



STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813

July 8, 2008

HRD08-3732

Laura H. Thielen
Chairperson
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii'i 96813

Re: Request for Issuance of Cease and Desist Order, Single-Family Residence, Lot 6, Wainiha Subdivision, S-84-58, TMK: (4) 5-8-09:45

Aloha nō Chairperson Thielen:

The Office of Hawaiian Affairs (OHA) looks forward to continuing our working relationship with the Department of Land and Natural Resources (department) on a multitude of important issues impacting both our agencies, on behalf of OHA's beneficiaries as well as all of the beneficiaries of the public trust.

By this letter, OHA is formally requesting that your department issue a Cease and Desist Order against ongoing ground disturbing work on the aforementioned parcel owned by Joseph Brescia per Hawaii Revised Statutes (HRS) Section 6E-13, which allows the Attorney General to bring an action "for restraining order, and injunction relief to restrain and enjoin violations or threatened violations of this chapter."

Please note that Section 6E-13(b), HRS, states that an individual may also file for a restraining order or injunctive relief against the State "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."

Our request is based upon the high likelihood of irreparable harm to ancestral Native Hawaiian remains due to a lack of adequate identification of human burials and proper mitigation of known sites. It is also based upon information that construction crews have mobilized on the subject property to begin earth disturbing activities. (See, Honolulu Star-Bulletin, mobile edition, Vol. 13, Issue 190. July 8, 2008, "Home work starts atop graves," Tom Finnegan) We understand that

some activity already occurred yesterday. OHA maintains that it is improper to construct a dwelling on top of a known concentration of at least 30 ancestral Native Hawaiian remains, constituting a cemetery.

Please see Section 6E-41, HRS, which provides several requirements for the removal of a cemetery, and Section 6E-43, HRS, which lays out detailed procedures for prehistoric and historic burial sites, and Section 6E-43.6 with regards to inadvertent discoveries. OHA is not convinced that any of these procedures were followed to the letter or the intent of the law, as explained below.

OHA is obligated to work towards the betterment of native Hawaiians and Hawaiians, and to serve the needs and interests of a wide and diverse beneficiary group. OHA must also ensure that other agencies, on the State and County levels, uphold their constitutionally, statutorily and judicially mandated obligations to the native Hawaiian and Hawaiian people.

Section 10-3(4), HRS, states that a core purpose of OHA shall be:

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians.

Section 10-1(b) states that:

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs. [L 1979, c 196, pt of Section 2]

In light of these statutory provisions, OHA takes guidance from Article XII, Section 7, of the Constitution of the State of Hawai'i which reads:

TRADITIONAL AND CUSTOMARY RIGHTS, Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

With these responsibilities in mind, OHA writes to you on behalf of our beneficiaries concerning the application of Chapter 6E, Hawaii Revised Statutes (HRS) and Chapter 13-300, Hawaii Administrative Rules (HAR).

Improper Identification of Unmarked Burial Sites

OHA staff in our Native Rights, Land and Culture (NRLC) division have reviewed available minutes of the Kaua'i Planning Commission and Kaua'i/Ni'ihau Islands Burial Council as well as relevant burial treatment and preservation plans.

Staff with experience with Chapter 6E, HRS and Chapter 13-300, HAR, have serious concerns regarding apparent misrepresentations of the law and rules before both the Kaua'i Planning Commission and the Kaua'i/Ni'ihau Islands Burial Council by attorneys, archaeologists, and SHPD staff, as reflected in the various minutes.

For example, according to the official minutes of the December 11, 2007, Kaua'i Planning Commission, the following exchange took place:

Ms. McMahan: Now the Attorney General, and I asked this question, again the burial council can say leave in place or remove, leave in place or remove, that's it. That is their prevue (sic) under the law....if the owner comes back and says I cannot save this one, legally, by law we could try to come up with some kind of proposal and it might have to be that he would have to build on top of it....but if the council did say that we would have to put some kind of thing and there is nothing in the law that says he cannot build on top.

Ms. Kato-Klutke: So the law does not protect those that are buried in that area, the owner has ultimate...

Ms. McMahan: The law will protect them to leave them in place but what happens around, on top and all that are recommendations with us.

Ms. Kato-Klutke: So basically looking at for instance Mr. Brescia's property that they have found so many already, knowing from your experience here, do you see that there will many more being excavated or found on this property?

Ms. McMahan: I would guess we might find a few more.

OHA maintains that not only does the department have the authority to prevent the unauthorized disturbance to unmarked burial sites but the public trust duty to identify and protect these resources. Further in the same minutes, the following exchange takes place:

Mr. Raco: And I just want to confirm that it's a State position not to do an overall site...

Ms. McMahan: Excavation?

Mr. Raco: Excavation, right?

Ms. McMahon: We have never done that, ever.

OHA maintains that there are numerous instances when larger burial areas have been wholly excavated to determine the number and extent of individuals and such a statement was unduly relied upon by the Planning Commission members in their important deliberations.

In fact, in a July 8, 2008 Cultural Impact Assessment of a Coastal Lot, TMK: (4) 5-9-05:029, at Hā'ena, Halele'a, Kaua'i, by Thomas S. Dye, Ph.D., a former O'ahu Island Archaeologist of the State Historic Preservation Division, Dr. Dye states:

Human burial remains are numerous in the sandy coastal soils of Hā'ena Point. In general, archaeological inventory survey techniques employed to date have been unsuccessful in locating or predicting the locations of burial sites at Hā'ena Point.

