mile stretch of the Project, and cannot mean the Project Phases (or anything else that SHPD may have determined appropriate). Contrary to Appellant’s assumption and argument, however, neither the plain terms of Chapter 6E or HAR Title 13, nor public policy mandates such an unrealistically narrow interpretation and application of the word “project.”

SHPD, the agency charged with overseeing the historic preservation process, regulating archaeological resources and adopting rules necessary to carry out the purposes of Chapter 6E, has discretion to determine what comprises a “project” for purposes of Chapter 6E and whether appropriate measures are in place to safeguard the process, protections and goals of this Chapter. *See* HRS § 6E-3; *see also Unite Here! Local 5 v. City & County of Honolulu*, 123 Hawai‘i 150, 176, 231 P.3d 423, 449 (“[A]n administrative agency’s authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted.”) (*See* R.48 at 318-320, ¶¶ 10, 23; R.48 at 324-327, ¶¶ 14-24.) SHPD has determined that despite being part of a larger project, the Project’s Phases can be considered separate “projects” for purposes of Chapter 6E, and that the phased approach to the AIS process set forth in the PA comports with Chapter 6E. (R.48 at 316-320, ¶¶ 5-23.) That determination is entitled to considerable deference and should not be overturned unless Appellant can show that it is “plainly erroneous or inconsistent with the underlying legislative purpose.” *Elbaum*, 77 Hawai‘i at 457, 887 P.2d at 667 (emphasis added); *see also Kiewit Pacific Co.*, 104 Haw. at 29-30, 84 P.3d at 537-538 (“reviewing court deference

is especially due in the discrete context of an agency’s interpretation of its own administrative rules...”).

In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, **a presumption of validity** is accorded to decisions of administrative bodies acting within their sphere of expertise and **one seeking to upset the order bears ‘the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.’**

Keliipuleole v. Wilson, 85 Hawai‘i 217, 226, 941 P.2d 300, 309 (Hawai‘i, 1997) (emphases added).

Appellant argues that “[t]here is only one project at issue in this case: the entire 20-mile fixed guideway rail system,” and that the City has admitted that all four Phases are part of a “single project.” (Op. Br. at 21.) However, Appellant’s overly literal argument ignores that “project” is defined broadly under Chapter 6E as:

any activity directly undertaken by the State or its political subdivisions or supported in whole or in part through appropriations, contracts, grants, subsidies, loans, or other forms of funding assistance from the State or its political subdivisions or involving any lease, permit, license, certificate, land use change, or other entitlement for use issued by the State or its political subdivisions.

HRS § 6E-3; HAR §§ 13-275-2, 13-284-2. The point is not whether the Project’s four construction Phases are part of a larger project, but whether these Phases can nonetheless be evaluated as phases or “projects” for purposes of satisfying the intent and purpose of Chapter 6E. As the Circuit Court properly found, both the entire 20-mile Project, as well as each of its four separate Phases fit within the definition of “project” under Chapter 6E. (*See* Tr.36 at 63:2-4.) The breadth of this definition gives SHPD necessary and appropriate discretion to determine the scope of a given “project” for Chapter 6E purposes.

The PA essentially provides for each Phase to be treated as a separate “project” for purposes of review. SHPD determined this was appropriate for the overall Project and expressly approved this approach by signing and thereby acknowledging its concurrence with the PA.⁹

⁹ There are numerous justifications for this approach, including the magnitude of the Project, the heavily urbanized nature of much of the Project’s alignment, access to private property to

Importantly, SHPD has not abdicated its review and oversight functions, but has expressly retained its right to review, comment, approve and concur on each Phase of the Project. By doing so, SHPD has ensured that burials are protected from harm before any ground-disturbing construction in a particular Phase and, therefore, ensured that the goals of Chapter 6E are given full effect. Accordingly, the Circuit Court properly declined to second-guess SHPD's determination and affirmed the agency's well considered decision regarding how best to address the issue of handling prospective unknown burials.

c. Phasing the AIS Process is Entirely Distinguishable from the Principle of Segmentation That Is Expressly Prohibited Under HRS 343

Appellant also attempts to argue that phasing the AIS is unlawful because it is akin to the prohibition against segmentation under Chapter 343. (Op. Br. at 21-23.) However, the principle of "illegal segmentation" is purely a creature of environmental disclosure laws under NEPA and HEPA and does not apply at all to Chapter 6E. (See R.50 at 22-28; *see also* R.22-49) First, while HEPA contains an express prohibition against segmentation of a project within the environmental review process as a whole, as explained by case law, there is no analogous or comparable prohibition in Chapter 6E.¹⁰ See HRS § 343-2, HAR §§ 11-200-2, 11-200-7;

excavate, the federal government's funding requirements, and the fact that final design is still under development to determine final column placement; thus, any additional archaeological testing could be outside the Project's actual footprint and therefore unnecessarily disturb resources that would otherwise not have been impacted by the Project. (See *e.g.* R.42 at 249 at 3-2; R.48 at 326-327, ¶¶ 22-23.)

¹⁰ HEPA requires that for certain proposed "actions," the environmental impacts and mitigation measures be evaluated and disclosed. An "action" is defined under HEPA to mean "any program or project to be initiated by any agency or applicant." HRS § 343-2, HAR § 11-200-2. While this definition is similar to the term "project" under Chapter 6E, HEPA requires that an "action" be defined to include all substantially related components of a proposed project, such that a single EIS (or EA) will be prepared to address the impacts of the project as a whole, so that no areas or parts of the project to be constructed are missing from consideration. See *Sierra Club v. Dep't. of Transp.*, 115 Hawai'i 299, 336-338, 167 P.3d 292, 329-331 (2007). Thus, in defining the scope of a particular "action," HEPA regulations, as set out in HAR § 11-200-7 require that:

A group of actions proposed by an agency or an applicant shall be treated as a single action when: (1) The component actions are phases or increments of a larger total undertaking; (2) An individual project is a necessary precedent for a larger project; (3) An individual project represents a commitment to a larger project; or (4) The actions in question are essentially identical and a single

Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 947 P.2d 378 (1997).

Moreover, as the Circuit Court found, this is consistent with the differing goals, policy considerations and scope of protection of these two different statutes. (See Tr.36 at 64-75.) For example, while the purpose of Chapter 343 is to evaluate the impacts of a project on the environment as a whole in a single EIS disclosure document, including air, land, water, social, and ecological considerations, etc., Chapter 6E focuses on the identification and protection of specific historic resources, including burials and their immediate surrounding archaeological context, which necessarily covers a more limited geographical area. (See Tr.36 at 68-75 and HRS § 6E-2; 1992 Haw. Sess. Laws Act 113 § 1) The Chapter 343 process requires a single EIS document that discloses potential impacts over the entire 20 miles of the Project (not just a part or "segment" of the Project), whereas in contrast, Chapter 6E depends on ensuring that within the Project itself appropriate protections are afforded to burials before any ground-disturbing construction occurs -- which the PA expressly provides for here within each Phase. Therefore, the concept of segmentation under HEPA is entirely separate and distinguishable from the protections contemplated in Chapter 6E. Segmentation of a project in the EIS context, where a component part or segment of a project is not evaluated at all, has nothing to do with the Chapter 6E plan for protecting individual burial sites at any specific point or area within the 20-mile Project. Nevertheless, the concerns and policies underlying both of these separate statutory schemes are fully preserved and protected here by the FEIS and PA.

3. SHPD was Consulted and has Reviewed, Approved and Provided its Concurrence as Provided under HRS § 6E-8 and § 6E-42.

In this case, there can be no dispute that SHPD was advised about the Project and given an opportunity to review and consider the Project's effects on historic properties, including burials, and has provided its express approval and concurrence, to the phased approach to archaeological studies set forth in the PA, in accordance with the requirements of Chapter 6E. (R.48 at 316-320, ¶¶ 5-23.) See HRS §§ 6E-8, 6E-42; HAR §§ 13-284-3, 13-275-3. SHPD has

statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

This regulation is intended to prevent an agency from "segmenting" a project and omitting from the EIS document a discussion of all component or related parts of a project to be constructed. See *Sierra Club*, 115 Hawai'i at 338, 167 P.3d at 33. This illegal segmentation issue is entirely a creature of EIS law and there is no similar rule or regulation under Chapter 6E.

also retained the right under the binding provisions of the PA to provide further oversight to review and comment on each Phase of the Project that may impact burials during the AIS process, in accordance with HRS § 6E-42 and HAR § 13-284-3, and to concur with the completed AISs for each Phase, before ground-disturbing construction can commence in a Phase, in accordance with HRS § 6E-8 and HAR § 13-275-3. (*See* R.40 at 112-115; R.48 at 319-320, ¶¶ 14-23; R.40 at 98-99, ¶¶ 7-10.)

In accordance with the terms of the PA and Chapter 6E, SHPD will continue to be consulted, have the opportunity to comment, and retain the right and authority to approve the remaining Phases. Appellant has not alleged or otherwise produced any evidence to the contrary. Moreover, there is no evidence of any threat of injury to a burial anywhere along the entire 20-mile corridor, and the prospect for uncovering possible unknown burial sites is fully considered and addressed by the requirement to do subsurface investigative field work in an AIS, before any ground-disturbing construction work can occur within any of the four construction Phases. Accordingly, summary judgment on Counts 1 through 4 was warranted and appropriate.

B. SUMMARY JUDGMENT ON COUNT 5 WAS PROPER BECAUSE THE FEIS ADEQUATELY DISCLOSES THE PROJECT'S POTENTIAL IMPACTS TO BURIALS AND MITIGATION MEASURES TO SATISFY PRICE

Appellant challenged the sufficiency of the FEIS in Count 5 solely on the basis that it does not include a completed AIS for the entire Project. (R.40 at 32-33.) According to Appellant, absent a completed AIS, the FEIS fails to disclose sufficient information regarding the potential impacts to burials and therefore does not satisfy the requirements for acceptability as set forth under HAR § 11-200-1 *et seq.* (Op. Br. at 26-29.) There is no provision anywhere under HEPA or in case law, however, that requires an intrusive ground-disturbing AIS in an EIS. While some EISs have made reference to AISs, there is no requirement that a full AIS must be included in an EIS. Here, extensive archaeological studies exist which demonstrate that there are no known burial sites at any location along the 20-mile Project. (R.42 at 219-428)

Whether an AIS is required or not is a question to be raised under Chapter 6E; not as an EIS sufficiency challenge under Chapter 343. Rather, the sufficiency of an EIS is governed entirely by HEPA and its implementing regulations at HAR §§ 11-200-1 *et seq.* Nowhere does HEPA provide that, to be sufficient, an EIS must contain a completed AIS. Appellant's desire to write such a restrictive policy preference into law by this lawsuit would usurp the authority of

OEQC to exercise discretion and, in effect, legislates new EIS requirements that were never previously adopted.

For purposes of the EIS analysis, all necessary environmental disclosures were made about the prospect for encountering unknown burials and the measures that will be implemented to mitigate any potential adverse effects to those resources. That is what the EIS disclosure law requires. Appellant cannot show, based on the disclosures within the Project's FEIS, that the FEIS does not contain sufficient information regarding the potential impacts to burials. Indeed, extensive efforts were made to investigate and disclose impacts to burials by studies prepared for the FEIS, and appropriate mitigation measures were then developed for such impacts. This information is set forth in the FEIS, its underlying technical reports, and the PA, which are plainly sufficient to have enabled the accepting authority to make an informed decision about the Project.

1. The Sufficiency of an FEIS is Entirely a Question of Law and Should Be Resolved on Summary Judgment Based on the Disclosures in the FEIS

Hawai'i law is clear that "the sufficiency of an environmental impact statement is a question of law, which is properly addressed through summary judgment." *Price v. Obayashi*, 81 Hawai'i at 182, 914 P.2d at 1375 (1996) (emphasis added). "This is because the only question presented is whether the EIS complies with applicable statutory mandates.... There are no factual determinations to be made regarding EIS adequacy." *Id.* The question, however, is not whether, according to Appellant or her expert, certain information *should* have been included in the FEIS; but whether under the "**rule of reason**" the FEIS adequately discloses sufficient facts to enable the decision maker to render an informed decision. *See id.* at 182, 914 P.2d at 1375; *see also id.* at 181, 914 P.2d at 1374 (disagreement amongst parties or experts does not create a genuine issue of material fact, nor is it the yardstick by which the sufficiency of an EIS is measured.)

HEPA requires that an EIS identify environmental impacts and develop mitigation measures to avoid or reduce any anticipated adverse impacts. However, "[n]either HRS Chapter 343 nor the administrative rules of Chapter 200 indicate the level of detail or specificity that should be included on any given subject. The statute and rules were designed to give latitude to the accepting agency as to the content of each EIS." *Price* 81

Hawai‘i at 183, 914 P.2d at 1376 (emphasis added). Thus, when evaluating the sufficiency of an EIS under Chapter 343, Hawai‘i Courts apply the **rule of reason**, under which:

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been **compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision** after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

Price, 81 Hawai‘i at 182, 914 P.2d at 1375 (emphases added) (internal citations omitted).

2. A Completed AIS is Not a Mandatory Requirement for a Sufficient EIS

The Hawai‘i Supreme Court has made clear that **“what is required in one EIS may not be required in another, based on the circumstances presented by the particular project.”** *Price*, 81 Hawai‘i at 183, 914 P.2d at 1376 (emphasis added) (*more than enough* information was presented by reconnaissance review in order to disclose potential impacts to decision maker). Accordingly, whether or not an AIS has been included for EISs on other unrelated projects is wholly irrelevant for purposes of assessing the adequacy of the FEIS here. The determination of sufficiency must be made by looking at the content of the specific FEIS at issue, which Appellant fails to do. When properly looking at the content of the FEIS, it is clear that, given the extensive evaluation of archaeological and cultural resources performed, and the resulting disclosures regarding potential impacts to burials, the City engaged in a good faith effort to satisfy its disclosure obligation under HEPA and the resulting disclosures and mitigation measures sufficient to satisfy the rule of reason.

