ORIGINAL

NO. 27407

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

AND

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawai'i; MAUI TOMORROW, INC., a Hawai'i non-profit corporation; and the KAHULUI HARBOR COALITION, an unincorporated association,

Plaintiffs-Appellants,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I; RODNEY HARAGA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I; BARRY FUKUNAGA, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I and HAWAI'I SUPERFERRY, INC.,

Defendants-Appellees.

CIVIL NO. 05-1-0114 (3)
(Declaratory Judgment)

APPEAL FROM FINAL JUDGMENT FILED JULY 12, 2005 AND ORDER GRANTING (1) DEFENDANT STATE OF HAWAI'I'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, FILED MAY 12, 2005; AND (2) DEFENDANT HAWAI'I SUPERFERRY, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, FILED MAY 12, 2005, FILED JULY 12, 2005

CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI'I

The Honorable Joseph E. Cardoza
Judge

DEFENDANTS-APPELLEES HAWAI'I SUPERFERRY, INC. AND THE STATE OF HAWAI'I 'S ANSWERING BRIEF

APPENDIX

STATEMENT OF RELATED CASES

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DEFENDANTS-APPELLEES HAWAI'I SUPERFERRY, INC. AND THE STATE OF HAWAI'I'S ANSWERING BRIEF

Defendants-Appellees Hawai'i Superferry, Inc. ("Hawai'i Superferry") and the State of Hawai'i[1] (collectively "Appellees") jointly submit their Answering Brief to Appellants The Sierra Club, Maui Tomorrow, Inc. and Kahului Harbor Coalition's (collectively "Appellants") Opening Brief filed October 21, 2005, pursuant to Rule 28(c) of the Hawai'i Rules of Appellate Procedure.

I. INTRODUCTION

Appellants filed their First Amended Complaint ("FAC") against Appellees seeking a determination that an environmental assessment ("EA") must be prepared for the Hawai'i Superferry project and/or that the Hawai'i Superferry project must be incorporated into the EA being prepared for Kahului Harbor.

The Circuit Court properly found that Appellants (1) lacked standing to bring their claims; (2) that even if Appellants had standing, the Hawai'i State Department of Transportation ("DOT") complied with Hawai'i Revised Statutes ("HRS") Chapter 343 and the accompanying administrative rules; (3) to the extent Appellants alleged a claim relating to the draft EA for Kahului Harbor, such claim is premature and the court

[1] The Department of Transportation, Rodney Hiraga in his official capacity, and Barry Fukunaga in his official capacity are collectively referred to as the "State." See Makanui v. Department of Educ., 6 Haw. App. 397, 406, 721 P.2d 165, 171 (Haw. App. 1986) ("A suit against a state's agencies or against its officers or agents in their official capacities is a suite against the state and not against its officers or agents in their individual capacities.")

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lacks jurisdiction; and (4) there is an insufficient basis to grant Appellants' rule 56(f) request for an extension.

Appellants' Opening Brief fails to identify any error of the Circuit Court. Instead, Appellants' Opening Brief reads much like a Motion for Reconsideration, setting forth the same arguments, essentially verbatim, that were presented to the Circuit Court. The Circuit Court already reviewed Appellants' arguments and found them unavailing. The Circuit Court's rulings are supported by the record and should be affirmed.

II. CONCISE STATEMENT OF THE CASE

The Hawai'i Superferry project generally involves an inter-island ferry service between the islands of Oahu, Maui, Kauai and the Big Island. See, e.g., Record on Appeal ("ROA") 388 - 390; ROA 620 - 623. The ferry will use existing harbor facilities at Honolulu Harbor, Kahului Harbor, Nawiliwili Harbor, and Kawaihae Harbor. Id. Plaintiffs' FAC alleges impropriety with respect to the exemption issued for Kahului Harbor. ROA 55 - 103. Proposed improvements necessary to accommodate Hawai'i Superferry at Kahului Harbor are:

- a removable barge (floating platform) that will be moored at pier 2 to provide a platform between the vessel and the pier for passenger loading and off loading;
- a removable ramp between the barge and pier for safe vehicle loading and off loading;
- minor improvements in the form of utility services (water, power and lighting);
- minor improvements in the form of security fencing and pavement striping; and

- minor improvements in the form of tents at inspection points or customer waiting areas.

See ROA 946 - 948.

In November 2004, DOT consulted with the Office of Environmental Quality Control ("OEQC") regarding the scope of improvements and changes needed at the various piers to accommodate the introduction of the Hawai'i Superferry and the propriety of issuing exemptions. See ROA 818 - 823. Genevieve Salmonson, the Director of OEQC, issued a response on November 23, 2004, confirming that "OEQC believes that the proposed improvements fall within the scope of work described in the Department of Transportation's approved exemption list." See ROA 827 - 828. OEQC further confirmed, "**we believe that the Department of Transportation has authority to declare the actions described above as exempt from the requirement to prepare an environmental assessment**." Id. (emphasis added).

Prior to issuing the exemptions, DOT also consulted with various agencies regarding the exemption for Kahului Harbor, including the Department of Public Works and Waste Management for the County of Maui (ROA 854 - 855) and the Department of Planning for the County of Maui (ROA 857 - 858).[2]

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[2] For improvements at Nawiliwili Harbor on Kauai, DOT consulted with the County of Kauai Public Works Department (ROA 851 - 852) and the County of Kauai Planning Department (ROA 848 - 849). For improvements at Kawaihae Harbor on the Big Island, DOT consulted with the County of Hawai'i Planning Department (ROA 860 - 861) and the County of Hawai'i Public Works Department (ROA 863 - 864). For improvements at Honolulu Harbor on Oahu, DOT consulted with the Department of Design and Construction of the City and County of Honolulu (ROA 866 - 867), the Department of Planning and Permitting of the City & County of Honolulu (ROA 869 - 870), the Plant

On February 23, 2005, DOT issued its decision determining that the operation of Hawai'i Superferry at Kahului Harbor conforms with the intended use and purpose of the harbor and meets conditions that permit exemption from environmental review. See ROA 946 - 948.

