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GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

January 13, 2011

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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

SUBJECT: Enforcement Action against Hawaii Intergenerational Community Development Association and Halealii Homes for excavating a historic property within the designated buffer zone in Maunalua Ahupua'a, Oahu

SUMMARY: This submittal requests the Board find that Hawaii Intergenerational Community Development Association and Halealii Homes violated Hawaii Revised Statutes §6E-11(c) by excavating a historic property within the designated buffer zone area, as defined by Hawaii Administrative Rules §13-277-4, and within the interim protective measures, as defined by Hawaii Administrative Rules §13-277-5, during the course of land alteration activities, and requests the Board assess an administrative fine pursuant to Hawaii Revised Statutes §6E-11(f) and Hawaii Administrative Rules §13-277-8.

DATES OF INCIDENT: On or about June 9, 2009

AGAINST: Hawaii Intergenerational Community Development Association
Tom Baty, Chairman of the Board
Mike Klein, President
1154 Fort Street Mall, Suite 412
Honolulu, Hawaii 96813

AND

Halealii Homes, LLC
Joseph C. Brown, Manager
Mike Klein, Manager
Lawrence Pring, Manager
1154 Fort Street Mall, Suite 405
Honolulu, Hawaii 96813

ITEM I-1

I. INTRODUCTION

In the month of June 2009, private historic property located at TMK (1) 3-9-008:039 (“property”) in Maunaloa Ahupua`a, Honolulu District, island of Oahu, State of Hawaii, was excavated, injured, and altered during the course of land development or land alteration activities. See Exhibit A. These activities were made within the designated buffer zone of the historic property without obtaining the required City and County of Honolulu grading and grubbing permits. As such, the project was not reviewed pursuant to Hawaii Revised Statutes (“HRS”) §6E-42 and its implementing regulations. See Exhibit B. This constitutes a civil and administrative violation under HRS §6E-11(c) and subjects the property owner and the contractor conducting the activities to civil and administrative penalties under HRS §6E-11(f). See Exhibit C.

The property owner of the subject historic property on the date of the incident was Hawaii Intergenerational Community Development Association. See Exhibit D. The Department of Commerce and Consumer Affairs (“DCCA”) Business Registration Division (“BREG”) records list Tom Baty as the Chairman of the Board, and Mike Klein as the President. Id. Halealii Homes, LLC was the contractor who performed the illegal excavation of the historic property within the buffer zone. See Exhibit E. DCCA BREG records list Joseph C. Brown, Mike Klein, and Lawrence Pring, as managers of the corporation. Id.

According to the City and County of Honolulu, State of Hawaii, Department of Planning and Permitting Office, the current owner of the historic property is Hale Ali`i Park Association LLC. See Exhibit F. The DCCA BREG records show that the managing member of Hale Ali`i Park Association LLC is Hanwha America Development LLC. See Exhibit G. The Hale Ali`i at Hawaii Kai website, <http://www.halealiihawaiikai.com/> lists the current developer of the historic property is Hale Ali`i Development Group, LLC, the contractor as Hanwha Engineering and Construction, and the Project Manager is Brett Hill Management. See Exhibits H, I, and J.

On April 19, 2010, Department of Land and Natural Resources (“DLNR”) State Historic Preservation Division (“SHPD”) Administrator Pua Aiu and Deputy Attorney General (“DAG”) Rowena Somerville met with Dawn Chang of Ku`iwalu. Ku`iwalu was hired by Hale Ali`i to represent their interests in the pending violations. Ms. Chang requested that SHPD Administrator Aiu allow Ku`iwalu and Hale Ali`i a few months to consult with the community and Native Hawaiian organizations before bringing any action against them before the Board of Land and Natural Resources. (“BLNR”). The DLNR agreed to refrain from bringing forth any action while the consultation was pending.

II. FACTUAL BACKGROUND

A. Historic Property Review Process

In anticipation of unspecified land development and land alteration activities, land owner Hawaii Intergenerational Community Development Association’s agent, Michael M. Klein, contracted with Archaeological Consultants of the Pacific, Inc. (“ACP”) to conduct archaeological surveys of the property. Mr. Klein requested ACP to conduct the surveys on behalf of the construction firm, Hale Alii Group. The property is zoned P-2, a general preservation district, by the City and County of Honolulu, State of Hawaii. See Exhibit K.

