No. 28602

IN THE SUPREME COURT OF THE STATE OF HAWAII

Civil No. 06-1-0265
UNITE HERE! LOCAL 5; ERIC W. GILL; TODD A.K. MARTIN,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU, a municipal corporation; KUILIMA RESORT COMPANY, a Hawaii corporation; DOE DEFENDANTS 1-10,

Defendants.

KUILIMA RESORT COMPANY, a Hawaii general partnership,

Counterclaim Plaintiff,

vs.

UNITE HERE! LOCAL 5 HAWAII, a Hawaii labor partnership; ERIC W. GILL, an individual,

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawaii general partnership,

Counterclaim Plaintiff,

vs.

UNITE HERE! a New York labor organization; DOE DEFENDANTS 1-10,

Additional Counterclaim Defendants.

Civil No. 06-1-0265
KEEP THE NORTH SHORE COUNTRY, a Hawaii non-profit corporation, and SIERRA

Civil No.. 06-1-0265
Civil No. 06-1-0867

APPEAL FROM THE AMENDED FINAL JUDGMENT, filed on June 4, 2007

FIRST CIRCUIT COURT

HONORABLE GARY W.B. CHANG
HONORABLE SABRINA S. McKENNA
Judges

CLUB, HAWAII CHAPTER, a foreign non-profit corporation,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; HENRY ENG, Director of Department of Planning and Permitting, in his official capacity; KUILIMA RESORT COMPANY, a Hawaii general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICI CURIAE

MEMORANDUM IN SUPPORT OF MOTION

APPENDIX "A"

CERTIFICATE OF SERVICE

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DEFEND OAHU COALITION

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CITY AND COUNTY OF HONOLULU; HENRY ENG, Director of Department of Planning and Permitting, in his official capacity; KUILIMA RESORT COMPANY, a Hawaii general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICI CURIAE

Defend Oahu Coalition, by and through its attorneys Damon Key Leong Kupchak Hastert, hereby moves this Honorable Court for leave to appear and file a brief as amici curiae in support of the writ of certiorari granted to Plaintiffs-Appellants Keep The North Shore Country and Sierra Club, Hawaii Chapter. A copy of Defend Oahu Coalition's proposed amicus brief is attached hereto as Appendix "A."

This motion is made pursuant to Rules 27 and 28(g) of the Hawaii Rules of Appellate Procedure and is based on the attached Memorandum in Support, Appendix, and the records and files of this case.

DATED: Honolulu, Hawaii, November 25, 2009.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE

Attorney for Proposed Amicus Curiae
DEFEND OAHU COALITION

No. 28602

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CLUB, HAWAII CHAPTER, a foreign non-profit corporation,

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Defendants.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Proposed Amicus Curiae Defend Oahu Coalition hereby moves this Honorable Court for leave to appear and to file a brief as amici curiae in the above-captioned appeal, addressing the very important issue of the duty to supplement a stale environmental impact statement. A copy of Defend Oahu Coalition's proposed brief is attached hereto as Appendix "A."

Defend Oahu Coalition is a non-profit Hawaii corporation that was formed in 2006 to protect the North Shore and Koolauloa from the harmful effects of large scale development which threatens rural lifestyles, agriculture, marine life, natural resources from mauka to makai, and the environment. Defend Oahu Coalition is particularly concerned with Appellee Kuilima Resort Company ("KRC")'s recent efforts to revive the long-abandoned Turtle Bay Expansion Project, which would place approximately 3,500 additional resort and condominium units along the North Shore/Kahuku coastline. Defend Oahu Coalition members live and work on and around the Turtle Bay Resort, the North Shore, and elsewhere. Defend Oahu Coalition supports the existing Turtle

Bay hotel and existing rural and open space uses, and seeks to preserve the jobs and country lifestyle that make Oahu's North Shore and the Turtle Bay resort a desirable and marketable alternative to Waikiki and its intense urbanization.

