

**Electronically Filed
Intermediate Court of Appeals
CAAP-11-0000611
29-DEC-2011
03:57 PM**

CAAP -11-0000611

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, PUAAALAOKALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD

) CIVIL NO. 11-1-0206-01 GWBC
)
) 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 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 DEFENDANTS'
) SUBSTANTIVE JOINDER IN
) DEFENDANTS WAYNE YOSHIOKA IN HIS
) OFFICIAL CAPACITY AS DIRECTOR OF
) THE CITY AND COUNTY OF

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.

) 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 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
) RULING OF MARCH 23, 2011
)
) CIRCUIT COURT OF THE FIRST CIRCUIT,
) STATE OF HAWAI'I
)
) HON. GARY W. B. CHANG

STATE DEFENDANTS-APPELLEES¹ ANSWERING BRIEF

CERTIFICATE OF SERVICE

DAVID M. LOUIE 2162
Attorney General of Hawai'i

WILLIAM J. WYNHOFF 2558
Deputy Attorney General
Department of the Attorney
General, State of Hawai'i
465 King Street, Suite 300
Honolulu, Hawai'i 96813
Telephone: (808) 587-2993

Attorneys for State Defendants-Appellees

¹ State Defendants-Appellees" are WILLIAM J. AILA, JR., PUAALAO KALANI AIU, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, and NEIL ABERCROMBIE.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
I. CONCISE STATEMENT OF THE CASE	1
A. NATURE OF THE CASE	1
B. COURSE AND DISPOSITION OF PROCEEDINGS.....	1
C. FACTS MATERIAL TO THE APPEAL.....	2
II. STANDARD OF REVIEW.....	6
III. ARGUMENT.....	7
A. THE PROJECT COMPLIES WITH HAW. REV. STAT. CHAPTER 6E	7
B. REVIEWING THE PROJECT IN PHASES DOES NOT VIOLATE HAW. REV. STAT. CHAPTER 6E	12
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page
State Cases	
Director, Dept. of Labor and Industrial Relations v. Kiewit Pacific Co., 104 Hawai'i 22, 84 P.3d 530 (Haw.App. 2004)	6
Hui Malama I Na Kupuna O Hawai'i Nei v. Wal-Mart, 122 Hawai'i 171, 223 P.3d 236 (Haw.App. 2009)	10, 11
In re Doe Children, 105 Hawai'i 38, 93 P.3d 1145 (2004)	10
International Bd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 713 P.2d 943 (1986)	6
Koga Engineering & Const., Inc. v. State, 122 Hawai'i 60, 222 P.3d 979 (2010)	6
Lee v. Elbaum, 77 Hawai'i 446, 887 P.2d 656 (Haw.App. 1993)	6
Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 167 P.3d 292 (2007)	13
Federal Statutes	
42 U.S.C. § 4321	2
Section 106 of the National Historic Preservation Act of 1966	14
State Statutes	
Haw. Rev. Stat. chapter 6E	1, 6, 7, 12, 15
Haw. Rev. Stat. § 6E-8	7
Haw. Rev. Stat. § 6E-11	12
Haw. Rev. Stat. § 6E-42	7, 10, 11, 12
Haw. Rev. Stat. § 6E-43.5	12
Haw. Rev. Stat. chapter 343	2
HRS § 6E-43.6	12
Federal Regulations	
36 CFR 800.4(b)(2)	14
State Regulations	
HAR § 13-275-2	9
HAR § 13-275-3	9
HAR § 13-275-5	9, 14
HAR § 13-284-3	9
HAR § 13-284-5	9
HAR chapter 13-300	8

STATE DEFENDANTS-APPELLEES' ANSWERING BRIEF

I. CONCISE STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiff filed this suit seeking to prevent or stall the Honolulu High-Capacity Transit Corridor Project, otherwise known as the Rail Project (“Project”). The Project was subjected to a thorough review for compliance with environmental and historic properties issues. Plaintiff nevertheless claims the Project fails to comply with Haw. Rev. Stat. chapters 6E, Historic Preservation, and 343 Environmental Impact Statements.