III. STANDARD OF REVIEW

A. Motion to Dismiss and/or Motion for Summary Judgment

Review of a motion to dismiss and/or motion for summary judgment is a question of law, reviewable *de novo*, under the same standard applied by the circuit court. See, e.g., Hawai'i Community Federal Credit Union v. Keka, 94 Haw. 213, 221, 11 P.3d 1, 9 (2000) (discussing standard of review applicable to a circuit court's grant or denial of summary judgment); Bremner v. City & County of Honolulu, 96 Haw. 134, 138, 28 P.3d 350, 354 (2001) (discussing standard of review applicable to a circuit court's grant or denial of a motion to dismiss).

1. Motion to Dismiss

Dismissal is proper where it appears beyond a doubt that Appellants can prove no set of facts entitling them to relief. Bertelmann v. Taas Assocs., 69 Haw. 95, 99, 735 P.2d 930, 933 (1987). Although this Court should generally assume the allegations contained in the complaint are true, the Court does not have to accept conclusory allegations as true or reasonable if they do not reasonably follow from the

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Quarantine Branch of the Department of Agriculture (ROA 872 - 873), the Department of Business, Economic Development & Tourism (ROA 875 - 876), the DOT Highways Division and Statewide Transportation Planning (ROA 878 - 879), and the Department of Transportation of the City & County of Honolulu (ROA 887 - 888).

events described. Moore v. Allstate Ins. Co., 6 Haw. App. 646, 651, 736 P.2d 73, 77 (Haw. App. 1987).

2. Motion for Summary Judgment

Summary judgment is proper "where the moving party demonstrates that there is no genuine issue of material fact and it is entitled to summary judgment as a matter of law." Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 258, 861 P.2d 1, 6 (1993) (citing Gossinger v. Assoc. of Apartment Owners of The Regency Ala Wai, 73 Haw. 412, 417, 835 P.2d 627, 630 (1992)).

3. Deference to OEQC and DOT

Although review of a motion to dismiss and/or motion for summary judgment is reviewable *de novo*, both the circuit court and the appellate court should give deference to OEQC and DOT, the agencies with expertise regarding the Chapter 343 exemptions. See HRS §§ 26-19, 266-1. Specifically, upon finding that DOT followed all proper procedures in making and issuing the exemption determination, deference should be given to OEQC and DOT's substantive determination regarding the exemptions for harbor improvements. See, e.g., Price v. Obayashi, 81 Haw. 171, 182, 914 P.2d 1364, 1375 (1996), ("[t]he court does not wish to substitute its judgment for that of an agency within the executive branch of government . . ."); Lee v. Elbaum, 77 Haw. 446, 457, 887 P.2d 656, 667 (Haw. App. 1993) ("an administrative agency's interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose") (internal quotations and citations omitted).

The legislature authorized the environmental council, after consultation with affected agencies, to effectuate rules to "[e]stablish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an assessment[.]" HRS § 343-6. In response, the council promulgated HAR § 11-200-8 regarding exempt classes of action. The council's rules require that agencies declaring an action exempt "shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption," and grants authority to "the proposing agency or approving agency" to declare exemptions from the preparation of an environmental assessment. HAR § 11-200-8. As defined by HEPA and the EIS Rules, an "Agency" includes "any department, office, board, or commission of the state or county government which is part of the executive branch of that government." HRS § 343-2; HAR § 11-200-2.

OEQC was created to "implement" Chapter 341 and is required to "perform its duties under [HEPA]" and to "serve the governor in an advisory capacity on all matters relating to environmental quality control." HRS § 341-3(a). The Director of the Office of Environmental Quality Control, Genevieve Salmonson, has "such powers delegated by the governor as necessary to coordinate and, when requested by the governor, to direct pursuant to chapter 91 all state governmental agencies in matters concerning environmental quality." HRS § 341-4(a). To further this objective, the Director is required to offer "advice and assistance" to governmental agencies. HRS § 341-4(b)(7). OEQC has determined for the Superferry project "that the proposed

improvements fall within the scope of work described in the Department of Transportation's approved exemption list" and that DOT "has authority to declare the actions described above as exempt from the requirement to prepare an environmental assessment." ROA 827 - 828.

As the legislature has authorized OEQC to define the parameters of HEPA, and, as the EIS rules require DOT to issue the declarations for the Superferry project, the determinations by OEQC and DOT that the Superferry project is exempt "should be accorded deference." Paul's Electrical Service, Inc. v. Befitel, 104 Haw. 412, 416, 91 P.3d 494, 499 (2003).

B. Motion to Continue, HRCP Rule 56(f)

A trial court's decision to deny a request for continuance pursuant to Hawai'i Rules of Civil Procedure ("HRCP") Rule 56(f) will not be reversed absent an abuse of discretion. See, e.g., Acoba v. General Tire, Inc., 92 Haw. 1, 9, 986 P.2d 288, 296 (1999) (citation omitted). The request must demonstrate how postponement of a ruling on the motion will enable him or her, by discovery or other means, to rebut the movants' showing of absence of a genuine issue of fact. Id. (citations omitted). An abuse of discretion occurs "where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Save Sunset Beach Coalition v. City & County of Honolulu, 102 Haw. 465, 484, 78 P.3d 1, 20 (2003) (citations omitted).