Archaeological Inventory Survey:

On February 10, 2009, James Moore, Senior Supervisor of ACP, submitted an Archaeological Inventory Survey ("AIS") to SHPD. In response to the AIS submittal, Nancy McMahon, Deputy State Historic Preservation Officer ("Deputy SHPO"), wrote a letter dated February 25, 2009 to ACP asking, "Why was this work [AIS] being done? Do the owners plan to build on it? If you know, please include in the Introduction Section." ACP responded to SHPD in a letter dated March 30, 2009, "ACP does not question our clients' proposed development plans. Being one of the last undeveloped parcels in that area of Hawaii Kai, it is likely that there may be several alternative proposals for this properties' development, however, ACP is not privy to the details of future utilization." The AIS then stated on page 1 of the Introduction:

The purpose of this archaeological investigation was to perform the tasks and meet the requirements specified by the State of Hawaii, Department of Land and Natural Resources, State Historic Preservation Division (DLNR-SHPD). These investigations would allow for the identification of potential historic resources located on the property as well as an evaluation of their significance including their eligibility for inclusion in the National Register of Historic Places. These investigations also allow for the making of recommendations concerning the mitigation of the impact of future construction activities upon potentially significant historic resources.

The AIS noted that ACP's investigations documented the presence of the remains of two sites of significance to the interests of historic preservation on the property.

Site 43 consists of the remains of a habitation site which is believed to have been occupied in the pre-Contact to post-Contact periods. This site qualifies to be considered significant under Criterion D (site has yielded, or is likely to yield, information important in prehistory or history) of the National Register of Historic Places criteria (refer to Table 2¹). Because sufficient information has been recovered during prior investigation as well as the current investigations, no further archaeological work is recommended for this site. (AIS page 63).

Site 2900 consists of an agricultural/habitation complex including disturbed terracing, a small U-shaped enclosure, a stone wall, a modified outcrop and a petroglyph field. This site is believed to represent the remnants of a site complex minimally utilized for agricultural and habitational purposes in the pre-Contact to early post-Contact periods. The site qualifies to be considered significant under Criteria C (site embodies the distinctive characteristics of a type, period, or method of construction; or is the work of a master; or possess high artistic values; or represents a significant distinguishable entity) and D (site has yielded, or is likely to yield, information important in prehistory or history) of the National Register of Historic Places criteria as well as Criterion E (Site has Cultural Significance [*heiau*, shrine, burial, etc.]) of the Hawaii Register of Significant Places (refer to Table 2²). Because Site 2900 still retains cultural significance as well as

¹ Table 2: Summary of Significance Criteria Evaluations: Site 43 Description. Habitat Complex: 1) Dirt & crushed coral roadway; 2) Mortared stone well; 3) Stone ringed tree; 4) Upright stone; and 5) Cobble paving. Recommended Treatment: NFW (No Further Work).

² Table 2: Summary of Significance Criteria Evaluations: Site 2900 Description. Agricultural/Habitation Complex: 1A-E) Remnant terracing & Stone wall; 2A-D) Petroglyphs; 3) Terrace; 4) U-Shaped enclosure; and 5) Modified Outcrop. Recommended Treatment: M (Mitigation).

the potential to yield information important to the interests of historic preservation, it is recommended that measures be taken to help mitigate any potential adverse effect of proposed development in the form of preservation of portions of the site and data recovery of other areas of the site. (AIS page 63).

The AIS concluded that sufficient information had been recovered during the investigation of Site 43, and that no further archaeological work was necessary. The AIS also concluded that Site 2900, "retains cultural significance as well as the potential to yield information important to the interests of historic preservation." (AIS page 65). Therefore it was recommended that measures be taken to help mitigate any potential adverse effect of development of the property on Site 2900. Proposed mitigation measures included further data collection, detailing of data recovery in a separate Archaeological Data Recovery Plan, and preservation of the culturally significant petroglyphs as detailed in a separate Archaeological Preservation Plan.

On April 19, 2009, SHPD wrote a letter to ACP accepting the final AIS. The final AIS incorporated SHPD's previously recommended revisions.

Archaeological Data Recovery Plan:

On April 23, 2009, ACP submitted the draft Archaeological Data Recovery Plan (DDRP) for the property to SHPD for its review. SHPD recommended, in a letter dated May 11, 2009, that a preservation plan be instituted to mitigate the effect that proposed development would have on the historic property.