B. COURSE AND DISPOSITION OF PROCEEDINGS

Plaintiff filed her complaint on January 31, 2011. R. 40 at 21.² City defendants filed a motion to dismiss or in the alternative for summary judgment on February 9, 2011. R. 40 at 64. State defendants filed a substantive joinder on February 18, 2011. R. 42 at 14. Plaintiff filed a motion for preliminary injunction on February 23, 2011. R. 42 at 18.

The parties filed substantial memoranda and evidence as to the motions. R. 42 at 83, R. 44 at 9, R. 44 at 15, R. 44 at 55, R. 44 at 66, R. 44 at 70, R. 44 at 90, R. 44 at 115, R. 44 at 126, R. 50 at 8, R. 50 at 15, R. 50 at 22, R. 50 at 50, R. 50 at 53, R. 50 at 57, R. 50 at 61, R. 50 at 66, and R. 50 at 74.

The court considered the motions on March 14, 2011 (T. 32), March 15, 2011 (T. 34), and March 23, 2011 (T. 36). The court issued an oral ruling in favor of defendants on March 23, 2011. T. 36 at 49.

² The record on appeal was filed electronically in seven parts on October 3, 2011. JEFS Nos. 40, 42, 44, 46, 48, 50, and 52. We refer to the record by JEFS number and page, e.g., R. __ at __. There are four transcripts. JEFS Nos. 32, 34, 36, and 38. We refer to transcripts by JEFS number and page, e.g., T. __ at __.

Plaintiff filed a motion to reconsider. R. 50 at 88. After additional filings, R. 50 at 333, R. 52 at 8, and R. 52 at 261, the court denied the motion to reconsider on April 29, 2011. T. 38.

On July 5, 2011, the court entered its orders granting the City's motion, R. 52 at 273, denying plaintiff's motion for preliminary injunction, R. 52 at 278, denying plaintiff's motion to reconsider, R. 52 at 282, and granting State defendants' joinder. R. 52 at 286.

The court entered final judgment on August 8, 2012. R. 52 at 290. Plaintiff timely appealed. R. 52 at 297.

C. FACTS MATERIAL TO THE APPEAL

The Project is a 20-mile fixed guideway rail system that begins at the University of Hawai`i-West Oahu by Kapolei, and proceeds east via Farrington Highway and Kamehameha Highway (adjacent to Pearl Harbor), to Aolele Street to serve the Honolulu Airport, to Dillingham Boulevard, to Nimitz Highway, to Halekauwila Street, and ending at Ala Moana Center. R. 40 at 94.

The Project will be built in four construction phases: (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. R. 40 at 94. The purpose of the Project is to provide high-capacity rapid transit in the highly congested east-west corridor between Kapolei and the Ala Moana areas. R. 40 at 94.

The Project was subjected to a thorough review for compliance with environmental and historic properties issues. The Draft Environmental Impact Statement ("DEIS") and a Final Environmental Impact Statement ("FEIS") for the Project are joint National Environmental Policy Act, 42 U.S.C. § 4321, et seq ("NEPA") and Hawai'i Environmental Policy Act, Haw. Rev. Stat. chapter 343 ("HEPA") documents prepared by the City's Department of

Transportation Services ("DTS") and its consultants in coordination with the Federal Transit Administration ("FTA"). (*See Exhibit L or N, R. 40 at 400 R. 42 at 87, FEIS after "References" section entitled: "List of Preparers"*). The following is a summary of key dates and events for the regulatory process undertaken for the Project to date (all supported in R. 40 at 95-98):

