



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE HISTORIC PRESERVATION DIVISION
601 KAMOKILA BOULEVARD, ROOM 555
KAPOLEI, HAWAII 96707

MINUTES

KAUAI/NIIHAU ISLAND BURIAL COUNCIL MEETING

DATE: THURSDAY, November 6, 2008
TIME: 9:00 A.M. to 1:00 P.M.
PLACE: Queen Lili'uokalani Children's Center
Lili'uokalani Trust, Kaua'i Unit
4530 Kali Road, Lihu'e, Kaua'i 96766

I. OPENING PULE

The Opening Pule was offered by Mr. John Kruse, Acting Chairman for the council.

II. ROLL CALL

III. HIBC MEMBERS: John Kruse, Acting Chairman
Kunane Aipolani
Sandra Quinsaat
Leiana Robinson
Barbara Say
Keith Yap

ABSENT: Presley Wann
Michael Loo
Dee M. Crowell

SHPD STAFF: Nancy McMahon, Deputy SHPO/Kaua'i Archaeologist
Coochie Cayan, History & Culture Branch Chief
Cicely Lorenzo-Ganir, Clerk III

Deputy AGs: Vince Kanemoto, Deputy Attorney General
Jay Paige, Deputy Attorney General

GUESTS SIGN-IN:

Louise Sausen	Leah Sausen	Malia Evans-Mason
David Inciong	Abby Clause	Karisa Butler-Wall
Sherry Farrell Racette	Dale Turner	Marina Calender
Misty	Ku'uipo Kelekolio	Rochelle Tuitagava'a Fonoti
Karin Williams	Caroline Sinavaiana	Audra Simpson

Anthony Fleury
Bob Gregory
Bianca Isaki
Elaine Dunbar
Palikapu Dedman
Todd Shimoda
Hanalei Fergestrom

Cynthia Franklin
K. Whitney Mauer
Puanani Rogers
Wilma Holi
Jim M.K. Medeiros
Hale K.J. Mawa
Kaiulani Eden-Huff

Vince Diaz
John McKinn
Alan Murakami
Cheryl Lovell-Obatake
Tracey Schavone
Kai Markell

IV. CALL TO ORDER

Acting Chairman John Kruse called the meeting to order at 9:05 a.m. Kruse asked each commissioner to introduce themselves and whom they represented. The SHPD staff and the two AG's also introduced themselves. Vince Kanemoto stated for the record that he will be the counsel to the Kauai-Niihau Island Burials Council (KNIBC) on all items except the Brescia item which the KNIBC will be represented by Deputy AG Jay Paige. Kruse asked everyone to follow basic rules, to be courteous when dealing with na iwi as the ancestors - they are due respect. He cautioned folks to practice common courtesy, wait to be recognized and then you speak to the council.

Ms. Cheryl Lovell-Obatake interjected that the Agenda should be amended as the Opening Pule was done first. Obatake wanted the approval of the agenda and the minutes to be listed and still reserve the numerical order. Kruse noted to staff to put the Opening Pule first in the agenda as it always was done previously.

Kanemoto stated that this is a new meeting of the KNIBC with a continuance on Item V. (A) Amended Burial Treatment Plan for 30 Burial Sites Identified During Inventory Survey: Wainiha ahupua'a, Hanalei District, Island of Kaua'i. [TMK: (4) 5-8-09:45] (Brescia Property).

MOTION: A motion to receive the amended agenda whereby the Opening Pule was moved to item I. was made by Barbara Say. The motion was seconded by Sandra Quinsaat.

VOTE: The motion to amend the agenda with the Opening Pule as item I passed unanimously.