Archaeological Preservation Plan:

On April 27, 2009, ACP submitted the draft Archaeological Preservation Plan (DPP) for the property to SHPD for its review. ACP presented two preservation options for long term preservation of Site 2900. On May 11, 2009, SHPD sent a letter to ACP accepting the DPP and concurring with proposed "Option 2," to preserve the petroglyphs in place. Option 2 proposed:

The building of a 1.0 to 1.5 meters high rock wall at the buffer line of 3 meters from the edge of Site 2900, along with re-landscaping in indigenous and endemic plants both within and outside the wall. Interim measures during construction would be a 10 meter buffer zone protected by a construction fence. The permanent protective measures would be the construction of the wall, which will be constructed in such a way to allow Native Hawaiian cultural practices to take place at Site 2900. These actions mitigate any effects to this historic property.

SHPD preferred Option 2 because it offered preserving the petroglyphs in place.

B. Investigation of Violation

On June 9, 2009, SHPD began receiving calls about illegal grubbing and grading on the historic property. The Department of Planning and Permitting, City and County of Honolulu, had not issued a permit allowing such activities on the property, and there was no permit application pending.

On June 11, 2009, SHPD Administrator Aiu, visited the property and noted that grading and grubbing had occurred on the site, inside the pre-approved buffer zone and the interim protective measures (the orange construction fencing) marking the Site 2900 preservation area. The rock terrace had been partially demolished, tree branches and grubbed material had been pushed around one of the petroglyphs, and several large rocks had been removed. Much of the damage occurred inside of the construction buffer zones and interim protective measure markers.

On June 19, DLNR Division of Conservation and Resources Enforcement ("DOCARE") Officer Gerard Villalobos met SHPD Administrator Aiu and DAG Randall Ishikawa at the property to investigate the violation. SHPD Administrator Aiu pointed out the damage to the stone wall bordering the construction fence, tree branches that had been broken off, and scars on the rocks, possibly caused by bulldozer track. Officer Villalobos took photos of the violation and filed DOCARE report number 09-3024-oa. See Exhibit L.

On September 23, 2009, Deputy State Historic Preservation Officer McMahon and DAG Somerville visited the property to assess the extent of the desecration of the Site 2900 preservation area. The illegal work had stopped; however, the orange construction fencing marking the Site 2900 preservation area had been removed. According to McMahon, some of the grubbed material had been removed, but a considerable amount remained within the Site 2900 preservation area. McMahon also pointed out recent scarring to the rocks within the site that were presumably caused by heavy equipment used to perform the grading and grubbing activities.

C. Notice of Violation

On June 26, 2009, the City and County of Honolulu issued Notice of Violation 2009/NOV-06-126 ("NOV") to the property owner, Hawaii Intergenerational Community Development Association, care of Mike Klein, and to the Contractor, Halealii Homes, LLC, care of Mike Klein. See Exhibit M. In the NOV, the Department of Planning and Permitting Inspector, Joseph Correia, found a violation of Revised Ordinances of Honolulu (ROH 1990, as amended, Chapter 14, §14-14.1(b)), grubbing without a permit. See Exhibit N. Inspector Correia determined that the violation involved approximately 22,981 square feet on the property. The NOV ordered that the illegal work be stopped immediately, that immediate measures to stabilize the site be taken, and that a permit be obtained and/or violations corrected by July 27, 2009. See Exhibit O No permit was obtained.

On August 20, 2009, the Department of Planning and Permitting, City and County of Honolulu, issued a Notice of Order to the owner and contractor because the NOV had not been corrected. See Exhibit O. They were ordered to: 1) Pay a fine of \$50 by September 21, 2009; and 2) Correct the violation by September 21, 2009. If the corrective action was not taken by

that date, a daily fine of \$25 would be assessed until the corrective action was completed. Id. The Notice of Order became final on September 21, 2009.

III. LEGAL AUTHORITY FOR ENFORCEMENT

A. Violation of HRS §6E-11

On or about June 9, 2009, the property owner and contractor engaged in land development and land alteration activities to which HRS §6E-42 applied in that their activities required, at the very least, approval by the Department of Planning and Permitting of a grading and grubbing permit, as their project clearly would affect site 2900, a known and admitted historic property. The property owner and contractor specifically excavated and altered an historic property, namely site 2900, during the course of their land development and land alteration activities without the required permit.

