

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 organization; 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

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

2010 MAY 18 PM 3:50

U.S. DISTRICT COURT
CLERK'S OFFICE
HONOLULU, HAWAII

FILED

CIVIL NO. 06-1-0867

KEEP THE NORTHSORE COUNTRY, a Hawaii non-profit corporation, and SIERRA CLUB, HAWA'I 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 Hawai'i general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF OF *AMICUS CURIAE* OF:

**LAND USE RESEARCH FOUNDATION OF HAWAII,
AMERICAN SAVINGS BANK,
BANK OF HAWAII,
BROOKFIELD HOMES HAWAII,
BUILDING INDUSTRY ASSOCIATION OF HAWAII,
CASTLE & COOK HOMES HAWAII, INC.,
CENTRAL PACIFIC BANK,
CHAMBER OF COMMERCE OF HAWAII,
DOWLING COMPANY, INC.,
D.R. HORTON,
FIRST HAWAIIAN BANK,
GENERAL CONTRACTORS ASSOCIATION OF HAWAII,
GENTRY HOMES, LTD.,
GENTRY INVESTMENT PROPERTIES,
HASEKO (HAWAII), INC.,
HAWAII BANKERS ASSOCIATION,
HAWAII CARPENTER'S UNION LOCAL 745
HAWAII DEVELOPER'S COUNCIL,
HAWAII ISLAND ECONOMIC DEVELOPMENT BOARD,
HAWAII LEEWARD PLANNING CONFERENCE,
JAMES CAMPBELL COMPANY, LLC,
JAYAR CONSTRUCTION, INC.,
KAPOLEI PROPERTY DEVELOPMENT, LLC,**

**KOGA ENGINEERING AND CONSTRUCTION,
MARK A. ROBINSON TRUST,
MARK DEVELOPMENT, INC.,
MIYABARA ASSOCIATES, LLC,
PAHIO DEVELOPMENT,
PRINCEVILLE AT HANALEI,
QUARTERS, INC.,
RALPH S. INOUE, CO. LTD.,
STANFORD CARR DEVELOPMENT, LLC AND
W.H. SHIPMAN**

**MEMORANDUM IN SUPPORT OF MOTION;
DECLARATION OF DAVID Z. ARAWAKAWA;
EXHIBITS "A"-“B”**

CERTIFICATE OF SERVICE

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BANK OF HAWAII, BROOKFIELD HOMES
HAWAII, BUILDING INDUSTRY
ASSOCIATION OF HAWAII, CASTLE &
COOK HOMES HAWAII, INC., CENTRAL
PACIFIC BANK, CHAMBER OF
COMMERCE OF HAWAII, DOWLING
COMPANY, INC., D.R. HORTON, FIRST
HAWAIIAN BANK, GENERAL
CONTRACTORS ASSOCIATION OF
HAWAII, GENTRY HOMES, LTD.,
GENTRY INVESTMENT PROPERTIES,
HASEKO (HAWAII), INC., HAWAII
BANKERS ASSOCIATION, HAWAII
CARPENTER'S UNION LOCAL 745,
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BROOKFIELD HOMES HAWAII,
BUILDING INDUSTRY ASSOCIATION
OF HAWAII, CASTLE & COOK HOMES
HAWAII, INC., CENTRAL PACIFIC
BANK, CHAMBER OF COMMERCE OF
HAWAII, DOWLING COMPANY, INC.,
D.R. HORTON, FIRST HAWAIIAN
BANK, GENERAL CONTRACTORS
ASSOCIATION OF HAWAII, GENTRY
HOMES, LTD., GENTRY INVESTMENT
PROPERTIES, HASEKO (HAWAII), INC.,
HAWAII BANKERS ASSOCIATION,
HAWAII CARPENTER'S UNION LOCAL
745, HAWAII DEVELOPER'S COUNCIL,
HAWAII ISLAND ECONOMIC

LEEWARD PLANNING CONFERENCE,
JAMES CAMPBELL COMPANY, LLC,
JAYAR CONSTRUCTION, INC., KAPOLEI
PROPERTY DEVELOPMENT, LLC, KOGA
ENGINEERING AND CONSTRUCTION,
MARK A. ROBINSON TRUST, MARK
DEVELOPMENT, INC., MIYABARA
ASSOCIATES, LLC, PAHIO
DEVELOPMENT, PRINCEVILLE AT
HANALEI, QUARTERS, INC., RALPH S.
INOUE, CO. LTD., STANFORD CARR
DEVELOPMENT, LLC AND W.H.
SHIPMAN

DEVELOPMENT BOARD, HAWAII
LEEWARD PLANNING CONFERENCE,
JAMES CAMPBELL COMPANY, LLC,
JAYAR CONSTRUCTION, INC.,
KAPOLEI PROPERTY DEVELOPMENT,
LLC, KOGA ENGINEERING AND
CONSTRUCTION, MARK A. ROBINSON
TRUST, MARK DEVELOPMENT, INC.,
MIYABARA ASSOCIATES, LLC, PAHIO
DEVELOPMENT, PRINCEVILLE AT
HANALEI, QUARTERS, INC., RALPH S.
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CIVIL NOS. 06-1-0265 & 06-1-0867

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FIRST CIRCUIT COURT

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

AND RELATED COUNTERCLAIMS

CIVIL NO. 06-1-0867

KEEP THE NORTHSHERE COUNTRY, a
Hawaii non-profit corporation, et al.,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; et al.,

Defendants.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF OF *AMICUS CURIAE* OF:

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BANK OF HAWAII,

BROOKFIELD HOMES HAWAII,

BUILDING INDUSTRY ASSOCIATION OF HAWAII,

CASTLE & COOK HOMES HAWAII, INC.,

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HASEKO (HAWAII), INC.,

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KOYA ENGINEERING AND CONSTRUCTION,
MARK A. ROBINSON TRUST,
MARK DEVELOPMENT, INC.,
MIYABARA ASSOCIATES, LLC,
PAHIO DEVELOPMENT,
PRINCEVILLE AT HANALEI,
QUARTERS, INC.,
RALPH S. INOUYE, CO. LTD.,
STANFORD CARR DEVELOPMENT, LLC AND
W.H. SHIPMAN**

The Land Use Research Foundation of Hawaii (“LURF”), American Savings Bank, Bank of Hawaii, Brookfield Homes Hawaii, Building Industry Association of Hawaii, Castle & Cook Homes Hawaii, Inc., Central Pacific Bank, Chamber of Commerce of Hawaii, Dowling Company, Inc., D.R. Horton, First Hawaiian Bank, General Contractors Association of Hawaii, Gentry Homes, Ltd., Gentry Investment Properties, Haseko (Hawaii), Inc., Hawaii Bankers Association, Hawaii Carpenter’s Union Local 745, Hawaii Developer’s Council, Hawaii Island Economic Development Board, Hawaii Leeward Planning Conference, James Campbell Company, LLC, Jayar Construction, Inc., Kapolei Property Development, LLC, Koga Engineering and Construction, Mark A. Robinson Trust, Mark Development, Inc., Miyabara Associates, LLC, PAHIO Development, Princeville at Hanalei, Quarters, Inc., Ralph S. Inouye, Co., Ltd., Stanford Carr Development, LLC, and W.H. Shipman (collectively “Movants”), by and through their attorneys, respectfully seek leave of this Court to file a brief of amicus curiae in support of Defendant/Counterclaim-Plaintiff/Appellee Kuilima Resort Company’s Motion for Reconsideration, filed on April 19, 2010 in this appeal.

