

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

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STATE OF HAWAII

JOSEPH A. BRESCIA,

Plaintiff,

vs.

KA'IULANI EDENS-HUFF; et al.,

Defendants.

JEFFERY CHANDLER,

Third-Party Plaintiff,

vs.

JOSEPH A. BRESCIA; PUA AIU; et al.,

Third-Party Defendants.

) Civil No. 08-1-0107
) (Other Civil Action)
)
)

DANETTE FUJII
CLERK

) **ORDER GRANTING IN PART AND**
) **DENYING IN PART DEFENDANT**
) **JEFFERY T. CHANDLER'S MOTION**
) **FOR PRELIMINARY INJUNCTION**
)
)

) Hearing Date: September 15, 2008
) Hearing Time: 1:00 p.m.
) Judge: Honorable Kathleen N.A. Watanabe
)
)
)

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT JEFFERY T. CHANDLER'S
MOTION FOR PRELIMINARY INJUNCTION**

This Court held hearings on Defendant/Third Party Plaintiff JEFFERY T. CHANDLER's ("CHANDLER") Motion for Preliminary Injunction on August 14, 2008, and continuing on September 3 and 4, 2008. Alan T. Murakami, Camille Kalama and David Frankel of the Native Hawaiian Legal Corporation appeared on behalf of CHANDLER during the course of these hearings. Phillip Leas and Calvert Graham Chipchase appeared on behalf of Plaintiff/Third Party Defendant JOSEPH A. BRESCIA ("BRESCIA"). Vince Kanemoto appeared on behalf of PUA AIU, in her official capacity as Administrator of the State Historic Preservation Division

I do hereby certify that this is a full, true, and
correct copy of the original on file in this office.


Clerk, Circuit Court, Fifth Circuit

("SHPD") of the Department of Land and Natural Resources, and LAURA THIELEN, in her official capacity as the Director of the Department of Land and Natural Resources (collectively "State Defendants").

FINDINGS OF FACT

A. The Property and Related County Development Approvals

1. Plaintiff/Counterclaim Defendant Joseph A. Brescia is an owner of one of six lots in the Wainiha Subdivision 11, situated in Hâ`ena, Island and County of Kaua`i (the "County"), State of Hawai`i, and identified as Tax Map Key No. (4) 5-8-009-045 (the "Property").

2. The Property is approximately 15,500 square feet.

3. On December 11, 2007, the Kaua`i County Planning Commission (KPC) approved the construction of a single-family residence on the Property ("Planning Commission Approval").

4. By letter dated December 12, 2007, the Kaua`i County Planning Department confirmed the Planning Commission Approval.

5. Conditions 5, 6, and 7 of the Planning Commission Approval provide as follows:

5. Due to the historical findings in the immediate area on previous developments, the Applicant shall excavate the soil at the foundation locations and observe for any archaeological findings with a qualified archaeologist prior to actual construction of the proposed residence. If any archaeological findings are discovered, the Applicant shall cease construction immediately and contact the State Historic Preservation Division-DLNR and the County Planning Department to determine mitigative measures. No building permit shall be issued until requirements of the State Historic Preservation Division and the Burial Council have been met.

6. The Applicant shall apply for the necessary building permit within four (4) months from the date of approval by the Burial Council and State Historic Preservation Division-DLNR, commence construction within four (4) months from the date of issuance of the building permit by the County of Kaua`i, and complete construction within two (2) years from the date of the issuance of the building permit.

7. Should the Applicant fail to comply with the provisions noticed in Condition No. 6, the Applicant shall then be subject to the County shoreline setback rules/laws in existence at the time of construction, whichever establishes a greater shoreline setback. Furthermore, the approval of this project shall run with the Applicant, and not the land. Should the property be sold, the design review by the Planning Commission shall be rendered null and void.

6. As approved by the Planning Commission, the residence will rest approximately eight feet above the ground on columns built atop concrete footings.

7. The approved residence will be approximately 2,300 square feet.

8. BRESCIA has all necessary discretionary and ministerial approvals to construct the approved residence on the Property.

9. BRESCIA complied with all of the Planning Commission's building permit conditions, including conducting archaeological inventory surveys and drafting and submitting Burial Treatment Plans.

B. Archeological Inventory Surveys

10. Consistent with conditions 5 and 6 of the Planning Commission Approval, Scientific Consultant Services, Inc. ("SCS"), which is an archeological consultant firm in Hawai'i, conducted multiple archeological inventory surveys by excavating the "soil at the foundation locations" and in other areas of the Property.

11. SCS partner Dr. Michael Dega, PhD, a qualified "principal investigator", supervised and approved the archaeological surveys.