HRS §6E-11(c) provides:

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

See Exhibit C. The property owner and contractor therefore violated HRS §6E-11(c).

B. Administrative Penalties for Violation of HRS §6E-11(c)

As previously stated, the property owner, through its contractor, conducted land alteration activities that excavated, injured, and altered a known historic property without obtaining the required Agency approval. This action constitutes a violation of HRS §6E-11(c). Id.

Any person who violates HRS §6E-11(c) shall be fined not more than \$10,000 for each separate violation, pursuant to HRS §6E-11(f). Id. Additionally, if the violator directly or indirectly has caused the loss of, or damage to, any historic property, the violator shall be fined an additional amount determined by the court or an administrative adjudicative authority to be equivalent to the value of the lost or damaged historic property or burial site. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property, or for the transportation of the violator to or from the historic property or burial site, shall be subject to seizure and disposition by the State without compensation to its owner or owners. The civil and administrative penalties imposed pursuant to HRS chapter 6E shall be in addition to the criminal penalties provided by this chapter and any other penalties that may be imposed by law, pursuant to HRS §6E-11(i). Id.

C. Violation of HAR §§13-277-4 and 13-277-5

The property owner or contractor excavated within the buffer zone and disregarded the interim measures that SHPD accepted in the draft Archaeological Preservation Plan ("DPP"). On May 11, 2009, SHPD accepted the DPP submitted by ACP and concurred that:

The building of a 1.0 to 1.5 meters high rock wall at the buffer line of 3 meters from the edge of Site 2900, along with re-landscaping in indigenous and endemic plants both within and outside the wall. Interim measures during construction would be a 10 meter buffer zone protected by a construction fence. The permanent protective measures would be the construction of the wall, which will be constructed in such a way to allow Native Hawaiian cultural practices to take place at Site 2900. These actions mitigate any effects to this historic property.

HAR §13-277-4(a) describes that, "Buffer zones shall ensure that the integrity and context of the historic property is preserved, in many cases including the visual integrity." See Exhibit P. Once approved, HAR §13-277-4(d) provides that the "buffer zones shall be marked on overall project maps, and physical markers shall be placed in the ground delineating the buffers." Id. The 10 meter buffer zone was disregarded as evidenced by the scarring of the rocks and the piles of removed grubbing materials within Site 2900. By conducting activity within the buffer zone, the property owner and contractor violated HAR §13-277-4. Id.

HAR §13-277-5 describes that "Interim protection measures shall protect the significant historic property and its buffer zone during construction activities. Interim measures may include, "erecting barriers (such as plastic fencing) along the buffer zone." See Exhibit Q. The interim protective measure was disregarded as evidenced by the grading and grubbing within the Site 2900 protection area buffer zone and the eventual removal of the construction fencing.

D. Administrative Penalties for Violation of HAR §§13-277-4 and 13-277-5

By conducting grading and grubbing activity within the pre-approved buffer zone and interim protective measures set forth in the DDP, the property owner and contractor violated HAR §§13-277-4 and 13-277-5, respectively. See Exhibits P and Q. These violations subject the property owner and contractor to the penalty provisions set forth in HAR §13-277-8. See Exhibit R. The penalties,

May result in a directive to the person not to proceed with construction in the project area, a denial or revocation of SHPD's written concurrence or agreement, and penalties as provided in section 6E-11, chapters 13-275³, 13-278, 13-281⁴, 13-282⁵, 13-284, HAR, and applicable laws.

Id. The penalty provision for violating the archaeological data recovery process, is set forth in HAR §13-278-6 and states,

³ "Rules Governing Procedures for Historic Preservation Review for Governmental Projects Covered Under Section 6E-7 and 6E-8, HRS." This chapter is inapplicable in this case.

⁴ "Rules Governing Professional Qualifications." This chapter is inapplicable in this case.

⁵ "Rules Governing Permits for Archaeological Work." This chapter is inapplicable in this case.

Non-compliance with the provisions and procedures established by this chapter may result in a directive to the person not to proceed with construction in the project area, a denial or revocation of SHPD's written concurrence or agreement, and penalties as provided in section 6E-11, HRS, and applicable laws.

See Exhibit S. Similarly, the penalty provision for violating the rules governing the historic preservation review process of HRS §6E-42, is set forth in HAR §13-284-13, and states,

Failure to obtain the written comments of the SHPD in accordance with this chapter shall result in a SHPD comment to the agency not to proceed with the project.