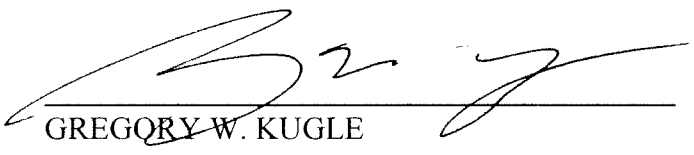
Defend Oahu Coalition has filed with the State Land Use Commission ("LUC") a Motion For Issuance Of An Order To Show Cause Why The Boundary Reclassification Of Kuilima Development Company Should Not Be Revoked For Failure To Perform Conditions, Representations And Commitments By Kuilima Development Company. Defend Oahu Coalition filed that motion alleging the developer, KRC, has failed to perform numerous conditions imposed by and representations made to the LUC in 1986, in its effort to reclassify approximately 236 acres of Agricultural land in the Urban district as part of the Turtle Bay Expansion Project. Key among those broken promises over the past twenty years are KRC's failure to provide affordable housing, failure to provide public parks and public access, and failure to provide employment opportunities.

Defend Oahu Coalition filed its motion with the LUC on April 1, 2008. Although the LUC has held several meetings and hearings on the motion, its has not yet ruled on the motion. In fact, the LUC has not even scheduled a meeting at which it will rule on the motion.

Because of its vested interest in the long-term sustainability of Oahu's North Shore, Defend Oahu Coalition brings a unique amicus position to this case. Therefore, for the reasons stated herein, Defend Oahu Coalition respectfully requests that this Honorable Court grant its motion and allow it to appear as amici curiae and to file its proposed brief in this case.

DATED: Honolulu, Hawaii, November 25, 2009.

DAMON KEY LEONG KUPCHAK HASTERT



GREGORY W. KUGLE

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APPENDIX "A"

CLUB, HAWAII CHAPTER, a foreign non-profit corporation,

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BRIEF OF AMICUS CURIAE DEFEND OAHU COALITION

I.

INTRODUCTION

Amicus curiae Defend Oahu Coalition requests that this Honorable Court vacate and remand the opinion of the majority panel of the Intermediate Court of Appeals ("ICA majority"), *Unite Here! Local 5 v. City and County of Honolulu*, 120 Hawai'i 457, 209 P.3d 1271 (App. 2009). This case presents a unique factual situation that is unlikely to be repeated. The environmental impact statement ("EIS") that was prepared by the predecessor to appellee Kuilima Resort Company ("KRC") disclosed and analyzed the impacts of the Turtle Bay expansion project, which it described as the construction of 3,500 resort and condominium units between 1986 and 1996. The developer chose this 10 year development window, and it also chose to analyze the environmental impacts occurring for a project being built within that same 10 year window. The EIS did not analyze the impacts of the construction of 3,500 resort and condominium units occurring sometime after 2009. The Hawaii Environmental Policy Act ("HEPA"), Haw. Rev. Stat. Ch. 343, and the regulations adopted pursuant to HEPA, make clear that this project, which has changed substantively in its timing, is a new project with impacts that must be assessed based on a new development schedule through the preparation of a SEIS.

Defend Oahu Coalition's members live and work on the North Shore of Oahu, including at and around the Turtle Bay resort. While the Defend Oahu Coalition supports the existing Turtle Bay resort, it is opposed to the wholesale urbanization that was proposed and then abandoned by KRC's predecessor-in-interest nearly 25 years ago. An additional 3,500 resort and condominium units is an idea whose time has come and gone. This project can and should be assessed as it is currently proposed, with construction of the 3,500 resort and condominium units to commence sometime after 2009. There are significant decision-making opportunities that yet remain – including reconsideration of the SMA Use permit and issuance of subdivision approval – which

would benefit from the preparation of an SEIS addressing changes to the project, new information and changed circumstances.

Moreover, the benefits that were promised to the community as a condition of the approval of the expansion project have never materialized. In 1986, the developer promised to provide the North Shore community with jobs, affordable housing, public access and public parks. Now, nearly twenty-five years later, these benefits are still lacking. Yet, a new developer now proposes to subdivide and sell off the parcels to yet more developers, all the while realizing speculative profits while the community waits, and waits, and waits. This case represents the epitome of unplanned and ill-conceived development, and should be stopped until the appropriate studies have been performed , disclosed and considered.

