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April 7, 2020

Suzanne D. Case, Chairperson
Board of Land and Natural Resources
State of Hawaii
P.O. Box 621
Honolulu, Hawaii 96809

Re: *Issuance of an archaeological permit for calendar year 2021 to Archaeological Services Hawaii LLC;* Board of Land and Natural Resources (Meeting date: April 9, 2021), Agenda Item I.1

Dear Chairperson Case and Members of the Board of Land and Natural Resources

The undersigned represents Archaeological Services Hawaii LLC, hereafter referred to as "ASH", in the above-referenced matter. ASH acknowledges receipt of the Staff Report that was submitted by Alan S. Downer, Ph.D, Administrator for the State Historic Preservation Division, hereafter referred to as "SHPD".

On December 3, 2019, ASH submitted a request for a permit to conduct archaeological activities in the State of Hawaii during calendar year 2020. Clare H. Apana, Kaniloa Lani Kamaunu and Malama Kakaniloa, hereafter collectively referred to as the "Petitioners", requested a contested case on ASH's application for the archaeological permit. On April 29, 2020, the Board of Land and Natural Resources, hereafter referred to as the "BLNR", issued Minute Order No. 1 by which Lou Chang was appointed as the hearing officer in the contested case. The contested case hearings were held on September 1, 2020 to September 4, 2020 and from September 22, 2020 to September 24, 2020. On November 30, 2020, Hearing Officer Lou Chang issued the Findings of Fact, Conclusions of Law And Recommended Decision, hereafter referred to as the "Hearing Officer's Decision", in which the Hearing Officer recommended that the BLNR issue a permit that allows ASH to conducted archaeological activities in the State of Hawaii during calendar year 2020. On February 4, 2021, the BLNR adopted the Order Adopting Hearing Officer's Recommendations, As Amended, hereafter referred to as the "Order" that authorized the issuance of a permit to ASH that allowed it to conduct archaeological activities in the State of Hawaii during calendar year 2020.

On or about December 18, 2020, ASH filed an application in which it requested to be allowed to conduct archaeological activities in the State of Hawaii during calendar year 2021. No action was taken on the application since a contested case was being conducted on the application for an archaeological permit that for calendar year 2020.

A. The BLNR Should Deny Petitioner's Request For A Contested Case.

In *Flores v. Board of Land and Natural Resource*, 143 Haw. 114 , 424 P.3d. 114 ((2018), Kalani Flores, hereafter referred to as "Flores", requested a contested case hearing on whether the BLNR should consent to the University of Hawaii's request for assignment of a Sublease. In a separate proceeding, the BLNR had conducted a contested case on the request for a Conservation District Use Permit, hereafter referred to as; the "CDUA Permit", to construct the thirty meter telescope. Flores participated in the contested case hearing regarding the CDUA Permit.

The Hawaii Supreme Court held that Flores was not entitled to a contested case hearing on whether the BLNR should consent to the assignment of the Sublease. In justifying its ruling, the Court stated as follows:

> Considering the third *Sandy Beach* factor in light of the foregoing, it appears that BLNR has a strong interest in not having to hold separate contested case hearings in this case. Put simply, to mandate BLNR to hold a full contested case hearing on whether it should consent to the Sublease would require BLNR to bear the duplicative administrative burden of providing procedural protections that would be of no additional value in safeguarding Flore's interest in engaging in traditional Native Hawaii cultural practices on Mauna Kea. See *Briggs v. Sullivan*, 954 F.2d 534, 530-40 (9th Cir. 1992) (determining that in applying the federal equivalent of the *Sandy Beach Defense Fund* balancing test, plaintiffs were not entitled to a more detailed, thorough procedures because the government had a significant interest in not having to bear the substantial fiscal and administrative burdens of administering the enhanced procedures when such procedures would not substantially improve the risk of erroneous deprivation. 143 Haw at 128, 424 P.3d at 483.

It cannot be disputed that the BLNR conducted a contested case hearing on ASH's application for a permit to conduct archaeological activities in the State of Hawaii during calendar year 2020. Any issues that were or could have been raised in ASH's present request for an archaeological permit was or should have been presented and addressed during the contested case hearing on the application for the archaeological permit that was filed on December 3, 2019. The BLNR should not have to bear the duplicative administrative burden and the substantial expenditure of funds to conduct another contested case on ASH's request for an archaeological permit for calendar year 2021.

The Staff Report provided by SHPD, the governing/regulatory agency with the expertise for all matters related to archaeological, architectural, history and culture, recommends that the BLNR deny Petitioner's request for a contested case hearing on the application for a permit that would allow ASH to conduct archaeological activities in the State of Hawaii during calendar year 2021. The Staff Report cites *Flores v. Bd. of Land & Natural Resources*, 143 Haw. 114,

126-27, 424 P.3d 468, 481-482 (2018), in support of the recommendation set forth in the Staff Report for the "reason that due process does not require any additional procedures to safeguard petitioner's interests. Most especially, petitioners have already received a complete contested case hearing as to ASH's 2020 request." Staff Report at 3.

ASH joins in the recommendation set forth in the Staff Report. The BLNR should deny Petitioners' request for a contested case hearing.

B. The BLNR Should Issue An Archaeological Permit To ASH For 2021.

The Hearing Officer's Decisions contains the Conclusion of Law, hereafter referred to as "COL", that Jeff Pantaleo meets the qualifications set forth in HAR § 13-281-3, and is qualified to serve as a principal investigator for archaeological consulting firms, museums, universities, agencies nonprofit institutions or scholars. COL, ¶ 19. The Hearing Officer's Decision contains a finding that there are no past, present or outstanding disciplinary proceedings against ASH regarding past archaeological permits that were issued to ASH. COL ¶ 20. The Hearing Officer's Report concludes that ASH has complied with conditions for the issuance of archaeological permits that is set forth in HAR § 13-281-3. COL ¶ 21. The Hearing Officer's Report further states that the applications filed by ASH comply with the requirements set forth in HAR § 13-282-3(c). COL, ¶ 22.

The BLNR adopted the Order and found that ASH has a qualified principal investigator on its staff and that the application filed by ASH for an archaeological permit for calendar year 2021 complies with HAR §13-282-3(c).

The Staff Report states that ASH satisfies the requirements for the issuance of an archaeological permit and that it has a qualified principal investigator on contract. The Staff Report also recommends the issuance of an archaeological permit to ASH pursuant to HAR § 13-282-3.

Any objections that Petitions have to the issuance of an archaeological permit for calendar year 2021 was or should have been raised during the contested case hearing. The BLNR should adopt the recommendation presented by the State Historic Preservation Division and recommend the issuance of a permit to ASH that allows it conduct archaeological activities in the State of Hawaii during calendar year 2021.

Very truly yours,

/s/ Paul L. Horikawa

PAUL L. HORIKAWA

cc: Archaeological Services Hawaii LLC