See Exhibits B and T. Lastly, the penalties for HRS §6E-11 state,

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

IV. ANALYSIS

HAR Chapter 13-284, "Rules Governing Procedures for Historic Preservation Review to Comment on Section 6E-42, HRS, Projects," outlines the review process contemplated by HRS §6E-42. See Exhibit B. The purpose of the chapter is to afford DLNR an opportunity to comment on any such permit or approval to ensure that the historic preservation review policy of HRS Chapter 6E, to preserve, restore and maintain historic properties for future generations, is followed. The primary participants in the review process are the DLNR, represented by the SHPD, the governmental permitting agency ("Agency") with jurisdiction over the project, and the person proposing the project. The Agency, as stated in HAR §13-284-2(c)(1), in this case the City and County of Honolulu Department of Planning and Permitting, has the responsibility for initiating the review process. See Exhibit U.

While HAR §13-284-2(c)(1) states that the Agency initiates the review process once a permit application is received, it is common practice for applicants to request SHPD's approval of the historic preservation review documents first. Id. This is done in an effort to streamline the timing of the Agency permitting process. In these situations, the applicant submits all of the review documents and specific plans for the proposed project directly to SHPD. This allows SHPD to review the historic preservation documents in conjunction with the plans to determine the potential impact the project will have on the property and the mitigation that will be necessary to protect historic sites. Then when the appropriate Agency permit is applied for, SHPD's review time is significantly reduced.

In this case, the property owner and contractor had ACP submit the historic preservation review documents directly to SHPD for their approval. However, the documents submitted to SHPD failed to indicate the specific use of the property or the proposed project. The reports were prepared in anticipation of unspecified future construction; therefore, SHPD was unable to make an informed approval on the potential impact the project would have and was unable to address the specific mitigation measures necessary to protect Site 2900. However, SHPD's "acceptance" of the DDRP and DPP incorrectly stated, "This report is accepted and it meets the minimum requirements for compliance with [HRS] 6E-42 and Hawaii Administrative Rules

(HAR) 13-13-278 (*sic.*) *Rules Governing Standards for Archaeological Data Recovery Studies and Reports.*” Irrespective of SHPD’s error, the property owner and contractor never applied for the required permit from the Agency prior to their grading and grubbing activities.

Had the property owner and contractor properly applied for a permit with the Agency, the historic preservation review process set forth in HRS §6E-42(a) and HAR Chapter 13-284 would have been triggered. Plans for the proposed project would have been submitted, and SHPD would have provided informed meaningful comments. Similarly, had the property owner and contractor provided SHPD with the specific plans for the proposed project, SHPD would have had an opportunity to comment on the actual proposed project to make sure that the historic property would be preserved or maintained and to execute a detailed mitigation plan. Additionally, interested persons, including organizations and individuals concerned with the effect on the historic property, would have been consulted by the Agency. Thus, while the property owner and contractor purported to undertake certain actions required by HRS §6E-42 and its implementing regulations, by evading the permitting process and the complete historic preservation review process that is part of the permitting process, the property owner and contractor violated HRS §6E-11. See Exhibits B and C.

Identification and Inventory of Historic Properties:

The procedure for Step 1, identification and inventory of historic properties, is outlined in HAR §13-284-5. See Exhibit V. In order to ensure the presence or absence of historic properties, the Agency shall first consult with SHPD to determine if the project needs to undergo an inventory survey. If SHPD concludes that an inventory survey needs to be completed, the survey shall identify all historic properties and gather enough information to evaluate the properties’ significance. SHPD has thirty days to supply the Agency a written response. The requirements of the AIS are further outlined in HAR Chapter 13-276.

In this case, the property owner and contractor had ACP submit the AIS directly to SHPD for review on February 9, 2009, not through the Agency review process. The AIS noted two historic properties, Sites 43 and 2900, located on the property. HAR §13-276-5(g) states that the AIS “shall contain information on the consultation process with individuals knowledgeable about the project area’s history, if discussion with the SHPD, background research or public input indicate a need to consult with knowledgeable individuals.” See Exhibit W. The AIS did not include any information regarding a consultation process. Although SHPD subsequently “accepted” the AIS on April 19, 2009, it was not accepted in response to an Agency’s request in conjunction with a specific project. SHPD did not provide comments to the Agency. Thus, the AIS “approval” could not constitute compliance with HRS §6E-42 or its implementing rules.