IV. ARGUMENT

A. The Circuit Court Properly Found that Appellants Failed to Establish Standing

The Circuit Court properly found that Appellants "failed to establish standing," ROA; Tr.; p. 67:7-11, and therefore did not err in dismissing Appellants' First Amended Complaint ("FAC") on the basis of lack of standing. ROA; Tr. p. 68:4-5.

"A plaintiff without standing is not entitled to invoke a court's jurisdiction." Sierra Club v. Hawai'i Tourism Authority, 100 Haw. 242, 250, 59 P.3d 877, 885 (2002) (citations omitted). The burden is on Appellants to establish standing. See id. Further, as emphasized by the Hawai'i Supreme Court in Sierra Club v. Hawai'i Tourism Authority, a rigorous review of the element of standing is required in cases, such as this, involving allegations that an environmental assessment should be conducted. Id. at 250, 59 P.3d at 885 (finding that Plaintiffs lacked standing to assert claims that an environmental assessment should have been conducted).

1. Appellants Have Not Been Adjudged Aggrieved, as Required by HRS § 343-7(a)

Appellants' action is brought under HRS § 343-7(a), which pertains to actions relating to the lack of an environmental assessment. HRS § 343-7(a) specifically addresses standing as follows:

> The council or office, any agency responsible for approval of the action or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. **Others, by court action, may be adjudged aggrieved.**

As explained by the Hawai'i Supreme Court, the legislature permitted "judicial action" under HRS § 343-7 only by "aggrieved parties". Id. at 261-62; 59 P.3d at 896-97. "Specifically named parties have an automatic right of action regarding the lack of an assessment," id. at 262, 59 P.3d at 897, while "others" "must show in a court action brought under § 343-7(a) that they are aggrieved and must be adjudged aggrieved." Id. (emphasis added). "**It is only in concert with being adjudged aggrieved that "others," such as petitioner, have rights under HRS § 343-7(a)**". Id.

As Appellants are not specifically named parties with a right to pursue legal action, they must, by court action, be adjudged aggrieved. Id. at 262, 59 P.3d at 897. However, here, Appellants failed to seek a finding by the Court that Appellants were aggrieved parties entitled to bring the instant action. Appellants had every opportunity to address this issue when it was raised by Appellees in its motion before the Circuit Court. Yet, they failed to address this issue below. Similarly, Appellants' Opening Brief completely neglects this requirement. Appellants' failure to seek or obtain a finding that they are aggrieved parties for all claims brought under HRS 343, is fatal to Appellants' case.

2. Appellants Failed to Satisfy the Requisite Elements of the Injury In Fact Test

Even if Appellants had sought such a finding in their FAC, Appellants failed to establish the injury-in-fact test requirements to establish standing. Appellants admit that the requisite elements for standing are:

> In deciding whether the plaintiff has the requisite interest in the outcome of the litigation, we employ a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's . . . conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury.

See, e.g., id; see also Opening Brief, at Part V.A.2., p. 15. Appellants must satisfy all three elements in order to establish standing. Id.

a. Appellants Failed to Establish an Actual or Threatened Injury

Here, the injuries claimed by Appellants are purely speculative and do not rise to an actionable injury. In their FAC, Appellants alleged threatened injury as a result of (1) ***increased*** adverse traffic impacts affecting Appellants who "regularly drive on the highways nearby and surrounding the Kahului Harbor" (ROA 64, ¶ 30a) (emphasis added); (2) ***diminished*** quality of water affecting Appellants' recreational use of the waters (ROA 64, ¶ 30b) (emphasis added); and (3) ***increased*** alien species introductions impacting agricultural operations and the integrity of the natural habitat preserved in the parks (ROA 64 – 65, ¶ 30c - e) (emphasis added). However, Appellants have failed to demonstrate that traffic and alien species introduction will be increased at or around Kahului Harbor and/or that water quality at Kahului Harbor will be diminished as a result

of the Hawai'i Superferry project, much less the improvements to Kahului Harbor. Appellants' Opening Brief attempts to blur the distinction between the minor improvements at Kahului Harbor, which are the subject of this action (i.e. DOT's exemption for the minor improvements at Kahului Harbor), and the Hawai'i Superferry project in general. Appellees respectfully submit that it is the improvements at Kahului Harbor (e.g. removable ramp, utility services, fencing, striping, and tents), and DOT's exemption regarding the improvements, that Appellants must demonstrate results in an actual or threatened injury to them.

Significantly, Appellants' threatened injury claims in this case are virtually identical to those claimed in Sierra Club v. Hawai'i Tourism Authority. There, the Sierra Club alleged that as a result of the Hawai'i Tourism Authority ("HTA")'s marketing program, visitor arrivals would increase leading to increased traffic, use of recreational areas, and introduction of alien species. 100 Haw. at 251; 59 P.3d at 886. Upon review of affidavits strikingly similar to the declarations in this case, the Hawai'i Supreme Court found that it was not evident that the HTA's program would result in an increase in visitor arrivals (in comparison to the expressed goal of increased visitor expenditures). Id. The court further noted:

> Similarly, with regard to general laments about increased traffic and use of recreational areas, the affidavits do not establish that such conditions are the result of the HTA's marketing program, as distinguished from other causes, or of non-tourists. The proposition that an increased introduction of alien species is or will be the result of the marketing program suffers from the same infirmity. Id.