Movants seek to file an amicus curiae brief to apprise this Court of important legal issues and public interests at stake in this precedent-setting case of first impression including, but are not limited to, how:

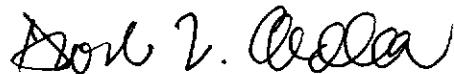
1. The Court Opinion, unless reconsidered or clarified, has created new regulatory requirements and policies and/or substituted its judgment for the existing land use process and decisions made by the legislature and relevant government agencies.
2. The Court Opinion will, and is already, affecting other projects in the State, subjecting uncompleted projects to a cloud of uncertainty and time limitations and other new requirements not known to exist until the Decision.

3. The Court Opinion, unless reconsidered or clarified, has already had and will continue to have far-reaching and a negative impact on the development of market and affordable housing, the visitor industry, the construction industry, lenders, and on Hawaii's economy as a whole.

Based on their background and interests, Movants are well-situated to contribute as amici curiae and to provide helpful insight in this significant case affecting landowners, developers, lenders and the Hawaii business community. The Court's decision has already had and will continue to have far-reaching implications to Hawai'i's land use process, expectations based on approvals and creates a cloud of uncertainty over every construction project in Hawaii, which will create a negative impact on development of market and affordable housing, the visitor industry, the construction industry, lenders, and on Hawaii's economy as a whole. Accordingly, Movants wish to provide additional briefing that may assist the Court in its decision-making, including the effects this Court's decision may have on the land use process and vital interests in Hawaii. A copy of Movants' proposed Amicus Curiae Brief is attached hereto as Exhibit "B."

This Motion is filed pursuant to Rules 27 and 28(g) of the Hawai'i Rules of Appellate Procedure. It is brought with good cause and supported by the attached Memorandum in Support of Motion and Declaration of David Z. Arakawa.

DATED: Honolulu, Hawai'i, May 18, 2010.



DAVID Z. ARAKAWA
Counsel for *Amici Curiae*
DAVID L. CALLIES
Of Counsel for *Amici Curiae*

LAND USE RESEARCH FOUNDATION OF HAWAII, AMERICAN SAVINGS BANK, BANK OF HAWAII, BROOKFIELD HOMES HAWAII, BUILDING INDUSTRY ASSOCIATION OF HAWAII, CASTLE & COOK HOMES HAWAII, INC., CENTRAL PACIFIC BANK, CHAMBER OF COMMERCE OF HAWAII, DOWLING COMPANY, INC., D.R. HORTON, FIRST HAWAIIAN BANK, GENERAL CONTRACTORS ASSOCIATION OF HAWAII, GENTRY HOMES, LTD., GENTRY INVESTMENT PROPERTIES, HASEKO (HAWAII), INC., HAWAII BANKERS ASSOCIATION, HAWAII CARPENTER'S UNION LOCAL 745, HAWAII DEVELOPER'S COUNCIL, HAWAII ISLAND ECONOMIC DEVELOPMENT BOARD, HAWAII LEeward PLANNING CONFERENCE, JAMES CAMPBELL COMPANY, LLC, JAYAR CONSTRUCTION, INC., KAPOLEI PROPERTY DEVELOPMENT, LLC, KOGA ENGINEERING AND CONSTRUCTION, MARK A. ROBINSON TRUST, MARK DEVELOPMENT, INC., MIYABARA ASSOCIATES, LLC, PAHIO DEVELOPMENT, PRINCEVILLE AT HANALEI, QUARTERS, INC., RALPH S. INOUE, CO. LTD., STANFORD CARR DEVELOPMENT, LLC AND W.H. SHIPMAN.

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Counterclaim Plaintiff,

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UNITE HERE! a New York labor organization;
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Judges

CIVIL NO. 06-1-0867

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vs.

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Defendants.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Land Use Research Foundation of Hawaii ("LURF"), American Savings Bank, Bank of Hawaii, Brookfield Homes Hawaii, Building Industry Association of Hawaii, Castle & Cook Homes Hawaii, Inc., Central Pacific Bank, Chamber of Commerce of Hawaii, Dowling Company, Inc., D.R. Horton, First Hawaiian Bank, General Contractors Association of Hawaii, Gentry Homes, Ltd., Gentry Investment Properties, Haseko (Hawaii), Inc., Hawaii Bankers Association ("HBA"), Hawaii Carpenter's Union Local 745, Hawaii Developer's Council, Hawaii Island Economic Development Board, Hawaii Leeward Planning Conference, James Campbell Company, LLC, Jayar Construction, Inc., Kapolei Property Development, LLC, Koga Engineering and Construction, Mark A. Robinson Trust, Mark Development, Inc., Miyabara Associates, LLC, PAHIO Development ("PAHIO"), Princeville at Hanalei, Quarters, Inc., Ralph S. Inouye, Co., Ltd., Stanford Carr Development, LLC, and W.H. Shipman (collectively

“Movants”), by and through their attorneys, respectfully seek leave of this Honorable Court to file a brief of amicus curiae in support of the position of Defendants-Appellees Kuilima Resort Company (“KRC”) and City and County of Honolulu (the “City”) in this appeal.