V. OPENING REMARKS

Chairman Kruse reviewed the following items for folks who wanted to testify:

- A. Testimony limited to three (3) minutes.
- B. Meeting time limited until 1:00 p.m.
- C. Sign in to testify on agenda items. Basic courtesy requested of all speakers.
- D. Agenda item V continued from October 2, 2008

KNIBC members discussed the following prior to public comment on item V:

- Three minutes is sufficient for mana'o without screaming. We have to listen and answer questions as best we can.
- More information may be needed and will be allowed by the Chair after the first round of speakers.
- To include the actual date (day not just month and year) of the amended Burial Treatment Plan (BTP) that is on the agenda. McMahan said the BTP was revised two or three times in April by SHPD request to include the number of burials and to show on the map where it is preserved in place. Mike Dega of SCS said they can go back and put the exact date(s) of revisions after this review by KNIBC and the SHPD. Also, Dega added the October revision shows accurate locale of all burials (GPS done by a professional company), amended table with one burial listed with artifacts and the consultation dates are in order.

- Dega added another inadvertent discovery on the property line when they were putting up the dust fence – near the beach more remains found and left in situ. One is half on Brescia’s property and the other half is on the adjacent parcel in June, 2008.
- The artifact found with one burial was comprised of puka shells.
- McMahon went over the process of the BTP from its submittal and revisions; she added that the KNIBC voted in April to preserve all burials in place. The inadvertent on the property line is not included in the BTP.

VI. BUSINESS

A. Amended Burial Treatment Plan for 30 Burial Sites Identified During Inventory Survey: Wainiha Ahupua’a, Hanalei District, Island of Kaua’i [TMK: (4) 5-8-09:45] (Brescia Property)

Testimony offered by the attendees included the following points:

1. Sandra D. stated her concerns on the handling of the Brescia property, that Judge Watanabe process not followed in some instances...Watanabe said there should be proper contact made with all parties...including kanaka maoli claiming descendancy...have they been contacted? You have the authority to withdraw your approval. [Letter read on behalf of a Kilauea resident unable to attend.]
2. Elaine Dunbar stated “...sensibilities are outraged...” She informed the KNIBC there has been misinterpretations of your rights and authority...leaving no legal recourse...amendment to [BTP] are for typographical errors..the lack of specifics in law is suspicious...leave in place...but nothing to stop build on top...common sense should dictate.. lawfully no more house built on top...Brescia can seek reimbursement from the state..you can choose.
3. Hanalei Colleado from I’ao, Maui stated his expense of \$300 to come and testify for three (3) minutes...the importance of prayer...as a National here...are you as Americans held accountable...talking about bones is not real problem...time to talk about real problems. I’m challenging on faith..time put back things...your decision made in proper manner...make it accountable...not address the root of hewa...this liability on you...to compromise is to continue the hewa.
4. Mike Dega clarified that the thirty (30) burials remain in place, not encased on all four sides, there is a layer 4 inches of concrete atop which is 6’ diameter and is 6’ below the surface. Kruse added he thought the photos of the covers looked like sewer covers...he helped before and they capped burials with ‘ohi’a post, ‘ili’ili and sand.
5. Cheryl Lovell-Obatake stated the item should have specific dates and when the BTP was finalized is important, the chronology and each day counts...agrees have specific dates...is sure there will be amendments as go on...do amendments with inserts...support kane from Maui...pule is important...
6. A letter of protest from Mr. Hanalei Fergestrom of Hawaii Island was read into the record by Sandra D. He wrote to reiterate his last testimony in October that the Temple of Lono is an interested party to consult...demand consultation. Note: [Fergestrom’s address is on the letter entered into the record. A BTP was emailed to Fergestrom two weeks ago.]

7. Elaine Dunbar read a letter from Kaiulani Huff into the record and noted ...no consulting or discussion on the latest email...not following Watanable's orders...it is still a crime.
8. Nani Rogers stated...took a day to reflect on na iwi of Naue...show respect..before a decision made you come well prepared and reviewed the new BTP, HRS...versed on what Judge said, a mandate to SHPD to follow...knowing all that...your authority just recommend, there's power there..make decision to protect na iwi at Naue...BTP foreign...not trust archaeologist...preserve in place some suggestions and you were not advised cap with concrete and you can have them removed since you not approve...recommend the Planning Commission review and revoke this permit and no building atop iwi...that's not preservation or protection in place...we worry about all of them...