II.

STATEMENT OF THE CASE

Defend Oahu Coalition incorporates by reference the Statement of the Case set forth in Appellants' Opening Brief, filed September 27, 2007, and its Application for Writ of Certiorari To Review The Judgment On Appeal Of The Intermediate Court Of Appeals Filed June 12, 2009, filed September 8, 2009.

III.

POINTS OF ERROR

Amicus curiae Defend Oahu Coalition incorporates by reference the Points of Error set forth in Appellants' Opening Brief, filed September 27, 2007, and its Application for Writ of Certiorari To Review The Judgment On Appeal Of The Intermediate Court Of Appeals Filed June 12, 2009, filed September 8, 2009.

IV.

STANDARD OF REVIEW

"The requirements of HRS § 602-59(b) are 'directed only to the application for the writ. It is not descriptive of the scope of review determinative of the [s]upreme [c]ourt's decision

to grant or deny certiorari.'" *Ranches v. City and County of Honolulu*, 115 Hawai'i 462, 464, 168 P.3d 592, 594 (Hawai'i 2007).

V.

ARGUMENT

This Honorable Court should enter a judgment vacating and remanding the opinion of the ICA majority and directing appellee City and County of Honolulu ("City") to require the preparation of a Supplemental Environmental Impact Statement ("SEIS"). In the event that the City grants final subdivision approval to KRC before this Court enters such a judgment, this Court should also make clear that such action is void for failure to prepare an SEIS, under the authority of *Kepoo v. Kane*, 106 Hawai'i 270, 291-293, 103 P.3d 939, 950-952 (2005) (voiding a lease executed by a state agency without conducting an EIS).

A. The ICA Majority Ignored The Applicable Regulations.

The ICA majority erred when it construed the applicable Environmental Council regulations and HEPA to require the preparation of a SEIS only when there has been a substantive change to the design of a project that was the subject of a prior EIS. This construction defies both logic and the law.

The Environmental Council is authorized to enact rules to prescribe the contents, procedures, review, acceptance and rejection of an EIS. Haw. Rev. Stat. § 343-6. Pursuant to this statutory authority, the Environmental Council has adopted regulations. *See* Haw. Admin. Reg. Ch. 11-200. Significantly, the Environmental Council has determined that an EIS must be supplemented for any one of four reasons:

> A supplemental statement shall be warranted [1] when the scope of an action has been substantially increased, [2] when the intensity of environmental impacts will be increased, [3] when mitigating measures originally planned are not to be implemented, **or** [4] where new circumstances or evidence have brought to light different or likely increased environmental impacts **not previously dealt with**.

Haw. Admin. Reg. § 11-200-27 (emphasis and numbering added). The regulation lists four circumstances in which an SEIS must be prepared. The ICA majority, however, erred when it construed the regulations to require an SEIS only when the project "has changed substantively in size, scope, intensity, use, location or timing." *Unite Here! Local 5*, 120 Hawai'i at 465, 209 P.3d at 1279. The ICA majority incorrectly focused on only the first of the four alternative criteria.

The fourth criteria – "where new circumstances or evidence have brought to light different or likely increased environmental **not previously dealt with**" is at issue in this case. Here, the EIS prepared in 1985 makes absolutely no mention of environmental impacts if the 3,500 resort and condominium units were to be built, sold and occupied sometime after 2009. To the contrary, the EIS dealt only with impacts occurring for a project that was to be built between 1986 and 1996. The developer chose to set these narrow parameters on its project and its EIS. Therefore, impacts post-2000 were "not previously dealt with" for purposes of Haw. Admin. Reg. § 11-200-27. By ignoring the remainder of section 11-200-27 in favor of its "change in design" interpretation, the ICA majority committed plain error.

B. The Project Has Changed Substantively In Timing.

In addition to its erroneous interpretation of the regulations, the ICA majority also erred because, even under its mistaken interpretation, the project has changed substantively in its timing, rendering the original EIS inadequate as a matter of law.

