CAAP-11-0000611

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

PAULETTE KA`ANOHIOKALANI KALEIKINI, Plaintiff-Appellant, vs. WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and state historic preservation officer, PUAALAOKALANI AIU in her official capacity as administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O`AHU ISLAND BURIAL COUNCIL, Defendants-Appellees.	CIVIL NO. 11-1-0206-01 GWBC APPEAL FROM: A) Final Judgment, filed on August 8, 2011; B) July 5, 2011 Order Granting DEFENDANTS WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, and CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING's Motion to Dismiss Complaint and/or for Summary Judgment filed February 9, 2011; C) July 5, 2011 Order Granting Certain State Defendants' Substantive Joinder in Defendants WAYNE YOSHIOKA, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, and CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING's Motion to Dismiss

) Complaint and/or for Summary Judgment
) filed February 9, 2011 [Joinder Filed
) February 18, 2011]; D) Denial of Plaintiff's
) Hawai`i Rules of Civil Procedure Rule 56(f)
) request; E) July 5, 2011 Order Denying
) Plaintiff's Motion for Reconsideration of this
) Court's March 23, 2011 Oral Rulings, Filed
) on April 4, 2011
)
)
) FIRST CIRCUIT COURT
)
) HONORABLE GARY W.B. CHANG
) Judge

PLAINTIFF-APPELLANT'S OPENING BRIEF

APPENDICES A - O

STATEMENT OF RELATED CASES

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PLAINTIFF-APPELLANT'S OPENING BRIEF

I. INTRODUCTION

"The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all[.]" 1990 Haw. Sess. Laws Act 306 § 1. An archaeological inventory survey (AIS) is the key tool used by citizens, the island burial councils, and government agencies to identify and protect burial sites. Hawai`i Administrative Rules (HAR) Title 13 chapters 276, 300, 275, and 284. A timely AIS allows for: (a) informed decisionmaking that allows for the preservation of historic properties (including burial sites); (b) consideration of all options before they are foreclosed and agency commitments are set in concrete; and (c) a meaningful opportunity to protect identified burials. HAR Title 13 chapters 300, 275, and 284.

In order to fast-track the Honolulu High-Capacity Corridor Project (more commonly referred to as the "rail project"), however, the City (collectively: Peter Carlisle, Wayne Yoshioka, City and County of Honolulu, Honolulu City Council, City and County of Honolulu Department of Transportation Services, and City and County Department of Planning and Permitting) and DLNR Defendants (Department of Land and Natural Resources (DLNR), Board of Land and Natural Resources, William Aila, and Puaalaokalani Aiu) agreed to postpone completion of the AIS along the entire corridor until after approval and commencement of the rail project. They refused to fully assess the adverse impacts of the rail project on archaeological sites, including burial sites. HRS Chapters 6E, 343, and 205A require the early preparation of an AIS to determine the location and quantity of burials that the rail project is likely to impact before options are closed and agency commitments are set in concrete.

II. STATEMENT OF THE CASE

A. The Rail Project

The rail project involves the construction of an approximately 20-mile fixed guideway rail system from West O`ahu to Ala Moana Center. JEFS #50 RA: 10 at ¶ B(1).[1] It is proposed to be constructed in four 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). *Id.* at ¶ B(2). All four phases are connected and part of a single

[1] This refers to the 50th document listed in Judiciary Electronic Filing and Service System (JEFS), which is a portion of the Record on Appeal, page 10 of the PDF.

project. JEFS #50 RA: 111 ¶ 3.

Ground disturbing work for the rail project would include: (a) groundwork for the main support pillars; (b) groundwork related to the stations; and (c) redirection of underground infrastructure (electrical lines, water lines, sewage lines, etc.) affected by the rail project's construction. *Id.* ¶ 5. The project's "area of potential effects" includes all areas of proposed direct ground disturbance by the project, including areas excavated for piers, foundations, utility installation and utility relocation. JEFS #50 RA: 112 ¶ 6; JEFS #50 RA: 11-12 ¶ 10(b) and 105.

B. Burials

Since 1986, over four hundred burials have been found in the area bordered by River Street, Ke`eaumoku Street, Nimitz/Ala Moana Boulevard, and King Street. JEFS #44 RA: 61 ¶ 28. Over sixty Native Hawaiian burials have been discovered at **each** of these three development projects in Kaka`ako over the past decade: General Growth's Ward Village Shops Project, the Wal-Mart site on Ke`eaumoku Street, and Kawaiaha`o Church's Multi-Purpose Center project. JEFS #44 RA: 61-62 ¶ 29.

The rail project has a high likelihood of affecting burials and other archaeological resources in Kaka`ako. JEFS #46 RA: 205, 222; JEFS #48 RA: 27. The final environmental impact statement (EIS) for the rail project acknowledges that the probability of encountering burials in the later phases (*e.g.*, Downtown and Kaka`ako) of the project is high. JEFS #50 RA: 10 ¶ 4. The City and DLNR Defendants are aware that the rail project may adversely affect archaeological sites, including burial sites. *Id.* ¶ 3.

C. AIS

An AIS is the process used to locate burials and other archaeological features. The purpose of an AIS is to (a) conduct a thorough ethnohistorical study of archival and archaeological documents related to the project area to inform upon the presence/absence, nature of, location of, distribution of, and significance of historic properties in the project area (including burial sites), (b) conduct surface and subsurface investigations to determine the presence/absence, nature of, location of, distribution of, and significance of historic properties in the project area (including burial sites) and to gather additional field data to allow for reasoned predictions of the presence/absence, nature of, location of, distribution of, and significance of historic properties in the project area (including burial sites); (c) engage in consultation with interested parties regarding the identification, interpretation, significance evaluation, and

treatment of historic properties; and (d) provide information to decision makers to enable them to preserve significant historic properties (including burial sites). JEFS #44 RA: 62 ¶ 32. An AIS that is prepared early in the decisionmaking process allows for a better informed and meaningful process of addressing potential finds of cultural or historic significance. *Id.* at 62-63 ¶ 33. According to unrefuted expert testimony, if a project commences before an AIS is completed, it becomes difficult for the project to both move forward and protect burials in a meaningful way. JEFS #44 RA: 63 ¶ 34. Significant negative consequences result when an AIS is not completed before construction commences. JEFS #50 RA: 151 ¶ 6.

D. Decisionmaking and Construction Commence Prior to Completing AIS for the Project.

The City and DLNR Defendants acknowledge the need to perform an AIS along the entire corridor of the rail project. JEFS# 50 RA: 12 ¶¶ 11-12. Despite universal acknowledgement that the rail project had a high likelihood of affecting burial sites, however, the City and DLNR Defendants[2] – along with the Federal Transit Administration (FTA) – agreed to a "phased approach" to the preparation of an AIS for the project. JEFS #40 RA: 103-143; JEFS #50 RA: 11 ¶ 9. Pursuant to this "phased approach," the City is not planning on completing the AIS for all phases of the project until after construction on phase one has commenced. JEFS #50 RA: 12-13 ¶ 15 and 20. Although they determined that that the project may adversely affect archaeological sites, they concluded that these effects could not "be fully assessed prior to the approval of FTA financial assistance." JEFS #40 RA: 105.

The City approved the project and broke ground prior to completing an AIS for the entire project (*i.e.*, all four construction phases). It granted a special management area permit for the project. JEFS #40 RA: 401-13. It held a ceremonial groundbreaking. JEFS #50 RA: 13 ¶ 18. The City planned to commence construction on the first phase of the project prior to completion of an AIS for the entire project. *Id.* ¶ 19-20.

Final EISes often include an AIS. JEFS #42 RA: 46-47; JEFS #50 RA: 13 ¶ 21. Yet, an AIS for the rail project was not prepared prior to the completion and acceptance of the final EIS for the rail project. JEFS #50 RA: 13 ¶¶ 16 and 20, 125 ¶ 38; JEFS # 66 SR (hardbound volume

[2] The DLNR's mission is to "[e]nhance, protect, conserve and manage Hawaii's unique and limited natural, **cultural and historic resources held in public trust** for current and future generations of visitors and the people of Hawaii nei in partnership with others from the public and private sectors." JEFS #50 RA: 229 (emphasis added).

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E. Plaintiff

Plaintiff Paulette Ka`anohiokalani Kaleikini is a Native Hawaiian who engages in traditional and customary practices that her parents and other ancestors taught her. JEFS #42 RA: 44 ¶ 2-3; *see also Kaleikini v. Thielen,* 124 Hawai'i 1, 26, 237 P.3d 1067, 1092 (2010). Plaintiff's traditional and customary practices include, but are not limited to, mālama iwi. One of the critical tenets of Native Hawaiian traditional and customary practices is the obligation to ensure that iwi remain undisturbed and that they receive proper care and respect. Protection of iwi in place and prevention of relocation is a traditional and customary practice of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778. JEFS #42 RA: 44 ¶ 4-5. Plaintiff is a recognized cultural descendant to iwi found in Kaka`ako. *Id.* ¶ 6. The unnecessary removal of iwi causes Plaintiff great pain and suffering. *Id.* ¶ 7. Plaintiff relies on information contained in archaeological inventory surveys to advocate for the protection of iwi. Although the law may not allow Plaintiff to unilaterally decide the fate of ancestral remains, Plaintiff brought this action to ensure that all proper procedures are followed for a project that will impact iwi. An AIS along the entire corridor of the rail project would allow Plaintiff to better ensure the appropriate protection of iwi. *Id.* ¶ 8-10.