As in the HTA case, here, there is no evidence that the improvements to Kahului Harbor (the subject of this action) will have anything whatsoever to do with visitor arrivals. Additionally, even if the Court considers the impact of the project in general,[3] Appellants have still failed to establish any evidence that the Hawai'i Superferry project will increase visitor arrivals to Maui. To the contrary, the Hawai'i Superferry merely offers an alternative means of inter-island transportation for visitors and residents already in Hawai'i. In its CPCN application, Hawai'i Superferry specifically described, "Applicant will offer a transportation alternative for Hawai'i residents visiting Oahu and the neighbor islands. Applicant provides a new mode of transportation that is lower in cost and, in many ways, more convenient than the only existing alternative, travel by air." (ROA 404 (emphasis added)). The PUC's Decision and Order further notes, "Applicant expects its ferry service to cost about fifty (50) per cent of the price of flying, and is viewed as an alternative to the airlines and inter-island barge service for residents, visitors and businesses." (ROA 621 (emphasis added)). The addition of the Hawai'i Superferry to inter-island travel is akin to Hawaiian Airlines and/or Aloha Airlines adding another route to its inter-island schedule and/or adding a new airline to service inter-island travel. The overall number of visitors will not

[3] As previously set forth, Appellees submit that the issue is whether the minor improvements at Kahului Harbor cause an actual or threatened injury to Appellants. However, even to the extent the Court considers Appellants' argument that the actual or threatened injury results from the impacts of the project in general (as opposed to the harbor improvements), Appellants' arguments still fail as their contentions, just as in the HTA case, are wholly speculative. Moreover, Appellees note that Appellants' arguments in this matter relate to the impacts of the project on Kahului Harbor and/or Maui and not every potential impact of the project in general.

necessarily increase as a result of the added transportation; rather, residents and visitors will have alternatives when traveling between islands. As such, the alleged threat of increased traffic and alien species introduction resulting from an alleged increase in visitors is wholly inapplicable.

The alleged threat of increased traffic congestion suffers from the same infirmity. There is no reason to believe that the minor improvements to Kahului Harbor will have any effect whatsoever on traffic. Moreover, as with Appellants' argument regarding visitors, while Appellants presume that there will be an increase in the number of vehicles as a result of Hawai'i Superferry, there is no evidence that the overall number of vehicles at each island will increase, or that the number of vehicles arriving at each island will exceed the number departing from that island. Presently, residents and visitors traveling inter-island via airline typically rent cars upon their arrival on the various islands. Travelers on the Hawai'i Superferry may still choose to rent a car upon arrival *or* some may bring their own vehicle *in lieu of* renting a car. Thus, the total number of vehicles will not necessarily increase. Indeed, if anything, the total number of vehicles in use may decrease as travelers who previously had to park one vehicle at the airport and rent a car at their new destination, will now be able to travel with their cars, thus decreasing the parking congestion at the airport terminal. Additionally, because Hawai'i Superferry will be operating as a long haul ferry with a single departure time and advanced reservations, it is not anticipated to have the traffic congestion associated with commuter ferries that depart throughout the day. Thus, Appellants' allegations of

increased adverse traffic impacts are without basis and are insufficient to establish standing.

Finally, with respect to the recreational use of the waters, the Hawai'i Superferry plans to operate in the same location already utilized by other vessels, barges, containerships, and cruise liners servicing Maui. There is no evidence that the minor improvements to Kahului Harbor will have an affect on the recreational use of waters. Moreover, Appellants have no evidence that the Hawai'i Superferry project as a whole would interfere with recreational use of the waters at Kahului Harbor to any greater extent than is already being used for commercial purposes.

As the harbor improvements do not concretely affect or threaten Appellants' interests as is required to establish standing, Appellants have failed to establish standing to bring claims in this matter.

b. Appellants Failed To Establish A Causal Connection to the Harbor Improvements or the Hawai'i Superferry

Even if Appellants had alleged actionable injuries, Appellants have failed to establish that the alleged injuries are attributable to the harbor improvements or the Hawai'i Superferry. As set forth, supra, the second element of the injury in fact test requires that Appellant establish a causal connection between the injury suffered and the action at issue. See HTA, 100 Haw. at 252, 59 P.3d at 887.

Here, Kahului Harbor is being used by numerous other vessels, barges, containerships and cruise liners. Appellants have not provided any evidence or information attributing the alleged injuries to the harbor improvements or Hawai'i

Superferry, as distinguished from any other commercial use of the harbor. Moreover, as the Hawai'i Supreme Court noted in the HTA case, "Petitioner must rely on a chain of conjecture, ultimately resting on the independent actions of third parties such as the actions of hypothetical tourists not before this court, there is no discernable link fairly traceable between the HTA's expenditure and Petitioner's injury within the scope of the injury-in-fact test." Id. at 254, 59 P.3d at 889. So to in the instant matter, Appellants similarly rely on a chain of conjecture resting on hypothetical visitors not before this Court. As was the case in the HTA matter, none of the declarations in this case establish that any purported actual or threatened injury is or would be traceable as a matter of fact to the harbor improvements or Hawai'i Superferry. Accordingly, because Appellants have failed to establish a causal connection as required to establish standing, they have failed to establish standing to bring this action.

c. Appellants Failed to Establish that the Alleged Injury is Likely to Be Remedied by a Favorable Decision