Evaluation of Significance:

The procedure for Step 2, evaluation of significance, is outlined in HAR §§13-284-6 and 13-276-7. See Exhibits X and Y. Once a historic property is identified, an assessment of significance is conducted. The Agency shall make this initial assessment or delegate this assessment, in writing, to SHPD, and the information shall be included in the AIS if historic properties are present.

To be significant, a historic property shall possess integrity of location, design, setting, materials, workmanship, feeling, and association, and shall meet one or more of the five criteria

set forth in HAR §13-284-6(b)(1-5). *Id.* As previously stated, Site 43 met Criterion “d,” HAR §13-284-6(b)(4). *Id.* Site 2900 met three criteria, Criteria “c,” “d,” and “e,” HAR §13-284-6(b)(3), (b)(4), and (b)(5), respectively.⁶ *Id.* The property owner and contractor did not apply for an Agency permit; therefore, no effect determination could be made.

Effect (Impact) Determination:

The procedure for Step 3, effect determination, is outlined in HAR §13-284-7. *See* Exhibit Z. The effects or impacts of a project on significant properties shall be determined by the Agency. Effects include direct as well as indirect impacts, such as partial or total destruction or alteration of the historic property, detrimental alteration to the property’s surrounding environment, detrimental visual, spatial, noise or atmospheric impingement, increasing access with the chances of resulting damage, and neglect resulting in deterioration or destruction. Effect determinations shall be submitted to the SHPD for review. Pursuant to HAR §13-284-7(c), the determinations shall include a map showing the location of the project and a general discussion of the project’s scope of work, so the nature of possible effects can be understood. *Id.*

The AIS did not contain a general discussion of the project’s scope of work. The only reference to construction activities was contained on page 1 of the Introduction, and stated, “These investigations also allow for the making of recommendations concerning the mitigation of the impact of *future construction activities* upon potentially significant historic resources.” (Emphasis added.) This statement provides inadequate information to enable SHPD to determine the possible effects or impacts to the historic property. ACP admitted that they were not privy to the details of the future utilization of the property. SHPD could not make an informed decision of the effect determination without the specific scope of the construction project. Lastly, the property owner and contractor did not apply for an Agency permit; therefore, no effect determination could be made.

Mitigation:

The procedure for Step 4, mitigation, is outlined in HAR §13-284-8. *See* Exhibit AA. If a project will have an effect or impact on a significant historic property, then a mitigation commitment proposing the form of mitigation to be undertaken for each historic property shall be submitted by the Agency to the SHPD for review and approval. Mitigation may occur in five forms: 1) Preservation; 2) Architectural recordation; 3) Archaeological data recovery; 4) Historical data recovery; and 5) Ethnographic documentation. After mitigation commitments are accepted, the Agency shall provide detailed plans for the mitigation work to the SHPD for review and approval. *Id.*

On April 23, 2009, the property owner and contractor had ACP submit a draft Archaeological Data Recovery Plan (“DDRP”) to SHPD for review. The DDRP was submitted as a form of mitigation. DDRPs must comply with the requirements listed in HAR Chapter 13-278, “Rules Governing Standards for Archaeological Data Recovery Studies and Reports.” The

⁶ Criterion “c” (site embodies the distinctive characteristics of a type, period, or method of construction; or is the work of a master; or possess high artistic values; or represents a significant distinguishable entity).
Criterion “d” (site has yielded, or is likely to yield, information important in prehistory or history) of the National Register of Historic Places.
Criterion “e” (Site has Cultural Significance [*heiau*, shrine, burial, etc.]) of the Hawaii Register of Significant Places.

policy and purpose of this chapter is to establish “uniform standards for archaeological data recovery studies and reports, to ensure the overall quality of mitigation measures and *to better protect the public’s interest.*” (Emphasis added.) SHPD recommended, in its letter dated May 11, 2009, that ACP submit a preservation plan to mitigate the effect of the proposed development on the historic property.