On January 30, 2009, Plaintiff, through counsel, commented[3] on the draft EIS for the rail project. JEFS #42 RA: 44-5 ¶12. In her comments, Plaintiff notified Defendant Wayne Yoshioka, Defendant Puaalaokalani Aiu, and others that the proposed transit project would impact iwi. She pointed out that an AIS should be prepared prior to decisionmaking. JEFS #42 RA: 45 ¶ 13-14; JEFS #40 RA: 174-181. In September 2009, Plaintiff asked City and federal officials to include her as a consulted party pursuant to Section 106 of the National Historic Preservation Act for the rail project. JEFS #42 RA: 45 ¶ 15. On August 25, 2010, Plaintiff, through counsel, wrote Defendant Wayne Yoshioka and Defendant Puaalaokalani Aiu once again, pointing out that an AIS needed to be prepared prior to decisionmaking and construction and that state law did not allow for "phased approach" to these studies. *Id.* ¶ 16. On January 26, 2011, in written and oral testimony, Plaintiff urged the City Council to deny the special management area permit for the rail project because an AIS for the entire corridor had not yet been completed. *Id.* ¶ 17.

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[3] Plaintiff's comment letter was timely. JEFS # 46 RA: 57; JEFS #50 RA: 273-74.

F. O`ahu Island Burial Council

On October 14, 2009, the O`ahu Island Burial Council[4] voted unanimously to point out to the City and the FTA that an AIS needed to be completed before acceptance of the final EIS and to outline its objections to the programmatic agreement for the rail project. JEFS #50 RA: 236 and 241. On October 27, 2009, the O`ahu Island Burial Council presented testimony to the Honolulu City Council, which included correspondence to the FTA that highlighted the importance of early identification of iwi through an inventory survey prior to decisionmaking. *Id.* at 257-272. On April 14, 2010, the O`ahu Island Burial Council unanimously adopted a resolution in which it took the position that HRS chapters 6E-8 and 6E-42 preclude a phased approach to archaeological inventory surveys. *Id.* at 252. This resolution also recommended that the State Historic Preservation Officer object to any version of a programmatic agreement that allows for a phased AIS approach. *Id.*

G. Harm

By failing to ensure preparation and review of an AIS along the entire transit corridor, the City and State Defendants failed to give full consideration of the impact of the rail project on iwi and cultural and historic values prior to decisionmaking. An AIS prepared after decisionmaking significantly increases the likelihood that burials will be disturbed and removed. JEFS #50 RA: 151-52. JEFS #42 RA: 47 ¶ 37 and at 60.

Plaintiff's expert, Dr. Abad, pointed out (without contradiction): (1) the uncovering of burial remains is an alteration of a burial site; (2) early identification of burial sites allows for all options to be considered (including scope, size, location and design) so that burial sites can be protected; (3) there is a very high likelihood of discovering burials in the urban portions of the rail project; (4) an AIS provides information to decisionmakers to enable them to preserve burial sites; (5) early preparation of an AIS allows for a better informed and meaningful process of addressing potential finds; (6) given the number of burials likely to be encountered and the extent of excavation, the relocation of piers will not adequately protect burials; (7) more fundamental options – including the route and the technology – need to be considered to protect burials; and (8) significant negative consequences have resulted when an AIS was not completed

[4] Island burial councils are statutorily charged with assisting the DLNR in the inventory and identification of native Hawaiian burial sites and in providing recommendations regarding appropriate treatment and protection of burial sites. HRS § 6E-43.5(f).

before decisionmaking – including limiting options available for the protection of burials. JEFS #44 RA: 60-63; JEFS #50 RA: 151-52.

As shown by Plaintiff's expert's testimony, an alteration of the route or technology is essential in order to protect burials. JEFS #44 RA: 63 ¶ 37. But the City has already rejected alteration of the route. The City is willing to redesign columns to protect burials; "[h]owever, radical measures such as moving the alignment to a different street or area would not be available." JEFS #48 RA: 333. The City's approvals prohibit it from changing the route. The FTA's Record of Decision (ROD) requires the City to "design and build" the rail project "as presented in the Final EIS and this ROD. Any proposed change by the City . . . must be approved by FTA[.]" JEFS #48 RA: 288. The preferred alternative, referred to in the ROD allows for only one route and only one technology. *Id.* at 293-94. As the City acknowledges, "the City and County of Honolulu must immediately notify the FTA of any proposed change to the project that would differ in any way from what the Final EIS states." JEFS #48 RA: 302. The special area permit for the rail project states: "Any changes in the size or the nature of the approved Project which have a significant effect on coastal resources . . . shall require a new application and permit." JEFS #40 RA: 401.

H. Procedural History

Plaintiff filed her Complaint on January 31, 2011. JEFS #40 RA: 21. A week after the City was served, the City filed its motion to dismiss complaint and/or for summary judgment. *Id.* at 64. The DLNR Defendants joined. JEFS #42 RA: 14-15. The hearing was scheduled for March 14, 2011. JEFS #40 RA: 415. A document titled "14th Division Notice to All Parties RE:(1) Duty to Identify Relevant Record and (2) Duty to Authenticate Evidence" advised that "the court will not consider any exhibit you attach or incorporate by reference unless the exhibit is admissible into evidence. . . . In order to be admissible, each exhibit must also be authenticated by a competent witness." http://hsba.org/resources/1/Committees/Judicial%20Admin/Survey.Hon%20Gary%20Chang.pdf at 32.

Plaintiff filed her memoranda in opposition on March 2, 2011, thirty days after filing her complaint. JEFS #44 RA: 9-41. In filing her memorandum in opposition, Plaintiff, pursuant to Hawai`i Rules of Civil Procedure (HRCP) Rule 56(f), sought more time to complete discovery prior to hearing the motion to dismiss and/or summary judgment. *Id.* at 10, 21, 41. Certificates of service filed with the Court demonstrate that Plaintiff was diligent in pursuing discovery,

sending three requests on February 17, two requests on February 22 and one request on February 23. JEFS #42 RA: 8-13, 70-73, 80-81. Pursuant to HRCP Rules 34(b) and 36(a), Plaintiff was unable to obtain responses to any of her discovery requests until at least forty-five days after the complaint had been served, or March 21, 2011. Plaintiff included a declaration stating that Plaintiff's counsel had sent four sets of admissions and two requests for production of documents, the responses to which were not due until after the scheduled March 14, 2011 hearing. JEFS #44 RA: 41. Plaintiff's counsel further declared that the deputy attorneys general representing the O`ahu Island Burial Council informed him that Plaintiff's legal team would not be able to meet with Dr. Kēhaunani Cachola-Abad, one of Plaintiff's expert witnesses, to begin working on her declaration until March 3, 2011 at noon. *Id.* Based on such facts, Plaintiff's counsel declared that Plaintiff was "unable to present the essential facts necessary to oppose a motion for summary judgment by the time [Plaintiff's] memorandum in opposition to the motion is due." *Id.* Based on the Court's directive requiring the authentication of all documents, it was impossible for Plaintiff to submit any admissible documents by March 14, 2011 – let alone when her memorandum in opposition was due.

In the mean time, Plaintiff filed a motion for preliminary injunction, which was scheduled to commence after the hearings on the City's motion. JEFS #42 RA: 18-69, JEFS #40 RA: 11. In anticipation of the preliminary injunction hearing Plaintiff and Defendants submitted various documents, including stipulated facts, an expert declaration, expert lists and witness lists. JEFS # 44 RA: 55-65, JEFS #50 RA: 8-14, 50-65.

The Court held hearings on the Defendants' motion to dismiss and/or summary judgment on March 14, March 15, and March 23, 2011. JEFS #40 RA: 7-14. On March 23, 2011, the Court -- which considered evidence outside of the pleadings -- orally denied Plaintiff's Hawai`i Rules of Civil Procedure ("HRCP") Rule 56(f) request and granted Defendants' motions. JEFS # 36 TRANS.

On April 4, 2011, Plaintiff filed a motion for reconsideration of the court's March 23, 2011 oral ruling. JEFS #50 RA: 88-316. On April 29, 2011, the Circuit Court denied Kaleikini's motion for reconsideration of the court's ruling. JEFS #38 TRANS.

On July 5, 2011, the Circuit Court filed four orders, granting the City's motion for summary judgment, granting the DLNR Defendants' joinder, denying Plaintiff's motion for preliminary injunction as moot, and denying Plaintiff's motion for reconsideration. JEFS #52

RA: 273-89. Final Judgment was entered on August 8, 2011. *Id.* at 290-93.

III. POINTS OF ERROR

The Circuit Court committed the following errors:

1. The Circuit Court erred in entering its 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, attached hereto as Appendix B. JEFS #52 RA: 273-77. Plaintiff objected to the order. JEFS #44 RA: 9-41; JEFS #50 RA: 88-316. The Circuit Court concluded:

> there are no genuine issues as to any material fact, that the City Defendants are entitled to summary judgment as a matter of law, and therefore, the City Defendants' Motion filed on February 9, 2011 is GRANTED. Summary judgment shall enter as to all claims asserted in Counts I through VI of Plaintiff's Complaint against plaintiff.

JEFS #52 RA: 276.