Note: Deputy AG Jay Paige reminded the public that the council makes recommendations to the department on the BTP.

9. Jeff Chandler shared his mana'o "...mahalo for this opportunity to speak here as a lineal descendant...my grandmother was buried with honor...my dad same treatment, also my mom...chanting genealogy was done twice then..the state and island burial council have to find a way that we can carry on this practice...I no can recite all...we have two can recite [genealogy] in my family...not matter what government want [paperwork]...allow that practice all will be lost...I do some things then apply as a lineal descendant...I support this process giving us an opportunity to express ourselves about our na iwi kupuna...need find a way...someone claims as lineal; you know this law stops us from doing the right thing...keep practicing and pass it on...if not, then these practices be gone. Then that be my fault because I never try to keep that practice...will come later and speak again.
10. Camille Kalama, attorney for Native Hawaiian Legal Corporation stated she was here on behalf of Jeff Chandler and Nani Rogers. "...only option you have is treatment...Planning Committee's condition #5 no permits till conditions both SHPD and Planning Commission are met...told its preservation in place...the house still being built...in your opinion doesn't mean you can't make that recommendation...you can recommend revoke permit that doesn't follow your...you have broad recommendations and never took the step to make it a motion...know you all on the same page.."

Note: Acting Chairman Kruse commented that the approval by the Planning Commission was with reservations on 12/12/2007 to Mr. Hong regarding Condition #5 and no permit till met. The Building folks approved the permit earlier on 3/22/2007 prior to it going to Planning Commission...looks like misinformation when Building Department gave the permit earlier.

11. Caryn Diamond added clarity that the Planning Commission in February, 2008 knew a survey was done and the discovery of 30 burials...case for a setback...case won and Brescia went back to Planning Commission and knew [there was] 31 burials there. Nancy McMahan said need approval to continue archaeology work...Planning Commission accepted her expertise...Planning amended that permit which lists Galanti as contractor...put concrete and difficult to have inspection on site...entire concrete over parcel...Remove concrete and send back to Planning.

12. Hanalei Colleado of Maui added it's a process we have to work with at the moment. He then read a letter of protest in to the record and signed by various religious leaders.
13. Louise Sansen stated her concerns included this process is a "government thing...all these words here...caps on iwi should not have been capped...everyone know where [sites]...he went dig all over...it's not typos in paperwork to make it right. What about the septic tank? Where it that going with leaching all over? We clean the property...you have a hard job.
14. Leah Sansen shared that its hard to be here, unprepared...support what my mother said...we live in the neighborhood...its overwhelming...my generation have so much more to learn...important to take care kupuna...it definitely hurts. I grew up in Haena...can't recognize it anymore...seeing concrete today...don't understand how they can do that. That subdivision has many burials...let's do the right thing from now on...maybe remove cement and make it right.

NOTE: Acting Chairman Kruse informed the public and the council there was a forum this past weekend which included many cultural practitioners, real estate folks, agricultural and political leaders, and some burial council members from the other islands. It seemed all are on the same page to working together more with the island burial councils and the SHPD regarding how best to malama burials. We [the council] are the avenue that the community can come to share mana'o. It is hard, there's plenty western legalese. However, we can work it out.

15. Jeff Chandler stated that "legally you have authority to make decision before this matter moves on...you should read that document before make a decision...ask to go see burials, first thing come to mind...I fish there all my life; fish night time...Naue for families to go as other places filled up. That point and iwi area not [known] till windsurfing there...That BTP is rubbish, misleads you...go back three times survey where the iwi is...nothing talk about cap, use for 'sewer covers'...this plan not pono...the judge said take initiative and bless the place, probably second time bless place, did three times and still not pono...why ask me? I'm lineal descendant to iwi kupuna. Who's left? Me. I will stand up for us...make sure future access to every single iwi...every property [there] have iwi..but no access to any property...if don't take it back to court...go back 100 years and bury six feet. Is that enough? State can help us be part of process and allow us back to take care...prove to next generation that the practice can continue...assure you make the right decision. Ask yourself why Watanabe didn't do a cease and desist.