- i) On December 8, 2005, the Final Environmental Assessment-Environmental Impact Statement Preparation Notice (FEA-EISPN) for various alternatives with the potential to provide high-capacity transit service was published in the December 8, 2005 edition of The Environmental Notice.
- ii) The FTA and the City considered a broad range of alternatives in various studies prior to the initiation of the NEPA/HEPA process and continuing through the completion of the DEIS and FEIS. The City and its consultants prepared an Alternatives Analysis Report ("AA") in October 2006, which evaluated the following alternatives: (i) No-Build; (ii) Transportation System Management; (iii) Managed Lane Alternative, and (iv) Fixed Guideway Transit System.
- iii) On October 22, 2006, after consultation with various government agencies, consideration of public comments, and review of the AA and its supporting materials, the City Council approved the Fixed Guideway Alternative, extending from Kapolei to UH Manoa with a connection to Waikiki, as the Locally Preferred Alternative. Ordinance No. 07-001, signed into law by the Mayor, formally recognized the selection of this alternative on January 6, 2007.
- iv) On October 27, 2009, the City Council authorized the DTS Director to enter into the Project's Programmatic Agreement ("PA") by adopting Resolution No. 09-306,

CD1. After subsequent consultation and amendments to the PA at the request of the consulting parties, the City Council re-authorized entry into the PA by adopting Resolution No. 10-305, CD1, on November 22, 2010. As discussed more fully below, the PA includes a process, developed through consultation with various participating parties (including SHPD), for addressing the discovery of burials and other archaeological and cultural artifacts in later phases of the Project. R. 40 at 103.

v) In November 2008, the City, along with the FTA, issued the DEIS for the Project. A notice of availability of the DEIS was published in the November 23, 2008 edition of The Environmental Notice. The DEIS comment deadline was January 7, 2009. During the statutory 45-day public comment period, five public meetings were held. A total of 586 comments were provided by Federal agencies, State agencies, county agencies, community organizations, and private individuals. *See Exhibit L or N*, R. 40 at 400 R. 42 at 87.

vi) Governor Neil Abercrombie, as the accepting authority under HEPA, accepted the FEIS on December 16, 2010. The State Office of Environmental Quality Control ("OEQC") published notice of this acceptance in the January 8, 2011 edition of The Environmental Notice, which commenced a 60-day statute of limitations period to challenge the acceptance of the FEIS under HEPA.

vii) The FTA completed its separate review for environmental compliance and signed the FEIS on June 14, 2010. The FTA completed the final step for acceptance and compliance with the environmental review processes under NEPA by issuing its Record of Decision ("ROD"), dated January 18, 2011. Publication of the Notice of Limitation of Claims was published in the Federal Register on January 24, 2011.

viii) During the environmental review process, the City notified SHPD of the Project and worked with it to review and comment on the potential impact of the Project on historic properties, including burial sites. The City coordinated and consulted with SHPD to develop an appropriate plan for investigating and handling archaeological and burial sites that may be impacted by the Project. This plan, set forth in the PA, was executed by William Aila, the State Historic Preservation Officer and Interim Chairperson of the State Department of Land and Natural Resources, on January 13, 2011, and accepted by the FTA in its ROD, dated January 18, 2011.

x) As stated in Section III of the PA, an Archaeological Inventory Survey ("AIS") will be developed and completed in consultation with SHPD and the Oahu Island Burial Council ("OIBC") for each phase of the Project before completion of design and commencement of construction for each respective phase. Section III of the PA also provides that if any burials are uncovered in the AIS process for any phase, they shall be treated as "previously identified" burial sites, and subject to the jurisdiction of the OIBC, pursuant to Hawai`i Administrative Rules chapter 13-300. R. 40 at 112-115. Accordingly, the PA serves as an interim protection plan for burials. This plan for investigating and handling burial sites was disclosed in both the DEIS, R. 40 at 144 and FEIS. R. 40 at 337, R. 40 at 400, and R. 42 at 87.

xi) The City has begun the process of developing and performing AISs for each of the Project construction phases, and intends to continue this process as contemplated by the PA. An AIS for phase 1 has already been completed and approved by SHPD. *See* Exhibit I. In accordance with the PA, the City will defer the AIS for phase 3 to allow the AIS for phase 4 to take place first. Phase 4 includes an area of Moanalua Stream and the Kaka`ako area,

which Project studies have identified as having a potential for burials. Phase 3 and 4 AISs will be performed well before design and construction commences in those phases. No ground disturbing activity will occur in any construction phase of the Project until after an AIS has been performed for that phase. R. 40 at 98.