2. The Circuit Court erred in entering the July 5, 2011 Order Granting Certain State Defendants' Substantive Joinder in Defendants Wayne Yoshioka, City and County of Honolulu, Honolulu City Council, Peter Carlisle, City and County of Honolulu Department of Transportation Service and City and County of Honolulu Department of Planning and Permitting's Motion to Dismiss Complaint and/or for Summary Judgment filed February 9, 2011 [Joinder filed February 18, 2011], attached here to as Appendix C. JEFS #52 RA: 286-89. The Court ordered that "the Substantive Joinder is GRANTED." *Id.* at 289. Plaintiff objected to the order. JEFS #44 RA: 9-41; JEFS #50 RA: 88-316.

3. The Circuit Court erred in entering the July 5, 2011 Order Denying Plaintiff's Motion for Reconsideration of This Court's March 23, 2011 Oral Rulings Filed on April 4, 2011, attached hereto as Appendix D. JEFS #52 RA: 282-85. The Court concluded that "Plaintiff's Motion failed to present any new evidence or law that would alter this Court's prior March 23, 2011 oral rulings." *Id.* at 284. Plaintiff's objection was articulated at JEFS #50 RA: 88-316; JEFS #52 RA: 261-67.

4. The Circuit Court erred in its March 23, 2011 oral ruling denying Plaintiff's HRCP Rule 56(f) request. JEFS #36 TRANS: 50-52. These portions of the transcript are

attached as Appendix E. Plaintiff articulated her need to pursue discovery. JEFS #44 RA: 10, 21, 41.

IV. STANDARD OF REVIEW

An appellate court reviews the grant or denial of summary judgment *de novo* under the same standard applied by the circuit court. *Unite Here! Local 5 v. City & County of Honolulu*, 123 Hawai`i 150, 170, 231 P.3d 423, 443 (2010). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. *See id.*

The court "must ensure that the agency has taken a 'hard look' at environmental factors." *Sierra Club v. DOT*, 115 Hawai`i 299, 342, 167 P.3d 292, 335 (2007) ("*Superferry*"). The "environment" includes objects of historic significance. HAR § 11-200-2 (definition of "environment"); *see also* HAR § 11-200-12(B)(1). Furthermore, when public trust resources are involved, Hawai`i courts take a "close look" to ensure compliance with public trust principles and "will not act merely as a rubber stamp for agency or legislative action." *In Re Water Use Permit Applications*, 94 Hawai`i 97, 144, 9 P.3d 409, 456 (2000) ("*Wai`āhole*").

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

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

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

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

(Emphasis added). In amending HRS Chapter 6E to provide further protection of burials, the legislature observed: "The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all[.]" Act 306 1990 Sess. Laws of Haw (emphasis added). *Accord: Davis v. May*, 135 S.W.3d 747, 749-750 (Tex. App. 2003); *Hines v. State*, 149 S.W. 1058, 1059 (Tenn. 1911). The DLNR's mission is to

"[e]nhance, protect, conserve and manage Hawaii's unique and limited natural, **cultural and historic resources held in public trust** for current and future generations of visitors and the people of Hawaii nei in partnership with others from the public and private sectors." JEFS #50 RA: 229 (emphasis added).

V. ARGUMENT

HRS Chapters 6E, 343 and 205A require the early preparation of an AIS of the entire rail project to determine the location and quantity of burials that the rail project is likely to impact prior to decisionmaking and prior to construction. The Circuit Court should have denied the City's motion for summary judgment and the DLNR's Defendants' joinder. In fact, instead, summary judgment should have been granted to Plaintiff pursuant to *Flint v. MacKenzie*, 53 Haw. 672, 501 P.2d 357 (1972). In the alternative, Plaintiff should have been given an opportunity to pursue discovery.

A. Legal Context

Hawai`i State Constitution Article IX § 7 provides: "The State shall have the power to conserve and develop objects and places of historic or cultural interest and provide for public sightliness and physical good order. For these purposes private property shall be subject to reasonable regulation." Hawai`i State Constitution Article XII § 7 states: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence purposes and possessed by ahupua`a tenants who are descendents of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."

1. HRS Chapter 6E

To facilitate the constitutional mandate of Article IX § 7 and Article XII § 7 of the Hawai`i State Constitution, the legislature enacted HRS Chapter 6E. The purposes of HRS chapter 6E are articulated in HRS § 6E-1:

> The Constitution of the State of Hawaii recognizes **the value of conserving and developing the historic and cultural property** within the State for the public good. The legislature declares that **the historic and cultural heritage of the State is among its important assets** and that the **rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage**. The legislature further declares that it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens. The legislature further declares that **it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining**

> **historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations,** and to conduct activities, plans, and programs in a manner **consistent with the preservation and enhancement of historic and cultural property.**

HRS § 6E-1 (emphases added).

HRS § 6E-3(16) requires the State Historic Preservation Division (SHPD) to adopt "rules in accordance with chapter 91, necessary to carry out the purposes of this chapter." HAR Title 13 chapters 284 and 275 further the purposes of HRS Chapter 6E and implement HRS §§ 6E-42(a) and 6E-8(a) respectively. The historic review process outlined in these rules supports "the policy of chapter 6E, HRS, to preserve, restore and maintain historic properties [including burial sites] for future generations." HAR §§ 13-284-1(a) and 13-275-1(a). *See also Unite Here!,*123 at 176, 231 P.3d at 449 ("[A]n administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted.").[5] HRS Chapter 6E and its rules establish procedural and informational requirements. *Cf. Kepo`o v. Watson*, 87 Hawai`i 91, 101, 952 P.2d 379, 389 (1998)("Both HRS ch. 343 and HAPA primarily establish procedural and informational requirements."). HRS §§ 6E-42(a) and 6E-8(a) as well as HAR Title 13 chapters 284, 275, and 276 specifically mandate procedures be followed to analyze the effects upon historic resources.

2. Hawai`i Burials Law

The historic review process is fully integrated with the State's effort to protect burial sites. In 1990, when the State Legislature enacted Act 306 to protect burials, it declared:

> the full recognition and protection of the unique cultural values of the multi-ethnic peoples of Hawai`i are **directly affected by historical preservation decisions**. Of particular sensitivity to each group is the impact and response of governmental decisions on the cultural values related to the treatment and protection of burials.
>
> The legislature further finds that **native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance**.
>
> All human skeletal remains and burial sites within the State are entitled to equal protection under the law regardless of race, religion, or cultural origin. The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all, and, therefore the legislature reaffirms the common law rule that a land owner knowingly in possession of human skeletal remains cannot own the remains but merely holds the same in trust for cultural descendants, who have the right to possession for purposes of proper cultural

[5] The rules are fully consistent with HRS §§ 205A-2(b)(2)(A), 205A-2(c)(2), and 205A-4.

preservation or reinterment.

1990 Haw. Sess. Laws Act 306 § 1 (emphases added).

Traditionally, the law has recognized the importance of protecting Christian cemeteries -- while at the same time refusing to provide similar recognition to Native American burials, particularly unmarked ones. Jack F. Trope & Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35 (1992); Robert Lannan, Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act and the Unresolved Issues of Prehistoric Human Remains, 22 Harv. Envtl. L. Rev. 369, 393-94 (1998). The Legislature refused to sanction such continued disparate treatment. The traditional approach that disregarded native burial sites is inconsistent with justice, dignity and equal protection. Simply because it was the custom of Native Hawaiians (and other Native Americans) to bury remains in unmarked graves, there is no reason to give them less protection than Christian burials. Indeed, "[a]ll burial sites are significant[.]" HRS § 6E-43(b).

The burials law draws a distinction between "previously identified" burial sites and "inadvertently discovered" burial sites. Burial sites identified in an AIS are "previously identified." HAR § 13-300-2. Island burial councils determine whether previously identified Native Hawaiian burial sites should be preserved in place or relocated, HRS § 6E-43, HAR §§ 13-300-3(b), 13-300-33(a). Inadvertent discoveries are found from unintentional disturbance or other ground disturbing activity. HAR § 13-300-2. DLNR, through SHPD, makes decisions regarding inadvertently discovered human skeletal remains. *See* HRS § 6E-43.6; HAR § 13-300-40(a).

Island burial councils assist SHPD "in the inventory and identification" of burial sites. HRS § 6E-43.5(f)(1) and (2). This assistance is provided through the consultation process undertaken during an AIS. HAR § 13-276-5(a) and (g). "If identified unmarked burial sites are present, the relevant island burial council of the department must approve the proposed mitigation commitments" for "native Hawaiian burials, following chapter 6E-43, HRS, and section 13-300-33." HAR §§ 13-284-8(d) and 13-275-8(d).

3. AIS

The AIS is the key tool used by the island burial councils, citizens, and government agencies to identify and protect burial sites. *See* HAR Title 13 chapters 276, 300, 275, 284. The

AIS includes a "consultation process" that involves "notifying interested organizations and individuals that a project could affect historic properties of interest to them; seeking their views on the identification, significance evaluations, and mitigation treatment of these properties; and considering the views in a good faith and appropriate manner during the review process." HAR §§ 13-276-2, 13-276-5(a), 13-275-2, 13-284-2. Interested persons include those organizations, such as the island burial councils, "that are concerned with the affect of a project on historic property." HAR §§ 13-284-2, 13-275-2.