Dr. Dye goes on further to say:

An alternative technique that has been used successfully to identify burial sites elsewhere in the islands maximizes horizontal exposure by scraping the surface. The goal of this technique is to expose the tops of possible grave shafts, which can be identified by the mixed sediment used to fill them, without exposing human remains.

Again, OHA maintains that this technique has been utilized to mass excavate large areas to determine the presence or absence of human burial sites. In looking further at the minutes of the same subject Kaua'i Planning Commission meeting, the landowner's attorney also makes erroneous representations as in the following statements:

Mr. Walton Hong: Our position is backed up by Ms. McMahon's testimony earlier today. In fact it is only logical and reasonable that you first approve the house location and design before we begin survey excavation for the foundation areas not previously tested.

Mr. Hong later adds:

Mr. Walton Hong: Aside from the liability potential and as Nancy has just stated, we are not aware of any situation where a landowner was required to do subsurface testing in areas where the ground is planned to be left undisturbed.

A little later in the minutes, Mr. Hong states:

Mr. Walton Hong: Ms. McMahon made a remark earlier today which really struck home and I think it's very important to again note. The Burial Council's jurisdiction lies following, was part of the inventory survey. Once the Burial Council has acted, they lose jurisdiction. Any additional findings are inadvertent discoveries and it only goes to SHPD. The Burial Council no longer has any jurisdiction or any say over it. If we do not have an approved site plan to work off and we just do random samplings and later on the site plan is approved and we start digging the trenches where the foundations are really going and find additional burials, the Burial Council cannot have any say whatsoever on it.

OHA maintains that this is a misrepresentation of both the law and practice. There are many cases, often involving large numbers of burial sites and complex cases where the island burial councils have weighed in on treatment and disposition of inadvertent discoveries leading to determinations by the department. Such that these statements were made before the Planning Commission and not corrected by department staff is of serious concern.

Furthermore, and of great concern to OHA, are the minutes of the February 7, 2008 meeting of the Kaua'i/Ni'ihau Islands Burial Council where the following statement was made:

Vega (sic) addressed the concerns brought up. Vegas (sic) referred to objections of building the house and commented that Council knows that is not within their purview to object to building the house but to determine approval or rejection of the BTP itself and the preservation or relocation of the iwi.

Section 6E-43.5(f)(3), HRS, relating to the duties of the island burial councils, specifically states that the councils shall:

Make recommendations regarding appropriate management, treatment, and protection of native Hawaiian burial sites, and on any other matters relating to native Hawaiian burial sites;

Clearly the recommendations of the island burial council to the department could include whether a house should be built over a Native Hawaiian cemetery. The fact that the developer's archaeological consultant is giving advice to the island burial council on their duties is extremely troubling to the extent the council relied upon this erroneous advice.

Futher down in these same meeting minutes, the department representative, Ms. McMahon notes that "all the land in the sandy shoreline areas are all burial areas" and further recollects the highest concentration in the area being the "Anna Walls" property at Hā'ena Point where 48 burials were found during "monitoring." This would seem to support Dr. Dye's point about inventory survey being inadequate at identifying burials in the area.

This obfuscation of the process appears to have severely undermined the purposes of the historic preservation review process and intent of the Hawai'i State Legislature in enacting the burial protection statutes. For example, one of the legislative purposes in establishing the historic preservation program was to "[c]oordinat[e] the evaluation and management of burial sites." (Section 6E-3(10), HRS.) This cannot possibly include the construction of a single-family dwelling upon a sacred site of Native Hawaiian burials.

The department has a constitutional and statutory duty to properly identify unmarked burial sites under the department's jurisdiction for their proper care, management and protection.

Notwithstanding the procedures outlined in Chapter 6E, HRS, Chapter 13-300, HAR and the strong Constitutional mandates and statutory obligations set forth to recognize the duties of the State of Hawai'i and its sub-agencies to protect the traditional and customary rights of native Hawaiians and Hawaiians, the Hawaii Supreme Court has set forth judicial guidance and interpretation in this regard as well.

OHA would submit that in *Ka Pa'akai o Ka 'Āina vs. Land Use Commission*, the Hawai'i Supreme Court again noted, as in previous decisions, that it was clear that the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians, to the extent feasible.

Furthermore, the court also set forth an analytical framework, in that instance for the LUC to adhere to, but in the spirit and intent of the law, a framework that all State and County entities should follow, which is espoused as follows. The proper analysis of cultural impacts should include:

1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources -- including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the (agency) to reasonably protect native Hawaiian rights if they are found to exist.

The department, its Historic Preservation Division, and Island Burial Councils, as agencies of the State of Hawai'i, hold an affirmative duty to follow this framework prior to rendering the various approvals which allow land alteration activities to proceed such as in the Brescia case. The proper identification of unmarked burials at risk of irreparable harm on this property and the right of our Hawaiian beneficiaries to mālama the iwi of their kūpuna are traditional and customary practices protected by the Constitution of the State of Hawai'i.

We look forward to your immediate intervention in this serious and sensitive matter. If you would like further clarification on our concerns or if OHA can be of any assistance in this matter,

Laura H. Thielen, Chairperson
Department of Land and Natural Resources
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please do not hesitate to contact Kai Markell, Director of our Native Rights, Land and Culture Hale, Office of Hawaiian Affairs at 594-1945 or kaim@oha.org via email.

‘O wau iho nō,

A handwritten signature in black ink, appearing to read "Clyde W. Nāmu'o". The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Clyde W. Nāmu‘o
Administrator

- c. Trustee Donald Cataluna, Island of Kaua‘i
Kaliko Santos, CRC, Island of Kaua‘i
Kaua‘i/Ni‘ihau Islands Burial Council