II. STANDARD OF REVIEW

In reviewing summary judgment decisions, an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied. 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. Koga Engineering & Const., Inc. v. State, 122 Hawai‘i 60, 78, 222 P.3d 979, 997 (2010).

Review of SHPD’s determinations under Haw. Rev. Stat. chapter 6E are entitled to considerable deference. “[A]n administrative agency’s interpretation of its own rules is entitled to ‘deference’³ 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 (Haw.App. 1993) quoting International Bd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 323, 713 P.2d 943, 950 (1986) (citations omitted). And see Director, Dept. of Labor and Industrial Relations v. Kiewit Pacific Co., 104 Hawai‘i 22, 29-30, 84 P.3d 530, 537-538 (Haw.App. 2004) (footnote omitted):

It further appears that reviewing court deference is especially due in the discrete context of an agency’s interpretation of its own administrative rules, given the supreme court’s proviso in *Camara*, 67 Haw. at 216, 685 P.2d at 797:

This [(deference)] is particularly true where the law

³ Alternatively: “great deference.” Lee v. Elbaum, 77 Hawai‘i at 457, 887 P.2d at 667.

to be applied is not a statute but an administrative rule promulgated by the same agency interpreting it.

III. ARGUMENT

A. THE PROJECT COMPLIES WITH HAW. REV. STAT. CHAPTER 6E

Haw. Rev. Stat. § 6E-8 covers a governmental “project” that “may affect . . . a burial site.” Haw. Rev. Stat. § 6E-42 covers a non governmental “project” that requires a governmental approval. The statutes say that before a covered project commences or is approved, the involved governmental entity (in this case, the City) must allow SHPD to review the project.⁴ Specifically section 6E-8(a) says (in relevant part):

[The City] shall advise the department and allow the department an opportunity for review of the effect of the proposed project on . . . burial sites, consistent with section 6E-43, especially those listed in 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.

Section 6E-42(a) says (in relevant part):

[The City] shall advise the department and prior to approval allow the department an opportunity for review and comment on the effect of the proposed project on . . . burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places.

Regardless of any issues with phases or phasing, the requirements of these statutes have been met, in both letter and spirit. The City advised SHPD of the project. SHPD reviewed the project, commented, and worked with the City to ensure protection of historic property and burials.

⁴State defendants do not believe section 6E-42(a) is applicable, but the issue does not materially affect the analysis. Note, however, that section 6E-8(a) says that a project may not be commenced until SHPD “shall have given its written concurrence.” Section 6E-42(a) requires only that SHPD be given “an opportunity for review and comment.”

As stated in the declaration of Pua`alaokalani Ai, SHPD's administrator (R. 48 at 315 to 320), beginning in 2006, consultants for the Project prepared a series of extensive archaeological, historical and cultural technical reports related to historic properties. They provided to and consulted with SHPD as to the May 31, 2007, Historic and Archaeological Technical Report (incorporated into the City's Alternative Analysis Report); the August 15, 2008, Archaeological Resources Technical Report; and the August 15, 2008, Cultural Resources Technical Report incorporated by reference into the Project's DEIS and FEIS.

These reports provided extensive cultural, historical, and archaeological data that served as a basis for developing a plan for identifying historic properties that may be impacted by the Project, including archaeological and burial sites. They led to the PA which is SHPD's written concurrence to the phased construction approach, as required by statute and rule. R. 40 at 103.