Finally, Appellants have failed to establish that the alleged injury is likely to be remedied by a favorable decision, the third element required to show an injury in fact. As previously discussed, the goal of the Hawai'i Superferry is to provide a transportation alternative to Hawai'i residents, and there is nothing in the record to indicating that an alternative to air travel between islands would necessarily increase any burdens on the Appellants' interests. Moreover, and significantly, even assuming for sake of argument that the Hawai'i Superferry were to increase the number of visitors to Maui, there is nothing in the record to indicate that an abandonment of the Hawai'i

Superferry would obviate the burdens on Appellants' interests. The airlines, cruise ships, containerships, and other vessels would continue to carry visitors and cargo to and from Maui and neither their current transportation patterns nor any future increase to their routes would be curtailed by a decision favorable to Appellants. See HTA, 100 Haw. at 256, 59 P.3d at 891 (similarly finding that an abandonment of the marketing project would not obviate the impact on Petitioner's interest as marketing campaigns by other entities would not be curtailed by granting Petitioner the relief requested). Accordingly, because Appellants have failed to establish that the alleged injury is likely to be remedied by a favorable decision, as required to establish standing, they have failed to establish standing to bring this action.

3. Group Standing Requires an Injury Suffered By the Membership and Does Not Apply to this Case

Appellants allege that group standing should apply, i.e. standing of an organization on behalf of individual officers and members. However, group standing requires an injury suffered by the membership. As discussed in Hawai'i's Thousand Friends v. Anderson, 70 Haw. 276, 284, 768 P.2d 1293, 1300 (1989), in some cases, suits bought by non-profit organizations on behalf of their membership may be permitted; however, in such cases, the injury alleged by the organization must be suffered by the membership in general and the remedy provided to the organization would also remedy the injury suffered by the members individually. Here, as in Hawai'i's Thousand Friends, the injuries alleged in Appellants' FAC are not injuries which were/will be suffered by the membership of the Sierra Club in general. Rather the alleged injuries are

personalized injuries. Accordingly, standing cannot be based on the injuries alleged in Appellants' FAC.

4. Appellants' Attempt to Rely on the Minority Opinions in the HTA Case is Unavailing

In a final attempt to plead their case on standing, Appellants attempt to rely on the minority opinions in the HTA case. See Appellants' Opening Brief, at IV.A.2[sic], pp. 17-20. Appellants' arguments in this regard are "new" and not supported by the record and, accordingly, should not be considered. Yokouchi v. Admin. Dir. of Courts, 94 Haw. 348, 14 P.3d 358 (2000) (appellate court will generally only consider questions raised and reserved in the lower court). Appellants cannot ask this Court to consider new arguments that were never presented to the circuit court, and were therefore not preserved for appeal.

Moreover, even if Appellant had properly raised their arguments relating to the HTA case in the lower court, Appellants' arguments are unavailing.

a. Nexus

Appellants first argue that three justices (the concurring and dissenting opinions) considered whether the plaintiffs had showed a "geographical nexus" (a nexus between the plaintiffs' interests and the land that is the subject of the action) as part of the standing inquiry. Opening Brief, at IV.A.2[sic], p. 18. In actuality, all the justices considered the question of whether or not the plaintiffs had established the requisite nexus with the action. See HTA, 100 Haw. at 252-53, 59 P.3d at 887-88 (plurality opinion, Acoba, J. and Ramil, J.) (a causal connection is required between the plaintiffs'

actual or threatened injury and the action); id., at 268, 59 P.3d at 903 (concurring opinion, Nakayama, J.) (a plaintiff must show it has a concrete interest that is the basis for its standing to challenge agency action); id., at 281, 59 P.3d at 916 (dissenting opinion, Moon, C.J. and Levinson, J.) (the injury must be concrete and particularized).

Significantly, the majority found that the Sierra Club *failed to establish* the requisite nexus between the HTA's proposed marketing plan and the alleged environmental effects. Id. at 254, 59 P.3d at 889 (Acoba, J. and Ramil, J.); id. at 268, 59 P.3d at 903 (Nakayama, J.). As discussed above, a majority of the Supreme Court found that the Sierra Club's alleged nexus relied on a "chain of conjecture," that was based on independent, hypothetical visitors not before the court. Id. at 254, 59 P.3d at 889. In Justice Nakayama's concurring opinion (upon which Appellants curiously attempt to rely), she specifically stated:

> . . . Sierra Club's allegation that it has a geographic nexus to various sites on the island that may be affected by increased visitor traffic as a result of HTA's marketing plan is not sufficient to establish such a concrete interest in this case.
>
> * * *
>
> . . . Sierra Club has failed to prove it has a concrete interest because the nexus between the HTA's proposed marketing plan and the alleged environmental effects is dependent upon the decisions of independent acts of prospective visitors.

Id. at 268, 59 P.3d at 903.

In this case, as in the HTA case, the Appellants have failed to establish a discernable nexus between the alleged injuries to Appellants and the land that is the subject of this action. Just as the Court found in the HTA case, here, the alleged injuries

(e.g. increased traffic and increased alien species) to Appellants depend on the independent acts of prospective visitors to the island of Maui (i.e. that there will be an increase in visitors and that those visitors may bring additional cars and/or alien species). Additionally, Appellants' claim of injury regarding adverse impacts to endangered species as a result of potential vessel collisions, a claim not alleged in Appellants' FAC, (see ROA 55-103), has nothing whatsoever to do with the land that is the subject of the action – i.e. Kahului Harbor improvements.

b. Increased Risk

Appellants' second argument with respect to the HTA case is that "standing for procedural injuries . . . depends not on whether Plaintiffs-Appellants will actually suffer harm, but upon whether the HDOT's circumvention of HEPA "increased the risk that the action may have a significant effect on environmental quality." Opening Brief, at IV.A.2[sic].b, p. 20 citing id. at 281, 59 P.3d at 916 (dissenting opinion, Moon, C.J.). Appellants' argument relies entirely on the dissenting opinion, which was not adopted by the plurality or the concurring justice. The law in Hawai'i is not "increased risk" but an actual or threatened injury. As discussed above, Appellants have not and cannot establish an actual or threatened injury. Accordingly, the circuit court properly found that Appellants failed to establish standing, and should be affirmed.