Appellant’s argument that the FEIS is insufficient on its face because it lacks an AIS is unsupported by any legal precedent. Appellant argues that the rule of reason “requires” that the FEIS include an AIS because, among other things, “EISs often include an AISes,” “the City has prepared EISs for other projects that include AISes,” and because the City acknowledges that there is a likelihood of encountering burials along the Project’s alignment and that AISs are necessary before the City be permitted to commence construction. (Op. Br. at 28-29.) According to Appellant, “delaying preparation of an AIS until after decisionmaking [*sic*] and construction defeats the purpose of the AIS and the EIS.” (*Id.* at 29.) Regardless of whether an AIS is required under Chapter 6E, was included in other EISs, or would have provided the

accepting authority with *more* information, it does not follow that an AIS *must* be included in the FEIS in order to be acceptable under HEPA. Appellant is essentially arguing that in every case where an AIS is prepared under Chapter 6E that an AIS is then necessarily required under Chapter 343. There is no such legal requirement, and if adopted, Appellant's position would improperly expand the requirements beyond those contemplated by the legislature and effectively legislate new law requiring a mandatory intrusive subsurface AIS for every project before an EIS could ever be approved. This would defeat the disclosure process of EIS law, which exists to disclose such conditions in the EIS document and then articulate appropriate mitigation measures which, in this case, happens to include further AIS preparation. Approvals about the timing and implementation of the AISs are fully disclosed in the FEIS and PA which also address appropriate mitigation measures adopted by the governing oversight agencies. None of their determinations have been shown to be unreasonable, arbitrary or capricious. *See* Section II.B and Section VI.B.3 herein.

3. The FEIS Discloses Sufficient Information Regarding the Potential Impacts to Burials and Mitigation Measures for the Project to Enable a Reasoned Decision

In this case, the FEIS has an entire section devoted to "Archaeological, Cultural, and Historic Resources." (*See* SR.66 at 4-176 to 4-196, § 4.16.) Early in the environmental review process, the City engaged CSH to evaluate, among other things, below-ground effects on archaeological resources within the Project's study corridor. (*See id.* at 4-178.) To accomplish this, CSH conducted an extensive review of existing archaeological documentation, geological and depositional characteristics, and some field inspections within the study corridor and developed a qualitative rating system for evaluating and describing potential archaeological impacts. (*See* R.42 at 219-428.) The results of this comprehensive study are set forth in the Archaeological Report, which was submitted to SHPD, served as a basis for the development of the PA, and is incorporated by reference into the FEIS.¹¹ (*See id.*; SR.66 at 4-178; R.48 at 317-318, ¶ 9; R.44 at 151-152, ¶¶ 11-13.)

Based on the findings in the Archaeological Report, the FEIS discloses the archaeological resources already documented within the entire Project's APE. (*See* SR.66 at 4-183, § 4.16.2; *id.* at 4-185.) Although there were no documented native Hawaiian burials, the FEIS notes that

¹¹ Impacts on burials were also evaluated in CSH's Cultural Report, the results of which are also incorporated into the FEIS. (*See, e.g.*, SR.66 at 4-177, 4-179 to 4-180.)

documented “subsurface cultural layers related to native Hawaiians [] may include religious or cultural artifacts and resources, including iwi kupuna or Hawaiian burials.” (*Id.* at 4-183; *see also id.* at 4-185.) The FEIS further identifies three general categories of archaeological resources that could be affected by the Project: *burials*, pre-contact archaeology and post-contact archaeology, and discloses that the probability of encountering burials within the Phase 4 developed sub-areas of Dillingham, Downtown and Kaka‘ako is “High.” (*Id.* at 4-183 to 4-184.)

Given the likelihood of encountering burials, appropriate *mitigation measures*, and procedures for protecting historic resources including burials, were developed in consultation with the SHPO and numerous other state and federal governmental agencies. (*See* SR.66 at 4-178: 4-196; *see also* R.48 at 260, 266.) These mitigation measures and protective procedures are outlined in the PA, which is incorporated by reference into the FEIS.¹² (*Id.*) As set forth in the PA and FEIS, based on significant consultation and coordination with various agencies and interested parties, it was determined that a phased approach to the identification and evaluation of archaeological historic property that may be impacted by the Project was reasonable and appropriate for the Project. (*See* R.44 at 165, 172-175; SR.66 at 4-178 to 4-179.) This decision on how to best approach the identification of specific archaeological resources, and mitigate or otherwise protect these resources from adverse effects was entirely within the authority and discretion of SHPD, whose approval exists in the PA.

Based on the foregoing, the FEIS and supporting documents show that the City compiled the FEIS in good faith and provided sufficient information about the potential effects and appropriate mitigation measures so that the decision-maker could make an informed decision regarding the potential impacts of the Project on archaeological resources, including possible burials sites. Accordingly, the FEIS complies with the mandates of HEPA and HAR Title 11,

¹² Appellant confuses and conflates the mitigation measures set forth in the PA as part of the EIS process with the entirely separate concept of a mitigation plan under Chapter 6E. HEPA requires the consideration of proposed mitigation measures to rectify, minimize or reduce environmental and other impacts. *See* HAR § 11-200-17 (“The draft EIS shall consider mitigation measures proposed to avoid, minimize, rectify, or reduce impact, including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources, including the acquisition of land, waters, and interests therein.”). A mitigation plan under HRS Chapter 6E means “a plan approved by [SHPD] for the care and disposition of historic properties, aviation artifacts, and burial sites or the contents thereof, that includes monitoring, protection, restoration, and interpretation plans.” HRS § 6E-2.

Chapter 200, and the Governor's determination that it is acceptable is entitled to judicial deference. *See Elbaum*, 77 Haw. at 457, 887 P.2d at 667; *Price*, 81 Hawai'i at 182 n.12, 914 P.2d at 1375-76, n.12.

C. SUMMARY JUDGMENT ON COUNT 6 WAS PROPER BECAUSE THE RECORD SHOWS THAT THE AGENCIES PROPERLY CONSIDERED BURIALS WHEN MAKING DECISIONS ON THE PROJECT

In Count 6 of the Complaint, Appellant cites to no statute, law or rule to support the asserted claim for relief. (*See* R.40 at 33.) Nevertheless, Appellant's subsequent papers, including the Opening Brief argue that this Count is grounded in HRS Chapter 205A. (*See* Op. Br. at 29-31.) Appellant's Opening Brief also cites to two cases involving judicial review of project approvals alleging a failure to properly "consider" burials: *Hui Alaloa v. Planning Comm'n*, 68 Haw. 135, 705 P.2d 1042 (1985) and *Ka Pa'akai O Ka'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000). (*See id.*) In addition, Appellant cites three general cases for the proposition that cultural and archaeological issues are required to be considered: *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P. 2d 1246 (1995) ("PASH"); *In re Water Use Applications*, 94 Hawai'i 97, 9 P. 3d 409 (2000); and *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 140 P. 3d 985 (2006). (*Id.*). All three cases stand for the same proposition that Chapter 205A requires due consideration be given to (*i.e.* not ignoring) historical, cultural and archaeological resources that may be affected.

In this case, both SHPD and the City Appellees have clearly considered and taken appropriate steps to handle the possible impacts on burials. (*See* R.48 at 316-320, ¶¶ 5-24; R.44 at 150-158, ¶¶ 6-13, 16-27; *see also* SR.66; R.40 at 103-143; R.42 at 219-428; R.42 at 429-739; R.48 at 252-267.) Further, there is no evidence that SHPD or any governmental agency has forsaken or abandoned its oversight function during the AIS process to ensure compliance. While no known burials are identified anywhere along the alignment -- and indeed, Appellant identifies no existing burials at risk anywhere -- additional measures will be taken to ensure that all consultative processes and approvals will in fact occur for each construction Phase. The protections afforded to burials are memorialized and preserved in a PA that binds both SHPD and the City. The PA provides a specific process for addressing the likelihood of encountering burials and then appropriately handling or mitigating effects to any burials. Therefore, all potential risks of a further Phase's AIS disclosing burials and the mitigation measures addressed in the PA demonstrate that such issues were fully "considered."

1. All Criteria for SMA Approval Have Been Satisfied

For this Project, the City applied for a Special Management Area (“SMA”) permit, which was approved upon the express condition that the governmental oversight functions set forth in the PA be preserved. (R.40 at 401-413.) There is no basis to assert a violation of HRS Chapter 205A itself by this permit approval. All consideration for any impacts on environmental, cultural or ecological effects was satisfied by expressly conditioning the permit approval on adherence to the PA. The PA is specifically designed to safeguard the Chapter 6E review, consultation and approval process, and was integrated into part of the SMA permit approval. (*Id.*)

2. The Technical Reports Incorporated and Referenced in the FEIS were Prepared to Comply with *Ka Pa‘akai*

Cultural assessments were developed for the Project that adequately address and consider the likelihood of encountering burials in order to be consistent with the ruling in *Ka Pa‘akai*. (See R.42 at 429-739.) Entire sections of the Cultural Report are devoted to discussions about how the Project satisfies the concerns in *Ka Pa‘akai* requiring “consideration” of possible burials and other resources in addition to the development of mitigation measures. (See *id.* at 452, 458, 526, 530.) This is also addressed directly in the FEIS, which itself is the result of that consideration process identified in the DEIS. (See SR.66 at 4-177, 4-180.) These sections set forth the steps taken to comply with cultural and historical efforts so as to fully *consider* any impacts on resources identified in the PA. The public trust is not at risk because the potential impacts to burials have been fully *considered* and the protections afforded by Chapter 6E include continued oversight and enforcement by SHPD, which are preserved by the PA.

3. *Hui Alaloe* is Inapposite as an Improper Delegation of Governmental Oversight Case, Which Does Not Exist Here

Hui Alaloe does not support the argument that the PA cannot operate to preserve required governmental oversight for an SMA permit. *Hui Alaloe* did not require that an AIS be fully completed before an SMA permit can issue. Rather, *Hui Alaloe* only addressed the problem caused by an **improper delegation** of agency oversight and enforcement functions to the applicant developer. *Hui Alaloe* is not a case where an SMA permit was invalidated for adopting a protective plan as a condition that binds all three levels of agency oversight (local, state and federal agencies) to continue to oversee and enforce the PA’s mitigation measures. In fact, the PA does exactly what *Hui Alaloe* says has to be done: **it preserves and protects the**

government oversight function, including OIBC’s right to determine the treatment of any *iwi kupuna* that may be discovered through the AIS process for each construction phase.

Absent any violation of the existing statutory and regulatory scheme, and without a showing of imminent irreparable harm to any possible future burial that may be discovered through a specific Phase’s AIS, the mitigation measures in the PA are an entirely reasonable and rational means to safeguard the process along the Project’s alignment including preserving burials in place, if deemed necessary. Thus, no actionable claim exists under Count 6. The process of “due consideration” is fully encompassed in the Technical Reports, FEIS and the obligations within the PA. These are regulatory determinations by the agencies whose actions to approve the PA were rational and based on common sense, practical considerations designed to protect any possible later discovered burials.

D. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S REQUEST FOR A HAW. R. CIV. P. 56(F) CONTINUANCE

Appellant contends that the Circuit Court “erred by not giving Appellant time to complete discovery.” (Op. Br. at 31.) Appellant argues that a Haw. R. Civ. P. 56(f) continuance was warranted merely because the case was in its early stages. (*Id.*) Appellant completely ignores the standard for obtaining a continuance under Rule 56(f). Rule 56(f) continuances are not granted as a matter of right. Rather, a request for a Rule 56(f) continuance “**must demonstrate how postponement of a ruling on the motion will enable him or her**, by discovery or other means, **to rebut the movants’ showing of absence of a genuine issue of fact.**” *Josue*, 87 Hawai‘i at 416, 958 P.2d at 538 (emphasis added; internal quotation marks and brackets omitted); *see also Royal Kunia Cmty. Ass’n ex rel. Bd. of Dir. v. Nemoto*, 119 Hawai‘i 437, 450, 198 P.3d 700, 713 (2008). If a party fails to make this requisite showing and discharge its burden under Rule 56(f), a continuance should be denied. *See Nemoto*, 119 Hawai‘i at 450, 198 P.3d at 713 (upholding trial court’s denial of request for continuance where party failed to explain the significance of certain purported missing documents or how such documents would rebut the showing of no genuine issue of material fact.); *Acoba v. General Tire, Inc.*, 92 Hawai‘i 1, 12, 986 P.2d 288, 299 (1999) (affirming trial court’s determination that a general request for more time to complete discovery was inadequate to warrant a continuance of motion); *see also Assoc. Fin. Servs. Co. of Hawaii, Inc. v. Richardson*, 99 Hawai‘i 446, 454, 56 P.3d 748, 756 (App. 2002); *808 Dev., LLC v. Murakami*, 111 Hawai‘i 349, 363, 141 P.3d 996, 1010 (2006).

Appellant's request for a Rule 56(f) continuance was plainly inadequate. Appellant's Opposition to the City Appellees' Motion merely stated: "[i]f this Court were to consider the City's motion as one for summary judgment, then this Court should give Plaintiff sufficient time to pursue discovery and obtain admissible evidence." (R.44 at 21.) Appellant's request failed to explain how outstanding discovery requests and/or Appellant's expert declaration on the legal issues raised by the City Appellees' Motion would enable Appellant to rebut the City Appellees' showing of the absence of a genuine issue of fact. Accordingly, the Circuit Court concluded that Appellant failed to discharge her burden under Rule 56(f), and denied her general request for a continuance. (Tr.36 at 50:22-51:10.) In light of the legal standard for a Rule 56(f) continuance and the record in this case, the Circuit Court cannot be found to have "exceeded the bounds of reason or disregarded any rules or applicable principles of law" in making this ruling.

Even if Appellant had been given the opportunity to replead her request, Appellant would not have been able to make the requisite showing under Rule 56(f) because resolution of the City Appellees' Motion turned on questions of law, not of fact; and, the factual record necessary to rule on these legal issues, including the contents of the PA and FEIS, was established and uncontroverted. *See Josue*, 87 Hawai'i at 418, 958 P.2d at 540 (upholding denial of 56(f) request "because this is solely question of law, the discovery requested was not only irrelevant, but would have subjected the parties to unnecessary cost and expense.") As the Circuit Court found, "Plaintiff has not advanced an argument that relies upon a factual record in order for the Court to dispose of the instant motion. Therefore, Appellant's assertion that she requires further evidence in order to oppose the instant motion is without merit." (*See* Tr.36 at 52:19-25.)