The SEIS regulations expressly acknowledge that a project that has changed substantively in any of a number of characteristics has become a new project:

> A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required, **to the extent the action has not changed substantively in size, scope, intensity, use, location *or timing***, among other things. If there is any change in any of these characteristics that may have a significant effect, the original statement that was changed **shall no longer be valid because an essentially different action would be under consideration** and a supplemental statement shall be prepared and reviewed as provided by this chapter.

Haw. Admin. Reg. § 11-200-26 (emphasis added).

In this case, the original "action" described in the EIS was the construction of 3,500 additional resort and condominium units between 1986 and 1996. *Unite Here! Local 5*, 120 Hawai'i at 459 - 460, 209 P.3d at 1273-1274. The proposed action was to have been completed by 1996. For that reason, the EIS only evaluated effects that would occur within the development window. The EIS did not, for instance, study the impact of the development on traffic on Kamehameha Highway if the project were to commence in 2009 and be completed sometime in the ensuing decades. Similarly, the EIS did not discuss the impact of the project on the endangered Hawaiian monk seal because, at the time it was drafted and during the original development window, monk seals were not frequenting the beaches on which the hotels will be built.

Thus, the action has changed substantively in timing, and the original EIS contained absolutely no information concerning the environmental effects of the project if constructed at least twenty years later than proposed in the EIS. This case fits squarely into the SEIS regulations, because the project timing has changed substantively, resulting in environmental and other impacts that have never been studied.

This is not the first time that Hawaii's appellate courts have dealt with a stale EIS and the need for further environmental disclosures. In *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Hawai'i 247, 188 P.3d 761 (App. 2008), the State of Hawaii had prepared EISs concerning the activities at the Natural Energy Laboratory of Hawai'i ("NELH") not once, but twice, in 1976 and1985. Nevertheless, the ICA held that neither EIS addressed the proposed new "action," the importation of a new strain of genetically engineered micro-algae. This was true even though the 1985 EIS did address algae importation in general. The ICA explained:

> There is no discussion in the 1985 EIS regarding the production of micro-algae in photobioreactors. There is also no discussion about the potential environmental impacts of large-scale production of miro-algae in raceways, tanks, or ponds, which the EIS mentions are feasible operations at NELH or HOST parks. ... The two EISs, which were prepared more than three and two decades ago, respectively,

> confirm that the NELH and HOST parks were still conceptual or in their infancy stages when the EISs were prepared. It is clear from the EISs that as the nature and details of individual projects to be conducted at either park became known, further HEPA review was expected.

Id. at 258-259, 188 P.3d at 772-773. Just as in *'Ohana Pale Ke Ao*, in this case the EIS did not even mention the impact of the project on traffic if the project were to be built sometime after 2009, nor did it even mention the endangered Hawaiian monk seal. That the EIS in this case mentioned traffic impacts for a development occurring between 1986 and 2000 is tantamount to the 1985 EIS in *'Ohana Pale Ke Ao*, which mentioned algae propogation in general, but did not study the impacts of genetically engineered micro-algae in particular. In both cases, it is clear that HEPA requires the effects of the particular action conducted at the appropriate time be adequately analyzed and disclosed.

C. <u>The Developer Chose Its Development Window.</u>

KRC, or its predecessor-in-interest, held all the cards in this case. It proposed the original 1986 - 1996 construction schedule. It chose to study the environmental impacts from a project being built in ten years, rather than a twenty or thirty year build-out window. Having set the parameters for its project in the EIS and then having limited its environmental analysis to those years, KRC cannot be heard to complain today if it is required to disclose the environmental impacts of 3,500 resort and condominium units being built and sold in 2009, or 2019, or whenever it proposes actual construction, sale and occupancy.[1]

D. <u>An SEIS Continues To Inform Decision-Making In This Case.</u>

This Court need not determine whether subdivision approval constitutes a discretionary approval for purposes of Haw. Rev. Stat. Ch. 343 because KRC's predecessor obtained an SMA Use permit that can be reconsidered, revoked or modified based upon new information or

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[1]The public has no way to know when this project will actually be built, or who will build it.