The PA ensures that AISs will be developed and completed in consultation with SHPD and the OIBC for each phase of the Project before completion of design and commencement of ground-disturbing construction for each respective phase. No ground-disturbing activity will occur in any construction phase of the Project until an AIS has been performed. Section III of the PA provides that any burials discovered during an AIS will be treated as "previously identified" and subject to the jurisdiction of the OIBC, pursuant to HAR chapter 13-300. R. 48 at 315 to 320. Thus the City must develop a treatment plan to avoid, minimize, or mitigate adverse effects on any burial site. The PA confirms that if the OIBC requires preservation in place, the City will relocate or modify structural elements as needed. R. 40 at 114.

If (as happens no matter how thorough the preliminary study) burial sites are inadvertently discovered when ground disturbing construction starts, then all work in the vicinity must stop immediately and remain stopped pending adoption of a burial treatment plan. That

plan will be developed by SHPD in compliance with law and in consultation with interested groups and persons. Again the City is committed to relocate or modify structural elements as needed if the plan calls for preservation in place. R. 40 at 128-129.

Applicable rules recognize SHPD's discretion over decisions regarding the appropriate scope and approach of the historic review process for a given project. See HAR § 13-275-3, § 13-275-5, § 13-284-3, § 13-284-5. The rules expressly allow SHPD to concur with commencement of projects absent full completion of the review process, where appropriate interim protection plans are in place. See HAR § 13-275-3 ("In cases where interim protection plans are adequately in place or data recovery fieldwork has been adequately completed, a determination letter may be issued."). See also HAR § 13-284-3.⁵

Here, the PA is an interim protection plan under Chapter 6E. As noted above, the PA requires completion of AISs for each construction phase of the Project and mandates consultation with OIBC regarding the disposition of any burials discovered through that process prior to final design and commencement of any ground-disturbing activities in each phase. The PA expressly preserves all protections afforded historic properties, and burials in particular, under Chapter 6E and ensures that the full review process is complete for each phase before ground-disturbing work commences in each phase.

Ultimately, SHPD, acting to discharge its statutory and regulatory duties and based on interpretation of its own rules allowed the City to proceed with phase I of the rail project before completing the AISs for phases 2, 3, and 4. SHPD provided its required "written concurrence" in the form of the PA. R. 40 at 103 and R. 48 at 319. The PA ensures that later phases are fully

⁵A determination letter is defined as: "SHPD's written response which either concurs or does not concur with an agency's proposed project." HAR § 13-275-2.

studied long before any ground is broken for those later phases and long before any historic sights or burials could possibly be disturbed in any way.

Plaintiff filed this lawsuit, not because of any failure to comply with the statute or rules, but because she disagrees with SHPD. Simply put, plaintiff wishes SHPD had required AISs to be completed for all phases of the project before construction of any phase commenced. But nothing in the statute or rules requires that all AISs be completed first. It is therefore up to SHPD, in a thoughtful exercise of its discretion, to decide how best to protect burial sites in these circumstances. As noted above, SHPD's determination is entitled to considerable deference. The circuit court and this court are not reviewing SHPD's determination *ab initio*. SHPD's assessment in the application of its expertise and applying its own rules must be affirmed "unless it is plainly erroneous or inconsistent with the underlying legislative purpose." In re Doe Children, 105 Hawai'i 38, 53, 93 P.3d 1145, 1160 (2004) (citations omitted).

A recent case concerning chapter 6E is instructive. Hui Malama I Na Kupuna O Hawai'i Nei v. Wal-Mart, 122 Hawai'i 171, 223 P.3d 236 (Haw.App. 2009) involved the Wal-Mart project. Wal-Mart retained a consultant to prepare an archeological assessment of the property. This assessment did not suggest that the property contained any burial sites. The City's Department of Planning and Permitting did not advise SHPD or seek SHPD's review and comment before issuing necessary permits to Wal-Mart. This was because "DPP determined that the Property was not likely to affect historic property or burial sites." 223 P.3d at 240. The project nevertheless encountered 42 sets of human remains. All were classified as inadvertent discoveries.