Moreover, all of the evidence and arguments that Appellant claims she sought to, and would have, introduced had she been granted more time for discovery, was ultimately presented to the Court in her Motion for Reconsideration. (*See* R.50 at 88-316.) Indeed, notwithstanding the fact that, contrary to her representations, Appellant *could* have actually presented her purported "new" evidence prior to the Court's ruling on the City Appellees' Motion (*see* R.52 at 17-21), the Court nevertheless did fully consider the arguments and evidence in the motion for reconsideration (Tr.38 at 6), rendering the Court's ruling on the Rule 56(f) request non-prejudicial to Appellant and Appellant's objection to this ruling moot.

E. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S MOTION FOR RECONSIDERATION

Appellant appeals the Circuit Court’s order denying her motion for reconsideration, yet presents no argument to support a review or reversal of that decision. (*See* Op. Br. 10-32) Although there is a mention of that denial (*id.* at 7) and reference to that denial in Appellant’s third point of error (*id.* at 8), such simple references do not satisfy Rule 28(b)(7) of the Hawai‘i Rules of Appellate Procedure. Accordingly, this Court should deny that portion of this appeal. *See* HRAP 28(b)(7) (“Points not argued may be deemed waived”).

Moreover, the record in this case demonstrates that the Circuit Court did not abuse its discretion in denying Appellant’s motion for reconsideration. Under Hawai‘i law:

[T]he purpose of a motion for reconsideration is to allow the parties to present **new evidence and/or arguments that could not have been presented during the earlier adjudicated motion.** Reconsideration is **not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.**

Cho, 115 Hawai‘i at 384, 168 P.3d at 28 (emphases added); *see also Leslie v. Estate of Tavares*, 91 Hawai‘i 394, 396, 984 P.2d 1220, 1222 (1999) (“The purpose of a motion for reconsideration is not to simply relitigate old matters, but to allow the parties to present new evidence or make fresh arguments that could not have been presented or made in the earlier proceeding.”); *Gossinger v. Ass’n of Apartment Owners of the Regency Ala Wai*, 73 Hawai‘i 412, 427, 835 P.2d 627, 635 (1992) (upholding denial of motion for reconsideration where “[t]he argument and evidence could and should have been presented to the trial court prior to its determination of the [defendant’s] motion for summary judgment[.]”). Despite Appellant’s representations to the contrary, all of Appellant’s “new” evidence was available to Appellant at or before the March 23, 2011 hearing on City Appellees’ Motion and could have been presented to the Court before it issued its ruling on that motion. (*See* R.52 at 17-20 *cf.* R.50 at 93-101.) Similarly, all of Appellant’s legal arguments were previously presented to and ruled upon by the Court. (*See* R.52 at 20-25 *cf.* R.50 at 96-101.) Nor did Appellant present any new evidence to warrant reconsideration of the Court’s denial of Appellant’s Rule 56(f) request, or to show that the Court’s ruling on City Appellees’ Motion did not encompass Counts 5 and 6, or that final judgment was premature. (*See* R.52 at 25-30 *cf.* R.50 at 96, 101-102.) Upon consideration of Appellant’s motion for reconsideration, the Court determined that it “was unable to find any new

evidence or law of significance that would alter the Court's rulings," and thus "maintain[ed] its conclusion that there are no genuine issues of material fact as to any claims asserted in the complaint, and that the defense has established that they are entitled to judgment as a matter of law," and properly denied Appellant's motion for reconsideration (R.38 at 6.)

VII. CONCLUSION

The City Appellees respectfully request this Court to affirm the Circuit Court's Final Judgment and orders (1) granting the City Appellees' Motion, (2) granting State Appellees' Joinder to that motion, (3) denying Appellant's motion for preliminary injunction as moot, and (4) denying Appellant's motion for reconsideration.

DATED: Honolulu, Hawai'i, December 30, 2011.

/s/ John P. Manaut

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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

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, PUAALAOKALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O'AHU ISLAND BURIAL COUNCIL,

Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC
(DECLARATORY RELIEF)

APPEAL FROM:

(1) FINAL JUDGMENT FILED ON
AUGUST 8, 2011

(2) 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

(3) JULY 5, 2011 ORDER GRANTING CERTAIN STATE APPELLEES' 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

(4) JULY 5, 2011 ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF THE COURT'S
MARCH 23, 2011 ORAL RULINGS FILED
APRIL 4, 2011

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAI'I

HON. GARY W.B. CHANG

APPENDICES A-B

APPENDIX A

PROGRAMMATIC AGREEMENT

Among the
U.S. Department of Transportation Federal Transit Administration
The Hawai'i State Historic Preservation Officer
The United States Navy
and the Advisory Council on Historic Preservation
Regarding the
Honolulu High-Capacity Transit Corridor Project
in the City and County of Honolulu, Hawai'i

WHEREAS, the City and County of Honolulu (City) Department of Transportation Services (DTS) is proposing the Honolulu High-Capacity Transit Corridor Project (Project or Undertaking) on O'ahu and is seeking financial assistance from the U.S. Department of Transportation Federal Transit Administration (FTA) for the Project, which is therefore a Federal undertaking subject to Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (16 U.S.C. § 470f) and its implementing regulation at 36 C.F.R. pt. 800; and

WHEREAS, the proposed Project is an elevated, electrically powered, fixed guideway transit system in the east-west travel corridor between East Kapolei and the Ala Moana Center via the Honolulu International Airport with an approximate length of twenty (20) miles and twenty-one (21) stations; and

WHEREAS, the City Council has authorized DTS to enter into this Programmatic Agreement (PA) through Resolution 10-305, CD 1 on November 22, 2010; and

WHEREAS, by operation of law, Section 16-129 of the Revised Charter of the City and County of Honolulu 1973, as amended, provides that all lawful obligations and liabilities owed by or to the City relating to the City's fixed guideway mass transit system shall be assumed by the Honolulu Authority for Rapid Transportation on July 1, 2011; and

WHEREAS, pursuant to 36 C.F.R. pt. 800, the FTA has consulted with the Hawai'i State Historic Preservation Division (SHPD), which is the State Historic Preservation Office, and the following parties:

- Advisory Council on Historic Preservation (ACHP)
- U.S. Navy (U.S. Naval Base Pearl Harbor)
- Historic Hawai'i Foundation
- National Park Service (NPS)
- National Trust for Historic Preservation
- University of Hawai'i Historic Preservation Certificate Program

- AIA Honolulu
- Hawai'i Community Development Authority
- Office of Hawaiian Affairs
- O'ahu Island Burial Council
- Hui Mālama I Nā Kūpuna O Hawai'i Nei
- Royal Order of Kamehameha
- Ahahui Ka'ahumanu
- Hale O Nā Ali'i O Hawai'i
- Māmakakaua: Daughters and Sons of the Hawaiian Warriors
- Association of Hawaiian Civic Clubs
- Ali'i Pauahi Hawaiian Civic Club
- Ka Lei Mālie Ali'i Hawaiian Civic Club
- King Kamehameha Hawaiian Civic Club
- Nānāikapono Hawaiian Civic Club
- Hawaiian Civic Club of Wahiawa
- Ahahui Siwila Hawai'i O Kapolei Hawaiian Civic Club
- Waikīkī Hawaiian Civic Club
- Princess Ka'iulani Hawaiian Civic Club
- Wai'anāe Hawaiian Civic Club
- Merchant Street Hawaiian Civic Club
- Prince Kūhiō Hawaiian Civic Club
- Pearl Harbor Hawaiian Civic Club
- Hawaiian Civic Club of 'Ewa-Pu'uloa
- Kalihi-Pālana Hawaiian Civic Club
- Hawaiian Civic Club of Honolulu; and

WHEREAS, in accordance with 36 C.F.R. § 800.10, FTA has notified the Secretary of the Interior of the consultation for FTA's adverse effect determination that the undertaking will have an adverse effect on the United States Naval Base, Pearl Harbor National Historic Landmark (NHL), and the CINCPAC Headquarters Building 250 NHL, and as a result, the NPS has been designated to participate formally in the consultation; and

WHEREAS, the public and consulting parties have been afforded the opportunity to consult and comment on the Project; and

WHEREAS, the FTA, in consultation with the SHPD, has defined the undertaking's Area of Potential Effects (APE) as depicted in Attachment 1 for the Airport Alternative; and

WHEREAS, the FTA, in consultation with the SHPD, has determined that the proposed Project would have an adverse effect on historic properties listed in the National Register of Historic Places (NRHP) or eligible for listing in the NRHP; and

WHEREAS, the FTA, in consultation with the SHPD, has determined that the following historic properties will be adversely affected by the Project: Honoulluli Stream Bridge; Waikēle Stream Bridge and Span over OR&L Spur; 1932 Waiawa Stream Bridge; Waimalu Stream Bridge; Kalauao Spring Bridge; Kalauao Stream Bridge; United States Naval Base, Pearl Harbor NHL; CINCPAC Headquarters Building NHL; Makalapa Navy Housing Historic District; Ossipoff's Aloha Chapel, SMART Clinic, and Navy-Marine Corps Relief Society; Hawai'i Employers Council; Afuso House; Higa Fourplex; Teixeira House; Lava Rock Curbs; Six Quonset Huts; Kapālama Canal Bridge; True Kamani Trees; Institute for Human Services/Tamura Building; Wood Tenement Buildings; Oahu Rail & Land Co. Office and Document Storage Building; Oahu Rail & Land Co. Terminal Building; Nu'uuanu Stream Bridge; Chinatown Historic District; Merchant Street Historic District; HDOT Harbors Division Offices; Pier 10/11 Building; Aloha Tower; Irwin Park; Walker Park; HECO Downtown Plant; Dillingham Transportation Building; and Mother Waldron Playground; and

WHEREAS, an adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for the inclusion in the NRHP in a manner that would diminish the integrity of the property's location, design, setting, materials, craftsmanship, feeling, or association as summarized in Attachment 2 from the Project's technical reports and the Project's Final Environmental Impact Statement (EIS). Adverse effects may include reasonably foreseeable effects caused by the Project that may occur later in time, be farther removed in distance, or be cumulative; and

WHEREAS, the FTA, in consultation with the SHPD, has determined that the Project may adversely affect archaeological sites listed in or eligible for listing in the NRHP, but effects cannot be fully assessed prior to the approval of FTA financial assistance; and

WHEREAS, the FTA and the SHPD have agreed that a phased approach to identification and evaluation of archaeological sites is appropriate, pursuant to 36 C.F.R. § 800.4(b)(2); and

WHEREAS, the timing of activities listed in this PA are estimated based on FTA granting approval to enter final design in 2011, and FTA signing a full-funding grant agreement during 2012. The Project is anticipated to be completed in four construction phases: Phase 1: East Kapolei to Pearl Highlands, Phase 2: Pearl Highlands to Aloha Stadium, Phase 3: Aloha Stadium to Middle Street, and Phase 4: Middle Street to Ala Moana Center. The City may request and FTA may approve minor construction on Phase I to begin prior to FTA granting approval for the project to enter final design, and

WHEREAS, the DTS has included minimization and avoidance measures during project design, including, but not limited to, narrow guideway design, route selection, station location selection, and contained station footprints, to avoid and minimize adverse effects on historic properties; and

WHEREAS, all built components will follow the Project's *Design Language Pattern Book*; and

WHEREAS, consulting parties and the public will be offered the opportunity to provide ongoing comments on station design and transit-oriented development planning at neighborhood design workshops; and

WHEREAS, the City has implemented zoning "overlay districts" to preserve individual and groupings of historic and cultural resources, through the application of architectural and other design guidelines and standards for developments surrounding them; and such overlay districts are already established for Chinatown, Merchant Street, and the Hawai'i Capital (civic center) areas; and

WHEREAS, City Ordinance 09-04 (2009), *Relating to Transit-Oriented Development* (TOD Ordinance), requires the establishment of transit-oriented development zones (TOD Zone) and implementing regulations around every transit station which, among other things, shall include (1) The general objectives for the particular TOD Zone in terms of overall economic revitalization, neighborhood character, and unique community historic and other design themes; (2) Desired neighborhood mix of land uses, general land use intensities, circulation strategies, general urban design forms, and cultural and historic resources that form the context for TOD; and (3) Identification of important neighborhood historic, scenic, and cultural landmarks, and controls to protect and enhance these resources; and

WHEREAS, the TOD Ordinance cannot preempt applicable state and federal historic preservation laws such as Hawai'i Revised Statutes (HRS) Chapter 6E, *Historic Preservation*, and Section 106 of the NHPA; and

WHEREAS, the City will comply with development controls in Special District Regulations in Chapter 21 of the Revised Ordinances of the City and County of Honolulu 1990 (ROH) which include policies that safeguard special features and characteristics of particular districts, such as the Chinatown and Merchant Street Historic Districts, to allow for their preservation and enhancement; and

WHEREAS, the Project will cross lands controlled or owned by the federal government and is subject to an approval of that crossing by the applicable federal agencies, which may elect to adopt this PA at any time, and

WHEREAS, this PA was developed with public involvement pursuant to 36 C.F.R. § 800.2(d) and 800.6(a), and the public was provided opportunities to comment on the Project and its adverse effects; and

WHEREAS, in accordance with 36 C.F.R. § 800.6(a)(1), FTA has notified the ACHP of its adverse effect determination with the required documentation, and the ACHP has chosen to participate formally in the consultation; and

WHEREAS, the FTA, the ACHP, the U.S. Navy and the Hawaii State Historic Preservation Officer (SHPO) are signatories to this PA; and

WHEREAS, FTA invited the City and the NPS to be invited signatories to this PA; and

WHEREAS, FTA invited all other consulting parties to be concurring parties to this PA if they choose; and

WHEREAS, signatories, invited signatories, concurring parties and consulting parties are all consulting parties; and

WHEREAS, FTA commits to continued engagement and ongoing communication with the consulting parties for the duration of this PA; and

WHEREAS, any future extensions of the Project with federal involvement would undergo a separate independent review under the National Environmental Policy Act and Section 106 of the NHPA, and any such review will be guided by the approaches to treatment of historic properties included in this PA; and

WHEREAS, unless defined differently in this PA, all terms are used in accordance with 36 C.F.R. § 800.16; and

NOW, THEREFORE, FTA, ACHP, the Hawai'i SHPO and the U.S. Navy agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the adverse effect of the undertaking on historic properties.

STIPULATIONS

The FTA will ensure that the terms of this PA are carried out and will require, as a condition of any approval of federal funding for the undertaking, adherence to the stipulations set forth herein.