changed circumstances, which are exactly the circumstances of this case. Contrary to KRC's argument, there is ample opportunity for an SEIS to continue to inform the public, the City, and the State of Hawaii, concerning the impacts of the project on the environment and the community. This is so because (1) just like in *Morgan v. Planning Department*, 104 Hawai'i 173, 86 P.3d 982 (Hawaii 2004), KRC has not built the project that it originally proposed and that it was authorized to build, and (2) as noted by the dissent, there is a question of fact concerning whether an SEIS would be of use to the Department of Planning and Permitting ("DPP") as it considers elements of the subdivision. For these reasons, an SEIS is not useless; to the contrary, an SEIS must be prepared so that the City and the State will not continue to make decisions in a vacuum and so the public will not be saddled with a dinosaur, and the gridlock, urbanization, and environmental destruction, that will follow.

1. The SMA Use Permit Can Be Reconsidered Under *Morgan*.

In *Morgan v. Planning Department*, 104 Hawai'i 173, 86 P.3d 982 (Hawai'i 2004), this Court held that a Special Management Area ("SMA") Use permit issued by a county could: (1) be modified "at a later date for changed conditions"; (2) have additional conditions imposed "to insure compliance with the terms and conditions of the SMA Use permit, as originally issued" and; (3) be "revoke[d], amend[ed] or modif[ied] ... to correct, remedy or rectify the wrongs caused by [the developer's] noncompliance." *Morgan*, 104 Hawai'i at 175, 86 P.3d at 984.

This Court's opinion in *Morgan* is not nearly as narrow as KRC suggests. The Court made clear that a county retains the authority to reconsider an SMA Use permit, not only when the permitted development was not constructed, but whenever there are changed circumstances and new information, particularly of potential environmental harm that was not previously considered:

> In the instant case, the Planning Commission was not aware of the consequences of the seawall on neighboring properties and its natural effects at the time it issued Morgan the SMA Use permit. Specifically, it was not until 1986 that the Planning Commission learned that the seawall caused significant environmental damage to the shoreline area. Moreover, Morgan failed to comply with the conditions of the SMA Use permit, inasmuch as Morgan built a

> seawall, instead of a rock revetment, and, later, made improper and unpermitted additions to the seawall. Experts further testified that the seawall caused significant adverse environmental effects to the shoreline area and led to an increased rate of erosion and loss of beach fronting the seawall. Indeed, at the time the Planning Commission issued Morgan's SMA Use permit, it could not foresee and anticipate every emergency which might present itself or make proper provisions for conditions which might arise in the future.

Id. at 183 - 184, 86 P.3d at 992 - 993.[2] Thus, this Court concluded that "the Planning Commission must possess the inherent power to reconsider a validly issued SMA Use permit." *Id.* at 184, 86 P.3d at 993. The Court also held "the Planning Commission has the power to revoke, amend, or modify a SMA Use permit, inasmuch as this power is reasonably necessary to carry out the Planning Commission's express authority granted under the CZMA." *Id.*

> Clearly, the underlying intent of the CZMA is to protect, preserve, and, where possible, restore the natural resources of Hawai'i's coastal zone. As the designated authority to carry out the CZMA's policies and objectives, the Planning Commission is vested with broad power and authority in implementing the CZMA's mandate. As such, the Planning Commission must have jurisdiction over SMA Use permits to ensure compliance with the CZMA, and, therefore, has both the authority to reconsider and the implied authority to modify a validly issued SMA Use permit.

Id. at 185, 86 P.3d at 994. Thus, *Morgan* demonstrates why the preparation of an SEIS will not be useless, but will provide extremely valuable information to the City as the City evaluates its duties under *Morgan.*

2. <u>KRC Did Not Build The Project Contemplated By The SMA Use Permit.</u>

Even under KRC's overly restrictive interpretation of *Morgan*, i.e., that an SMA Use permit can only be reconsidered (and thus revoked, amended or modified) when the developer has not constructed the development authorized under the permit, such a rule would apply in this case. That is because the development described in the SMA Use permit application, and analyzed under

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[2]The consequences of a revocation are not at issue in this case and the amicus takes no position on that issue.

the EIS that predated it, was for the construction of 3,500 resort and condominium units to be constructed between 1986 and 1996. KRC was not given *carte blanche* to build 3,500 units anytime in the next century, or the next millennium. To conclude otherwise is wholly unreasonable.