Plaintiff sued Wal-Mart, the City, and SHPD, claiming the City violated Haw. Rev. Stat. § 6E-42. The court rejected this claim. Even though numerous remains were found once the

project started, the court found the City had properly determined section 6E-42 was not applicable:

The foregoing statute is plain and unambiguous. It does not require review and comment from SHPD on *all* proposed projects “involving a permit, license, certificate, land use change, subdivision, or other entitlement for use”—only those “which *may* affect historic property, aviation artifacts, or a burial site [.]” (Emphasis added.)

Id., 122 Hawai‘i at 171, 223 P.3d at 236

Importantly, the court also rejected plaintiffs’ invitation to engage in after the fact second guessing of the agency’s investigation of the project. It rejected plaintiffs’ argument that the City ought to have conducted a more thorough examination before concluding that section 6E-42 did not apply. Without articulating a standard for its decision, the court found the City’s review adequate.

The present case differs from Hui Malama but it nevertheless provides several important guideposts. First and most importantly, Hui Malama teaches that chapter 6E is to be enforced as written, not as plaintiff wishes it was written. Sections 6E-8 and 6E-42 require SHPD to review projects. Those sections do NOT require that all phases be studied by way of AISs before any construction begins.

The court in Hui Malama “decline[d] Plaintiffs’ invitation to enlarge the applicability and obligations of Haw. Rev. Stat. § 6E-42 beyond the express terms of the statute.” Id. The same ruling is appropriate here as to plaintiff’s invitation to rewrite sections 6E-8 and -42.

Second, here, as in Hui Malama, any iwi or historical sites will be fully protected regardless of how this lawsuit turns out.

We observe, moreover, that the legislature has enacted other statutes to protect native Hawaiian burial sites. For example, HRS

§ 6E-43.6 sets forth procedures that must be followed in the event of inadvertent discovery of burial sites, and HRS § 6E-11 (Supp.2008) provides civil and administrative violations for failure to comply with either HRS §§ 6E-42 or 6E-43.6.

Id.

In our case, AISs will be conducted on subsequent phases, including phase 4, long before construction commences in this area. Any burial sites discovered in the AIS will be treated as previously identified and subject to Haw. Rev. Stat. § 6E-43.5. R. 40 at 114.

If burial sites not identified in the AIS are discovered during the course of construction, then construction in the area will cease until the requirements of section 6E-43.6 are met. R. 40 at 128-129.

Third, Hui Malama reflects the respect that courts should afford the responsible agency's determination of how much and when study should occur.

To reiterate, State defendants and the City in our case faithfully complied with both the letter and spirit of chapter 6E and implementing regulations. The City referred the project to SHPD. SHPD reviewed it, and subject to strict conditions, provided its written concurrence. Plaintiff does not agree with SHPD's decision but her mere disagreement does not substantiate her appeal.

B. REVIEWING THE PROJECT IN PHASES DOES NOT VIOLATE HAW. REV. STAT. CHAPTER 6E

Plaintiff cannot and does not deny that AISs with respect to phases 2, 3, and 4 of the Project will occur long before any actual construction of those phases begins. Rather the crux of her argument is that the City is required – as a matter of law and no matter what the facts of a particular situation – to study the entire Project before any work commences.

The concept of segmentation is derived from the environmental process contemplated by

HEPA. 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 addresses 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, 306, 167 P.3d 292, 299 (2007) ("Superferry I").

The Supreme Court of Hawai'i has explained that pursuant to HEPA all component parts of a proposed action are to be evaluated in a single EIS document in order to prevent "applicants or agencies from escaping full environmental review by pursuing projects in a piecemeal fashion." Superferry I, 115 Hawai'i at 338, 167 P.3d at 33 (citing Office of Environmental Quality Control, State of Hawai'i, A Guidebook for the Hawaii State Environmental Review Process 6 (2004)). In other words, an agency is prevented from "segmenting" a project and omitting from the EIS document a discussion of all component or related parts of a project to be constructed. "Segmenting" occurs where a connected or component part of a larger or related project is intentionally left out of an EIS. For instance, if a proposed project is planned to be built in two phases, but the EIS document includes a discussion of only one of those two phases, then the EIS has improperly ignored or segmented the other phase from consideration. HEPA requires both phases be addressed in the same EIS.