12. Those surveys collectively revealed thirty (30) human burials on the Property which Dega determined to be prehistoric native Hawaiian remains, or "iwi," some of which were located in burial pits and some of which had associated burial goods.

13. SCS presented the results of the archeological surveys in a report to SHPD.

14. By letter dated January 24, 2008, SHPD approved the report and directed SCS to submit a burial treatment plan to SHPD for review and forwarding to the appropriate island burial council.

C. Burial Treatment Plan and Burial Council Proceedings

15. SCS prepared and submitted a burial treatment plan ("Initial BTP") for approval by SHPD, so it could be presented to the KNIBC.

16. As reported in the Initial BTP, twenty-one iwi were found in the makai building setback for the Property, three iwi were found mauka of the setback but away from the footprint for the approved residence and six iwi were found beneath or very near the footprint of the approved residence.

17. The Initial BTP proposed preserving the twenty-four iwi in place that had no potential for impact by construction.

18. The Initial BTP proposed relocating the remaining six iwi to a designated area of the Property to allow the building of the proposed residence over the site of those iwi.

19. On February 7, 2008, with the approval of SHPD, SCS presented the Initial BTP to the Kaua'i/Ni'ihau Island Burial Council ("KNIBC").

20. SCS submitted an amended burial treatment plan to the KNIBC in April, 2008, which proposed to relocate seven (7) burials falling within the footprint of the house, instead of the original six (6) burials.

21. The KNIBC did not make a determination or any related recommendations as to the iwi at its February 7, 2008 meeting, and there was no KNIBC meeting in March 2008.

22. At the April 3, 2008 meeting, the KNIBC voted 4-2 to preserve in place all 30 sets of iwi located on the Brescia property.

23. The Burial Council also voted to recommend that "any future iwi be left in place."

24. After the April 3, 2008 KNIBC meeting, and prior to April 24, 2008, the SHPD neither:

- (a) provided written copies of the revised BTP to the members of the KNIBC; nor
- (b) met with the KNIBC in order to consult with its members about the contents of the newly revised BTP.

25. The premise of the Plaintiff's initial burial treatment plan, which Dr. Dega submitted to the SHPD and to the KNIBC and amended in April, was based on the removal of the seven (7) individual burials which plans showed would fall under the footprint of the planned Brescia residence.

26. Consistent with the KNIBC's decision to preserve all thirty iwi in place, SCS revised the Burial Treatment Plan in April 2008.

27. The two versions of the burial plans were entirely different in terms of relocation and preservation in place of the seven (7) subject individual burials.

D. Irreparable Harm

28. There is irreparable harm caused by the desecration of iwi.

29. There is irreparable harm caused by the inability of CHANDLER to follow ancient traditions to protect the iwi.

30. There is irreparable harm in allowing the erosion of the importance of preservation and respect for cultural heritage.

CONCLUSIONS OF LAW

1. In order to grant any motion for a preliminary injunction, this Court must conclude that (a) the movant is likely to prevail on the merits, (2) the balance of harm favors the issuance of an injunction, and (3) the injunction is consistent with the public interest. *Life of the Land v. Ariyoshi*, 59 Haw. 156, 577 P.2d 1116 (1978)

2. HRS § 6E-13(b) (emphasis in bold italics added) provides:

Any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person upon a showing of irreparable injury, for ***the protection of an historic property or a burial site and the public trust therein from unauthorized*** or improper demolition, ***alteration***, or transfer of the property or burial site.

3. HRS § 6E-43(b) (emphasis in bold italics added) provides:

All burial sites are significant and shall be preserved in place until compliance with this section is met, except as provided in section 6E-43.6. The appropriate island burial council shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted, following criteria which shall include recognition that burial sites of high preservation value, such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or areas that are within a context of historic properties, or have known lineal descendants, shall receive greater consideration for preservation in place. . . .

4. HAR § 13-300-1 (emphasis in bold italics added) provides:

Purpose. This chapter governs practice and procedure relating to the proper care and protection of burial sites found in the State before the island burial councils and the department of land and natural resources. ***These rules shall be construed to secure the just and efficient determination of every proceeding.*** The legislature finds that Native Hawaiian burial sites are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance (e.g. Honokahua). In order to avoid future disputes arising from the discovery of human skeletal remains fifty years or older, sections 6E-11, 6E-12, 6E-43, 6E-43.5, 6E-43.6, HRS, were amended or enacted in part to provide additional protection for Native Hawaiian burial sites of high preservation value such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals or events, that are within a context of historic properties, or have known lineal descendants. . . .