I. Roles and Responsibilities

A. **FTA Responsibilities**—In compliance with its responsibilities under the NHPA, and as a condition of its funding award to the City under 49 U.S.C. § 5309 and any other subsequently identified FTA funding of the Undertaking, FTA will ensure that the City carries out the stipulated provisions of this PA in accordance with any applicable ACHP policy statements and guidelines.

B. **SHPD Responsibilities**—The SHPD shall specifically review and provide comments for work products completed as part of this PA.

C. **ACHP Responsibilities**—The ACHP will provide oversight and advise on disputes.

D. **U.S. Navy Responsibilities** – The U.S. Navy will work with the City, FTA, other signatories and consulting parties, and their contractors to coordinate and assist where necessary, in carrying out the stipulations listed below that affect Navy interests and Navy properties.

E. **City Responsibilities**—The City shall represent the interests of FTA and coordinate all activities described in the PA to carry out the stipulations below. The City will consult with the SHPD and other agency staff, as appropriate, in planning and implementing the stipulations of this PA. The City shall submit all plans and documents required by this PA in a timely and accurate manner to the SHPD and other agencies, as stipulated, for review. The City shall also ensure that all treatment measures developed by the City and as a result of consultation are compliant with government-wide policies and regulations.

F. **Qualifications of Personnel**—Unless otherwise specified, all work carried out under the terms of this PA shall be conducted and/or supervised by cultural resources professionals (historians, architectural historians, historic architects, and/or archeologists, as appropriate) who meet the Secretary of the Interior's Professional Qualification Standards set forth in *Procedures for State, Tribal, and Local Government Historic Preservation Programs*, 36 C.F.R. pt. 61, Appendix A.

G. The City shall provide an architectural historian through the completion of Project construction, who meets the qualifications described in Stipulation I.E for the purpose of coordinating Section 106 Project activities with other City departments (e.g., Department of Planning and Permitting (DPP)) and to ensure consideration of historic preservation in TOD and other development projects along the Project corridor.

H. PA Project Manager

The City shall fund an independent PA Project Manager (*Kako'o*) within six (6) months of the PA being signed to assist with the coordination of all reviews and deliverables required under the terms of the PA.

The *Kako'o* shall meet the *Secretary of the Interior's Professional Qualification Standards* set forth at 36 C.F.R. pt. 61 regarding qualifications for preservation professionals in the areas of history, archaeology, architectural history, architecture or historic architecture.

Procurement

To the extent permissible by applicable state and federal procurement laws, the FTA and SHPD shall review and approve (1) the procurement request for the *Kako'o* prior to the release of such request, (2) the qualifications of the final candidates under consideration by the City prior to the final selection of the *Kako'o* by the City, and (3) the scope of work of the *Kako'o* to be included in the City's contract with the *Kako'o*, in order to ensure that the *Kako'o* duties and responsibilities are consistent with the provisions of this Stipulation.

Upon making its selection of the *Kako'o*, the City shall provide written notification thereof to the FTA, SHPD and other Signatory and consulting parties.

Duration

The *Kako'o* shall serve during the design and construction process for the Project. The *Kako'o* shall continue to perform the *Kako'o*'s responsibilities for the duration of this PA pursuant Stipulation XIV.D.

Roles and Responsibilities

The *Kako'o*'s principal task shall be to independently monitor, assess and report to the consulting parties on compliance by the City with this PA, specifically, the implementation of the measures to resolve adverse effects stipulated herein.

In addition, the City shall continue to engage, as part of its Project design team, consultant(s) which have professional qualifications meeting Secretary of the Interior's professional standards in the areas of history, archaeology, architectural history, architecture, or historic architecture, as appropriate, to carry out the specific provisions of this PA. The City shall also continue to be responsible for the performance of further studies, evaluations and other tasks required to meet the Stipulations set forth in this PA.

In this context and consistent with the independent monitoring, reporting and advisory role assigned to the *Kako'o* under this PA, the *Kako'o* shall perform the following responsibilities:

1. Establish and coordinate consultation and Project status update meetings as stipulated in Stipulations III.B and IX.B. On an as needed basis, additional

meetings may be held to address unforeseen effects on historic properties determined to be eligible within the APE as provided for in Appendix A.

2. Establish and maintain lines of project-related communication and consultation with the consulting parties and the design and construction engineers, including oversight and monitoring of internet sites created for the Project.
3. Monitor, assess and report, in writing, to the consulting parties on mitigation related to Phases I through IV and any associated deliverables of this PA that are to be reviewed by the consulting parties (Stipulations III through XII)
4. Monitor and report on the City's compliance during the design and construction process for the Project with the special historic preservation design guidelines referred to in Stipulation IV.A, Design Standards.
5. Monitor and report on work performed on historic properties with respect to measures to resolve adverse effects caused by the Project in accordance with Stipulations IX.C (demolition monitoring) and X.C (construction monitoring) of this PA.
6. Coordinate regularly with the FTA and SHPD in connection with the *Kako'o's* observations and recommendations regarding the progress of the Project in implementing measures to resolve adverse effects called for under this PA.
7. Report to the City, the FTA and SHPD concerning the existence, if any, of previously unidentified adverse effects of the Project on historic properties within the APE (that is, adverse effects which are not otherwise materially identified in the PA).
8. Submit written reports concerning the progress of the Project in the implementation of the Stipulations set forth herein in accordance with the reporting requirements in Stipulation XIV.E., with copies available to any other interested party who so requests.
9. Address requests by consulting parties to review deliverables and documentation that are provided to concurring parties.
10. Collect any comments from the consulting parties that identify impacts different from those stated in this PA to historic properties located within the APE for City and FTA processing. The *Kako'o* shall research the issues presented as described in Appendix A and prepare a recommendation for the disposition of the request and action by FTA. The notification process for consulting parties to submit requests for consideration is outlined in Appendix A of this PA.

11. Provide administrative support and technical assistance required by the consulting parties to meet the terms of this PA such as the timely submission of deliverables and the issuance of regular public updates regarding historic preservation issues.
12. Develop a best practice manual related to historic properties and a Section 106 “lessons learned” case study on the Project that may be helpful to future Section 106 processes on this and other projects. The best practice manual and “lessons learned” case study will be made available to the consulting parties and other interested parties within one (1) year of the completion of Phase 1 construction. When complete, FTA will make the best practice manuals available on their public website.

II. Traditional Cultural Properties

A. Through preliminary cultural resources research for the Project, the FTA and the City have only identified one Traditional Cultural Property (TCP), the Chinatown Historic District. Within thirty (30) days of execution of this PA, the City shall undertake a study, at the request of the consulting parties, to determine the presence of previously unidentified TCPs within the APE, which includes cultural landscapes if present. Prior to construction commencement, the City shall meet with the SHPD, consulting parties, and other parties with expertise, including Native Hawaiian organizations (NHOs) to discuss and identify potential TCPs, as defined by the National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. Building on cultural practices analysis already completed to address Act 50, Session Laws of Hawaii 2000 requirements, the City shall undertake studies to evaluate these TCPs for NRHP eligibility in accordance with guidance in National Register Bulletin 38. The TCP study shall be completed by qualified staff with experience in ethnographic studies and TCP assessments for NRHP eligibility.

If FTA determines that eligible TCPs are present, the City will complete effects assessments and seek SHPD concurrence on both eligibility and effects determinations. SHPD will have thirty (30) days to review eligibility and effect determinations. If FTA or the SHPD determine that there are adverse effects on eligible TCPs, the City shall meet with consulting parties to identify measures to avoid, minimize, or mitigate adverse effects. The City will complete all fieldwork, eligibility and effects determination, and consultation to develop treatment measures prior to the commencement of construction. The City shall complete any treatment measures prior to undertaking each construction phase that would adversely affect a TCP. Regardless of effect determination, the City will complete NRHP nominations for properties that meet the NRHP criteria for TCPs. The SHPD, NPS and consulting parties, including NHOs, will review draft NRHP nominations and provide comments within thirty (30) days of receipt. The City will consider all comments when completing final NRHP nominations. The City will submit final NRHP nominations to SHPD.

III. Identification and Protection of Archaeological Sites and Burials

The City shall implement the following archaeological stipulations before each of the four construction phases.

A. Initial Planning

1. The APE for archaeological resources is defined as all areas of direct ground disturbance by the Project. This APE for archaeology includes any areas excavated for the placement of piers to support the elevated structures, foundations for buildings and structures, utility installation, grading to provide parking, or other construction-related ground disturbance, including preparation of construction staging areas. The APE includes the new location of any utilities that will be relocated by the Project.

2. The City shall develop an Archaeological Inventory Survey (AIS) Plan for the APE for each construction phase and shall submit it to the SHPD. The SHPD will provide comments to the City to be taken into account in revising the AIS plan or accept the AIS Plan within thirty (30) days. The AIS Plan shall follow the requirements of Hawai'i Administrative Rules (HAR) Chapter 13-276, *Rules Governing Standards for Archaeological Inventory Surveys and Reports*.

3. The O'ahu Island Burial Council (OIBC) will have jurisdiction to determine the treatment of previously identified Native Hawaiian burial sites pursuant to HAR Chapter 13-300, *Rules of Practice and Procedure Relating to Burial Sites and Human Remains*. Any *iwi kupuna* (Native Hawaiian burials) discovered during the AIS shall be treated as previously identified burial sites.

B. OIBC, Lineal and Cultural Descendents, and NHO Consultation

1. Within sixty (60) days of execution of this PA, the City shall consult with the OIBC, lineal and cultural descendents, NHOs and other interested parties that are identified in discussion with OIBC, about the scope of investigation for the AIS Plan for construction of Phase 4. The City shall provide preliminary engineering plans and existing utility maps to assist in the scoping process. The AIS Plan will provide for investigation of the entire Phase 4 area, including from Waiakamilo Road to Ala Moana Center. In the portion of Phase 4 with the greatest potential for resources as identified in the *Honolulu High-Capacity Corridor Project Archaeological Resources Technical Report* (RTD 2008n), the AIS Plan will evaluate all areas that will be disturbed by the Project. The AIS Plan will include a review of historical shoreline location, soil type, and, where indicated by conditions, the survey measures listed in Stipulation III.C, including subsurface testing, for each column location, utility relocation, and major features of each station and traction power substation location based on preliminary engineering design data. The AIS Plan shall be submitted to the SHPD within four (4) months of execution of this PA. SHPD will provide comments on the AIS Plan to the City within sixty (60) days. The City will incorporate any timely

comments in revising the AIS Plan. Archaeological investigation will begin following approval of the AIS Plan by the SHPD.

2. The City shall complete the AIS for Phase 4 (Middle Street to Ala Moana Center) prior to beginning final design for that area.

3. The City shall inform OIBC of the status of the AIS. The City will continue to meet regularly with the OIBC, either as a taskforce, or with the council of the whole, for the duration of the construction period of the Project.

4. The City, in coordination with the OIBC, lineal and cultural descendents, NHOs, and other interested parties that are identified in discussion with OIBC shall complete a draft protocol for consultation regarding treatment of any *iwi kupuna* identified during the AIS. It shall be provided to the OIBC for review within six (6) months of the execution of this PA. The protocol shall address, at minimum, a process for communication about any identified *iwi kupuna*, definitions that will be applied to the Project, identification and inclusion of lineal and cultural descendents and NHOs, and workflow of actions prior to and upon identification of *iwi kupuna* during AIS. The workflow shall provide for options to avoid moving *iwi kupuna* (preservation in place) versus relocation options. Avoidance shall include relocation of columns, change of column design to or from a center alignment to straddle bent or other alternatively-supported design, modification of span length, and alternate utility locations. The City will take into account any comments provided within sixty (60) days from the OIBC, lineal and cultural descendents, NHOs and other interested parties to finalize the draft protocol. The City will proceed in accordance with the protocol once it is approved by FTA. Nothing in this protocol will supersede HRS § 6E 43.5, or HAR Chapter 13-300.

5. Dispute Resolution Specific to Stipulation XIV.C: Should the parties identified in this stipulation be unable to resolve elements identified in this stipulation, the parties would first consult with the signatories to this PA for guidance. Should the parties still be unable to resolve the dispute, the provisions of Stipulation XIV.C would take effect.

C. **Fieldwork**—The City shall conduct archaeological fieldwork as presented in the AIS Plan. For construction Phases 1, 2 and 3, the archaeological fieldwork shall be completed in advance of the completion of final design for each phase so that the presence of any sensitive archaeological sites/burials discovered during fieldwork may be considered during final design and measures incorporated to avoid and/or minimize adverse effects on historic properties. The City shall inform OIBC of status of the archaeological investigation. Fieldwork required by the AIS Plan shall include, but not be limited to, the following:

1. Reconnaissance survey (archival research and visual inspection by pedestrian inventory) within the APE,

2. A sample survey of subsurface conditions with ground-penetrating radar (GPR), and subsurface inspection as warranted.
3. A subsurface testing regime for locations identified in the AIS Plan,
4. A description of archaeological methods specific and applicable to the findings will be used in analysis, and
5. Draft and final reports summarizing the results of the fieldwork and analysis shall be submitted to the SHPD for review and approval.

D. **Treatment Plans**—Based on the results of the AIS fieldwork and in consultation with the SHPD, the City shall develop a specific treatment plan to avoid, minimize, or mitigate adverse effects on historic properties including archeological sites and burials pursuant to applicable state laws, including HRS Chapter 6E, *Historic Preservation*, and HAR Chapter 13-300, *Rules of Practice and Procedure Relating to Burial Sites and Human Remains*, for each construction phase. Treatment plans shall be submitted to the SHPD for approval. Upon approval by the SHPD, the City shall implement the treatment plan.