Rather, a development project is defined by the representations made by the developer to the approving agencies. In this case, KRC's predecessor described a major resort expansion project that was to be commenced in 1986 and completed in 1996. That was the development schedule analyzed in the original EIS.[3] Although the EIS could have assessed the environmental impacts of the construction of 3,500 resort and condominium units to be constructed between 2009 and 2019, or even 2019 and 2029, it did not do so. No such information is contained in the EIS. There was a conscious decision by this developer to limit its assessment of the impacts of the project to a project that was going to be built between 1986 and 1996. Having chosen its bed, this developer must now sleep in it.

3. Questions Exist Concerning Subdivision Approval.

Although the Court need never reach the issue because of the *Morgan* analysis above, as correctly noted by Judge Nakamura in dissent, questions remain as to whether the subdivision approval process before the DPP would benefit from a SEIS. *Unite Here! Local 5*, 120 Hawai'i at 476-477, 209 P.3d at 1290-1291. Thus, the ICA majority could, but need not, be reversed and the matter remanded on this basis.[4]

There are aspects of Honolulu's subdivision ordinance and regulations, regardless of whether it is discretionary or ministerial, that confirm that the DPP would benefit from the assessment of current impacts and current conditions in a SEIS.

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[3]Thus, it is immaterial that the City did not impose a concrete development schedule in the SMA Use permit.

[4]Tellingly, the City does not echo KRC's argument on appeal that Honolulu's subdivision process is a ministerial approval. Perhaps it was the apparent disagreement between KRC and the City that caused Justice Nakamura to identify a factual dispute.

For instance, when approving a subdivision application, the DPP must determine and then require that adequate public access be provided across the property to land below the shoreline and/or in the mountains. Hon. Rev. Ord. § 22-6.3 *et. seq.* Public access to the shoreline is a significant issue with respect to the Turtle Bay project and the 880 acres of oceanfront land it covers. "The director shall determine the location and alignment of the public access for pedestrian travel on subdivision land." *Id.* at 22-6.4(b). Similarly, subdivision applications must provide for public parks and playgrounds, Hon. Rev. Ord. § 22-7.3, or impose an in-lieu fee. *Id.* at § 22-7.6. Public access to and along the shoreline and public parks and amenities are another of the long-promised but never delivered community benefits. It is difficult to conclude, as DPP and KRC apparently have, that the performance of these duties would not be improved with current, rather than outdated, information and studies contained in a SEIS.

Similarly, the Honolulu Subdivision Rules and Regulations ("Subdivision Rules") demonstrate the ability of the City to compel a developer to mitigate traffic conditions caused by the development:

> Where major access to a proposed subdivision crosses or connects to a major street or highway [such as Kamehameha Highway], such access shall be provided with accelation lanes, deceleration lanes, turning lanes, traffic controls, overpass or underpass structures, off and on ramps and other traffic engineering improvements **as required by the Director upon consultation with the Traffic Engineer and Chief Engineer** in accordance with the requirements and standards of the Department of Transportatin Services, Department of Public Works and State Highways Divisision.

Subdivision Rules, § 4-406 (emphasis added). Of course the Director would benefit from an SEIS that measures the traffic impact and road improvement requirements caused by the construction and occupancy of 3,500 units on Kamehameha Highway beginning sometime after 2009. This traffic impact was never considered in the original EIS, which studied traffic impacts only through 2000 (and which assumed the construction would have been completed by that time, making further

evaluation moot).[5] If the Director is able, at the subdivision approval phase, to impose conditions and requirements to mitigate traffic impacts on major public highways, like Kamehameha Highway, then a SEIS describing traffic impacts in this heretofore unstudied development window would surely be of use.