B. The Circuit Court Properly Found that the Hawai'i Department of Transportation Fully Complied with HRS Chapter 343 and the Accompanying Administrative Rules

The Circuit Court properly found that "there has been compliance with Chapter 343 and the accompanying administrative rules" and thus, assuming for sake of argument that Appellants had standing, the Circuit Court properly granted summary judgment as to compliance with Chapter 343. ROA; Tr.; p. 67:22 - 68:7. Notably, Appellants agree that the issue of whether DOT complied with HRS Chapter 343 and the administrative rules is a legal question and appropriate for the Court's determination on a motion for summary judgment as a matter of law. See Opening Brief, at 13.

1. HDOT Followed All Proper Procedures in Issuing Its Decision Regarding Exemptions for the Minor Improvements to Kahului Harbor

The Hawai'i State Legislature has declared that specific actions determined by the Environmental Council to have minimal or no significant impact on the environment, are properly exempt from the preparation of an environmental assessment. See HRS § 343-6. The Environmental Council duly adopted HAR § 11-200-8 to implement this statue. ROA 161 - 163. Relevant to the instant matter are the following exemptions:

> Exemption Class 3: Construction and location of single, new, small facilities or structures and the alteration and modification of same . . . ;
>
> Exemption Class 6: Construction or placement of minor structures accessory to existing facilities;

See HAR § 11-200-8.

Pursuant to HAR § 11-200-8(a), *and upon review and concurrence by the Environmental Council*, the State of Hawai'i Department of Transportation issued its Comprehensive Exemption List, amended November 15, 2000 ("DOT's exemption list"). ROA 165 - 171. Relevant to the instant matter are the following exemptions:

> Exemption Class 3, #3. Installation of security and safety equipment.
>
> Exemption Class 6, #8. Alteration or addition of improvements with associated utilities, which are incidental to existing harbor and boat ramp operations, in accordance with master plans that have met the requirements of Chapter 343, Hawai'i Revised Statutes. Such improvements and associated utilities include concessions, comfort stations, pavilions, paving, rockwalls, fencings, walkways, loading docks, warehouses, piers, offices, container freight stations, cranes, fuel lines, lighting, sprinkler and drainage systems.

Under HAR § 11-200-8(a), **agencies may declare an action falling within a designated class exempt *provided only* that the agency obtain the advice of other agencies or individuals having jurisdiction or expertise as to the propriety of the exemption.**[4]

[4] The scope of DOT's consultation obligation under HAR § 11-200-8(a) ("other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption") is different from the consultation obligations under other sections of the Environmental Council's rules which are not applicable here. See, e.g., HAR § 11-200-9(a)(1), (a)(5), (b)(1) and (b)(5) (requiring agencies to seek the advice and input from, and distribute the draft EA to "citizen groups and individuals which the proposing agency reasonably believes to be affected" in the preparation of an EA); § 11-200-15(a) (requiring consultation with "other citizen groups" and "concerned individuals" prior to filing a draft EIS). The Environmental Council did not impose a similar requirement for consulting with citizen groups and individuals before issuing an exemption determination.

In reviewing the proposed minor improvements to Kahului Harbor, DOT sought OEQC's advice specifically pertaining to the improvements at Kahului Harbor. As set forth supra, OEQC director Genevieve Salmonson confirmed that "OEQC believes that the proposed improvements fall within the scope of work described in the Department of Transportation's approved exemption list." See ROA 818 - 823 and 827 - 828). Ms. Salmonson further confirmed, "we believe that the Department of Transportation has authority to declare the actions described above as exempt from the requirement to prepare an environmental assessment." Id. (emphasis added). In addition to obtaining confirmation from OEQC, DOT also consulted with the Department of Public Works and Waste Management for the County of Maui and the Department of Planning for the County of Maui as to the propriety of the exemptions. DOT fully complied with its consultation requirements, and thus its procedural requirements, under HAR § 11-200-8.

Appellants' only contention with respect to DOT's consultation is that it did not consult with all interested organizations. Opening Brief, at 29. DOT fulfilled its obligation to consult with Agencies and individuals with jurisdiction or expertise as to the propriety of the exemptions; there is no obligation to consult with all interested organizations. As defined by HEPA and the EIS Rules, an "Agency" includes 'any department, office, board, or commission of the state or county government which is part of the executive branch of that government." HRS § 343-2; HAR § 11-200-2. Appellants' disagreement with the applicability of the exemptions does not create an

entitlement to "consulted party" status, nor does it give them veto power over a decision by DOT, the most knowledgeable agency regarding maritime transportation, and OEQC, the agency most knowledgeable about HEPA itself.

DOT fully complied with its requirements under HAR § 11-200-8 and Chapter 343. Accordingly, the Circuit Court's decision should be affirmed.