Movants are a diverse group of stakeholders, including landowners, developers, financial institutions, members of the building and construction industry, and other business related organizations who are concerned and affected by the Court’s decision in this matter (“Decision”). Together, Movants represent over **2,000 companies** and over **200,000 employees**. For years, Movants have collectively and/or separately worked to promote and advance various interests including the interests in Hawai‘i thru the land use process, Hawai‘i’s landowners, lending institutions, and the development community, particularly in the areas of land use laws and regulations—all within the guidelines and constraints of Hawai‘i’s laws and regulations. For example, LURF is a statewide non-profit research and trade association whose members include major Hawai‘i landowners and developers. LURF strives not only to represent the interests of its membership, but also to find common ground for the concerns of government, business, and the community. One of LURF’s missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawai‘i’s significant natural and cultural resources and public health and safety. In fulfilling this mission, LURF actively participates at the local, state, and federal levels of government, seeking passage and proper application of legislation and policies that create a favorable business climate in which landowners, developers, and the business community can grow and improve the quality of life for the citizens of Hawai‘i. A list of LURF Members is attached as Exhibit “A.”

Similar to LURF, a number of landowners and developers are concerned with the Decision. Brookfield Homes Hawai'i is a venture between local ownership in Hawai'i and one of North America's larger home building companies, Brookfield Homes. Based on O'ahu, Brookfield Homes Hawai'i is managed by an experienced team. Brookfield creates diverse neighborhoods that evoke a unique sense of place and reflect the harmony of the land. Brookfield honors and incorporates Hawai'i's cultural heritage and island lifestyle into their projects.

Castle and Cooke Hawai'i, a division of Castle & Cooke, Inc. is one of the oldest developers in the nation. Among Castle & Cooke, Inc.'s greatest assets are its substantial land and real estate holdings, many of which are legacy lands tracing back to the company's founders. These include 98 percent of the 90,000 acre-island of Lanai, where Castle & Cooke owns two award-winning Four Seasons Hotels.

Dowling Company, Inc. is a Maui based company dedicated to developing exceptional properties that serve the needs of our community, create opportunity for their employees, meet their partners' financial goals and successfully support Maui's non-profit organizations. Dowling Company has a commitment to Building in Balance and serving the interests of the Maui community.

D.R. Horton is a developer of liveable and affordable new homes. D.R. Horton was started by Donald R. Horton 30 years ago and continues to demonstrate its leadership in residential development through design innovation, superior craftsmanship, and responsiveness to the needs of its customers.

Gentry Homes, Ltd. has been developing and building superior homes and communities in Hawai'i for over forty-one years. Gentry Homes, Ltd. stands for quality construction and superior customer service. The Gentry Company has built over 10,500 homes and commercial

and industrial developments in communities from Waimanalo, Oahu to Kailua Kona on the Big Island.

Gentry Investment Properties is a major landowner and investor in income property (commercial, industrial and apartment) investments related to master planned communities and other strategic investment projects

Haseko (Hawai`i), Inc. has been developing Hawai`i's most prized hotel, commercial and residential projects since 1973, including the award-winning master planned community of Ocean Pointe and the Hoakalei Resort in 'Ewa Beach. Haseko (Hawai`i), Inc.'s commitment to being a good neighbor provides 'Ewa Beach with improvement projects worth millions, in addition to active support of area schools and organizations.

Hawai`i Developer's Council is dedicated to the promotion of responsible real estate in Hawai`i and represents over 200 members and associates in development-related industries. The mission of Hawai`i Developer's Council is to promote high ethics and community responsibility in real estate and to educate developers and the public regarding land, construction and development issues through public forums, seminars and publications.

James Campbell Company LLC is a private, Hawai`i-based, nationally diversified real estate company with assets including ground leases, office, retail, and industrial properties in Washington D.C., and 16 states across the U.S. The company is also the master developer of the new City of Kapolei on the island of O'ahu, Hawai`i.

Kapolei Property Development, LLC is at the helm of the concerted effort to develop the City of Kapolei. In recent years, the surge of activity has accelerated the city's growth, generated by an influx of new investors who see Kapolei's enormous potential and who are fueling job creation and economic activity in the region. Kapolei Property Development, LLC is an affiliate

of the James Campbell Company LLC. Kapolei Property Development, LLC continues the company's long-standing commitment to the development of Kapolei.

The Mark A. Robinson Trust is a private family trust managing the land and assets of the James Robinson heirs dating back to 1820.

Mark Development, Inc. is a housing development and management company incorporated in 1977. Mark Development was formed with the sole intent of building affordable housing for the people of Hawai`i. Mark Development, Inc., and its other affiliated development entities have successfully completed many government-assisted housing projects within time and budget constraints. Mark Development has developed over 1,665 single and multi-family homes and has managed nearly 500 rental units on Oahu and the neighbor islands. In 2002, Mark Development was the Building Industry Association of Hawai`i's "Builder of the Year."

PAHIO includes development companies and a construction company. For the past 35 years, PAHIO has developed multiple types of projects both on the mainland, and on Kauai since 1978, projects include resort projects as well as affordable housing projects, apartments, historic building renovations, and residential housing.

Princeville at Hanalei is Kauai's first master-planned community that combines natural beauty with amenities to accommodate kama`aina and visitors alike.

Quarters Inc. is a real estate development and investment holdings company.

Stanford Carr Development, LLC is a local development firm headquartered in Honolulu founded in 1990, whose mission is to develop quality residential communities, commercial projects and special needs housing that achieve strong market acceptance and provide long-term value. Stanford Carr Development, LLC strives for excellence by: developing master-planned communities with innovative site planning; creating distinctive neighborhoods with diverse

architectural character; utilizing the latest technology and materials to provide the highest quality homes; and providing living experiences that are environmentally sensitive.

W.H. Shipman Limited is a kama`aina family-owned company established in 1882. The company has 17,000 acres in the Puna District, Hawai`i Island. Grounded in island values, the Shipmans have a history of conservation, preservation and community involvement. W.H. Shipman is engaged in agriculture and commercial/industrial development and leasing. Long engaged in agriculture, W.H. Shipman is an incubator for agricultural diversity and start-up farming, offering good infrastructure, varied soil types and favorable land license terms.

Likewise, the following financial institutions are also concerned about the Decision. American Savings Bank is one of the state's largest financial institutions and employs over 1,000 employees, with an 85-year history and strong connections to Hawai`i's communities. American Savings Bank offers customers the tools they need to have full, productive financial lives – including commercial and consumer banking services and insurance and investment options.

Bank of Hawai`i became the first chartered and incorporated bank in 1897, to do business in the Republic of Hawai`i. Bank of Hawai`i played an important role in Hawai`i's transition from a territory to a state. During the 1960s and 1970s, Bank of Hawai`i's growth kept pace with that of the state which provided major support to local agriculture.