1. Any human remains found on lands owned or controlled by the federal government will be addressed in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.*, in coordination with the affected land management agency.
2. The City confirms that guideway columns may be relocated a limited distance along the guideway at most column locations, straddle-bent supports may be used, or special sections developed to modify span length allowing for preservation in-place to be viable in those locations. If the OIBC determines that a burial is to be relocated, the City will consult with the OIBC to determine appropriate reinterment, which may include relocation to Project property in the vicinity of the discovery

E. **Mitigation Plans**—Subsequent to the archaeological fieldwork and development of the treatment plan, the City, in consultation with the SHPD, shall develop mitigation plans as appropriate. The mitigation plans may include the following:

1. **Archaeological Monitoring Plan**
 - a. The City may develop an archaeological resources monitoring plan specifying the locations within the construction area that require a monitor and describing the level of monitoring necessary. The monitoring plan will be developed and implemented by a qualified archaeologist, meeting the *Secretary of the Interior's Professional Qualification Standards for Archeology*, 48 Fed. Reg. 44738-9 (Sept. 29, 1983).
 - b. The City shall develop a follow-up monitoring report per HAR § 13-279-5 for the Project and shall submit it to the SHPD for approval. The monitoring report, if it contains the location and description of human

burial remains discovered during the course of the Project, shall remain confidential. Precise location data may be provided in a separate confidential index. The monitoring report for the construction phase of the Project shall be submitted by the City to the SHPD no later than ninety (90) days after the completion of construction of that phase.

2. Data Recovery Programs

- a. Data Recovery Programs (including Data Recovery Plans and Data Recovery Reports) will be prepared by the City as appropriate in consultation with the SHPD. Data Recovery Programs shall be submitted for review and approval by the SHPD.
- b. Whenever possible, technological means will be used to avoid potential human remains and archaeological resources to minimize disturbance.
- c. Completion of data recovery work must be verified by the SHPD prior to initiation of construction within the area of these sites.
- d. Data recovery plans that specify the disposition of recovered objects shall be submitted by the City, in consultation with the FTA and the Navy (as applicable), to the SHPD for review and approval and shall be in compliance with applicable laws, such as HAR Chapter 13-278, *Rules Governing Standards for Archaeological Data Recovery Studies and Reports*, and should be consistent with 36 C.F.R. Part 79, *Curation of Federally-Owned and administered Archaeological Collections*.

F. **Curation**—The City will curate recovered materials in accordance with applicable laws, such as HAR Chapter 13-278 and 36 C.F.R. 79. The City shall consult with public and private institutions to pursue an opportunity to provide public access to the recovered materials. Interpretive materials as described in Stipulation VII of this PA at one or more stations may incorporate archaeological materials recovered during development of the Project.

Any human remains found on lands owned or controlled by the federal government will be addressed in accordance with NAGPRA in coordination with the affected land management agency.

IV. Design Standards

A. The City shall develop standards for, and maintain and update the Project's *Design Language Pattern Book* for use in all Project elements. The pattern book shall be available electronically. For stations within the boundary of or directly adjacent to an eligible or listed historic property, the City shall comply with *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, and will make every reasonable effort to avoid adverse effects on historic properties. If the FTA,

the City and the Kako'o find that the standards cannot be applied, the City shall consult with the consulting parties to develop a treatment plan to minimize and mitigate adverse effects on the historic property.

B. The City shall conduct a minimum of two neighborhood design workshops for the stations in each of the Project phases. The City shall notify all consulting parties of the workshops and consider any comments received when completing station design.

C. At the earliest practicable time during preliminary engineering, prior to Project entry into final design, the City shall provide preliminary engineering design plans for built components of the Project, such as stations, guideway, and directly related Project infrastructure improvements, to consulting parties for review and comment. For stations within boundaries of or directly adjacent to listed or eligible historic properties, the City shall also provide plans during the final design phase. The consulting parties shall provide the City with comments on the plans within 30 days of receipt. The City shall consider and provide written documentation of that consideration on the project website of all comments provided by the consulting parties prior to completing preliminary engineering or final design plans.

V. Recordation and Documentation

A. Within ninety (90) days of execution of this PA, the City shall complete draft historic context studies related to relevant historic themes within the APE. This type of study assists in documenting the history of the affected area and may be used in developing NRHP nominations for historic properties in the area.

1. The City will develop a draft scope of work for the studies describing the context themes, research methodology, report format, photography specifications, and schedule for completion. The City will circulate a draft scope of work to the consulting parties.
2. Any comments received by the City from consulting parties within thirty (30) days of receipt of the draft scope of work will be considered by the City in developing a final scope of work in consultation with the SHPD.
3. Initial field work and photography for each study theme shall be completed prior to construction commencement in relevant geographic areas.
4. The City shall submit draft context studies to the SHPD for review, and all comments provided by the SHPD will be reconciled in consultation with the City within thirty (30) days while preparing the final studies.
5. Copies of the final studies shall be distributed to repositories listed in Stipulation XIV.E.5.

B. The City shall complete Cultural Landscape Reports (CLR) related to historic properties along the Honolulu High-Capacity Transit Corridor.

1. Within ninety (90) days of execution of this PA, the City shall develop a draft scope of work for the CLRs describing the cultural landscapes to be studied, research methodology, report format, photography specifications, and project schedule. All work shall follow NPS guidance and standards, as appropriate, including National Register Bulletin 30, *Guidelines for Evaluating and Documenting Rural Historic Landscapes* and National Register Bulletin 18, *How to Evaluate and Nominate Designed Landscapes*, as well as relevant information presented in NPS, *Guidelines for the Treatment of Cultural Landscapes*. The City shall circulate a copy of the draft scope of work to the consulting parties.
2. Any comments received by the City from consulting parties within thirty (30) days of receipt of the draft scope of work will be considered by the City in developing a final scope of work in consultation with the SHPD.
3. Initial field work and photography for each study area shall be completed prior to construction commencement in that area.
4. The City shall submit draft CLRs to the SHPD and consulting parties for review based upon a distribution list defined in advance in cooperation with the consulting parties. The SHPD will provide comments within thirty (30) days of receipt of draft materials. SHPD will have forty-five (45) days for review if multiple reports come in within ten days of each other. The City will consider all comments from the consulting parties and stakeholder groups while preparing final versions.
5. Copies of the final CLRs shall be distributed to repositories listed in Stipulation XIV.E.5.

C. Historic American Building Survey (HABS), Historic American Engineering Record (HAER), and Historic American Landscape Survey (HALS) Recordation

1. The City shall consult with the NPS HABS/HAER/HALS (HHH) coordinator in the Pacific West Regional Office to determine which of the historic properties that received adverse effect determinations will be documented by completing HHH recordation. After this determination, the NPS will stipulate the appropriate type and level of HHH documentation for each property.
2. The City shall ensure that all HHH documentation for properties identified in Stipulation V.C.1 is completed in accordance with NPS recommendations, including requisite draft and final submission requirements.
3. The City shall ensure that final HHH documentation is completed for a property and accepted by NPS prior to commencement of activities that could impact the historic property and/or affect its integrity.

4. The NPS shall provide comments on draft report submittals within 30 days of receipt and will provide comments on final report submittals within 30 days of receipt. If the City includes multiple reports in a submittal or submits multiple reports within a 10-day period, NPS will be allowed 45 days for review.

5. The City may request NPS to review the photographic documentation portion of a HHH report prior to completion of the full report, to accommodate construction schedules. The City shall only make such requests when the pace of the construction schedule makes it unlikely that a draft and final HHH report can be completed and reviewed in time for construction to commence on or near the specific property. In such instances, the City shall submit the archival black and white prints and negatives to NPS for review. NPS will provide comments within 30 days of receipt. The City will ensure that the full draft HHH report is submitted within six (6) months of NPS approval of photographic documentation.

D. The City shall engage a professional photographer to complete archival photography to NRHP standards for all resources that received adverse effect determinations that are not subject to HHH documentation under Stipulation V.C. Photographic documentation will include, at a minimum, representative views of relevant historic structures associated with each historic property, and representative views of the surrounding setting of each historic property. These photographs will be offered to the repositories listed in Stipulation XIV.E.5. Per the schedule established by Stipulation XIV.E.3, the City shall consult with the SHPD to determine an appropriate level of written documentation for each above-ground historic property that is not documented under Stipulation V.C or VI. The SHPD will review this documentation upon completion.

E. The City shall have digital photographs taken by a professional photographer, in conjunction with the input of a supervising architectural historian, to document select resources and view sheds within the APE. These photographs shall be taken prior to construction commencement and shall be used for interpretive materials, publications, cultural landscape reports, and historic context studies. Photographs will focus on NRHP-eligible resources and unique landscape features. Approximately 150 views will be submitted. These photographs will be housed at the City Municipal Library with copies submitted to the SHPD.

F. The City shall take a comprehensive video of the Project corridor prior to construction commencement. Video documentation shall be completed by a professional videographer and will consist of unedited footage filmed from a moving vehicle. The Project corridor shall be filmed from the vehicle in each direction, from Ala Moana to 'Ewa, and 'Ewa to Ala Moana. This film will be housed at the City Municipal Library with a copy submitted to the SHPD.

VI. National Register of Historic Places/National Historic Landmark Nominations

A. The City shall complete a NRHP Multiple Property Documentation (MPD) for Modern/Recent Past historic properties dating from 1939-1979. Additionally, the City shall complete a single Multiple Property Submission (MPS), including all appropriate accompanying documentation.

1. The City and SHPD will consult with property owners to obtain access and determine their consent to the proposed listing. Listing procedures shall be consistent with HAR Chapter 13-197, *Practice and Procedure before the Hawaii Historic Places Review Board* and HAR Chapter 13-198, *The Hawaii and National Registers of Historic Places Programs*. Should owners object to listing or access, the City shall document the properties to the extent possible from public right-of-way and using available research or alternative properties may be selected by the City, in consultation with SHPD, for documentation. The SHPD will determine appropriate listing procedures according to Hawai'i Administrative Rules for the properties whose owners do not consent.

2. As part of the MPD, the City will propose a list of Modern/Recent Past historic properties determined eligible for the NRHP to be advanced for nomination and will circulate it to the consulting parties.

3. The City will consider any comments received from the consulting parties within thirty (30) days in developing a final list in consultation with the SHPD.

4. The City shall submit a draft MPS nomination form to the SHPD and NPS for review and comment. The SHPD and NPS will provide any comments within thirty (30) days of receipt. The City shall consider all timely comments while preparing the final MPS documentation.

B. Pending the U.S. Navy approving the work and providing access to the site and relevant records, the City, in consultation with the Navy, or the Navy, if it chooses, shall complete an update to the Pearl Harbor NHL nomination and the CINCPAC Headquarters NHL nomination. For the Pearl Harbor NHL amendment, emphasis shall focus on those resources closest to the APE and to those not previously documented in the existing nomination. All work shall be coordinated with the Navy and follow the guidelines set forth in *National Park Serv., U.S. Dep't of the Interior, How to Prepare National Historic Landmark Nominations* (1999). The work shall be carried out and approved by persons meeting the professional qualifications for historical architect or architectural historian in *The Secretary of the Interior's Historic Preservation Professional Qualification Standards*, 62 Fed. Reg. 33,713-14, 33719-20 (June 20, 1997). The City shall submit a draft document to the NPS, Navy, and SHPD. The City shall consider all comments received from NPS, Navy, and SHPD within 30 days in preparing the final NHL nomination. The City will provide the Navy with the updated NHL nominations and accompanying documentation, including requisite maps and photographs for submittal to the NPS.

C. National Register Nominations

1. The City shall complete NRHP nomination forms and/or amendments for all 31 of the 33 properties (Attachment 2) that received adverse effect determinations located along the Project corridor (note that two resources are NHLs and are addressed in Stipulation VI.B). The City shall complete NRHP nomination forms for the potential Little Makalapa Navy Housing Historic District—although FTA has determined that the Project will have no adverse effect on this potential district. See Section 4.16 of the Project's Final EIS. The City will consult with the SHPD to determine if nomination forms for properties already listed in the NRHP should be updated and/or amended. The City and SHPD will consult with property owners to obtain access and determine their consent to the proposed listing. Should owners object to listing or access, the City shall document the properties to the extent possible from public right-of-way and using available research. This information will be provided to the SHPD, who will determine appropriate listing procedures according to Hawai'i Administrative Rules for owners who do not consent. All work shall conform to guidance presented in relevant National Register Bulletins. The City will complete all appropriate accompanying documentation, including photographs and mapping.

2. The City will submit draft nomination forms to the SHPD for review. The SHPD will provide comments within thirty (30) days of receipt. The City will consider the comments and submit final NRHP nomination forms following the established procedures of the National Park Service under 36 C.F.R. § 60.6(g). Final nomination forms will be completed before the Project begins revenue service operations.

In addition, the City shall complete nomination forms for Makalapa Navy Housing District and the Little Makalapa Navy Housing District, shall provide the forms for review by the SHPD and the Navy, and submit the nominations forms to the National Park Service under 36 C.F.R. § 60.6(g) or, if the Navy chooses, under 36 C.F.R. § 60.9. Final nomination forms shall be submitted to the National Park Service prior to the second Pearl Harbor Station design workshop as described in Stipulation IV.B.

3. The City will also coordinate with the SHPD to nominate these historic properties to the Hawai'i Register of Historic Places if they are not already included.

D. Properties documented in the MPS required by Stipulation VI.A will not be documented on separate, individual NRHP forms beyond what is included in the MPS.

E. All NRHP and Hawai'i Register of Historic Places nominations will follow the procedures set forth in HRS Chapter 6E, *Historic Preservation*, and HAR Chapter 13-198, *The Hawaii and National Registers of Historic Places Programs*, as appropriate. Completion of the stipulated NRHP nominations does not guarantee listing; the Keeper

of the NRHP may determine that the properties are not eligible for listing. Listing of any property in the NRHP is subject to NPS review and approval.

F. The City shall develop a searchable database of historic properties within the APE in a format suitable for public use. The database will include an interactive geographic component and include property information (e.g., property name, address, tax map key, construction date, architect, etc.). The City will initiate database development prior to construction commencement and will update and maintain the database for the duration of this PA. The Navy reserves the right to approve the inclusion of any Navy historic properties in any public database.

G. The City will consult with the SHPD to develop a strategy for making this database and its information available to any organization with the authority and ability to develop, maintain, and support a public research database at the end of construction.

VII. Educational and Interpretive Programs, Materials, and Signage

The City shall implement the following stipulations before revenue service begins.

A. The City shall complete an interpretive plan for the Project area and install interpretive signage at appropriate locations. The interpretive plan will highlight historical themes (e.g., Native Hawaiian History, Native Hawaiian Culture, Immigrant History, Plantation Culture, Architecture, Government, Agriculture, Transportation, Military, etc.) and will interpret these themes at an appropriate station location. Interpretive signage will be installed at or near relevant transit stations and, where appropriate, inside transit vehicles.