2. Appellants' Arguments Regarding the Propriety of the Exemptions Are Irrelevant and Without Merit

A substantial portion of Appellants' Opening Brief repeats, essentially verbatim, the arguments that they made to the lower court regarding the propriety of DOT's exemption determination. However, the issue before this Court is not the propriety of the exemption (i.e. whether DOT's decision was right or wrong), but whether the Circuit Court properly found that DOT followed all proper procedures in making its determination. Having followed all proper procedures, Appellees respectfully submit that deference should be given to DOT and OEQC's determination regarding the propriety of DOT's exemption. See supra Part III.A.3.[5]

Significantly, the Circuit Court had before it as Exhibits 3 – 103 of the State of Hawai'i's Motion for Summary Judgment, the complete record considered by DOT in making its determination. ROA 172 - 963. To the extent this Court reviews the propriety of DOT's exemption determination, Appellees respectfully submit that the

[5] Appellants argue in their Opening Brief that DOT is not entitled to deference. See Opening Brief, at 12-13. While Appellees disagree and submit that deference is entirely appropriate (see supra Part III.A.3), significantly, the Circuit Court did not state that it gave any deference to DOT in making its determination that DOT complied with HRS Chapter 343. Accordingly, Appellants' arguments in this regard are irrelevant.

record fully supports DOT's determination. The improvements and changes needed to accommodate Hawai'i Superferry at Kahului Harbor are identified in the consultation letters sent to the Department of Public Works and Waste Management for the County of Maui and the Department of Planning for the County of Maui (ROA 854 – 855 and 884 - 885) and DOT's exemption determination letter (ROA 946 - 948) and include the addition of a removable barge and ramp and minor improvements in the form of utility services, security fencing, pavement striping, and tents. Exemption class 6, no. 8 (alteration or addition of improvements incidental to existing harbor and boat ramp operations) of DOT's exemption list specifically identifies by way of example fencing, walkways, loading docks, piers, and container freight stations as additions/improvements which would properly fall within exemption class 6. See ROA 165 - 171. The removable barges and minor improvements contemplated for Hawai'i Superferry's operations fall squarely within the exemptions allowable under HAR § 11-200-8 and HRS § 343-6.

As noted by the PUC in its Decision and Order, the Hawai'i Superferry project is "consistent with the public interest and the transportation policy set forth in HRS § 271G-2." ROA 639. Additionally, the legislature, governor, and other prominent Hawai'i businesses have all expressed their support for the Hawai'i Superferry project. See, e.g., ROA 407 - 408; ROA 638).

Appellants' Opening Brief primarily argues that the exemptions issued by DOT were improper because DOT segmented the Kahului Harbor improvements from

the Superferry Project as a whole and did not review various issues such as cumulative impacts, impacts regarding environmentally sensitive areas, and the significance criteria. Essentially, Appellants would have this Court believe that a full EIS of the entire project needs to be prepared each time an exemption is declared under HEPA. Such is not the case under either the Hawai'i Administrative Rules or by analogy under the National Environmental Policy Act ("NEPA"). The federal Council on Environmental Quality ("CEQ") has concluded that "there is rarely need for a [categorical exclusion under NEPA] more than one page in length." CEQ, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years (1997). See also CEQ, Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (1983) ("the Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded"); Wilderness Watch v. Mainella, 375 F.3d 1085, 1095 (11th Cir. 2004) ("Documentation of reliance on a categorical exclusion need not be detailed or lengthy. It need only be long enough to indicate to a reviewing court that the agency indeed considered whether or not a categorical exclusion applied and concluded that it did."); Edmonds Inst. v. Babbitt, 42 F. Supp. 2d 1, 18 n.11 (D.D.C. 1999) ("The Court does not intend to establish a requirement that an agency prepare a full-blown statement of reasons for invoking a categorical exclusion. Such a requirement would detract from the legitimate governmental interest in avoiding unnecessary paperwork for actions that legitimately fall under a categorical exclusion and do not require an EA or EIS.").

The cases cited by Appellants are inapposite. Appellants first cite Kahana Sunset Owners Ass'n v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997) in support of its segmentation argument. However, that case involved construction by the county of "a completely new drainage system serving over 300 residences." Id. at 73, 947 P.2d at 385. The court specifically distinguished this situation from minor change to existing facilities, which would have been exempt. This latter situation is what is at issue in this case – i.e. DOT is making minor improvements to the existing harbor. Such minor changes to an existing facilities do not require an EA.

Appellants next cite to McGlone v. Inaba, 64 Haw. 27, 636 P.2d 158 (1981) and Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 (9th Cir. 2004) as amended by 402 F.2d 846 (9th Cir. 2005), for the proposition that the Hawai'i Superferry project as a whole must be considered before issuing an exemption to an EA. However, McGlone v. Inaba, was based on the pre 1979 version of HEPA which did not include the concept of EAs or draft EAs; and Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 (9th Cir. 2004) as amended by 402 F.2d 846 (9th Cir. 2005), did not involve a "decision not to prepare an EA" as Appellants claim, (Opening Brief, at 24), but rather a challenge *after* an EA had already been prepared, to the Corps' issuance of a "Finding of No Significant Impact" and determination that an EIS was not required. Id. at 1116. In that case, an EA was prepared and NEPA significance criteria were examined. Reversing and remanding based on inadequacy of the Corps' analysis in the Final EA, the Ninth Circuit did not rule, as Appellants claim, that uncertainty about

impacts are sufficient to reverse an exemption (Opening Brief, at 29), as no exemption was involved. Id. at 1127. There is simply no requirement that DOT prepare an EA before issuing an exemption under HEPA.