Similarly, Central Pacific Bank is equally concerned about the Decision. Central Pacific Bank is the primary subsidiary of Central Pacific Financial Corp., a Hawai`i based financial institution with \$4.4 billion in assets. Central Pacific Financial Corp.'s stocks are publicly traded on the New York Stock Exchange. Central Pacific Bank provides a full range of banking, investment and trust services. Central Pacific Bank was founded by a small group of World War

Il veterans in 1954 to help immigrant families build a life away from the plantations, the bank has grown to serve the financial needs of all families and small businesses in the Islands.

Also, First Hawaiian Bank shares equal concern. First Hawaiian Bank was founded in 1858 and is the oldest and largest financial institution in Hawai`i. First Hawaiian Bank has 58 branches throughout Hawai`i, three in Guam and two in Saipan. First Hawaiian Bank (a State of Hawai`i-chartered bank), provides commercial and consumer banking services, engages in equipment and vehicle leasing and offers trust, investment and insurance products.

Also joining the Amicus is the HBA, established in 1932. HBA has brought together all FDIC insured depository institutions doing business in Hawai`i, which includes banks, thrifts and a depository financial services company. HBA represents its members by advocating for Hawai`i's economic vitality and sustainability through collaboration with legislators, regulators and the local community we serve. Its members control roughly \$40 billion in assets and employ close to 8,000 women and men.

The following members of the building and construction industry are also concerned with the Decision. The Building Industry Association of Hawai`i, chartered in 1955, is a professional trade organization affiliated with the National Association of Home Builders, representing developers, contractors, suppliers, Realtors, architects, financial institutions and a host of other professionals who service the building industry. Building Industry Association of Hawai`i takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawai`i.

The General Contractors Association of Hawai`i was formed in 1932 by general contractors from the four major islands of Hawai`i. The General Contractors Association of Hawai`i is a full service construction association serving General Contractors, Subcontractors,

Equipment/Material Suppliers and Associate Members. The General Contractors Association of Hawai`i is the industry leader dedicated to skill, integrity and responsibility. GCA is an organization of choice for those associated with the construction industry.

The Hawai`i Carpenters Union Local 745 was founded in 1901 and represents 5,900 members. It is the largest construction union in Hawai`i providing wages, benefits and services that rival carpenters worldwide. The Hawai`i Carpenters work is reflected in world-class resorts and hotels, office high rises, shopping malls, government buildings and infrastructure, highways, schools, hospitals, military facilities, private residences and innumerable other structures.

Jayar Construction Inc. is a construction company that specializes in highway and street construction.

Koga Engineering & Construction, Inc. was founded in 1973 by Malcolm T. Koga and currently averages \$24 million of revenues per year and has consistently ranked in the Top 25 among the State's general contractors. Koga Engineering & Construction, Inc. has offices in Honolulu, Kauai, and the Big Island and is a signatory to the Operating Engineers, Laborers, Masons and Carpenters master agreements. It is an active member of the General Contractors Association (GCA) of Hawai`i, which is the local chapter of the Associated General Contractors of America.

Miyabara Associates, Inc. was founded in 1977 and specializes in landscape architecture. Miyabara's practice includes public and private sector work primarily residential, commercial, resort, and parks and recreational facilities.

Ralph S. Inouye Co. Ltd., a General Contractor and Hawaii corporation was founded in 1962. For decades Ralph S. Inouye Co. Ltd. has played an integral role in the growth and development of Hawai`i, and has consistently done it with the highest degree of skill,

responsibility and integrity. The trusted Ralph Inouye name has become synonymous with quality. From the Rainbow Place Condominium erected in the 70's to the projects underway today, Ralph Inouye projects are an attestation to the level of pride and detail we put into our work.

Other business related organizations are also concerned with the Decision. The Chamber is an organization representing the interest of all Hawai`i's business community and is now 159 years old. With over 1,100 member companies representing over 200,000 employees, the Chamber is the largest organization to serve as "The Voice of Business" in Hawai`i. The membership of the Chamber reflects the diversity of our state as a whole – from the size to the sector of business. The Chamber represents the interests of small, medium and large businesses, for profit and non-profit businesses and sole proprietors. More than 75 percent of the Chambers' members are small businesses, a reflection of Hawai`i's main business population. All Chamber members share a common vision to continue to find ways to help Hawai`i's business community sustain, grow and expand. The Chamber of Commerce of Hawai`i works on behalf of its members and the entire business community to improve the state's economic climate and help businesses thrive.

Hawai`i Island Economic Development Board Inc. is a private non-profit 501 (c) (3) corporation registered in the State of Hawai`i since August 1984. HIEDB's mission is to provide and promote private sector support and expertise for balanced growth in Hawai`i County in partnership with Federal, State, County and private resources. HIEDB promotes sustainable growth and development of place, people, and products of Hawai`i Island in balance with the diverse and unique resources of our island home and always respectful of our native culture.

Hawai`i Leeward Planning Conference was incorporated in 1974 and has been dedicated to promoting sound planning decisions for West Hawai`i, and promoting long term benefits for the communities involved.

The issues addressed below are important for the Court to consider as the Court's Decision has, unless modified or clarified, made a far-reaching change to the environmental review process vis-à-vis the Hawai`i land use process, beyond the Turtle Bay Resort expansion project, and the interests of KRC therein and the decisions of the City in connection with that project.

II. ARGUMENT

The issues now before the Court are of critical importance to Movants and their members. As landowners, lenders, developers and other stakeholders affected by the Court's Decision that are working to create sustainable growth and a favorable business community in Hawai`i, many of Movants' members are likely to be directly impacted by this Court's answer to the questions presented in this appeal.

Movants, therefore, seek leave of this Court to submit an Amicus Curiae Brief to address certain issues before the Court, including, but not limited to:

4. The Court Decision, unless reconsidered or clarified, has created new regulatory requirements and policies and/or substituted its judgment for the existing land use process and decisions made by the legislature and relevant government agencies.
5. The Court Decision will, and is already, affecting other projects in the State, subjecting uncompleted projects to a cloud of uncertainty and time limitations and other new requirements not known to exist until the Decision.
6. The Court Decision, unless reconsidered or clarified, has already had and will continue to have far-reaching and a negative impact on the development of market and affordable housing, the visitor industry, the construction industry, lenders, and on Hawaii's economy as a whole.

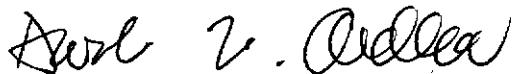
The City's Department of Planning and Permitting, the Circuit Court, and the ICA Majority correctly interpreted Hawai`i's statutory and regulatory framework in a manner that

(a) gives the SEIS Rules meaning without exceeding their enabling legislation, (b) conforms to the plain language of the HEPA and the SEIS Rules, (c) does not render substantial portions of HEPA and the SEIS Rules superfluous and/or meaningless, (d) is consistent with the purpose of HEPA, and (e) does not lead to absurd or illogical results relative. Any other interpretation will have potentially far-reaching implications for future growth and development in Hawai`i, and make the land use process in Hawai`i even more uncertain, cumbersome and intractable, and placing out of balance the interests of the environment to the significant detriment of economic considerations.