B. The City shall complete a color brochure describing the history of the area along the transit line. All materials shall also be produced in a digital format for electronic and/or online distribution. Upon completion, 1,000 physical copies of the product shall be printed and made available at stations to transit riders.

C. The City shall prepare materials for children, such as a coloring book or child-friendly game that would educate children about relevant local history. The materials shall be prepared by professional historians and a professional illustrator. The City shall solicit student input to propose and develop the content for the materials. All materials shall also be produced in a digital format for electronic and/or online distribution. The materials will be available on the Project website.

D. The City shall establish a Humanities Program that will explore human histories, cultures, and values. This program will enhance visitor and resident exposure to the depth of history and culture in the vicinity of the Project. The Humanities Program will educate the public about important topics in Hawaiian history through conferences/seminars, research fellowships, media programs, exhibits, lectures, and publications. The Humanities Program will also consider conducting select architectural surveys as a component of the potential program that may inform other program

aspects. The City will develop this program's goals in consultation with consulting parties, and the City will provide one hundred thousand dollars (\$100,000) to fund this program. The City will establish subcommittees to achieve the goals of the Humanities Program and meet at agreed-upon intervals. In the absence of additional funding from the City, the Humanities Program will continue until all designated funds are exhausted or until revenue service begins, whichever occurs later.

E. The City will develop and implement an educational effort/program to encourage the rehabilitation of historic properties located along the transit route. This effort will include printed and electronic information about proper rehabilitation practices; benefits of historic designation; financial incentives available for eligible properties; and existing resources for assistance in pursuing these options. The City will hold two meetings and/or public workshops with owners of historic properties to disperse this information. The City will invite all owners of eligible or listed properties located within the APE and also within a 2,000-foot radius of station locations to the two meetings/workshops and will also announce the meetings/workshops to the public on the Project website. The meeting/workshops will be completed before revenue service begins. At the conclusion of the effort, the City will submit a summary report to the consulting parties.

F. Based on the content developed in Stipulation VII.A, the City will develop an educational field guide of the historic properties (including historic districts) along the transit route. The City will make the field guide available to the public in both print and electronic formats.

G. Consulting parties will be invited to participate in a kick-off meeting to develop a work plan, content for deliverables, and schedule for all products required within Stipulation VII. The City will circulate a draft of the work plan, preliminary content outline, and schedule to consulting parties following the kick-off meeting. The City will consider all comments received within thirty (30) days while preparing the final work plan and schedule in consultation with the SHPD.

H. The City will submit drafts of all work products required in Stipulation VII to the consulting parties for review and comment. The consulting parties will provide comments on the content, design, and other relevant product components within thirty (30) days of receipt of draft materials. The City will consider all comments while preparing final versions.

VIII. Mitigation for Specific Historic Properties

A. All lava rock curbstones removed along the edges of pavement because of Project-related work shall be retained by the City for reuse and reinstallation. The stones will be marked prior to removal, stored securely, and replaced at their approximate original mile-point locations prior to the beginning of revenue service operation. Any stones that are damaged or destroyed during extraction or reinstallation shall be replaced with in-kind materials.

B. The bridge rails on the Kapālama Canal Bridge must be replaced or retrofitted to meet current safety standards. The City will maintain or replace the rails to match the appearance of the historic rails and to maintain existing views to and from the bridge. The City shall consider *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, in developing draft plans to provide to SHPD for review per Stipulation IV.

C. The City will replace true kamani trees within the corridor as close as feasible to the current location of the group of 28 true kamani trees on the makai side of Dillingham Boulevard that will be removed. The City will replace the trees prior to revenue service operation. In consultation with the SHPD landscape plans will be developed by the City during final design so that new plantings will provide similar advantages to the community. If new plantings do not provide "equitable mitigation" (e.g., older mature trees that are removed), additional younger trees will be planted that will, in time, develop similar benefits.

D. Improvements to Adversely Affected Parks

1. The City will invite consulting parties, property owners, and other stakeholders to participate in a kick-off meeting to discuss improvements to adversely affected historic parks. Based upon design standards contained in Stipulation IV, and considering comments offered at the kick-off meeting, the City will develop and circulate a draft park improvement plan to consulting parties. The City will consider all comments received within thirty (30) days while preparing the final plan in consultation with the SHPD.

2. The City shall consider *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, and make every effort to avoid adverse effects on historic properties.

3. The City will ensure completion of the park improvement plan before construction is complete.

4. Project funds in the sum of seven hundred fifty thousand dollars (\$750,000) shall be budgeted for implementation of the parks improvement plan. Should the City, following consultation with consulting parties, property owners, and stakeholders, determine that circumstances preclude improving these parks, Project funds budgeted for parks shall be transferred for use to the Honolulu High-Capacity Transit Corridor Project Historic Preservation Committee (Stipulation IX.B).

IX. Measures to Address Reasonably Foreseeable Indirect and Cumulative Effects Caused by the Project

A. The City shall include a staff position for a qualified Project architectural historian, defined in Stipulation I.F. The architectural historian shall oversee completion of the

stipulations of this PA, coordinate with the SHPD, Kāko'o and other consulting parties, and coordinate with the Department of Planning and Permitting (DPP) regarding land use planning activities, including the integration of transit-oriented development with historic preservation in the vicinity of Project stations.

B. The City, in consultation with the consulting parties, shall create, chair, and provide technical, administrative, and financial support for the operation of a Honolulu High-Capacity Transit Corridor Project Historic Preservation Committee (HPC). The City shall allocate two million dollars (\$2,000,000) within the Project's budget to fund the program administered by the HPC. The City will create and schedule the first meeting of the HPC within three months after execution of this PA. Prior to the creation of the HPC, the City will submit to the SHPD for approval, a list of the agencies, groups, and organizations that will be invited to be represented and serve on the HPC. The HPC shall comprised the following seven (7) members: the director of DTS, or his designee, to serve as a voting member and chair of the HPC; one representative, or its designee, from each of the following: SHPD, DTS, and DPP; and one representative each from three (3) non-governmental groups or organizations with expertise in historic preservation, cultural resources, architecture, planning, or landscape architecture. The HPC shall establish the goals, criteria, program guidelines, administrative procedures, and funding distribution for the disposition of these funds that will be provided by the City for exterior improvements to both Project related and other eligible or listed historic properties (including contributing resources within historic districts) within the Project's APE consistent with *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, accomplished through grants provided under this section. The HPC shall also consult with the City and SHPO on the existence of potential unforeseen adverse effects as a result of Project actions on the Chinatown and Merchant Street Historic Districts.

The HPC shall identify and select an entity or entities that will administer the funds for the purposes established. This entity or entities shall be compliant with the requirements of ROH Chapter 6, Article 29, as amended, *Standards for the Appropriation of Funds to Private Organizations*. The City will dissolve the HPC when the funds are exhausted, but not before six (6) months after completion of the Project and no later than three (3) years after completion of the Project, whichever occurs first.

C. To examine Project impacts related to development along the Project corridor, the City shall monitor the proposed demolition of resources built before 1969 within the APE and within a 2,000-foot radius of each station. This shall occur by monitoring demolition permits. The City shall establish a baseline for demolitions by calculating an annual average and standard deviation of demolitions that occurred within these areas between 2005 and 2008. The City shall include this baseline data and an explanation of its relevance to project planning and implementation in the first six-month report submitted pursuant to Stipulation XIV.E.3. The SHPD shall provide location information on previously identified eligible or listed historic properties within the 2,000-foot radius of each station location. If and when in any year during project construction the number of demolitions of listed or eligible resources within the APE or resources within the

station areas built before 1969 is greater than one standard deviation above the baseline, then the City shall notify the consulting parties during each scheduled quarterly and annual review of the PA.

D. If any Signatory to this PA finds during the duration specified in Stipulation XIV.D that there is likely to be a significant adverse indirect or cumulative effect on a resource determined eligible for the National Register as part of the Section 106 process for this project and that the adverse effect was not evaluated in this PA, that Signatory shall notify FTA. Post-review direct effect discoveries are handled in stipulation XII.A.

If consulting parties identify during the duration of this PA that a significant adverse indirect or cumulative effect on a resource determined eligible for the National Register as part of the Section 106 process for this project was not evaluated in this PA, the consulting party shall follow procedures identified in Stipulation I.H.10.

Upon such notification, FTA will call a meeting of the consulting parties to discuss what next steps would be appropriate under the new circumstances to mitigate the effects on such resources.

E. In the Chinatown and Merchant Street Historic Districts, these specific additional requirements shall apply regarding unanticipated cumulative adverse effects referenced in Stipulation IX. D, above:

1. During design, implementation, testing, and the first six months of full operation of the Project, the City shall follow the process described below to address unanticipated and reasonably foreseeable present and future non-Project actions that could, in combination with the Project, have cumulative adverse effects on the historic resources in the Chinatown and Merchant Street Historic Districts (hereinafter, the "Two Historic Districts") that may cause irreversible or long-term adverse effects on qualifying characteristics of the Two Historic Districts that were to be preserved or protected based upon the terms of this Agreement or other executed Section 106 Agreement document(s) associated with the Two Historic Districts.
2. City shall request all City agencies that are constructing projects related to the Project within the Two Historic Districts to submit preliminary documents to the City to allow coordination of the Project activities with such other work and to allow the City's assessment of the Project to include the potential for unanticipated cumulative adverse effects on the Two Historic Districts.
3. City, its historic preservation consultants, and the *Kako'o*, in cooperation with the FTA, will consult with SHPO and the Project Historic Preservation Committee in assessing whether there is an unanticipated cumulative adverse effect related to the Project in the Two Historic Districts.
4. If FTA, the City and SHPO agree that Project plans or completed activities in conjunction with unanticipated and reasonably foreseeable present and future

non-Project actions are likely to result in unanticipated cumulative adverse effects on the Two Historic Districts per Stipulation IX.D., above, then the City, in consultation with FTA, shall consider measures with respect to the Project to mitigate or minimize such effects, including technical or financial measures for the protection, rehabilitation, or repair and Project design modifications. Disagreements between the City and SHPO, including those related to effects findings, will be resolved pursuant to Stipulation XIV.C.

5. City shall make all appropriate City-generated and prepared documentation related to the Project for Section 106 purposes and utilized in consideration of unanticipated indirect and cumulative adverse effects in Section IX.D. available to the consulting parties via the Project website. Consulting parties will be notified of the documentation posting to the Project website via electronic notification. SHPO, ACHP, the Navy and FTA will respond within 30 days of receipt of all required documentation. All other consulting parties shall have 21 days to comment on the documentation. The City will provide paper copies of such documentation to consulting parties upon request. Should consulting parties fail to respond within 30 days after receipt of all documentation, it shall be assumed that they have no comments on the proposed action or mitigation, if any, to minimize or mitigate unanticipated cumulative adverse effects.

6. The review of the documentation by all parties per Section IX.D. shall focus on the historic elements of the Two Historic Districts, as defined in the state or National Register of Historic Places, which may be caused by the Project relative to unanticipated cumulative adverse effects.

7. City, in coordination with FTA, and SHPO will consider and respond to comments about the Project related to the Two Historic Districts from consulting parties as provided for in Stipulation I.H.10. The review, in particular, will address the potential for unanticipated cumulative adverse effects on the Two Historic Districts. The review will also attempt to resolve specific disagreements about how City intends to address unanticipated cumulative adverse effects per Section IX.D. of this Agreement. If City, in consultation with SHPO is unable to reach a resolution with the consulting parties who have commented pursuant to Section I.H.10 regarding an unanticipated cumulative adverse effect on the Two Historic Districts, the City will notify the FTA, and as appropriate, consult with the ACHP, in accordance with Stipulation X.I.V.

F. In addition to the mitigation presented in this stipulation, mitigation for indirect and cumulative effects is provided in Stipulations IV.A-B and VII.A-F.

X. Construction Protection Plan

A. During final design, DTS, in cooperation with its contractors and FTA, will develop a Construction Mitigation Plan (CMP). The CMP will include a Noise and Vibration Mitigation Plan. Per requirements to be included in the FTA Record of Decision (ROD) and FTA guidance entitled, *Transit Noise and Vibration Impact Assessment*, FTA-VA-90-1003-06 (2006) (FTA Guidance Manual), DTS shall perform quantitative assessments of both noise and vibration which will inform the CMP. Noise and vibration control plans will be updated every six (6) months. The updated plans should predict the construction noise and vibration impacts at sensitive receptor locations based upon the proposed construction equipment and methods. Appropriate construction plan noise and vibration mitigation measures shall be employed as identified in FTA's Guidance Manual.

Numeric limits and monitoring measures will be developed to minimize noise and vibration impacts. Vibration criteria included in Table 12-3, *Construction Vibration Damage Criteria*, of the FTA Guidance Manual will be applied. Note that most historic properties in the corridor are non-engineered timber or masonry; a criterion of 0.2 inches per second of peak particle velocity would be applicable to these structures. Noise and vibration mitigation strategies will be included in the Noise and Vibration Mitigation Plan.

B. Before Project construction begins, the City shall meet with the construction contractor(s) to review and transmit the CMP.

C. The City will monitor Project construction to ensure that the measures in the CMP are implemented and shall provide a record of monitoring activities in progress reports prepared pursuant to Stipulation XIV.E.

D. With the cooperation of the Navy, the City shall complete post-construction noise monitoring as stipulated in the Project's Final EIS within U.S. Naval Base, Pearl Harbor NHL.

E. The City, in consultation with FTA shall ensure that any inadvertent damage resulting from the Project to historic properties shall be repaired, to the extent possible, in accordance with *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68. The City, in consultation with the FTA, shall submit a scope of work or treatment plan to address inadvertent damage to the SHPD for comment before initiating repairs.

XI. City Contractors and Contract Adherence to PA

FTA and the City shall ensure that contracts developed in the implementation of all construction phases of the Project shall expressly refer to and require compliance with the stipulations of this PA. Contractors responsible for work set forth in this PA shall have qualified staff that meets the *Secretary of Interior's Professional Qualification*

Standards, 48 Fed. Reg. 44,738-39 (Sept. 29, 1983) for history, archaeology, architectural history, architecture, or historic architecture with experience in historic preservation planning to ensure the satisfactory compliance with the terms of the PA during the design and construction of each project construction phase.