An AIS: (a) determines if archaeological historic properties (including burials) are present; (b) identifies them; and (c) gathers information regarding them in order to evaluate their significance. HAR § 13-276-3. A timely AIS allows for: (a) informed decisionmaking that allows for the preservation of historic properties (including burial sites); (b) consideration of all options before they are foreclosed and agency commitments are set in concrete; and (c) a meaningful opportunity to protect identified burials. HAR Title 13 chapters 300, 275, and 284. After all, if consultation involves "considering the views in a **good faith** and appropriate manner during the review process," HAR §§ 13-276-2, 13-284-2, 13-275-2 (emphasis added), then decisionmaking must take place **after** such consultation has taken place.

4. Other Provisions Emphasizing Preservation of Historic Sites.

Attention to historic sites is not confined to HRS Chapter 6E and its rules. The Hawai`i State Planning Act calls for enhancement of multi-cultural/historical resources. HRS § 226-12(a). It is the policy of the State to "[p]romote the preservation and restoration of significant natural and historic resources" and to "[p]rotect those special areas, structures, and elements that are an integral and functional part of Hawaii's ethnic and cultural heritage. HRS § 226-12(b)(1) and (b)(4). State Environmental Policy defines "environment" to include places of historic significance. HRS § 344-2. Environmental impact statements (EISes) are required to describe the "resources of historic, archaeological, or aesthetic significance," HAR § 11-200-17(G), and discuss the impacts to objects of historic significance. HAR §§ 11-200-17(I) and 11-200-2 (definitions of "impacts" and "environment"). HRS Chapter 205A requires that state and county agenices "[p]rotect and preserve those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian . . . history and culture." HRS §§ 205A-2(b)(2)(A), 205A-4(b), 205A-5(b).

B. Counts 1 & 3: The City and DLNR Defendants Failed to Comply with HRS § 6E-42 and Its Implementing Rules .

HRS § 6E-42(a) requires that government agencies give the DLNR the opportunity to review and comment on the effect of a proposed project **prior** to granting any land use approval:

> Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places.

HRS § 6E-42(a). The procedures outlined in HAR title 13 chapter 284 "define how agencies meet this statutory requirement," and "itemizes the review process that the SHPD shall follow." HAR §§ 13-284-1(a) and (b).

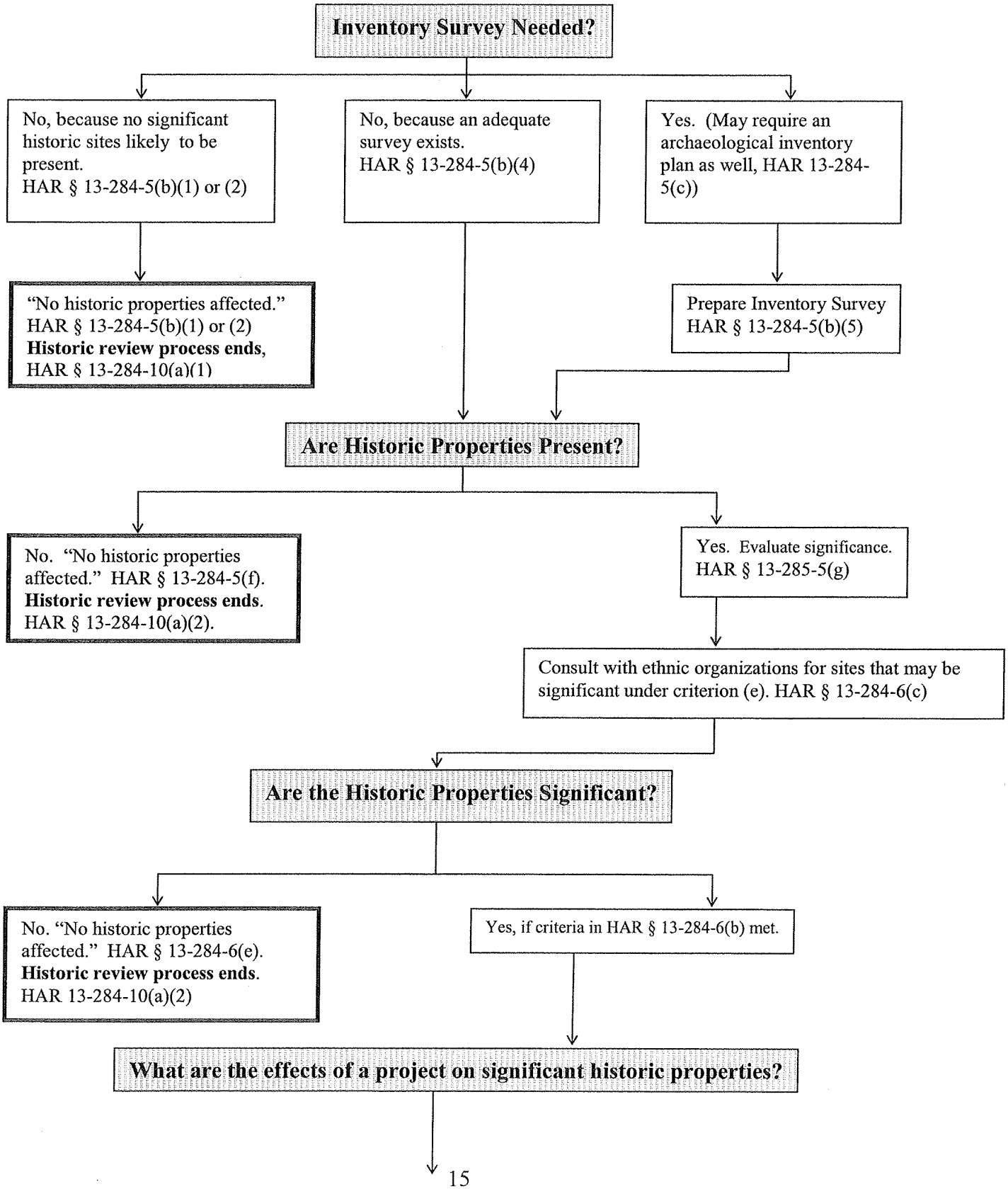
The City and DLNR Defendants argue that the rail project has completed the HRS § 6E-42 and HAR Title 13 chapter 284 process. They also argue that the AIS for the rail project can be piecemealed (or phased). HRS § 6E-42 and HAR Title 13 Chapter 284, however, do not allow a decision on this project before an AIS has been completed on the entire project.

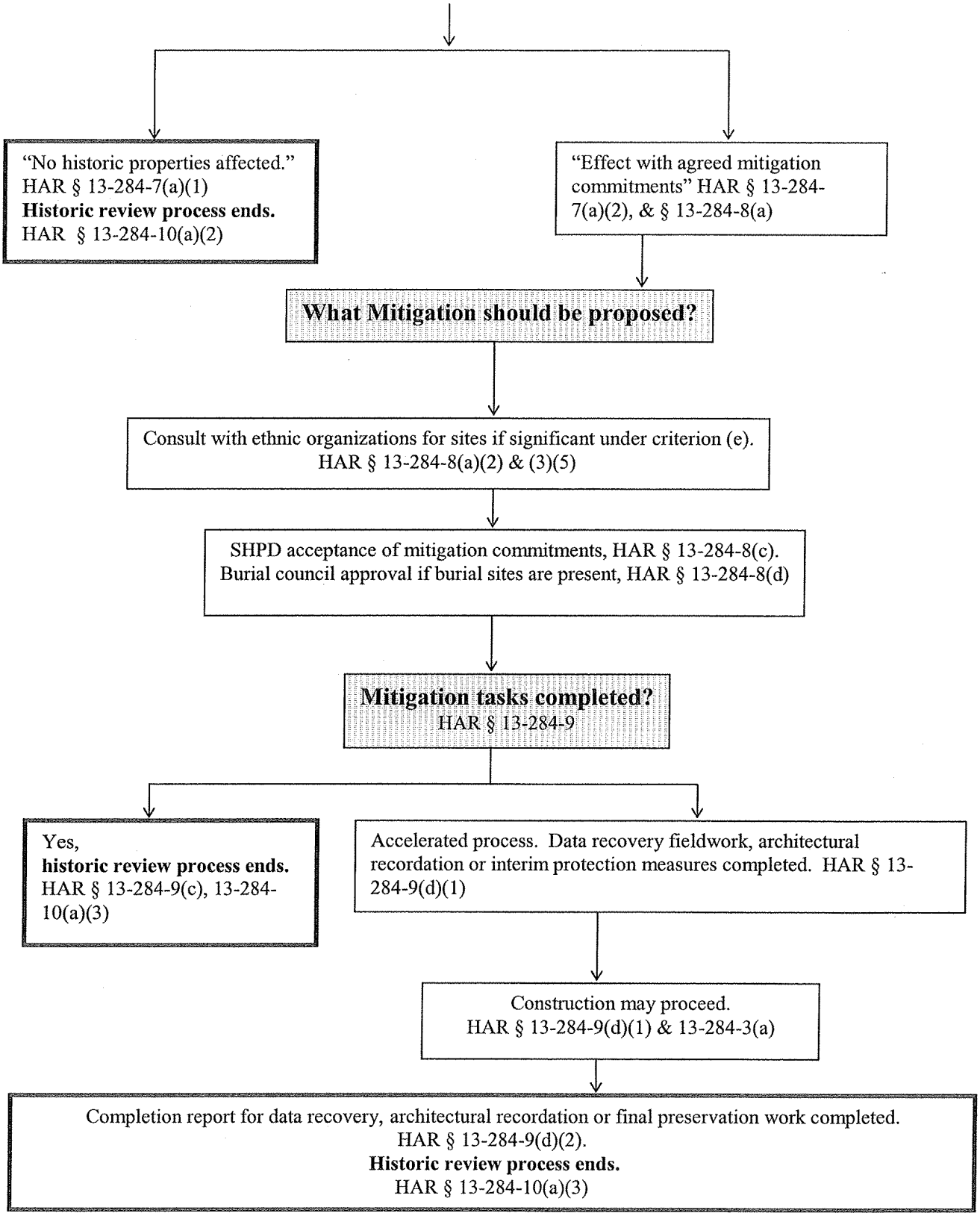
1. The Rail Project Has Not Completed the HRS § 6E-42 and HAR Title 13 Chapter 284 Process.