NOTE: Advice from Deputy AG Paige that the council is free to ask if they want to go into executive session before making a decision.

Deputy SHPO McMahon stated that in the Zimmerman case there was a cease and desist order. This one is a county permit and SHPD cannot do a cease and desist. For example, in 1990 there was an archaeological inventory survey (AIS) on the Stallone parcel, two houses had burials. County asked them to do an AIS before the administrative rules were made. A trench was made in each lot for those. In Brescia lot, [trench] only in the driveway. The SMA permits for the first house were exempt from a public hearing as the 2007 county planner said to monitor only. SHPD had no say there. SCS did monitoring as the AIS was done per my request. The 2007 building permit was approved and in March 2007 SCS did trenching when the first burial was found. Case was going on. From June, July, and October and December 2007 changes made in the SMA and the house was moved each time. On the design review

and planning level, McMahon requested they keep testing the footings area. SHPD cannot send the BTP to the council until the AIS is done – which means stop moving the house, finish the AIS and stop digging more. We know we're in a sandy area that has burials and habitation sites clearly. This is all inadvertent may be the better thing to do than let the council make a decision. I didn't approve the capping and can't change the [burial treatment] plan once it is approved....I agree with Barbara, agree with what Camille said. The island council never made a decision like this before as LaFrance would relocate. Other island [councils] have allowed it. This island [council] never did it because LaFrance relocated burials. Normally you want to put buffers, landscaping, signage. No one else there have come forward as a [recognized] lineal or cultural descendant. Those rules were written by Kanai and Eddie not by a haole archaeologist. I have always tried to give you the most information and tell you the follow ups.

Jeff Chandler continued to say that what he heard Dega describe in court on how archaeology is done today (i.e. metal plates, scrape 6" at time, use excavators and backhoe that leave teeth marks) and there's pictures on a CD that shows it is in his opinion desecration. He added that "...capping on Maui is okay, we not in Maui, not allow that be a practice here."

16. Camille Kalama, attorney for NHLC added that it may help to go back and do a timeline and look at the permit conditions. Questions should be asked if the permit is approved and there are more burials found. Nancy McMahon is correct that when the AIS is finished and comes to you [council] as previously identified burials there should be no building permit till the conditions are met. April 2008 this came before you. SHPD have no power to stop or revoke [the permit] and this island burial council voted to preserve in place. Who says what is preservation? Ask you define it. We recommend no building on top [the burials]. The SHPD has no power to revoke. The island burial council can say the conditions are not met and not want a building on top of iwi. This Planning Commission permit...you guys have knowledge to make recommendation. We know it's not SHPD, its Planning."

17. Cheryl Lovell Obatake added that the County of Kaua'i on 12/12/2007 application and conditions were permitted for Lot 6. I ask you write a letter to Mr. Ian Costa and Chairman Weinstein to revoke this permit.

18. Walton Hong, attorney for Mr. Brescia spoke to the following:

* 1983-1984 DiFerrara subdivided development needing SMA. Planning said they need SMA to develop 22 lots initially. Too high density, lowered to 21 lots, then 20, then 19. Finally Planning Commission approved 15 lots (no map then). Conditions go to Planning for Design and Res Site (then SMA).

* About 2004, the G. Fisher lot came to Planning and then found used the wrong setback all along [for SMA]. No structure should penetrate the open zone along the shoreline. R-4 [zoning] behind it only. County takes that line [imaginary line] which should have another line setback for zoning boundary setback. Fisher no contest. Now Brescia use strip being used on original zone line. Planning agree with defendants although map is not approved. It was appealed. Circuit court said it's wrong. It goes to supreme court. About 2004 or so, appeal and bond posted it's not fair to landowner for stay till act upon. Two and half years later, the supreme court makes a decision. Brescia after one year moved on circuit court's decision. Brescia moves the house back, 40 feet back except [less] in the two corners. The Planning approval received in 2007 February and complied with Condition #5, then contacted SCS with

the approved house design. The supreme court said its wrong; Brescia did a new house design again and again, return to Planning with revisions and meet SMA in that 12/12/07 letter.