III. CONCLUSION

Based on their background and interests, Movants are well-situated to contribute as amicus curiae and to provide helpful insight in this significant case affecting Hawai`i's landowners and developers, and business community. Movants respectfully asks the Court to grant them leave to file a brief of amicus curiae in the form attached hereto as Exhibit "B".

DATED: Honolulu, Hawai`i, May 18, 2010.



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Counsel for *Amici Curiae*
DAVID L. CALLIES
Of Counsel for *Amici Curiae*
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INDUSTRY ASSOCIATION OF HAWAII, CASTLE &
COOK HOMES HAWAII, INC., CENTRAL PACIFIC
BANK, CHAMBER OF COMMERCE OF HAWAII,
DOWLING COMPANY, INC., D.R. HORTON, FIRST
HAWAIIAN BANK, GENERAL CONTRACTORS
ASSOCIATION OF HAWAII, GENTRY HOMES, LTD.,
GENTRY INVESTMENT PROPERTIES, HASEKO
(HAWAII), INC., HAWAII BANKERS ASSOCIATION,

HAWAII CARPENTER'S UNION LOCAL 745, HAWAII DEVELOPER'S COUNCIL, HAWAII ISLAND ECONOMIC DEVELOPMENT BOARD, HAWAII LEEWARD PLANNING CONFERENCE, JAMES CAMPBELL COMPANY, LLC, JAYAR CONSTRUCTION, INC., KAPOLEI PROPERTY DEVELOPMENT, LLC, KOGA ENGINEERING AND CONSTRUCTION, MARK A. ROBINSON TRUST, MARK DEVELOPMENT, INC., MIYABARA ASSOCIATES, LLC, PAHIO DEVELOPMENT, PRINCEVILLE AT HANALEI, QUARTERS, INC., RALPH S. INOUYE, CO. LTD., STANFORD CARR DEVELOPMENT, LLC AND W.H. SHIPMAN.

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 organization; 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

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

CIVIL NO. 06-1-0867

KEEP THE NORTHSORE COUNTRY, a Hawaii non-profit corporation, and SIERRA CLUB, HAWAI'I 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 Hawai'i general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

DECLARATION OF DAVID Z. ARAKAWA

I, David Z. Arakawa, declare under penalty of law that the following is true and correct:

1. I am an attorney for the Land Use Research Foundation of Hawaii, American Savings Bank, Bank of Hawaii, Brookfield Hines Hawaii, Building Industry Association of Hawaii, Castle & Cook Hines Hawaii, Inc., Central Pacific Bank, Chamber of Commerce of Hawaii, Dowling Company, Inc., D.R. Horton, First Hawaiian Bank, General Contractors Association of Hawaii, Gentry Homes, Ltd., Gentry Investment Properties, Haseko (Hawaii), Inc., Hawaii Bankers Association, Hawaii Carpenter's Union Local 745, Hawaii Developer's Council, Hawaii Island Economic Development Board, Hawaii Leeward Planning Conference, James Campbell Company, LLC, Jayar Construction, Inc., Kapolei Property Development, LLC, Koga Engineering and Construction, Mark A. Robinson Trust, Mark Development, Inc.,

Miyabara Associates, LLC, PAHIO Development, Princeville at Hanalei, Quarters, Inc., Ralph S. Inouye, Co., Ltd., Stanford Carr Development, LLC, and W.H. Shipman

2. I am competent to testify to the matters stated herein, and do so based on my personal knowledge.

3. I am licensed to practice law in the state of Hawai`i.

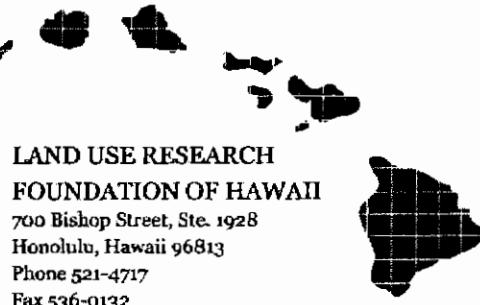
4. Attached hereto as Exhibit "A" is a true and correct copy of the Land Use Research Foundation of Hawaii Membership.

5. Attached hereto as Exhibit "B" is a true and correct copy of the Amicus Curiae Brief that Movants propose to file in this matter.

DATED: Honolulu, Hawai`i, May 18, 2010.



DAVID Z. ARAKAWA



Land Use Research Foundation of Hawaii Membership (FY 2009-2010)

Alexander & Baldwin, Inc.
Castle & Cooke Hawaii, Inc.
Dowling Company, Inc.
The Gentry Companies
Grove Farm Properties, Inc.
Haseko Hawaii, Inc.
Hawaiian Electric Company, Inc.
D.R. Horton Schuler Division
The Kamehameha Schools
Kapolei Property Development Group, LLC
Ko Olina Community Association
Loyalty Development Co., Ltd.
Maui Land & Pineapple Co., Inc.
1250 Oceanside Properties (Hokulia)
PAHIO Development Inc.
Princeville at Hanalei
Queen Emma Land
REIT Management & Research LLC
W.H. Shipman, Ltd.
Robinson Trusts:
 Caroline J. Robinson LLC
 J.L.P. Robinson, Ltd.
 Mark A. Robinson Trust
Stanford Carr Development LLC

EXHIBIT "A"

NO. 28602

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Counterclaim Plaintiff,

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UNITE HERE! LOCAL 5 HAWAII, a Hawaii
labor organization; ERIC W. GILL; an
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Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawaii
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Counterclaim Plaintiff,

vs.

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

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Exhibit B

CIVIL NO. 06-1-0867

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vs.