5. HAR § 13-300-38(a)(1) and (a)(4) (emphasis in bold italics added) provides:

Council determinations. (a) When determining appropriate treatment of a previously identified Native Hawaiian burial site, the council shall:

- (1) **Fully consider all provisions of the burial treatment plan** developed according to section 13-300-33; . . .
- (4) Fully consider any other relevant factors concerning **appropriate treatment** including those stated in section 13-300-36(b);

6. HAR § 13-300-36(b) (emphasis in bold italics added) provides:

When determining whether to preserve in place or relocate Native Hawaiian burial sites, the councils **and the department where appropriate**, shall give due consideration to the following:

- (1) The **cultural appropriateness** of the proposal to preserve in place or relocate;
 - (2) Any possible **harm to the Native Hawaiian skeletal remains** if the burial site is left in place;
- . . .

7. Under HRS § 6E-43(d) (emphasis in bold italics added),

Within ninety days following the final determination, a preservation or mitigation plan **shall** be approved by the department **in consultation with** any lineal descendants, **the respective council, other appropriate Hawaiian organizations**, and any affected property owner.

8. Under HAR § 13-300-38(e) (emphasis in bold italics added),

Where a council determination to preserve in place is accepted as final, the applicant shall develop the burial site component of the preservation plan consisting of the requirements of section 13-300-33(b)(3)(A) and any accepted recommendations relating to burial site treatment. Within ninety days of the council determination, the department shall approve the plan **following consultation with the applicant, any known lineal descendants, the appropriate council, and any appropriate Hawaiian organizations**.

9. Under a plain reading of HRS § 6E-43(d), after the KNIBC voted to preserve in place the 30 sets of iwi, and any other yet to be identified iwi on the Brescia property, the SHPD was clearly obligated to consult, and should have consulted, the KNIBC, the landowner, and

“appropriate Hawaiian organizations,” on the revised BTP that then-Acting SHPD Administrator Nancy McMahon (“McMahon”) ultimately approved.

10. Instead, the SHPD failed to comply with this crucial procedural step by failing to consult with the KNIBC and appropriate Hawaiian organizations prior to SHPD’s April 24, 2008 approval of the revised BTP.

11. SHPD failed to follow its own regulations and procedures for implementing the statutory requirements for consulting with the KNIBC *before* the April 24, 2008 approval of the revised BTP. HAR § 13-300-38(e).

12. The request for recommendations at the end of the April 3 meeting did not constitute consultation as required by the governing statute and rules.

13. If this Court were to accept the interpretation offered by SHPD and its’ counsel that SHPD appropriately “consulted” with the KNIBC before even providing council members with a copy of the revised BTP or meeting with the council, it would not be construing the implementing regulations so as “to secure the just and efficient determination of every proceeding.” HAR § 13-300-1.

14. As a result of SHPD’s failure to consult with the KNIBC before approving the revised BTP on April 24, 2008, the KNIBC could not “fully consider”: (a) “all provisions of the burial treatment plan,” as required by HAR § 13-300-38(a)(1), (b) “the cultural appropriateness of the proposal to preserve in place,” as required under HAR § 13-300-38(a)(4) and 13-300-36(b)(1); and (c) “[a]ny possible harm to the Native Hawaiian skeletal remains if the burial site is left in place,” as required under HAR § 13-300-38(a)(4) and 13-300-36(b)(2).

15. Accordingly, this Court concludes that CHANDLER is likely to prevail on the merits of his claim that the SHPD failed to properly consult with the KNIBC, the landowner, and

“appropriate Hawaiian organizations,” in accordance with HRS § 6E-43(d) and HAR § 13-300-38(e).

16. The Legislature and the DLNR were very clear in requiring this consultation procedure as part of its scheme to implement a democratic participatory process for those with a stake in protecting ancient Hawaiian burials, especially the respective island burial council.

17. The Court agrees with the argument of counsel for CHANDLER that following the process outlined in the statute and regulations is crucial to the entire scheme and must be followed if it is to have any meaning.

18. Accordingly, the Court concludes that the State Defendants’ April 24, 2008 approval of the revised burial treatment plan without the required consultation pursuant to HRS § 6E-43(d) was not authorized in the proper fashion.

19. The Court concludes that the various defenses raised by BRESCIA and State Defendants to the claims on the merits do not bar movant CHANDLER from pursuing his claims.

20. **Exhaustion.** The defense of failure to exhaust administrative remedies is inapplicable to these proceedings because CHANDLER is neither challenging the KNIBC action to preserve all burials in place nor the Kaua`i Planning Commission’s approval of BRESCIA’s house plans. CHANDLER is in fact challenging SHPD’s approval of the revised BTP, for which there is no opportunity for an appeal, especially when the SHPD provided no formal notice of SHPD’s approval or the opportunity for prior consultation.