In addition, the Subdivision Rules require the Director to undertake a determination of whether the land is suitable for subdivision and occupancy:

> No subdivision shall be granted tentative subdivision approval of the preliminary map or approval of the final map if the land is found by the Director, upon consultation with the Chief Engineer or other government agencies to be unsuitable for the proposed use by reason of proneness to flooding, bad drainage, geological conditions, unstable subsurface, ground water or seepage conditions, inundation or erosion by seawater, proneness to slides or similar hazards, adverse earth or rock formation or topography, or other features or conditions likely to be harmful or dangerous to the health, safety, or welfare of future residents of the proposed subdivision or of the surrounding neighborhood or community, unless satisfactory protective improvements or other measures have been proposed or taken by the subdivider and approved by the Chief Engineer or other appropriate agency.

Subdivision Rules, § 4-403. Where, as in this case, the developer has not begun a single one of the 3,500 resort and condominium units, then this requirement of the subdivision regulations suggests that the continued suitability should be studied. Is the presence of monk seals on the coast a threat to future residents (and vice versa) that buffers, setbacks or other mitigative measures should be imposed to reduce the likelihood of harm? Thus, it is again impossible to say, as the ICA majority did, that the DPP would not benefit from the information generated by the SEIS in making the assessments and determinations that it must make under the Honolulu subdivision laws.

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[5]KRC might suggest that it has periodically provided private traffic studies to the City, and so the City has information. This, however, is a far cry from complying with Chapter 343 and the public participation available therein. Furthermore, if KRC and the City have already generated the information, how hard would it be to disclose it in the form of an SEIS?

VI.

CONCLUSION

For the reasons set forth above, Defend Oahu Coalition respectfully requests this Court to vacate and remand the majority opinion in *Unite Here! Local 5 v. City and County of Honolulu,* 120 Hawaii 457, 209 P.3d 1271 (App. 2009).

DATED: Honolulu, Hawaii, _____.

DAMON KEY LEONG KUPCHAK HASTERT

_____

GREGORY W. KUGLE

Attorney for Amicus Curiae
DEFEND OAHU COALITION

No. 28602

IN THE SUPREME COURT OF THE STATE OF HAWAII

Civil No. 06-1-0265
UNITE HERE! LOCAL 5; ERIC W. GILL; TODD A.K. MARTIN,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU, a municipal corporation; KUILIMA RESORT COMPANY, a Hawaii corporation; DOE DEFENDANTS 1-10,

Defendants.

KUILIMA RESORT COMPANY, a Hawaii general partnership,

Counterclaim Plaintiff,

vs.

UNITE HERE! LOCAL 5 HAWAII, a Hawaii labor partnership; ERIC W. GILL, an individual,

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawaii general partnership,

Counterclaim Plaintiff,

vs.

UNITE HERE! a New York labor organization; DOE DEFENDANTS 1-10,

Additional Counterclaim Defendants.

Civil No. 06-1-0867
KEEP THE NORTH SHORE COUNTRY, a Hawaii non-profit corporation, and SIERRA

Civil No.. 06-1-0265
Civil No. 06-1-0867

APPEAL FROM THE AMENDED FINAL JUDGMENT, filed on June 4, 2007

FIRST CIRCUIT COURT

HONORABLE GARY W.B. CHANG
HONORABLE SABRINA S. McKENNA
Judges

CLUB, HAWAII CHAPTER, a foreign non-profit corporation,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; HENRY ENG, Director of Department of Planning and Permitting, in his official capacity; KUILIMA RESORT COMPANY, a Hawaii general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known address as follows:

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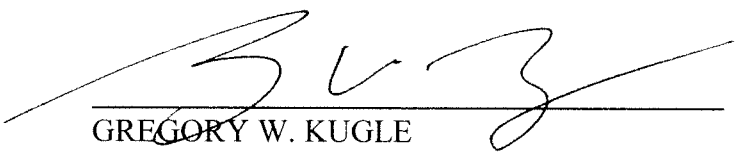
DATED: Honolulu, Hawaii, November 25, 2009.

DAMON KEY LEONG KUPCHAK HASTERT



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