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KUILIMA RESORT COMPANY, a Hawai'i general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

**AMICUS CURIAE BRIEF OF:
LAND USE RESEARCH FOUNDATION OF HAWAII,
AMERICAN SAVINGS BANK,
BANK OF HAWAII,
BROOKFIELD HOMES HAWAII,
BUILDING INDUSTRY ASSOCIATION OF HAWAII,
CASTLE & COOK HOMES HAWAII, INC.,
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HAWAII ISLAND ECONOMIC DEVELOPMENT BOARD,
HAWAII LEEWARD PLANNING CONFERENCE,
JAMES CAMPBELL COMPANY, LLC,
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QUARTERS, INC.,
RALPH S. INOUYE, CO. LTD.,
STANFORD CARR DEVELOPMENT, LLC AND
W.H. SHIPMAN**

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HAWAII, INC., CENTRAL PACIFIC
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KAPOLEI PROPERTY DEVELOPMENT,
LLC, KOGA ENGINEERING AND

TRUST, MARK DEVELOPMENT, INC.,
MIYABARA ASSOCIATES, LLC, PAHIO
DEVELOPMENT, PRINCEVILLE AT
HANALEI, QUARTERS, INC., RALPH S.
INOUE, CO. LTD., STANFORD CARR
DEVELOPMENT, LLC AND W.H.
SHIPMAN

CONSTRUCTION, MARK A. ROBINSON
TRUST, MARK DEVELOPMENT, INC.,
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DEFENDANTS 1-10,

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HONORABLE SABRINA S. McKENNA
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DOES 1-10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; and DOE
GOVERNMENTAL UNITS 1-10,

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AMICUS CURIAE BRIEF OF

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PRINCEVILLE AT HANALEI,
QUARTERS, INC.,
RALPH S. INOUYE, CO. LTD.,
STANFORD CARR DEVELOPMENT, LLC AND
W.H. SHIPMAN**

Amicus Curiae AMERICAN SAVINGS BANK, BANK OF HAWAII, BROOKFIELD HOMES HAWAII, BUILDING INDUSTRY ASSOCIATION OF HAWAII, CASTLE & COOK HOMES HAWAII, INC., CENTRAL PACIFIC BANK, CHAMBER OF COMMERCE OF HAWAII, DOWLING COMPANY, INC., D.R. HORTON, FIRST HAWAIIAN BANK, GENERAL CONTRACTORS ASSOCIATION OF HAWAII, GENTRY HOMES, LTD., GENTRY INVESTMENT PROPERTIES, HASEKO (HAWAII), INC., HAWAII BANKERS ASSOCIATION, HAWAII CARPENTER'S UNION, HAWAII DEVELOPER'S COUNCIL, HAWAII ISLAND ECONOMIC DEVELOPMENT BOARD, HAWAII LEEWARD PLANNING CONFERENCE, JAMES CAMPBELL COMPANY, LLC, JAYAR

CONSTRUCTION, INC., KAPOLEI PROPERTY DEVELOPMENT, LLC, KOGA ENGINEERING AND CONSTRUCTION, MARK A. ROBINSON TRUST, MARK DEVELOPMENT, INC., MIYABARA ASSOCIATES, LLC, PAHIO DEVELOPMENT PRINCEVILLE AT HANALEI, QUARTERS, INC., RALPH S. INOUYE, CO. LTD., STANFORD CARR DEVELOPMENT, LLC AND W.H. SHIPMAN (collectively, the “Amici”) respectfully submit this brief in support of Kuilima Resort Company’s Motion for Reconsideration, filed April 19, 2010.

I. INTRODUCTION

On May 13, 2010, numerous representatives of virtually every major lending institution, land use and environmental law firm, landowner and developer in Hawaii met to discuss and consider the decision of this Court in *Unite Here! v. City and County of Honolulu* (the “Opinion”). The implications of the Court’s Opinion stunned the assembled representatives into silence. Many wondered aloud how and at what enormous additional cost land development projects in Hawaii could continue, much less commence, as what was a preliminary, rational and predictable information-gathering stage of the land development process loomed now and instead as an additional major permitting requirement, virtually endless in time, with legal challenges available at each and every stage of a project and unpredictable in scope for virtually all development projects. This brief of amicus curiae represents the collective interpretation, concerns and suggestions of those assembled firms, lending institutions, landowners and development companies.

If we have misinterpreted or misread the Court’s language or drawn unintended conclusions, then we pray this honorable Court to clarify and explain its decision further. If we are instead correct in our reading, interpretation and conclusions about its implications, then we respectfully urge the Court to reconsider its decision in the Opinion. In its present stance, the Opinion will otherwise almost certainly bring land development in Hawaii to an abrupt halt.

II. DISCUSSION

- A. The Supreme Court Has Inadvertently Reached into the Province of a Coequal Branch of State Government --The Hawaii State Legislature.**
 - 1. The Court Has Amended the State Hawaii Environmental Protection Act and Ensuring Regulations by Adding New Language Concerning EIS “Timing” or Shelf Life Requirements**

There is nothing in Chapter 343 of the Hawaii Revised Statutes (“HRS”) (“HEPA”)

and/or the ensuing rules promulgated pursuant to HEPA (Hawaii Administrative Rules (“HAR”) Chapter 11-200) that suggest the age of an environmental impact statement (“EIS”) is an event that triggers the need for a new or supplemental EIS (“SEIS”). The HEPA environmental review process provides for the integration of the review of environmental concerns with existing planning process of the State and counties. HRS § 343-1. The State and county planning process includes various technical review by government agencies which are responsible for protecting the environment. The timing of projects and deadlines (or lack thereof) are also addressed in the existing planning processes of the State and counties and are determined by the approving agencies, boards or commissions and included in applicable permit and approval conditions. HEPA and the relevant State and county planning and permitting laws, rules and regulations have bestowed upon the responsible government agencies, commissions and councils the authority and responsibility to review the circumstances, which include the protection of the environment, and based on the evidence, to determine whether timing adjustments should be made. We respectfully submit that the Court’s Opinion should be reconsidered, because it imposes an implied timing, “shelf life,” or expiration date for EIS documents, which is inconsistent with and contrary to the relevant State and county planning and permitting laws, rules, regulations and process. With all due respect, we submit that the Court should not create totally new requirements, impose a new planning process, or substitute its judgment for the government agencies with technical expertise and experience in development and protecting the environment.

2. The Court Should Exercise Judicial Restraint in This Case, Where the Legislature Considered and Rejected Several Proposed Bills Which Sought to Impose a Timing Limitation or Shelf Life for An EIS.

During its 2010 session, the Hawaii State Legislature considered, but refused to hold hearings, or refused to approve all bills which proposed a change in the EIS process by imposing a “shelf life” for an EIS document. We understand that on May 17, 2010, Defendant/Appellee Kuilima Resort Company (“KRC”) filed a Fifth Motion for the Court to Take Judicial Notice of Certain Facts, which included relevant information generated during the 2010 Hawaii State Legislative session, including legislative bills, Committee Reports and Measure Histories, all of which confirm that bills which proposed to limit the “shelf life of EIS documents were not approved by the Hawaii State Legislature (“Kuilima’s 5th Motion for Judicial Notice”). We support Kuilima’s 5th Motion for Judicial Notice, and if allowed, we believe that this new

evidence of the actions of the 2010 Hawaii State Legislature, is important evidence of the intent of the legislature and should be respected. We respectfully submit that the Court's Opinion should be reconsidered, because it imposes an implied timing or expiration date for EIS documents, which is inconsistent with and contrary to the will and intent of the 2010 Hawaii State Legislature.