The property owner and contractor did not apply for an Agency permit pursuant to HRS §6E-42. See Exhibit B. Unfortunately, in its letter dated May 11, 2009, SHPD incorrectly stated in a letter to ACP, “This report is accepted and it meets the minimum requirements for compliance with [HRS] 6E-42 and Hawaii Administrative Rules (HAR) §13-13-278 (sic.) *Rules Governing Standards for Archaeological Data Recovery Studies and Reports.*”

Archaeological Preservation Plan: On April 27, 2009, ACP submitted the draft Archaeological Preservation Plan (DPP) for the property to SHPD for its review. On May 11, 2009, SHPD sent a letter to ACP accepting the DPP and concurring with the proposal to preserve the petroglyphs in place. The preservation plan that SHPD approved included:

The building of a 1.0 to 1.5 meters high rock wall at the buffer line of 3 meters from the edge of Site 2900, along with re-landscaping in indigenous and endemic plants both within and outside the wall. Interim measures during construction would be a 10 meter buffer zone protected by a construction fence. The permanent protective measures would be the construction of the wall, which will be constructed in such a way to allow Native Hawaiian cultural practices to take place at Site 2900. These actions mitigate any effects to this historic property.

As previously stated, the buffer line and interim measures were disregarded during the grading and grubbing activities.

Archaeological Monitoring Plan: ACP also submitted a Draft Archaeological Monitoring Plan (DAMP) to SHPD on July 6, 2009, pursuant to HAR §13-279-5. See Exhibit BB. According to HAR §13-279-1, the purpose of a Monitoring Report is to improve the overall quality of activities and to better protect the public’s interests. See Exhibit CC. Pursuant to HAR §13-279-3,

Archaeological monitoring may be an identification, mitigation, or post-mitigation contingency measure. Monitoring shall entail the archaeological observation of, and possible intervention with, on-going activities which may adversely affect historic properties. See Exhibit DD.

SHPD reviewed the DAMP submitted by ACP after the grubbing and grading activities occurred. In a letter dated March 2010, SHPD stated,

Based on the actions that occurred on the property, the Preservation Plan will need to be revised to expand what was the buffer for the archaeological preserve. Specifically, the Revised Preservation Plan shall be amended to contain: 1) New buffers that include the walls around the site; 2) Permanent defined boundaries surveyed by a licensed surveyor; 3) A description of the consultation process with the Office of Hawaiian Affairs, native Hawaiian organizations, and any other interested parties; 4) Access points/paths, or

viewing areas for the public; and 5) Interpretive information about the settlement pattern of the traditional district, the ahupuaa, the complex, and the site that is being preserved.

Additionally, SHPD addressed the interim protective measures and buffer zone. SHPD stated in its letter,

The submitted Draft Archaeological Monitoring Plan includes monitoring the installation of a protective fence around Site 2900, we concur. However, a new buffer around Site 2900 and new fencing will also need to be installed. We strongly suggest a preconstruction meeting. All ground disturbance for this project and heavy equipment use will need to have an archaeological on-site monitor present.

Extent of Desecration:

SHPD Administrator Aiu visited the property on June 11, 2009 and noted that grading and grubbing had occurred on the site, inside of the buffer zone and the interim protective measures (the orange construction fencing) marking the Site 2900 preservation area. The rock terrace had been partially demolished, tree branches and grubbed material had been pushed around one of the petroglyphs, and several large rocks had been removed. On September 23, 2009, Deputy State Historic Preservation Officer McMahan and DAG Somerville visited the property and witnessed that the illegal work had stopped; however, the orange construction buffers marking the Site 2900 preservation area had been removed. McMahan noted that some of the grubbed material had been removed, but a considerable amount remained within the Site 2900 preservation area. McMahan also pointed out recent scarring in the rocks within the site that were presumably caused by heavy equipment used to perform the grading and grubbing activities. Thus, it is clear the interim protection measures, as specified in the DPP, were not followed.

V. RECOMMENDATION

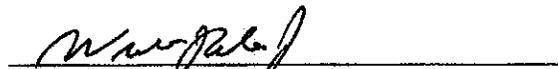
Based on the facts and circumstances of this case, the property owner and contractor did not comply with HRS §6E-11 and its implementing regulations. The property owner and contractor did not apply for a grubbing and grading permit and excavated land without a permit. The illegal grubbing and grading resulted in damage to the historic property within the designated buffer zone. The property owner and contractor's failure to comply with these statutes and rules should result in a maximum fine in the amount of \$10,000, pursuant to HRS §6E-11. See Exhibit C.

Respectfully submitted,



PUAALAOKALANI D. AIU, Ph.D
Administrator

APPROVED FOR SUBMITTAL



WILLIAM J. AILA, JR., Chairperson
Department of Land and Natural Resources