The rail project cannot be approved until an AIS for the rail project is completed, which has not been done. The City and DLNR Defendants have argued that the project could be approved without completion of an AIS because they entered into a programmatic agreement, which serves as an interim protection plan – a form of mitigation. JEFS #40 RA: 81. They argue that DLNR determined that the rail project "may adversely affect archaeological sites" and therefore all applicable requirements were met. *Id.* at 82. Their position, however, is inconsistent with HAR Title 13 Chapter 284.

A thorough understanding of the historic review process reveals why an AIS for the rail project was required prior to decisionmaking. The process of reviewing and commenting on the effect of a proposed project is complex, but easily understood as sequential. It "may involve up to six procedural steps." HAR § 13-284-3(a). The agency "shall consult with the SHPD and shall obtain the written comments of the SHPD **at each step of the review**." *Id.* A flow chart that outlines this process follows on the next two pages.

HISTORIC PRESERVATION REVIEW PROCESS
pursuant to HRS § 6E-42 and HAR § 13-284




"No historic properties affected." HAR § 13-284-7(a)(1) **Historic review process ends.** HAR § 13-284-10(a)(2)
"Effect with agreed mitigation commitments" HAR § 13-284-7(a)(2), & § 13-284-8(a)
What Mitigation should be proposed?
Consult with ethnic organizations for sites if significant under criterion (e). HAR § 13-284-8(a)(2) & (3)(5)
SHPD acceptance of mitigation commitments, HAR § 13-284-8(c). Burial council approval if burial sites are present, HAR § 13-284-8(d)
Mitigation tasks completed? HAR § 13-284-9
Yes, **historic review process ends.** HAR § 13-284-9(c), 13-284-10(a)(3)
Accelerated process. Data recovery fieldwork, architectural recordation or interim protection measures completed. HAR § 13-284-9(d)(1)
Construction may proceed. HAR § 13-284-9(d)(1) & 13-284-3(a)
Completion report for data recovery, architectural recordation or final preservation work completed. HAR § 13-284-9(d)(2). **Historic review process ends.** HAR § 13-284-10(a)(3)

See also SHPD's Historic Preservation Review Process flow chart. JEFS #50 RA: 228.

First, historic property must be identified. "If SHPD concludes an inventory survey needs to be done, this survey **shall** identify all historic properties[.]" HAR § 13-284-5(b)(5). "**Once** a historic property is identified, then an assessment of significance will occur." HAR § 13-284-6(a) (emphasis added). "**When** significant historic properties are present, **then** impacts of the proposed action on these properties shall be assessed, and mitigation commitments shall be devised as needed." HAR § 13-284-6(e) (emphasis added). "**If** a project will have an 'effect' (impact) on significant historic properties, **then** a mitigation commitment proposing the form of mitigation to be undertaken for each significant historic property shall be submitted by the agency to the SHPD for review and approval." HAR § 13-284-8(a) (emphases added). "**Once** the detailed mitigation plans are carried out, a request for verification shall be submitted by the agency to the SHPD."[6] HAR § 13-284-9(a) (emphasis added). This sequence demonstrates that measures taken to minimize the impacts to significant historic properties cannot be developed until the significant historic properties are actually identified and located. Furthermore, the rules are explicit that mitigation measures cannot be developed until historic sites have first been identified in an AIS.

> The goal of the review process is to **identify** significant historic properties in project areas, assess any effects, **and then** to develop and execute plans to avoid, minimize, or **mitigate** adverse effects to the significant historic properties in the public interest. The process supports the policy of chapter 6E, HRS, **to preserve, restore and maintain historic properties for future generations**.

HAR § 13-284-1(a).

The first step in this historic review process is to determine "whether historic properties are present in the project area." HAR §§ 13-284-5(a). *See also* HAR §§ 13-284-1(a) and 13-276-3 ("An archaeological inventory survey [(AIS)] shall . . . [d]etermine if archaeological historic properties are present in the project area[.]"). The inventory step (preparation of the AIS) cannot be skipped -- particularly when the Defendants all acknowledge that an inventory survey is necessary. HAR § 13-284-5(a) and (b)(5); JEFS #50 RA:10-11 at ¶3, ¶4, ¶ 9 and JEFS #40 RA: 103-143. SHPD's own flowchart provides for no skipping of this step where significant

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[6] A project may commence prior to completion of all the mitigation commitments if the data recovery fieldwork, architectural recordation or interim protection measures for properties to be preserved have been successfully completed. HAR §§ 13-284-9(d) and 13-284-3(a).

historic sites are likely to be present. JEFS #50 RA: 228. The AIS must be prepared to inform decisionmaking. After all, if SHPD is to be given an opportunity to review and comment on the effect of the proposed project on burial sites prior to approval, HRS § 6E-42(a), and if HAR chapter 13-284 defines how agencies meet this requirement, HAR § 13-284-1(a), and itemizes the review process that the SHPD shall follow, HAR § 13-284-1(b), then SHPD and the agencies must have the information from an AIS before rendering a decision. Because there is strong evidence that historic sites exist subsurface along the transit corridor in Kaka`ako, SHPD cannot review and comment on a project until an AIS is completed. An AIS must precede approval of the rail project.

The City and DLNR Defendants can point to no rule that allows the historic review process to be completed other than the specific procedures described in the rules. The rules provide that the historic process ends – *i.e.*, that SHPD has reviewed and commented on the effect of a proposed project on historic properties – only in accordance with the specific procedures outlined in HAR Title 13 Chapter 284. HAR §§ 13-284-1(a) and (b), 13-284-3, 13-284-10. The entire process must be concluded to ensure that agencies thoroughly consider the affect of a subdivision on historic sites "prior to any approval," HRS § 6E-42(a). The historic preservation review process ends only under limited circumstances:

(1) before an AIS is done if no significant historic sites are likely to be present, HAR §§ 13-284-5(b)(1) or (b)(2);

(2) after completing an adequate AIS, when the AIS shows that no historic sites are present, HAR § 13-284-5(f);

(3) when there is an agreement that none of the historic properties are significant, HAR § 13-284-6(e);

(4) when the historic properties are significant, but the project will not have a significant effect upon them, HAR § 13-284-7(a)(1); or

(5) when the project will have an effect and the mitigation commitments are made and completed, HAR §§ 13-284-7(a)(2), 13-284-9(c) or (d).

See also HAR § 13-284-10. A project may commence prior to completion of all the mitigation commitments only under strict criteria laid out in HAR §§ 13-284-9(d) and (e). *See* HAR § 13-284-3(a). Construction may not commence until the data recovery fieldwork, architectural recordation or interim protection measures for properties to be preserved have been successfully

completed. *Id.*

The first four circumstances did not take place here since all parties agree that the rail project may have effects on archaeological resources, including burial sites, and that the project has a high likelihood of having "potential" effects on archaeological resources in Kaka`ako. JEFS #50 RA:10 at ¶¶ 3 and. 4. In fact, in this case, SHPD has concluded that the inventory survey shall be done. JEFS #40 RA: 103-143; JEFS #50 RA:11 ¶ 9. HAR § 13-284-5(b)(5) provides that "[i]f SHPD concludes an inventory survey needs to be done, this survey **shall** identify all historic properties[.]" Yet, an AIS for the entire project has not been done – and the City granted the SMA permit and commenced construction.

The City appears to argue that the fifth circumstance is what has taken place here. The City's FEIS suggests that the programmatic agreement itself is mitigation. JEFS # 66 SR (hardbound volume transmitted to the Intermediate Court of Appeals) at 4-195. In fact, the FEIS goes one step further and claims that the rail project "will have an 'effect, with proposed mitigation commitments' under State law." *Id.* at 4-185. This citation is a clear reference to HAR § 13-284-7(a)(2).

The City's position, however, conflicts with HAR title 13 chapter 284, which allows for mitigation plans and commitments to be made only **after** an AIS is done. Not only is it logical that one can only develop mitigation options after one knows where the sites are, JEFS #50 RA:151 ¶5, but the rules are explicit. "The goal of the review process is to identify significant historic properties in project areas, assess any effects, **and then** to develop and execute plans to avoid, minimize, or mitigate adverse effects to the significant historic properties in the public interest." HAR § 13-284-1(a)(emphasis added). HAR § 13-284-3(a) provides that:

> A historic preservation review may involve up to six procedural steps, in order to **determine if significant historic properties are present and, if so, to develop and execute a detailed mitigation plan** and thereby satisfactorily take into account the impact of the project on such historic properties. Any agency involved in this review shall consult with the SHPD and shall obtain the written comments of the SHPD at each step of the review. In cases where any interim protection plans are adequately in place **and** any data recovery fieldwork has been adequately completed, the project may commence from a historic preservation perspective.