Similarly, Appellants claim that the exemptions are inapplicable because of a failure to review the cumulative impact of planned successive actions and/or because it involves a particularly sensitive environment (Opening Brief, at 25-26) is without merit. Hawai'i Superferry has no planned successive actions and the industrial commercial harbor is not a particularly sensitive environment which would render normally insignificant impacts significant. HAR § 11-200-8(b).

Appellants fail to raise any error regarding the exemptions issued by DOT. Accordingly, the Circuit Court's determination that DOT complied with Chapter 343 and the accompanying administrative rules should be affirmed.

C. The Circuit Court Properly Found that to the Extent Count II of Plaintiff's First Amended Complaint Addresses the Draft EA for Kahului Harbor, the Court Does Not Have Jurisdiction Over the Subject Matter

The Circuit Court properly found that to the extent Count II of Appellants' FAC addresses the draft EA for Kahului Harbor, "such an action would be premature" and "the court would not have jurisdiction over such a claim." ROA; Tr.; p. 67:15-19.

In Count II Plaintiffs allege that the Hawai'i Superferry project "must be incorporated . . . in the ongoing **Draft EA** for 'Kahului Harbor improvements.'" See ROA 86, ¶132 (emphasis added). Appellants admit that a Final EA has not been issued for the Kahului Harbor improvements (ROA 71, ¶ 62) and no determination has been

made as to whether or not an EIS is required for the Kahului Harbor improvements (ROA 71, ¶ 63).

There is no cognizable cause of action for an inadequate or improper draft EA. Permissible actions under HRS Chapter 343 are specifically set forth in HRS § 343-7 and include only: (1) actions relating to the lack of an environmental assessment (HRS § 343-7(a)); (2) actions relating to the lack of an environmental impact statement (HRS § 343-7(b)); and (3) actions relating to the sufficiency of the final, accepted environmental impact statement (HRS § 343-7(c)). Accordingly, Appellants' allegations relating to the draft EA for Kahului Harbor improvements are not ripe for adjudication and the circuit court properly found that it would have no jurisdiction over this claim.

D. The Circuit Court Did Not Abuse Its Discretion in Finding an Insufficient Basis For Granting Plaintiff's Request for a 56(f) Extension

The Circuit Court properly concluded that there is "insufficient basis to grant the request for a 56(f) extension." ROA; Tr.; p. 67:4-6. Notably, the Court did not find that discovery, per se, is not allowed, but rather that Appellants failed to establish that additional discovery would have any effect on the outcome of this matter. As previously noted, all parties agree that the issues in this case are legal questions appropriate for disposition by the circuit court as a matter of law. See Opening Brief, at 13.

Here, the Circuit Court properly found that Appellants failed to establish standing. Appellants have not, and cannot show, that additional discovery would result in

any new information that would assist Appellants in establishing standing. Similarly, with respect to the Circuit Court's finding that DOT followed all proper procedures and complied with HRS Chapter 343, Appellants have not, and cannot show, that additional discovery would assist Appellants in establishing that proper procedures as required by HRS Chapter 343, were not followed. Indeed, specific questions that Appellants "wished to question HDOT officials about" are set forth in their Opening Brief (p. 34) and relate entirely to DOT's substantive determination rather than the relevant issue of whether proper procedures were followed. The Circuit Court reviewed all the documents submitted by the parties to this action and was in the best position to ascertain whether additional discovery would make a difference in this matter. Its conclusion that Appellants failed to provide a sufficient basis for the 56(f) extension is supported by the record and did not "clearly exceed the bounds of reason or disregard rules or principles of law". Save Sunset Beach Coalition, supra.

V. CONCLUSION

Based on the foregoing, Appellees respectfully request that the Circuit Court's Order and Final Judgment be affirmed in its entirety and Appellants' appeal be dismissed.

DATED: Honolulu, Hawai'i, December 27, 2005.

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DATED: Honolulu, Hawai'i, December 21, 2005.

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STATE OF HAWAI'I

NO. 27407

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

AND

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawai'i; MAUI TOMORROW, INC., a Hawai'i non-profit corporation; and the KAHULUI HARBOR COALITION, an unincorporated association,

Plaintiffs-Appellants,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I; RODNEY HARAGA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I; BARRY FUKUNAGA, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I and HAWAI'I SUPERFERRY, INC.,

Defendants-Appellees.

CIVIL NO. 05-1-0114 (3)
(Declaratory Judgment)

APPEAL FROM FINAL JUDGMENT FILED JULY 12, 2005 AND ORDER GRANTING (1) DEFENDANT STATE OF HAWAI'I'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, FILED MAY 12, 2005; AND (2) DEFENDANT HAWAI'I SUPERFERRY, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, FILED MAY 12, 2005, FILED JULY 12, 2005

CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI'I

The Honorable Joseph E. Cardoza
Judge

STATEMENT OF RELATED CASES

Pursuant to Rule 28(b)(11)(F) of the Hawaii Rules of Appellate Procedure, Defendants-Appellees Department of Environmental Services of the City and County of Honolulu, Department of Planning and Permitting of the City and County of Honolulu, and City and County of Honolulu hereby state that the following is a related case: The

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Sierra Club et. al. v. The Maritime Administration et. al., CV 05-00487 HG BMK in the United States District Court, District of Hawai'i. The Honorable Helen Gillmor Order Granting Defendants' Motion to Dismiss was filed on October 31, 2005. The Judgment was filed on November 2, 2005. To date no appeal has been filed.

DATED: Honolulu, Hawai'i, December 27, 2005.

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DATED: Honolulu, Hawai'i, December 27, 2005.

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