* Did another study with where the foundations would be. Originally six burials and then a seventh found and asked if these would be relocated. That BTP was acted on in April 3, 2008. We asked the KNIBC to relocate the seven burials that will be impacted. Opposition said leave in place. KNIBC at that time had to consider relocating the burials or not moving them—not a question of no build.

* March 2007 the building permit was left in the original name with an amended plan. No work till the AIS was done and the conditions met. Planning agreed.

* April 2008 we consulted with the KNIBC and had SHPD's approval when work began in June. The decision was to leave all the burials 'in situ' when we returned to KNIBC to amend the BTP.

NOTE: Council member Barbara Say shared her concern about the thirty burials and why she made the motion to leave in place and did consider moving the seven under the house. How in good conscious can someone walk over these burials! This is an important case for me. The island burial council can only recommend. We are for na iwi. We all don't know who is there.

Council member Kunane Aipolani added his concern that these unmarked burials can be related to me, to you all...look at the future. My family has marked graves and we are the caretakers there. Now we will look at our recommendation and what can happen in the future.

19. Raine (?) recommended site recognized as an ancient cemetery. Recognize the appropriate cultural and lineal descendants and revisit rules under that. Clarify your intention. Rules always allow SHPD to give recommendation. You can recommend revoke the permit. Clearly state preserve in place with no building above it.

Motion by Kunane Aipolani, seconded by Barbara Say for the KNIBC to go into executive session. Vote was unanimous. The motion to go into executive session passed unanimously.

Executive session from approximately 11:45 a.m. to 12:16 p.m.

Motion by Barbara Say, seconded by Kunane Aipolani for the KNIBC to come out of executive session. Vote was unanimous. The motion to come out of executive session passed unanimously.

Motion by Barbara Say, seconded by Kunane Aipolani for the KNIBC to receive the Amended Burial Treatment Plan for 30 Burial Sites Identified During Inventory Survey: Wainiha Ahupua'a, Hanalei District, Island of Kaua'i TMK: (4) 5-8-09:45 (Brescia Property). Vote was unanimous. Motion to receive the Amended Burial Treatment Plan for 30 Burial Sites Identified During Inventory Survey: Wainiha Ahupua'a, Hanalei District, Island of Kaua'i TMK: (4) 5-8-09:45 (Brescia Property) passed unanimously.

Motion by Kunane Aipolani to recommend this preservation burial treatment plan to the department is to reject the amended burial treatment plan. Aipolani added mana'o he is not comfortable with the preservation in place and needs it to be defined more clearly. The motion was seconded by Barbara Say.

A roll call for the vote on the motion showed the following votes:

**Aipolani voted yes
Kruse voted yes
Quinsaot voted yes
Robinson voted yes
Say voted yes in
Yap voted yes**

The motion to recommend this preservation burial treatment plan to the department is to reject the amended burial treatment plan passed unanimously.

VI. CORRESPONDENCE

Acting Chairman Kruse called for a motion to receive all the correspondence listed on the agenda as follows:

- A. Office of Information Practices OpenLine bulletin, August 2008.
- B. Letter dated August 5, 2008 from Law Offices of Walton D.Y.Hong re: Status Report, Burials at Wainiha (TMK: 4-5-8-09-45)
- C. Letter dated September 16, 2008 from Ms. Cheryl Lovell-Obatake to County of Kauai Planning Department re: Single Family Residence, Lot 6, Wainiha II Subdivision S-84-58, Further Identified as Tax Map Key (4) 5-8-09:45 = Joseph Brescia
- D. Letter received on September 24, 2008 from Na Kupuna Moku O Keawe.

The motion offered by Keith Yap, and seconded by Kunane Aipolani to receive all the correspondence as listed on the agenda (see above list of items). Vote was unanimous. The motion to receive all the correspondence as listed on the agenda passed unanimously.

McMahon informed the council that SHPD continues to consult with others per the court order on the Brescia case.

E. ADJOURNMENT

The meeting adjourned at 12:30 p.m.

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