(Emphases added). Thus, historic sites must be identified (through an AIS) before the impact of a project and its mitigation can be analyzed. Furthermore, HAR § 13-284-3(a) explicitly authorizes project commencement only if the plans are in place "and any data recovery fieldwork

has been adequately completed." Data recovery fieldwork for the rail project was not completed prior to decisionmaking and groundbreaking. JEFS #50 RA: 12 ¶ 13.

2. A "Phased Approach" for the Rail Project is Not Authorized.

The City also argues that it can piecemeal or phase its AIS for the rail project. A plain reading of the rules demonstrates that an AIS must study all phases of a project.

First, unlike the implementing rules for the National Historic Preservation Act that explicitly allow the identification of historic properties and the analysis of a project's effects to be undertaken in a phased manner, 36 CFR § 800.4(b)(2),[7] explicit authorization for such a phased approach is entirely missing from the State's counterpart. This difference alone is enough to demonstrate that a "phased approach" (or segmentation) is inappropriate under Hawai`i law.

Second, HAR § 13-284-2 defines "project area" to mean "the area the proposed project may potentially affect, either directly **or indirectly**. It includes not only the area where the proposed project will take place, but also the proposed project's area of **potential** effect." (Emphases added). The first step in the historic review process is to determine "whether historic properties are present in the **project area**." HAR §§ 13-284-5(a). *See also* HAR §§ 13-284-3(b)(1), 13-284-1(a), and 13-276-3 ("An archaeological inventory survey shall . . . [d]etermine if archaeological historic properties are present in the project area[.]"). Thus, an AIS must search in areas that may be directly or indirectly affected, including areas that may be only potentially impacted. Clearly, the area impacted by a later phase of a project must be studied not only because the entire project itself will directly affect it, but it also because the area affected by the later phase is one that will be potentially affected by an earlier phase. In other words, the area of potential effect is **not** confined to areas within a particular phase. A phased approach would violate the requirement to find sites in the project area.

In this case, the rail project involves the construction of an approximately 20-mile fixed

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[7] There is no indication whatsoever that this act was intended to preempt State law. In fact, Congress declared that that it is "necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and **to assist State** and local governments and the National Trust for Historic Preservation in the United States **to expand and accelerate their historic preservation programs and activities."** 16 USC § 470(b)(7). *See also* 16 USC § 470-1(6).

guideway rail system from West O`ahu to Ala Moana Center. JEFS #50 RA: 10 at ¶B(1). The City admits that "All four phases of the [rail project] are connected and part of **a single project**." JEFS #50 RA: 111 ¶ 3. There is only one project at issue in this case: the entire 20-mile fixed guideway rail system. While construction may take place in four phases, there is no evidence that each phase is a separate "project." The construction phases "are connected and part of a single project." *Id.* It is uncontested that the "potential effect" of the project includes ground disturbed by the project in Kaka`ako for which there is a high likelihood of having potential effects. JEFS #46 RA: 205, 222, JEFS #48 RA: 27; JEFS #50 RA: 10 ¶ 4. Thus, an AIS must search for archaeological sites in the **entire** project area, not simply one phase at a time.

Furthermore, Defendants admit that the area of potential effects for archaeological resources is defined as all areas of direct ground disturbance by the rail project. JEFS #50 RA: 11-2 ¶ 10(b). In other words, the area of potential effect is **not** confined to areas within a particular phase. Yet, there has been no AIS completed that identifies the location of burials and other historic properties in Kaka`ako that will be affected – directly or indirectly – by the rail project.

3. Delaying or Segmenting an AIS is Inconsistent with the Purposes of HRS Chapter 6E and HAR Title 13 Chapter 284.

Postponing completion of an AIS for an entire project until after decisionmaking and construction is inconsistent with the purposes of HRS Chapter 6E and HAR Title 13 Chapter 284. Delaying information gathering until after a decision is made is inconsistent with "the public policy of this State to provide leadership in preserving, restoring and maintaining historic and cultural property." HRS § 6E-1. The government does not provide leadership in preserving and maintaining historic and cultural property by postponing investigation until after decisionmaking. A "comprehensive program of historic preservation" cannot preserve historic property by delaying efforts to identify and protect those sites until after decisions regarding the scope and location of a project are set in concrete. Similarly, the purpose of the rules is to "conserve" historic properties with the goal "to preserve, restore and maintain historic properties for future generations." HAR §13-284-1(a). This goal is turned on its head when historic sites are identified **after** (1) plans are developed to mitigate adverse effects and (2) decisions are made to approve the project.

The Legislature intended that the State treat historic property "in a spirit of stewardship

and trusteeship." *Id.; see also* HRS § 6E-13(b) ("for the protection of an historic property or a burial site and the **public trust** therein"); 1990 Haw. Sess. Laws Act 306 ("The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a **sacred trust** for the benefit of all[.]") (emphases added). A trustee must act with "a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Wai`āhole*, 94 Hawai`i at 143, 9 P.3d at 455. A trustee must take a "global, long-term perspective" and consider cumulative impacts. *Id.* Identifying historic properties that may be affected by a project **after** approval of the project is inconsistent with the principle of administering "historic and cultural property in a spirit of stewardship and trusteeship for future generations." HRS § 6E-1.

A primary reason for the historic review process is to protect Native Hawaiian burials. When HRS § 6E-42 was first enacted, its purpose was to "improve the State's historic preservation program by establishing rules for the protection, preservation, reinterment, and archaeological examination of significant prehistoric and historic burial sites." Conf. Com Rep. No. 168, 1988 Senate Journal 650. Two years later, in amending HRS chapter 6E and clarifying HRS § 6E-42 to emphasize that SHPD must be given an opportunity to review and comment on a project's effect on burial sites "prior to any approval," the Legislature found that "native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance." 1990 Haw. Sess. Laws Act 306 §§ 1 and 12. When burials are not identified prior to decisionmaking, they are vulnerable to disinterment. JEFS #44 RA: 60-63, JEFS #50 RA: 151-52; JEFS #42 RA: 60 and 44-47 ¶ 8, 10, 37. As Plaintiff's expert pointed out:

> Significant negative consequences resulted when an AIS was not completed before decision making for H-3, the Wal-Mart site on Ke`eaumoku Street, General Growth's Ward Village Shops Project, and Kawaiaha`o Church's Multi-Purpose Center project. In each of these cases, archaeological investigations occurred when construction had already begun. Because burials were discovered in these projects late in the process, the burial finds created delays, redesign needs, and concomitant cost overruns. Most importantly, the late-stage finds limited the viable options of the developer, the State Historic Preservation Division, the O'ahu Island Burial Council, and cultural descendants in identifying and implementing cultural appropriate treatment of those burials.

JEFS #50 RA: 151-52.

Delaying completion of the AIS by phasing or other means prevents the AIS from

functioning practically. *Cf. Citizens for the Protection of the North Kohala Coastline v. County of Hawai`i*, 91 Hawai`i 94, 105, 979 P.2d 1120, 1131 (1999) (holding that environmental review must occur early enough to function practically as an input into the decision making process); *Ka Pa`akai O Ka `Āina v. Land Use Comm'n*, 94 Hawai`i 31, 52 7 P.3d. 1068, 1089 (2000) ("Allowing a petitioner to make such after-the-fact determinations may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self-serving actions on the petitioner's part. After all, once a project begins, the pre-project cultural resources and practices become a thing of the past."). An AIS prepared after some options are closed and agency commitments are set in concrete reduces its functionality, impairing the ability of decisionmakers to protect burial sites.

The federal courts have struck down attempts to segment analysis of a project under a myriad of laws. For example, in *Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Department*, 446 F.2d 1013, 1023 (5th Cir. 1971), the Fifth Circuit Court of Appeals ruled that a highway project could not be segmented. First, the Court concluded that nothing in section 4(f) of the Federal Aid to Highway Act specifically authorized separating a project into segments. *Id.* at 1022-23. Second, the Court noted that the project in question had never been anything but one project for purposes of receiving approval. *Id.* at 1023. Third, the Court recognized: "The frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see." *Id.* at 1023. In *Thompson v. Fugate*, 347 F. Supp 120, 124 (VA 1972), a federal district court rejected an attempt to segment a portion of a highway project because it would result "in the subversion of the announced Congressional policy." The Court condemned the segmenting of the project as an impermissible "bureaucratic exercise" that would frustrate the Congressional policy in enacting the National Environmental Policy Act. Finally, the federal courts, focused on the purpose and spirit of the Endangered Species Act, have barred the incremental-step evaluation of a project's impacts on endangered species. *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1142 (S.D. Cal. 2006).

In sum, neither the structure, nor the plain language, nor the purposes of HRS § 6E-42 and HAR Title 13 Chapter 284 allow a decision on the rail project before the completion of an AIS for the entire project.

C. **Counts 2 & 4: The City and DLNR Defendants Failed to Comply with HRS § 6E-8 and Its Implementing Rules.**

HRS § 6E-8(a) requires that the DLNR concur with a project **before** it may commence:

> 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. . . .

HRS § 6E-8(a). The historic review process pursuant to HRS § 6E-8 and HAR Title 13 chapter 275 is virtually identical to the process pursuant to HRS § 6E-42 and HAR Title 13 chapter 284.