The *Kako'o* will provide guidance regarding the implementation of the terms of this PA to all contractors, particularly those involved in construction-related activities.

The City shall require, on an annual basis, or more frequently as circumstances require, historic preservation and cultural awareness training for the construction contractors and employees. The training shall include information related to the following topics:

- a) Illegal collection and disturbance of historic and prehistoric cultural materials, including human remains.
- b) Scope of applicable laws and regulations.
- c) Initial identification and reporting of archeological materials, human remains, and historic buildings or structures that may potentially be discovered during the course of their work.

Training materials, schedules and lists of persons trained will be made available to the consulting parties of this PA and other interested parties on an annual basis.

XII. Post-Review Discoveries

A. Post-review discoveries are not anticipated for built historic properties. Notwithstanding, the City agrees to cease all work in the vicinity of the discovery should an unanticipated adverse effect on a built historic property be found during construction. The City will notify the signatories and provide information about the unanticipated adverse effect and the City's proposed treatment plan within a period of three (3) business days. Signatories will provide comments on the City's proposed treatment plan within three (3) business days. The City, in consultation with FTA and SHPD, will consider any timely comments in developing a final treatment plan. FTA will not allow work to resume in the vicinity of the unanticipated adverse effect until a treatment plan has been finalized. The City will proceed in accordance with the treatment plan.

B. Because of the linear nature of the Project and because any areas excavated for the placement of piers to support the elevated structures, foundations for buildings and structures, utility installation, grading to provide parking, or other construction-related ground disturbance, including preparation of construction staging areas and the new location of any utilities that will be relocated by the Project, will be the subject of a comprehensive AIS, post-review archaeological discoveries after completion of AISs are not anticipated.

In the event of any inadvertent discoveries of burials, the OIBC shall be included in consultation as specified in HAR § 13-300-40. When suspected human skeletal remains are found, the City shall ensure that all work in the vicinity stops and that a City

archaeologist will secure the area to avoid any additional disturbance, pursuant to HRS § 6E-43.6. If the remains are identified to be human, the City will notify SHPD as required by law. (Non-human remains that are determined by the Project archaeologist not to be a protected resource will be documented in Project files and no further action taken.) With confirmed human skeletal remains, the archaeologist must also notify the OIBC, the County Coroner's Office, and the County Police Department. With all inadvertent burial finds, SHPD determines burial treatment, either preservation in place or relocation, in consultation with the landowner, the district representative of the OIBC, and any recognized cultural or lineal descendents or NHOs for the Project. Pursuant to §§ 6E-43.6(c) and (d), SHPD has one (1) day to make its treatment determination for single burials and two (2) days for multiple burials found on O'ahu. Recognizing the extent of the Project and the sensitivity of any discoveries, the Project will allow an extended time for SHPD determination of treatment by an additional three (3) days for a total of four (4) days for single burials and five (5) days for multiple burials; provided that this extension of time shall not affect other obligations, duties, or responsibilities required under HRS Chapter 6E and applicable regulations. Information generated in the AISs in Stipulations III.B, III.C and III.D will assist SHPD and OIBC in identifying and notifying lineal and cultural descendants and defining a treatment plan since background research is an integral component of the AIS. Construction must remain halted in the vicinity of the burial find until SHPD's treatment decision has been carried out or any other requirements of law have been met.

C. The City, in consultation with the OIBC and the SHPD, will be responsible for carrying out the burial treatment for post-review discoveries.

1. For preservation in place, the City will modify the planned construction to allow for the remains to stay in place in accordance with the burial treatment plan
2. Pursuant to HRS § 6E-43.6(f), in cases where remains are archaeologically removed, SHPD shall determine the place of relocation, after consultation with the City, OIBC, affected property owners, representatives of the relevant ethnic group, and any identified lineal descendants, as appropriate.

Parties Identified in this Stipulation XII.C will consider the inclusion of either of the following two provisions in a post-review discovery treatment plan: (1) If a reinterment site was not identified in a Treatment Plan in Stipulation III.D, the City will disinter the remains, curate the remains at the Project site until the associated Project phase is completed and then immediately arrange for reinterment within the Project area; or (2) If reinterment sites are identified as part of the Treatment Plans in Stipulation III.D, immediate reinterment to those identified sites will be the preferred practice

3. The City will document burial treatment in either a "burial site component of an archaeological data recovery plan" for burials that are relocated, or a "burial site component of an archaeological preservation plan" that documents the burial

treatment that was carried out. These plans/reports document the conditions of the discovery, the burial treatment, access and any subsequent measures that have been agreed to by the landowner to safeguard either the relocation site or the preserve site. The City will record preserved or relocated burial sites with the Bureau of Conveyances so that the burial sites are not further disturbed in the future.

D. Any human remains found on lands owned or controlled by the Federal government will be addressed in accordance with NAGPRA in coordination with the affected land management agency.

XIII. Public Information

Elements of public involvement and information are included throughout this PA. In addition, the City shall undertake the following:

A. To keep the public informed about PA implementation, the semi-annual progress reports described in Stipulation XIV.E will be posted on the Project website.

B. With the exception of sensitive information or locations, the City shall add all documentation completed as part of this PA to the historic properties database that will be created as part of Stipulation VI.F. However, if the consulting parties agree, the sensitive information or locations may be included in a password-protected mode.

C. At any time during implementation of the activities covered in this PA, should an objection pertaining to this PA or the effect of any activity on historic properties be raised by a member of the public, FTA will notify the signatories to this PA and take the objection into account, consulting with the objector, and should the objector so request, with any of the parties of this PA, to resolve the objection.

XIV. Administrative Provisions

A. **Implementation Schedule**—Within sixty (60) days of the execution of this PA, the City shall develop a schedule for the implementation of the provisions of this PA. The City will submit the schedule to the signatories and concurring parties for review and comment. The final schedule will include timelines and milestones for completion of deliverables and will be posted on the Project website. The City will update the schedule to reflect Project changes and will notify the signatories and concurring parties of any alterations to the schedule.

B. **Project Modifications**—Should the Project alignment be changed in any way that FTA determines results in a change to the APE, the City shall update the APE maps, and FTA and the City, in consultation with other consulting parties, shall ensure that the requirements of this PA are met, after further consultation and assessment of effects, with regard to the new portions of the APE.

C. **Dispute Resolution**—Should any Signatory or Invited Signatory to this PA object to any action proposed pursuant to the PA, the FTA shall consult with the objecting party to resolve the objection. If the FTA determines that the objection cannot be resolved, the FTA shall forward all documentation relevant to the dispute, including FTA's proposed resolution, to the ACHP.

1. Within thirty (30) days after receipt of all pertinent documentation, the ACHP shall provide the FTA with its advice on the resolution of the objection. FTA will then prepare a written response that considers any timely advice offered by the ACHP or by other signatories to the PA. FTA will provide all consulting parties with a copy of this written response and proceed according to its final decision.
2. If the ACHP does not provide its advice regarding the dispute within thirty (30) days of receiving appropriate documentation about the dispute, FTA may make its final decision on the dispute and proceed accordingly. Prior to reaching a final decision, FTA shall prepare a written response that considers any timely comments by other signatories to the PA and provide them and the ACHP with a copy of that response.
3. The responsibility of the FTA and the City to carry out all actions that are required by this PA and are not affected by the dispute remains unchanged.

D. **Duration**

1. This PA shall take effect on the date it is signed by the last Signatory and shall be in effect for ten (10) years from the date of execution, or terminated pursuant to Stipulation XIV.I. At least six (6) months prior to the end of the 10-year period, FTA will provide an update on the status of the work associated with all stipulations. At that time, and before the 10-year period elapses, the signatories may amend the content of the PA, which may include extension of the duration of the PA, in accordance with Stipulation XIV.H if they determine that it is necessary to complete all stipulations.

E. **Monitoring and Reporting**

1. Any Signatory to this PA may request, at any time, a review of the implementation of the terms of this PA.
2. For the first twenty-four (24) months following the implementation of this PA, the City shall hold quarterly (every three (3) months) meetings with the consulting parties to discuss implementation of this PA including near-term planned activities.
3. Every six (6) months following the execution of this PA, until it expires or is terminated, the City shall provide all signatories to this PA a summary report detailing the work undertaken pursuant to its terms. Such report shall include

any scheduling changes proposed, any problems encountered, and any disputes or objections received during efforts to carry out the terms of the PA.

4. After the 24-month period mentioned in Stipulation XIV.E.2. above, FTA shall conduct annual meetings of consulting parties to discuss implementation of this PA over the preceding year and planned activities for the coming year. FTA shall evaluate the effectiveness of this PA and whether any amendments or changes are needed based on the City's summary reports or Project modifications and provide its evaluation to the signatories prior to the meeting.

5. Work products not containing sensitive information will be submitted to the following repositories so that the information generated is made available to the public: SHPD, State Publications Distribution Center (15 copies), University of Hawai'i, and the Municipal Library (3 copies).

F. **Emergency Situation**—Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of Section 106 of the NHPA and this PA. In the event that an emergency situation should occur during the Project, FTA shall follow the provisions of 36 C.F.R. § 800.12.

G. **Coordination with Other Federal Involvement**—In the event that the City or other agency applies for additional federal funding or approvals for the Honolulu High-Capacity Transit Corridor Project and the undertaking remains unchanged, such funding or approving agency may comply with Section 106 of the NHPA by agreeing in writing to the terms of this PA and notifying the signatories. Any necessary amendments will be considered in accordance with Stipulation XIV.H.

H. **Amendments**—Any Signatory to this PA may propose that this PA be amended, whereupon the signatories to the PA shall consult to consider such amendment. Any amendment must be agreed to in writing by all signatories. The amendment will be effective on the date a copy with all signatures is filed with the ACHP.

I. **Termination**—If any Signatory to this PA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other Signatory parties to attempt to develop an amendment per Stipulation XIV.H. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, any Signatory may terminate the PA upon written notification to the other signatories. Once the PA is terminated and prior to work continuing on the undertaking, FTA must either: (1) execute a new agreement pursuant to 36 C.F.R. § 800.6; or (2) request, take into account, and respond to comments of the ACHP under 36 C.F.R. § 800.7. FTA shall notify the signatories as to the course of action it will pursue. This PA may be terminated by the execution of a subsequent agreement that explicitly terminates this PA or supersedes its terms.

Execution of this PA by FTA, SHPD, and the ACHP and implementation of its terms evidence that FTA has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

J. Native Hawaiian Organization (NHO)— If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration

Leslie T. Rogers, Regional Administrator

Date: _____

Hawai'i State Historic Preservation Officer

William J. Alla, Jr., Interim Chairperson of the Board of Land and Natural Resources

Date: _____

United States Navy

Rear Admiral Dixon R. Smith, Commander, Navy Region, Hawaii

Date: _____

Advisory Council on Historic Preservation

John M. Fowler, Executive Director

Date: _____

INVITED SIGNATORY PARTIES

City and County of Honolulu

Wayne Y. Yoshioka, Acting Director, Department of Transportation Services

Date: _____

National Park Service

Christine S. Lehnertz, Regional Director, Pacific West Region

Date: _____

CONCURRING PARTIES

Historic Hawai'i Foundation

Date: _____

National Trust for Historic Preservation

Date: _____

University of Hawai'i Historic Preservation Certificate Program

Date: _____

AIA Honolulu

Date: _____

Hawai'i Community Development Authority

Date: _____

Office of Hawaiian Affairs

Date: _____

O'ahu Island Burial Council

Date: _____

Royal Order of Kamehameha

Date: _____

The Ahahui Ka'ahumanu

Date: _____

Hui Mālama i Nā Kūpuna o Hawai'i Nei

Date: _____

Hale O Nā Ali'i O Hawai'i

Date: _____

Māmakakaua: Daughters and Sons of the Hawaiian Warriors

Date: _____

Association of Hawaiian Civic Clubs

Date: _____

Ali'i Pauahi Hawaiian Civic Club

Date: _____

Ka Lei Mālie Ali'i Hawaiian Civic Club

Date: _____

King Kamehameha Hawaiian Civic Club

Date: _____

Nānāikapono Hawaiian Civic Club

Date: _____

Hawaiian Civic Club of Wahiawa

Date: _____

Ahahui Siwila Hawai'i O Kapolei Hawaiian Civic

Date: _____

Waikiki Hawaiian Civic Club

Date: _____

Princess Ka'iulani Hawaiian Civic Club

Date: _____

Wa'ianae Hawaiian Civic Club

Date: _____

Merchant Street Hawaiian Civic Club

Date: _____

Prince Kūhiō Hawaiian Civic Club

Date: _____

Pearl Harbor Hawaiian Civic Club

Date: _____

Hawaiian Civic Club of 'Ewa-Pu'uloa

Date: _____

Kalihi-Pālama Hawaiian Civic Club

Date: _____

Hawaiian Civic Club of Honolulu

Date: _____

APPENDIX A - Consulting Party Comment Review and Disposition Process

If there are unanticipated effects on historic properties identified within the APE found after the execution of the Programmatic Agreement (PA), the process developed in this PA and applicable appendix to resolve any adverse effects upon such properties shall satisfy Section 106 responsibilities pursuant to 36 C.F.R. § 800.13. If there is an inadvertent discovery of burial remains that are not "historic property" as defined under 36 C.F.R. § 800.16(l), Stipulation XII of this PA and HRS § 6E-43.6 shall apply. If there is an inadvertent discovery of a historic property, Stipulation XII of this PA shall apply.

The following procedure has been developed to implement Stipulation I.H of the PA. The PA Project Manager (*Kako'o*) will manage the review and disposition of comments from consulting parties related to this Appendix A as part of its assigned responsibilities.

NOTIFICATION PROCESS

1. Notification letter must come from a consulting party.

2. Notification letter should include the following information:

- Consulting party contact information including telephone number, email, and mailing address.
- Identify the impacted resource (i.e., a historic property, historic district, a property that was previously not considered historic, other).
- Provide a general description of unforeseen impact.
- Explain how the impact is different from what is stated in the Final Environmental Impact Statement (Final EIS).
- Identify the possible cause of the impact.
- List any additional information or related studies.