B. The Court's Opinion Exposes Nearly Every Development Project in Hawaii that Has Yet to Obtain a Building Permit To Potential Attack for Lack of A New EIS.

The Court has substantially changed the environmental review process but has not provided sufficient guidance as to how its holdings are to be incorporated into the already lengthy and demanding land use development process. Although the Court suggests otherwise (see Opinion, at 62-63), its decision will apply to virtually any uncompleted project or part thereof in Hawaii, which lacks a building permit.

1. The Court Has Enabled Every “Concerned Citizen” to Challenge Each and Every Development that Has Not Obtained a Building Permit by Simply Alleging a New or Changed Circumstance in the Surrounding Community.

We fear the Court either overlooked or misapprehended the practical ramifications of its Opinion on land development in Hawaii. First, the Opinion strips away any protection afforded to developers under the applicable statute of limitations (“SOL”) by determining that the SOL for challenges to an EIS resets each time a government agency issues a land development permit or changes a land use classification. Second, the Opinion imposes time limitations on developments when no such limitations apply in the development approval, permit or reclassification process, by limiting an EIS to the latest date to which environmental impacts were projected, with no regard to whether the impacts listed, reviewed or projected in the original EIS are still applicable or relevant. Third, the Opinion requires an SEIS if development remains incomplete by the latest projection date, without any regard to the authority of the approving or permitting agency, commission or council to set deadlines (or not set deadlines) as conditions in the development approval process. Fourth, the Opinion establishes a vaguely low threshold for challenges by requiring an SEIS merely when “*substantial questions* whether a project may have a significant effect” *are raised* regarding a change in size, scope, intensity, use, location, or timing.

a. The Opinion Continuously Resets the Statute of Limitations,

Giving “Concerned Citizens” Multiple Opportunities to Challenge a Development under HEPA.

We fear the Court may have overlooked or misapprehended the effects of its Opinion, which suggests each approval is now an “action” under HRS § 343-7(a). As this Court correctly observes on page 46 of its Opinion, under Hawaii Revised Statutes (“HRS”) § 343-7(a), the period of limitation is 120 days from either an agency’s decision to carry out or approve an action or, if no formal decision, from the date that the proposed action commences. But, then, the Court held that “although the subdivision application was part of the larger action (i.e., the project), the specific ‘action’ for statute of limitation purposes **must be deemed** to be the date that the subdivision application was approved as opposed to when the project itself was originally approved. Indeed, any other interpretation would be absurd[.]” (Emphasis added.) In other words, even though HAR § 11-200-7 expressly provides that “a group of actions proposed by an . . . applicant shall be treated as a single action”, the Court holds instead that each and every application for approval is deemed to be the “action” contemplated under HRS § 343-7(a). It does not matter that the particular approval may be part “of a larger undertaking,” a “necessary precedent for a larger project,” a “commitment to a larger project” or “essentially identical,” because the Court renders superfluous HAR § 11-200-7 for statute of limitations purposes. In Hawaii’s already interminable planning and permitting process, each and every submission for approval will render a development vulnerable to challenge whether it is days, weeks or months apart. With all due respect, this is an absurd result. We respectfully hope and suggest that the Court did not intend such a significant change in the applicable rules, and implore the Court to retract, clarify or explain this broad interpretation of an “action”.

b. The Opinion Imposes a New Time Limitation on Every Development which Will Conflict with the Specific Deadlines, or Lack of Deadlines, as Determined by State or County Approving or Permitting Agencies, Commissions or Councils, in the Development Approval Process and Changes the Nature and Function of an EIS from a Disclosure Document to an Implementation Document.

Once again, we fear the Court has overlooked or misapprehended the practical consequences of imposing a shelf-life on an EIS. State and County approving or permitting agencies, commissions and councils routinely set specific development deadlines, or opt to not set any deadlines, as part of land development approval procedures. These government entities can also impose requirements and conditions if any deadlines are not met. But, on page 54 this

Court states: “based on the plain language of [HAR §11-200-26], every EIS is inherently “qualified,” or limited, by inter alia, “the timing of the action.”

The practical implications are twofold: First, the shelf life of an EIS is now determined by the farthest projection date considering environmental impacts within the EIS. Second, even though an EIS is no more than an “an informational document”¹ designed to “ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical concerns,”² hereafter the EIS must be as specific as an implementation document. This is because without the specificity of an implementation document, a developer cannot predict with any certainty how long a development will take to build and thus how far out in the future to plan its projects environmental impacts. Thus, what was initially only an informational document will now become an exercise to plan with precision any and all developments at the earliest practicable time. Most developments require a series of government approvals. There will be major problems with the process as each government approval may add conditions or otherwise change the project, which will in turn require new SEIS for after each and every such successive government approval. This turns HEPA and the land development process on its head.

c. The Opinion Deems an SEIS Is Required if Development Has Not Been Completed by the EIS’ Implicit Shelf Life.

We further respectfully suggest that the Court overlooked or misapprehended the practical consequences of its decision by creating a rule that is more demanding than the plain language of HAR § 11-200-26. That section provides: “If there is any change in any of these characteristics ***which may have a significant effect***, the original statement that was changed shall no longer be valid.” HAR § 11-200-26 (emphasis added). On page 56, this Court instead substitutes: “[w]e conclude that the project, although unchanged in terms of size, scope, location, intensity, and use, is – due to the change in timing – an ‘essentially different action,’ HAR § 11-200-26, thereby rendering “the original statement no longer valid.”

The Court now suggests that a “change in timing” **alone** renders an action “an essentially different action” under HAR § 11-200-26 so that “the original statement [is] no longer valid.” (Ellipses omitted.) Any action that takes longer than the time frame contemplated in the original

¹ HRS § 343-2.

² HRS § 343-1.

EIS (regardless of whether the land development permit process allows for extensions under certain circumstances), is automatically a different action on the day after the contemplated time frame has expired, immediately requiring an SEIS. The Court has essentially eviscerated from the Rule the phrase “which may have a significant effect”.

d. The Opinion Sets a Low Threshold for Challenges.