HAR Title 13 chapter 275 "itemizes the process to obtain concurrence." HAR § 13-275-1(b). "The review process is designed to identify significant properties in project areas **and then** to develop and execute plans to handle impacts to the significant historic properties in the public interest." HAR § 13-275-1 (emphasis added). It provides that a project cannot commence until SHPD has given its written concurrence – which can only occur under five circumstances:

(1) before conducting an AIS, when facts show that "no significant historic sites are likely to be present," and SHPD writes a "no historic properties affected" letter, HAR §§ 13-275-5(b)(1) or (b)(2);

(2) after completing an adequate AIS, when the AIS shows that no historic sites are present, and SHPD writes a "no historic properties affected" letter, HAR §§ 13-275-5(f);

(3) when there is an agreement that none of the historic properties are significant, and SHPD issues a "no historic properties affected" letter, HAR § 13-275-6(e);

(4) when the historic properties are significant, but the project will not have a significant effect upon them, HAR § 13-275-7(e); or

(5) when the project will have an effect and the mitigation commitments are made and completed, HAR §§ 13-275-7(a)(2), 13-275-9(c).

See also HAR § 13-275-10. A special exception is carved out allowing construction to commence when the project will have an effect, interim protection plans are adequately in place or data recover fieldwork has been adequately completed, HAR §§ 13-275-3(a), 13-275-9(d) and (e).

In this case, SHPD could not properly give its concurrence when it does not know what

the effect of the rail project will be on historic sites. It could not know because the City has not bothered to identify the location and number of burial sites in an AIS. Delaying the AIS runs contrary to the sequential historic review process. First, historic property must be identified. "If SHPD concludes an inventory survey needs to be done, this survey **shall** identify all historic properties[.]" HAR § 13-275-5(b)(5). "**Once** a historic property is identified, then an assessment of significance will occur." HAR § 13-275-6(a) (emphasis added). "**When** significant historic properties are present, **then** impacts of the proposed action on these properties shall be assessed, and mitigation commitments shall be devised as needed." HAR § 13-275-6(e) (emphasis added). "**If** a project will have an 'effect' (impact) on significant historic properties, **then** a mitigation commitment proposing the form of mitigation to be undertaken for each significant historic property shall be submitted by the agency to the SHPD for review and approval." HAR § 13-275-8(a) (emphases added). Conclusions regarding the effects of a project and any mitigation measures must follow the completion of an AIS where significant historic sites are present. A protection plan – whether interim or not – is a form of mitigation, HAR § 13-275-8(a)(1)(A), and therefore must follow completion of an AIS. Not only is it logical that one can only develop mitigation options after one knows where the sites are, JEFS #50 RA: 151 ¶5, but the rules are explicit: "The review process is designed to identify significant properties in project areas **and then** to develop and execute plans to handle impacts to the significant historic properties in the public interest." HAR § 13-275-1 (emphasis added). Where historic properties are present, an AIS must be prepared so that SHPD can issue its determination:

> For the department to provide a letter of determination, an agency proposing a project which may have an effect upon historic properties shall notify the department of the proposed project and request a letter of determination. Upon the request of the department, the agency **shall provide** the department with information as to **the number of historic properties within a proposed project area**, their significance, the impact of the proposed project on the historic properties, and any proposed mitigation measures.

HAR § 13-275-3(a) (emphases added).

The reasons that the AIS for the rail project cannot be postponed or phased until after decisionmaking pursuant to HRS chapter 6E and HAR Title 13 chapter 275 are similar to those for HRS § 6E-42 and HAR title 13 chapter 284. A determination of an "effect, with proposed mitigation commitments" cannot be made until an AIS is completed. HAR Title 13 Chapter 275, like Chapter 284, includes no specific authorization for segmentation. HAR § 13-275-2 defines

"project area" in the same way as HAR § 13-284-2. The purposes articulated in HAR § 13-275-1 are virtually identical to those in HAR § 13-284-1.

In this case, the City failed to even try to identify the location and number of burial sites that will be affected by the rail project prior to decisionmaking even though they knew that the likelihood of encountering burials is high.

D. Count 5: The FEIS is Inadequate Pursuant to HRS Chapter 343.

The environmental disclosure process governed by HRS Chapter 343 and HAR Title 11 chapter 200 also precedes decisionmaking. *See Kepo`o v. Kane*, 106 Hawai`i 270, 292, 103 P.3d 939, 961 (2005). In enacting the Hawaii Environmental Policy Act (HEPA), the legislature stated its purpose:

> The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that **an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions**. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and **public participation during the review process benefits all parties involved and society as a whole**.
>
> It is the purpose of this chapter to establish **a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making** along with economic and technical considerations.

HRS § 343-1 (emphases added). As the Hawai`i Supreme Court announced:

> The public comment and notification provisions of HEPA underscore the legislative intent to provide broad-reaching dissemination of proposed projects so that the public may be allowed an opportunity to comment and the agency will have the necessary information to understand the potential environmental ramifications of their decisions.

Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai`i 66, 72, 947 P.2d 378, 384 (1997). This environmental disclosure must come early in the process to ensure that informed decisions are made. More specifically,

> both federal and state courts have recognized that environmental review must occur early enough to function practically as an input into the decision making process. In construing the National Environmental Policy Act (NEPA), for example, the United States Court of Appeals for the Ninth Circuit cautioned that "an assessment must be "prepared early enough so that it can serve practically as an important contribution to the decision making

> process and will not be used to rationalize or justify decisions already made." Save the *Yaak Committee v. J.R. Block*, 840 F.2d 714, 718 (9th Cir. 1987) (quoting 40 C.F.R. § 1502.5 (1987)). It further stated that federal agencies are required to "integrate the NEPA process with other planning at the *earliest possible time* to insure that planning and decisions reflect environmental values. . ." *Id.* . . . According to the J.R. Block Court, "the rationale behind this rule is that inflexibility may occur if delay in preparing an EIS is allowed: 'After major investment of both time and money, it is likely that more environmental harm will be tolerated.'" *Id.* . . . *See also Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) ("[T]he EIS is a decision-making tool intended to 'insure that . . . environmental amenities and values may be given appropriate consideration in decisionmaking . . . .' Therefore, the appropriate time for preparing an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options.") (ellipsis points and emphasis in original) (citation omitted); Rodgers, Environmental Law § 9.7, at 921 (2d. ed. 1994) (NEPA's purpose is to require consideration of environmental factors "before project momentum becomes irresistible, before options are closed, and before agency commitments are set in concrete.").
>
> Accordingly, decisions reflecting environmental considerations can most easily be made when other basic decisions are also being made, that is, during the early stages of project conceptualization and planning. . . . Indeed, to require the DOT or DLNR, rather than the County of Hawai'i, to conduct an EA at some point in the future "might call for a burdensome reconsideration of decisions already made and would risk becoming a '*post hoc* rationalization[] to support action already taken.'" *Citizens for Responsible Government v. City of Albany*, . . . 66 Cal. Rptr. 2d 102, 114 (1997) (brackets in original).

Citizens, 91 Hawai`i at 105, 979 P.2d at 1131. *See also Superferry,* 115 Hawai`i at 326, 167 at 319 ("The main thrust of HEPA is to require agencies to consider the environmental effects of projects before action is taken."). Completion of the HRS Chapter 343 process is a condition precedent to approval of any request and commencement of the proposed action. *Citizens*, 91 Hawai`i at 105, 979 P.2d at 1131; *Pearl Ridge Estates Comm. Ass'n v. Lear Siegler Inc.*, 65 Haw. 133, 648 P.2d 702 (1982); *Kahana Sunset,* 86 Hawai`i 66, 947 P.2d 378; *Sierra Club v. Office of Planning*, 109 Hawai`i 411, 126 P.3d 1098 (2006).

The disclosure of "environmental" impacts includes impacts to cultural and social conditions and objects of historic significance. HAR §§ 11-200-2 (definition of "environment"), 11-200-12(B)(1). After all, "the historic and cultural heritage of the State is among its important assets." HRS § 6E-1. Indeed, the State has determined that "[a]ll burial sites are significant." HRS § 6E-43(b).

"The EIS process shall involve at a minimum . . . conducting necessary studies." HAR § 11-200-14. The EIS shall include a description of the "resources of historic, archaeological, or

aesthetic significance." HAR § 11-200-17(G). An acceptable EIS is one that adequately discloses sufficient information and describes all identifiable environmental impacts. HAR § 11-200-23. The courts use the "'rule of reason' to determine whether the EIS is legally sufficient in adequately disclosing facts to enable a decision-making body to render an informed decision." *Price v. Obayashi Hawaii Corp*, 81 Hawai`i 171, 182, 914 P.2d 1364, 1375 (1996). It must set "**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." *Id.* (emphasis added).

The final EIS for the rail project does not include an AIS. JEFS # 66 SR (hardbound volume transmitted to the Intermediate Court of Appeals, table of contents at v –xiii). The "rule of reason" requires that the final EIS for the rail project include an AIS because:

(1) EISes often include AISes, JEFS #42 RA: 46-47; JEFS #50 RA: 13 ¶ 21;

(2) the City has prepared EISes for other projects that include AISes, JEFS #42 RA: 46-47;

(3) the "EIS process shall involve at a minimum . . . conducting necessary studies," HAR § 11-200-14;

(4) the City and DLNR Defendants admit that an AIS is a necessary study, JEFS #50 RA: 11-12 ¶ 9, 11 and 12; JEFS #50 RA: 124 ¶36:

(5) in the course of other development projects, hundreds of burials have been found in the downtown and Kaka`ako areas that the rail project will cross, JEFS #44 RA: 61-62 ¶¶ 28, 29;

(6) the City acknowledges the likelihood of encountering burials in the course of the project is high, JEFS #46 RA: 205, 222, JEFS #48 RA: 27 and JEFS #50 RA: 10 ¶ 4;

(7) the legislature found "native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance" 1990 Haw. Sess. Laws Act 306 § 1; and

(8) an AIS determines if archaeological sites (including burials) are present; (b) identifies them; (c) gathers information regarding them in order to evaluate their significance; and

(d) provides information to decisionmakers to enable them to preserve historic properties (including burial sites), HAR § 13-276-3, JEFS #44 RA: 60-63; JEFS #50 RA: 151-52; and

(9) significant negative consequences result when an AIS is not completed before construction commences, JEFS #50 RA: 151-52; JEFS #42 RA: 60 and 47 ¶ 37.