3. Send or deliver the notification letter to the Department of Transportation Services (DTS) at the City and County of Honolulu and FTA Region IX noting the project identification (HHCTCP) and subject (Section 106 Programmatic Agreement) to:

Wayne Y. Yoshioka
Acting Director
Department of Transportation Services
650 S. King Street, Third Floor
Honolulu, HI 96813-3017

Ted Matley
FTA Region IX
P.O. Box 21648
201 Mission Avenue, Suite 1650
San Francisco, CA 94105

4. DTS and FTA will share the letter with the *Kako'o*. Within 30 calendar days of DTS and FTA receiving the notification letter, the *Kako'o* shall research or cause to be researched the issues listed in the notice, and write a recommendation for the disposition of the request for action by FTA.
5. The *Kako'o*, the City and the FTA shall consult with the Consulting Parties regarding the notification and appropriate action.
6. Within seven calendar days of receiving the recommendation from the *Kako'o*, FTA will take appropriate action and communicate the outcome of their review and decision to all of the Consulting Parties.

Attachments

Attachment 1: APE for Historic Resources; APE for Archaeological Resources
(CD enclosed)

Attachment 2: Information on Resources with Adverse Effect Determinations

J. Native Hawaiian Organization (NHO)— If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration


Leslie T. Rogers, Regional Administrator

Hawai'i State Historic Preservation Officer

Date: JAN 11 2011

William J. Alla, Jr., Interim Chairperson of the Board of Land and Natural Resources

United States Navy

Rear Admiral Dixon R. Smith, Commander, Navy Region, Hawaii

Advisory Council on Historic Preservation


John M. Fowler, Executive Director

Date: _____

Date: 1/8/11

INVITED SIGNATORY PARTIES

City and County of Honolulu

Wayne Y. Yoshiooka, Acting Director, Department of Transportation Services

National Park Service

Christine S. Lehnertz, Regional Director, Pacific West Region

Date: _____

Date: _____

J. Native Hawaiian Organization (NHO)— If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration

Leslie T. Rogers, Regional Administrator

Date: _____

Hawaii State Historic Preservation Officer

William J. Aila, Jr., Interim Chairperson of the Board of Land and Natural Resources

Date: 1/13/11

United States Navy

Rear Admiral Dixon R. Smith, Commander, Navy Region, Hawaii

Date: _____

Advisory Council on Historic Preservation

John M. Fowler, Executive Director

Date: _____

INVITED SIGNATORY PARTIES

City and County of Honolulu

Wayne Y. Yoshioka, Acting Director, Department of Transportation Services

Date: 1/10/11

National Park Service

Christine S. Lehnertz, Regional Director, Pacific West Region

Date: _____

HHCTCP Programmatic Agreement
Final - January 2011

J. Native Hawaiian Organization (NHO)--- If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration

Leslie T. Rogers, Regional Administrator

Date: _____

Hawai'i State Historic Preservation Officer

William J. Allen, Jr., Interim Chairperson of the Board of Land and Natural Resources

Date: _____

United States Navy

Rear Admiral Dixon R. Smith, Commander, Navy Region, Hawaii

Date: 1/12/11

Advisory Council on Historic Preservation

John M. Fowler, Executive Director

Date: _____

INVITED SIGNATORY PARTIES

City and County of Honolulu

Wynne Y. Yoshioka, Acting Director, Department of Transportation Services

Date: _____

National Park Service

Christine S. Lehnertz, Regional Director, Pacific West Region

Date: _____

APPENDIX B

[§6E-5] State historic preservation officer. The governor shall appoint a state historic preservation officer, and may appoint the officer without regard to chapter 76, who shall be responsible for the comprehensive historic preservation program and who shall be the state liaison officer for the conduct of relations with the federal government and the respective states with regard to matters of historic preservation. The state historic preservation officer shall be appointed on the basis of professional competence and experience in the field of historic preservation and shall be placed in the department for the purposes of the state program. [L 1976, c 104, pt of §2; am L 2000, c 253, §150]

§6E-8 Review of effect of proposed state projects. (a) Before any agency or officer of the State or its political subdivisions commences any project which may affect historic property, aviation artifact, or a burial site, the agency or officer shall advise the department and allow the department an opportunity for review of the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, especially those listed on the Hawaii register of historic places. The proposed project shall not be commenced, or in the event it has already begun, continued, until the department shall have given its written concurrence.

The department is to provide written concurrence or non-concurrence within ninety days after the filing of a request with the department. The agency or officer seeking to proceed with the project, or any person, may appeal the department's concurrence or non-concurrence to the Hawaii historic places review board. An agency, officer, or other person who is dissatisfied with the decision of the review board may apply to the governor, who may request the Hawaii advisory council on historic preservation to report or who may take action as the governor deems best in overruling or sustaining the department.

(b) The department of Hawaiian home lands, prior to any proposed project relating to lands under its jurisdiction, shall consult with the department regarding the effect of the project upon historic property or a burial site.

(c) The State, its political subdivisions, agencies, and officers shall report to the department the finding of any historic property during any project and shall cooperate with the department in the investigation, recording, preservation, and salvage of the property. [L 1976, c 104, pt of §2; gen ch 1985; am L 1990, c 306, §7; am L 1995, c 187, §2; am L 1996, c 13, §1 and c 97, §7; am L 2008, c 228, §2; am L 2009, c 4, §2]

[§6E-10.5] Enforcement. (a) If the board of land and natural resources determines that any person has violated or is violating this chapter, or any rule adopted pursuant to this chapter, the board shall serve written notice by certified mail or personal service upon the alleged violator or violators specifying the alleged violation and may include with the notice:

- (1) An order specifying a reasonable time during which that person shall be required to take such measures as may be necessary to correct the violation and to give periodic progress reports;
- (2) An order imposing penalties provided in section 6E-11.6; and
- (3) An order that the alleged violator or violators appear before the board for a hearing at a time and place specified in the notice or to be set later and answer the charges complained of.

(b) If the board determines that any person is continuing to violate this chapter or any rule adopted pursuant to this chapter after having been served notice of violation, the board shall serve written notice by certified mail or personal service upon the alleged violator or violators specifying the alleged violation. With the notice, the board:

- (1) Shall order the alleged violator or violators to submit a written schedule within thirty days specifying the measures to be taken and the time within which the measures shall be taken to bring that person into compliance with this chapter or any rule adopted thereunder. The board shall accept or modify the submitted schedule within sixty days of receipt of the schedule. Any schedule not acted upon after sixty days of receipt by the board shall be deemed accepted by the board;
- (2) Shall order the alleged violator or violators to cease and desist from the activities that violate this chapter or any rule adopted thereunder, if that person does not submit a written schedule to the board within thirty days. This order shall remain in effect until the board accepts the written schedule;
- (3) May impose penalties as provided in section 6E-11.6; and
- (4) May order the alleged violator or violators to appear before the board for a hearing to answer the charges issued, at a time and place specified in the notice or otherwise set by the board.

(c) If the board determines that any person has violated an accepted schedule or an order issued pursuant to this section, the board shall impose penalties by sending a notice in writing, either by certified mail or by personal service to that person, describing such non-adherence or violation with reasonable particularity.

(d) Any order issued pursuant to this chapter shall become final, unless the person or persons named therein requests in writing, not later than twenty days after notice of violation and order is served, a hearing before the board. Upon request for a hearing, the board shall require that the alleged violator or violators appear before the board for a hearing to answer the charges issued, at a time and place specified in the notice or otherwise set by the board.

Any penalty imposed pursuant to this chapter shall become due and payable twenty days after the notice of penalty is served, unless the person or persons named therein requests in writing a hearing before the board. Whenever a hearing is requested on any penalty imposed pursuant to this chapter, the penalty shall become due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part.

(e) Any hearing conducted pursuant to this section shall be conducted as a contested case under chapter 91. If, after a hearing held pursuant to this section, the board finds that a violation or violations has occurred, the board shall:

- (1) Affirm or modify any penalties imposed;
- (2) Modify or affirm the order previously issued; or
- (3) Issue an appropriate order or orders for the prevention, abatement, or control of the violation or for the taking of such other corrective action as may be appropriate.

Any order issued after a hearing may prescribe timetables for necessary action in preventing, abating, or controlling the violation. If, after a hearing on an order or penalty contained in a notice, the board finds that no violation has occurred or is occurring, the board shall rescind the order or penalty.

(f) If the amount of any penalty is not paid to the department within thirty days after it becomes due and payable, the board may institute a civil action in the name of the State to

collect the administrative penalty, which shall be a government realization. In any proceeding to collect the administrative penalty imposed, the board need only show that:

- (1) Notice was given;
- (2) A hearing was held, or the time granted for requesting a hearing has run without such a request;
- (3) The administrative penalty was imposed; and
- (4) The penalty remains unpaid.

(g) In connection with any hearing held pursuant to this section, the board may subpoena the attendance of witnesses and the production of evidence on behalf of all parties. [L 2003, c 104, pt of §2]

§6E-11 Civil and administrative violations. (a) It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or aviation artifact located upon the private lands of any owner thereof without the owner's written permission being first obtained. It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or aviation artifact located upon lands owned or controlled by the State or any of its political subdivisions, except as permitted by the department, or to knowingly violate the conditions set forth in an approved mitigation plan that includes monitoring and preservation plans.

(b) It shall be a civil and administrative violation for any person to knowingly take, appropriate, excavate, injure, destroy, or alter any burial site, or the contents thereof, located on private lands or lands owned or controlled by the State or any of its political subdivisions, except as permitted by the department, to knowingly fail to re-inter human remains discovered on the lands in a reasonable period of time as determined by the department, or to knowingly violate the conditions set forth in an approved mitigation plan that includes monitoring and preservation plans.

(c) It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or burial site during the course of land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval.

(d) It shall be a civil and administrative violation for any person who inadvertently discovers a burial site to fail to stop work in the immediate area and report the discovery, as required by section 6E-43.6.

(e) It shall be a civil and administrative violation for any person to knowingly glue together any human skeletal remains, label any human skeletal remains with any type of marking pen, or conduct any tests that destroy human skeletal remains, as defined in section 6E-2, except as permitted by the department.

(f) Any person who violates this section shall be fined not more than \$10,000 for each separate violation. If the violator directly or indirectly has caused the loss of, or damage to, any historic property or burial site, the violator shall be fined an additional amount determined by the court or an administrative adjudicative authority to be equivalent to the value of the lost or damaged historic property or burial site. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property or burial site, or for the transportation of the violator to or from the historic

property or burial site, shall be subject to seizure and disposition by the State without compensation to its owner or owners.

(g) Any person who knowingly violates this chapter with respect to burial sites shall also be prohibited from participating in the construction of any state or county funded project for ten years.

(h) Nothing in this section shall apply to land altering activities relating to family burial plots under section 441-5.5.

(i) The civil and administrative penalties imposed pursuant to this chapter shall be in addition to the criminal penalties provided by this chapter and any other penalties that may be imposed pursuant to law. [L 1976, c 104, pt of §2; gen ch 1985; am L 1990, c 306, §8; am L 1992, c 113, §3; am L 1996, c 97, §8; am L 2003, c 104, §3; am L 2005, c 128, §3; am L 2006, c 38, §1 and c 45, §2; am L 2007, c 9, §1]

§6E-11.5 Civil penalties. Except as provided in section 6E-11, any person who violates this chapter, or any rule adopted pursuant to this chapter shall be fined not less than \$500 nor more than \$10,000 for each separate violation. Each day of each violation constitutes a separate violation. [L 2003, c 104, pt of §2; am L 2005, c 128, §4]

[§6E-11.6] Administrative penalties. (a) In addition to any other administrative or judicial remedy provided by this chapter, or by rules adopted pursuant to this chapter, the board may impose by order the penalties specified in section 6E-11.5.

(b) Factors to be considered in imposing an administrative penalty include:

- (1) The nature and history of the violation and of any prior violations;
- (2) The economic benefit to the violator, or anticipated by the violator, resulting from the violation;
- (3) The opportunity, difficulty, and history of corrective action;
- (4) Good faith efforts to comply; and
- (5) Such other matters as justice may require.

(c) It is presumed that the violator's economic and financial conditions allow payment of the penalty, and the burden of proof to the contrary is on the violator.

(d) In any judicial proceeding to recover the administrative penalty imposed, the board need only show that:

- (1) Notice was given;
- (2) A hearing was held, or the time granted for requesting a hearing has run without such a request;
- (3) The administrative penalty was imposed; and
- (4) The penalty remains unpaid. [L 2003, c 104, pt of §2]

§6E-12 Reproductions, forgeries, and illegal sales. (a) It shall be unlawful to reproduce, retouch, rework, or forge any historic object and to represent it or offer it for trade or sale as an original and genuine object. It shall be unlawful for any person to offer for sale or exchange any historic object with the knowledge that it has been collected or excavated in violation of any of the terms of this chapter.

(b) It shall be unlawful for any person to:

- (1) Offer for sale or exchange any exhumed prehistoric or historic human skeletal remains or associated burial goods; or

(2) Remove those goods or remains, except those remains fabricated into artifacts prehistorically, from the jurisdiction of the State without obtaining a permit from the department.

(c) It shall be unlawful for any person to remove aviation artifacts derived from state lands or agencies from the jurisdiction of the State without obtaining a permit from the department.

(d) Any person violating this section shall be fined no more than \$10,000. Each object or part of a prehistoric or historic human skeleton or associated burial good offered for sale or trade or removed from the jurisdiction in violation of this section shall constitute a distinct and separate offense for which the offender may be punished. [L 1976, c 104, pt of §2; am L 1990, c 306, §9; am L 1996, c 97, §9]

§6E-13 Injunctive relief. (a) In addition to, and without limiting the other powers of the attorney general and without altering or waiving any criminal penalty, civil, or administrative provisions of this chapter, the attorney general shall have the power to bring an action in the name of the State in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter.

(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. [L 1976, c 104, pt of §2; am L 1990, c 306, §10; am L 2003, c 104, §4]

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, PUAALAOKALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O'AHU ISLAND BURIAL COUNCIL,

Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC
(DECLARATORY RELIEF)

APPEAL FROM:

(1) FINAL JUDGMENT FILED ON
AUGUST 8, 2011

(2) 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

(3) JULY 5, 2011 ORDER GRANTING CERTAIN STATE APPELLEES' 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

(4) JULY 5, 2011 ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF THE COURT'S
MARCH 23, 2011 ORAL RULINGS FILED
APRIL 4, 2011

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAI'I

HON. GARY W.B. CHANG

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true and correct copy
of the Answering Brief was duly upon the following parties by the method indicated below:

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