21. **Standing.** The defense of lack of standing is inapplicable. HRS § 6E-13(b) provides that “any person” may maintain an action for the protection of a burial site and the public trust therein. Such action is directed against an alleged violation to prevent the

unauthorized or improper alteration of a burial site. Because SHPD was not in compliance with its procedures, there was no proper authority for the approval of the revised BTP. In the absence of a validly approved BTP, the installation of concrete jackets resulted in the illegal “alteration” of a burial site. Since there was no authority to alter the burial sites on the BRESCIA property, CHANDLER has standing to pursue his claim to enjoin any resulting alteration of a burial site, like the installation of a concrete jacket over a burial, pursuant to HRS § 6E-13(b).

22. **Mootness.** While the Court recognizes that the concrete pouring for the footings of the proposed residence is complete, it cannot conclude that other relief might not still be available to CHANDLER.

23. This Court concludes without hesitation that CHANDLER will suffer irreparable harm should this Court allow the unauthorized alteration of the iwi kûpuna on the BRESCIA property.

24. Irreparable harm to CHANDLER would occur should there be a desecration of iwi caused by the unauthorized alteration of a burial site, failure to follow the required procedure, and the resulting erosion of respect for the law.

25. Additionally, there is a great public interest in protecting ancient Hawaiian burial sites from unlawful and unauthorized alteration, following the required procedures to protect those sites, and respecting the rights the Legislature has recognized in protecting iwi kupuna.

26. Accordingly, issuing an injunction mandating the appropriate State Defendants to follow the required procedure to ensure that the appropriate laws are followed would promote the public interest in the circumstances such as the instant one.

27. The Legislature, in passing HRS chapter 6E, and the DLNR, in promulgating rules to implement that chapter as they related to protecting burial remains, were very clear in

establishing specific procedures designed to protect iwi.

28. CHANDLER, as well as interested parties, including the private landowner, has the right to rely on legislative acts and government regulations designed to protect iwi, which the legislature found “are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance.” HAR § 13-300-1.

29. These laws provide for full democratic participation in formulating protection for previously identified burial sites that must be respected, in order “to secure the just and efficient determination of every proceeding” affecting the protection of iwi. *Id.*

30. The consultation process is the core part of the entire legislative scheme laid out in the statute, for which adherence is required.

31. The KNIBC must be consulted and have a key role in fashioning appropriate burial treatment measures that are “culturally appropriate.” HAR §§ 13-300-36(b), 13-300-38(a)(4).

32. This consultation must include consideration of the appropriateness of, *inter alia*, (i) “Short term measures to immediately protect all burial sites including, but not limited to, fencing, buffers, and site restoration;” and (ii) “Long term measures to properly manage and protect all burial sites including, but not limited to, buffers, landscaping, and access by known lineal or cultural descendants.” HAR § 13-300-33(b)(3)(A).

33. While the Court concludes that no injunction should issue against Plaintiff BRESCIA, the Court cautions that, he should not take any action that might foreclose implementing potential options for burial treatment plans that may result from the consultation between the SHPD and the KNIBC.

ORDER

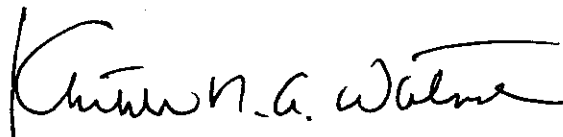
THEREFORE, the court hereby adjudges, decrees, and orders that:

This Court is GRANTING IN PART Defendant's Motion for Preliminary Injunction, until the Department of Land and Natural Resources, State Historic Preservation Division, complies with Chapter 6E, Hawaii Revised Statutes, and Hawaii Administrative Rules 13-300; in particular, HRS 6E-43(d) and HAR 13-300-38(e) which require consultation with the Kauai/ Niihau Burial Council, any appropriate Hawaiian organizations, and any recognized lineal descendants, on the *revised* Burial Treatment Plan for the authorized protection and management of the discovered burial sites.

This preliminary injunction **does not** enjoin Plaintiff BRESCIA, from continuing with construction of his residence, provided that the construction does not in any way further demolish, alter, or prevent access, for whatever purposes in the event it is so required by SHPD, after proper consultation, to the seven (7) burials that fall within the footprint of the house plans.

DATED: Lihue, Kaua'i, Hawai'i, OCT -- 2 2008, 2008.




KATHLEEN N.A. WATANABE
Judge of the Above-Entitled Court