This case differs from the *Price* case in two important respects. First, in that case, where Plaintiff challenged the adequacy of an EIS because it failed to locate "native Hawaiian archaeological sites in the proposed project area," *Price*, 81 Hawai`i at 183 n.13, 914 P.2d at 1376 n.13, the developer had actually prepared an archaeological field reconnaissance report, and the EIS contained information about "every finding, its location and value." *Id.* at 185, 914 P.2d at 1378. In fact, that EIS identified four burial sites.[8] JEFS #42 RA: 55. Because the rail project's final EIS fails to disclose the location of burial sites, it does not disclose as much information as was judged adequate in *Price*. Second, unlike *Price*, Plaintiff does **not** seek to contradict a conclusion in the final EIS. Rather, she seeks to ensure that the final EIS discloses information now rather than after decisionmaking. Plaintiff and Defendants **all** agree that an AIS should be conducted. The only question is when this AIS should be done: before or after substantive decisions have been made?

Delaying preparation of the AIS for the entire rail project until after decisionmaking and after construction defeats both the purpose of the AIS and the EIS. The number of burials in the project area could affect the entire project's viability. The rule of reason demands that this study be prepared prior to decisionmaking. "[E]nvironmental review must occur early enough to function practically as an input into the decision making process." *Citizens*, 91 Hawai`i at105, 979 P.2d at 1131. This should occur "before options are closed, and before agency commitments are set in concrete." *Id.* (citing Rodgers, ENVIRONMENTAL LAW § 9.7 at 921 (2d.ed. 1994)). The failure of the final EIS for the rail project to include AIS violated the requirements of HRS Chapter 343 and HAR Title 11 chapter 200.

E. Count 6: The City and DLNR Defendants Failed to Give Full Consideration of Cultural and Historic Values.

The City is "specifically required to give full consideration to cultural and historic

[8] That survey took place **before** DLNR adopted HAR Title 13 chapters 275 and 284 and does not meet modern archaeological standards. Nevertheless, it identified the four burial sites.

values." *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n*, 79 Hawai`i 425, 435, 903 P.2d 1246, 1256 (1995) ("*PASH*"). HRS § 205A-4 provides:

> (a) In implementing the objectives of the coastal zone management program, the agencies **shall give full consideration to** ecological, **cultural, historic**, esthetic, recreational, scenic, and open space **values**, and coastal hazards, as well as to needs for economic development.
>
> (b) The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority.

(Emphases added). HRS § 205A-5(b) further requires that all agencies enforce the objectives and policies of this chapter. One such objective is to "[p]rotect, preserve, and, where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture." HRS § 205A-2(b)(2)(A). *See also* HRS §§ 205A-2(c)(2) and 226-12.

In *Hui Alaloa v. Planning Comm'n*, 68 Haw. 135, 138, 705 P.2d 1042, 1044 (1985), the Hawai`i Supreme Court held that findings regarding impacts to historic sites must be made before a special management area (SMA) permit may be issued. In that case, a condition of the SMA permit was that further archaeological survey work be conducted. The Court observed that the planning commission could not conclude that a development is consistent with the objectives of protecting historic and pre-historic resources without first having the archaeological work be completed.

Similarly, in *Ka Pa`akai*, 94 Hawai`i 31, 7 P.3d. 1068, the Hawai`i Supreme Court reversed a decision of the land use commission (LUC) because the commission failed to identify valued cultural and historical resources that would be affected by a development. The LUC had approved a development without first investigating cultural resources. The Court held:

> Specific considerations regarding the extent of customary and traditional practices and the impairment and feasible protection of those uses **must first be made before a petition for a land use boundary change is granted**. . . . Allowing a petitioner to make such **after-the-fact determinations** may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self-serving actions on the petitioner's part. **After all, once a project begins, the pre-project cultural resources and practices become a thing of the past.**

Id. at 52, 7 P.3d at 1089 (emphases added).

Finally, given that Hawaiian burial sites and remains are part of the public trust, HRS §§ 6E-1 ("spirit of stewardship and trusteeship"), 6E-13(b) ("the public trust therein"); and Act 306, 1990 Sess. Laws of Haw. ("sacred trust"), the government must act pursuant to basic trust principles. "In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Waiāhole*, 94 Hawai`i at 143, 9 P.3d at 455. The Court has emphasized the importance of a "thorough assessment." *Kelly v. 1250 Oceanside Partners*, 111 Hawai`i 205, 231, 140 P.3d 985, 1011 (2006).

In this case, how could the City have given full consideration to cultural and historic values if it has not investigated how many burials sites are located along the route of the rail system and where they are? How could the City Council have rendered any finding that the rail project is consistent with HRS §§ 205A-2(b)(2)(A) and HRS § 205A-2(c)(2) when the City has not bothered to initiate its archaeological investigation in Kaka`ako? Just as in *Hui Alaloa*, the City has not yet conducted the necessary archaeological studies. As in *Ka Pa`akai*, the City has failed to identify the cultural resources that will be affected. By tolerating the delayed investigation into these issues, the DLNR Defendants also failed to ensure full consideration.

F. <u>The Court Erred by Not Giving Plaintiff Time to Complete Discovery.</u>

Given all of the above, the Circuit Court should have denied summary judgment to the Defendants and, in fact, should have granted summary judgment to Plaintiff. In the alternative, this Court should hold that Plaintiff should have been given a reasonable amount of time to pursue discovery. HRCP Rule 56(f) should be liberally construed particularly when the non-moving party has not had an adequate opportunity to conduct discovery. *Marshall v. University of Hawai`i*, 9 Haw. App. 29, 821 P.2d 937 (1991). In *Marshall*, the Intermediate Court of Appeals held that Plaintiff should have an opportunity to conduct discovery on a motion filed thirty-six days after the last service of the complaint. In this case, the motion was filed a week after service.

> Under rule 56(f) the adversary need not even present the proof creating the minimal doubt on the issue of fact which entitles him to a full trial; it is enough if he shows the circumstances which hamstring him in presenting that proof by affidavit in opposition to the motion. . . . Courts even have allowed parties with no clear idea of what specific facts they hope to obtain to overcome a summary judgment motion, at least temporarily.

Wright, Miller & Kane FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2740 at 398-9 (1998)

(internal citation omitted). Additionally,

> [o]ne of the most common reasons offered under Rule 56(f) for being unable to present specific facts in opposition to a summary-judgment motion is insufficient time or opportunity to engage in discovery. A major objective of subdivision (f) has been to ensure that a diligent party is given a reasonable opportunity to prepare the case. In keeping with this philosophy, the granting of summary judgment will be held to be error when discovery is not yet completed, and summary judgment has been denied as premature when the trail court determines that discovery is not finished.

Id. § 2741 at 412-16.

In this case, Plaintiff's memorandum in opposition to the City's motion for summary judgment was due before she was able to obtain any responses to any of her discovery requests. At a minimum, she needed time to authenticate documents – particularly given the 14th Division Notice to All Parties RE:(1) Duty to Identify Relevant Record and (2) Duty to Authenticate Evidence. Furthermore, discovery is an interactive process in which parties can follow up on one discovery request with further discovery requests. Having filed her Complaint on January 31, 2011, Plaintiff could not obtain any discovery responses until March 14, 2011, HRCP Rules 34(b) and 36(a), the same day that the hearing on the City's motion for summary judgment was scheduled. JEFS #40 RA: 415. In any case, Plaintiff could not use this information in time. HRCP Rule 56(c) and Hawai`i Rules of Circuit Court Rule 7(b). A party should not be completely precluded from engaging in any discovery where she has not been dilatory.

VI. CONCLUSION

"The essence of justice is largely procedural." *Mortensen v. Emp. Ret. Syst. Trustees*, 52 Haw. 212, 220, 473 P.2d 866, 871 (1970). The procedure at issue in this case – the preparation of an AIS – ensures public participation in decisionmaking as well as informed decisionmaking. *Citizens*, 91 Hawai`i 94, 979 P.2d 1120; *Superferry*, 115 Hawai`i 299, 342, 167 P.3d 292; *Wai`āhole*, 94 Hawai`i 97, 9 P.3d 409; *Ka Pa`akai,* 94 Hawai`i 31, 7 P.3d. 1068. Informed decisionmaking is particularly important when considering a massive project that all parties admit will likely encounter burials. After all, the "historic and cultural heritage of the State is among its important assets," HRS § 6E-1, and the "public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all." 1990 Sess. Laws of Haw. Act 306 §1 at 956. An uninformed decision increases the risk that the rail project will adversely impact numerous burial sites along the transit corridor. *Superferry*, 115 Hawai`i at 322-25, 167 P.3d at 315-18.

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

DATED: Honolulu, Hawai`i, October 21, 2011.

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