The principal of "segmentation" is derived from and applies exclusively to the HEPA and NEPA statutes and regulations. There is no "anti-segmentation" counterpart in chapter 6E or its implementing regulations. Nor does Chapter 6E expressly require that archaeological studies for phased construction projects be fully completed for the whole project before SHPD can provide its concurrence for construction to proceed in phases in

which the studies are complete. Indeed, implementing regulations specifically contemplate that SHPD may issue its approval where “interim protection plans are adequately in place.” HAR § 13-275-3(a).

Because Chapter 6E is silent on the issue of segmentation, this court can look to federal law for guidance, under which phasing of archaeological studies for long corridor projects such as the Project is permitted in the federal historic review process under Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. § 470t) and its implementing regulations when accompanied by a programmatic agreement.

A phased approach to historic properties is recognized for federal highway projects or other lengthy corridor or large land area developments constructed over many miles and long lengths of time. See e.g. 36 CFR 800.4(b)(2). Phasing, and an agency's approval of a phased approach to the evaluation of historic property, is fully recognized and acceptable so long as adequate protections are in place. Therefore, the concept of phasing for historical review purposes during construction is not prohibited (unlike segmentation for EIS purposes) and cannot be shown to be unreasonable *per se* so long as adequate protections that preserve appropriate review and disposition are part of a programmatic agreement that preserves the *status quo* until the required review is performed.

Similarly, SHPD here recognized and accepted phasing as a reasonable concept for the Project's historic review process in accordance with the terms of the PA. All protections afforded by Chapter 6E are preserved through SHPD's written concurrence and approval of the phased approach in the PA. Unlike prohibitions against segmentation of projects for environmental review, there is no express prohibition against "phasing" of historic review at either the federal or the State level.

The policy considerations are entirely consistent. Under HEPA, the concern is to make sure that all parts of a proposed action or development are considered in a single EIS disclosure document. If some part of a project is not identified, it is subject to scrutiny under principles of segmentation to ensure all component parts of the project are addressed and disclosed. In contrast, Haw. Rev. Stat. chapter 6E's policy is to protect historic properties and burials before any harm can occur and to preserve consultation with SHPD and OIBC for disposition before any ground disturbing activity. The required process for protecting burials is fully in place here under the PA.

Plaintiff's concern relates solely to the timing of when AISs will be performed. Plaintiff improperly seeks to impose a restrictive requirement on phased approaches that is not supported by law and which is contrary to SHPD's authority as an agency to interpret and apply its own rules and regulations. Plaintiff's particular policy preference cannot be allowed to substitute for the agency's. Absent a clear showing that the agency's interpretation was unreasonable, arbitrary or capricious SHPD's decision must be upheld. See Price, 81 Hawaii at 182, 914 P. 2d at 1375 (citing Stop H-3 Ass 'n v. Lewis, 538 F. Supp. 149, 159 (D.Haw.1982)) ("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.").

IV. CONCLUSION

For these reasons and for the reasons stated in City defendants' answering brief, the circuit court's ruling should be affirmed.⁶

⁶State defendants adopt and rely on City defendants' answering brief in full, including City defendants' discussion of HEPA and HRCP 56(f) issues.

DATED: Honolulu, Hawai‘i, December 29, 2011.

/s/ William J. Wynhoff
Deputy Attorney General
Attorney for State defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served by the court on the following persons through electronic service on the date it was filed with the court:

Scott K. Bush
Don S. Kitaoka
David K. Frankel
Lindsay N. Mcaneeley
John P. Manuat
James C. Paige
Gary Y. Takeuchi
Robert Godbey Carson
Ashley K. Obrey

DATED: Honolulu, Hawai‘i, December 29, 2011.

/s/ William J. Wynchoff
Deputy Attorney General
Attorney for State defendants