We fear the Court may also have misapprehended the consequences of adopting a low threshold burden based upon a “raises substantial questions” test for challenges to whether an SEIS is required. HAR § 11-200-26 requires an SEIS only when “there is any change in any of these characteristics – size, scope, intensity, use, location, or timing – ***which may have a significant effect.***” By adopting the standard set forth in Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562 (9th Cir. 2006), the Court has rewritten HRS § 11-200-26 to require an SEIS when there is evidence of a change in any of these characteristics – size, scope, intensity, use, location, or timing – that merely “***raises substantial questions.***” Opinion at 56-57. The Court essentially weakened HAR § 11-200-26 by stating that “the record in this case . . . clearly ‘raises substantial questions’ regarding ***changes in the project area and its impact on the surrounding communities.***” Id. at 57 (emphasis added).

In the instant case, only three letters were submitted to the DPP, one of which stated in its entirety:

Aloha Mr. Ing,

Much had changed since the approval of the EIS and SMAP some twenty plus years ago. Transportation, sewage, housing, water, cultural, the Master Plan for the Koolauloa region all needs to be included in an updated EIS and SMAP. Residential input from each community from Kaneohe to Mililani needs to be updated as the impact will be severe.

If there any question, please feel free to contact me.

Sincerely,
Ben Shafer

CROA 4A/538.

The Court then held that when the City and County of Honolulu’s Department of Planning and Permitting decided no SEIS was necessary, its decision was “arbitrary and capricious”. See Opinion at 65. Considered collectively, we are left with the impression that simply “raising questions” and listing issues that may arise in the surrounding community and have an impact on other surrounding communities is sufficient to trigger an SEIS under HAR § 11-200-26, and that an agency’s failure to require an SEIS upon receiving such sparse,

conclusory and factless “information” would be arbitrary and capricious.

2. If We Have Correctly Interpreted the Court’s Opinion, the Practical Effect on the Development Community and the Investment Climate in Hawaii Will Be Severe.

Prior to the Opinion, Businesses were already leery of investing in land development projects in Hawaii because of its notorious reputation as being the most regulated State in the nation. LURF explained to this Honorable Court that “not only do we have a statewide zoning system administered at the state level by a state agency (the Land Use Commission), but each county also has its own comprehensive zoning code, subdivision code, development code, and . . . coastal zone shoreline management is permitting process . . . in addition, there is the Federal Clean Water Act . . . the Federal Clean Air Act, and the Federal Endangered Species Act”. Amicus Curiae Brief of Land Use Research Foundation of Hawaii, Hawaii Developers’ Council, and Hawaii Leeward Planning Conference (collectively referred to as “LURF”), filed December 16, 2009 (“LURF Brief”) at 4-5. The practical implication of being the “most planned and regulated state” is that development in Hawaii is extremely costly. This cost acts as a deterrent to domestic and foreign businesses deciding between investing in Hawaii and elsewhere.

Due to the downturn in the economy, development in Hawaii has already slowed nearly to a standstill and financing is already difficult to secure. Several Amici have previously pleaded with this Court to take notice that a decision, such as this one, would have a further negative impact on all development in Hawaii and consequently on its economy. See Brief of Amicus Curiae First Hawaiian Bank (“FHB”), filed December 16, 2009 (“FHB Amicus Brief”) at 4 (warning that an adverse decision would “result [in a] negative impact on Hawaii’s economy”). FHB explained that any decision which empowered “any person” to “file litigation seeking an [SEIS] for any alleged change in the surrounding community” would cause “uncertainty in lending” because “such litigation would certainly cause a lengthy construction delay and cause construction to come to a grinding halt.” Id. This uncertainty, when coupled with the fact that “Hawaii is the most planned and regulated state in the nation” may kill development in Hawaii altogether. LURF Brief at 4.

Furthermore, financing for these costly developments are difficult to come by because of current economic conditions. The Court’s rewriting of the applicable provisions of the HEPA statute and Regulations now add immeasurably to the already lengthy planning, permitting and processing of land developments in Hawaii, almost certainly leading to an exponential increase

in costs, because every development could become subject to a lawsuit simply by a plaintiff raising a “substantial question” as to whether changes in the project area will cause a project to have a significant effect. Such uncertainty will lead lenders to suspend or fail to provide financing for projects. Developers will then be even less likely to complete their developments according to their proposed timing schedules, because of the lack of financing, and “concerned citizens” can then challenge the development once the development fails to proceed on time. As a result, the developer risks indefinite and continuous litigation, rendering either commencement or completion of land development projects all but impossible.

III. CONCLUSION

We fail altogether to discern anything positive in such outcomes for the State of Hawaii, unless the end game is to leave development decisions ultimately in the hands of an unelected, unappointed, unrepresentative and increasingly militant and antidevelopment fragment of this state’s population, which population ultimately depends upon the development community for the construction of its homes, its businesses, and its industry, where people live and work. We remain confident that this honorable Court cannot inadvertently mean to support such an outcome.

We respectfully urge the Court to reconsider and/or clarify its decision and issue a new Opinion.

DATED: Honolulu, Hawaii, May 18, 2010.

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LAND USE RESEARCH FOUNDATION OF HAWAII, AMERICAN SAVINGS BANK, BANK OF HAWAII, BROOKFIELD HOMES HAWAII, BUILDING INDUSTRY ASSOCIATION OF HAWAII, CASTLE & COOK HOMES HAWAII, INC., CENTRAL PACIFIC BANK, CHAMBER OF COMMERCE OF HAWAII, DOWLING COMPANY, INC., D.R. HORTON, FIRST HAWAIIAN BANK, GENERAL

CONTRACTORS ASSOCIATION OF HAWAII,
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ASSOCIATION, HAWAII CARPENTER'S
UNION, HAWAII DEVELOPER'S COUNCIL,
HAWAII ISLAND ECONOMIC DEVELOPMENT
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TRUST, MARK DEVELOPMENT, INC.,
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DEVELOPMENT, PRINCEVILLE AT HANALEI,
QUARTERS, INC., RALPH S. INOUYE, CO.
LTD., STANFORD CARR DEVELOPMENT, LLC
AND W.H. SHIPMAN

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.

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

KUILIMA RESORT COMPANY, a Hawaii
general partnership,

Counterclaim Plaintiff,

vs.

UNITE HERE! LOCAL 5 HAWAII, a Hawaii
labor organization; 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 NORTHSORE COUNTRY, a Hawaii non-profit corporation, and SIERRA CLUB, HAWAI'I 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 Hawai'i general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing document was duly served as indicated upon the following parties at their last known address:

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DATED: Honolulu, Hawai'i, May 18, 2010.



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