NO. 28602

IN 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,

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 NORTHSHORE 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.

DEFENDANT/COUNTERCLAIM-PLAINTIFF/APPELLEE KUILIMA RESORT COMPANY'S MOTION FOR RECONSIDERATION

DECLARATION OF COUNSEL

APPENDICES A - H

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

DEFENDANT/COUNTERCLAIM-PLAINTIFF/APPELLEE KUILIMA RESORT COMPANY'S MOTION FOR RECONSIDERATION

Kuilima Resort Company ("Kuilima")[1] hereby moves this Court for reconsideration of the decision issued on April 8, 2010 (the "Decision") pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure ("HRAP"), and asks the Court to clarify the intended effect of the Decision on the Turtle Bay Expansion Project (the "Project").

I. INTRODUCTION

Reconsideration of the Decision is sought because the Court appears to have overlooked or misapprehended important facts in the record of this case ("Record"), and overlooked the application of well-established law. If the Court is not inclined to reconsider the Decision, Kuilima asks the Court to, at a minimum, clarify the requirements of its Decision.

More specifically, reconsideration is sought because the Court appears to have overlooked or misapprehended: (1) the application of well-established rules of statutory interpretation to plain and unambiguous language; (2) important evidence in the Record and the evidence presented by Kuilima, in particular;[2] and (3) the applicable standard in reviewing an agency decision; and (4) the implications of the Decision on the land use and development process in Hawaii and the concepts of judicial takings and vested rights.

Alternatively, to the extent the Court is not inclined to reconsider the result of its Decision, Kuilima urges the Court to clarify:

(a) That the scope of review required by the supplemental environmental impact statement ("SEIS") required by the Decision is limited to those items that have been found by the Court to raise a substantial question regarding a significant effect, namely traffic, Hawaiian monk seals, and green sea turtles; and

(b) That in light of the entitlements and subdivision application under review, and in light of the fact that the SEIS is to inform agency decision making, the scope of the injunction granted by the Court enjoins only work on those portions of the land covered by the subdivision approval, and

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[1] Just prior to the issuance of the Court's Decision, title for the Project was transferred from Kuilima Resort Company to Turtle Bay Resort, L.L.C. ("TBR"). Kuilima has concurrently filed a substitution of parties. For purposes of this Motion for Reconsideration ("Motion"), the term "Kuilima" includes TBR.

[2] See e.g., Clog Holdings, N.V. v. Bailey, 91 Hawai'i 495, 985 P.2d 1062 (1999) and Clog Holdings, N.V. v. Bailey, 92 Hawai'i 374, 992 P.2d 69 (2000) (involving grant of motion for reconsideration and twice de-publishing the case due in part to incorrect factual information being cited and referenced in the opinions).

does not enjoin work on of those portions of the Project outside of the subdivision application area, such as development of Park P-1.

For these reasons, based on the argument below, Kuilima respectfully asks this Court to reconsider or to clarify its Decision.

II. LEGAL ARGUMENT

A. Clarification of the Decision is Appropriate.

Kuilima is asking the Court to reconsider its Decision, based on a further look at important portions of the Record, and based on the application of well-established rules of law to the statutes, facts and issues in this case. The detailed argument supporting the request for reconsideration is set forth below. To the extent the Court is not inclined to reconsider, however, Kuilima urges the Court to clarify two things that are not clear in its Decision: (a) the scope of the SEIS that it has held is required for the Project; and (b) the scope of the injunction that it has instructed to be entered.

1. What is the Scope of SEIS the Court Has Required?

Kuilima seeks clarification from the Court with respect to what the Decision is requiring to be reviewed in the required SEIS. Is the decision requiring a look at traffic, monk seals and green sea turtles, i.e., those areas of the environment about which the Court found Appellants have raised substantial questions as to whether the Project is likely to have a significant effect? Or does the Decision instead require a full review of every area of inquiry that is contained in an original EIS? Kuilima suggests that the former is appropriate for an SEIS, as it is consistent with the ***supplemental*** nature of an SEIS, and would not require every project that has a substantive change to spend the significant time and effort required to look again at issues that have not been determined to likely be significantly affected by the change. Requiring an SEIS for traffic, Hawaiian monk seals and green sea turtles comports with due process (as those are the issues that form the basis of this appeal), and strikes a fair and appropriate balance between interests in protecting the environment and in economic interests.

As a result, and based on the statutory construction and other law discussed below, Kuilima asks the Court to clarify that the scope of the SEIS required by the Decision is limited to the environmental issues made the basis for this appeal—traffic, Hawaiian monk seals, and green sea turtles.

2. What Has the Court Enjoined?

Kuilima also asks that, if the Court does not reconsider its Decision based on the law and argument below, that it clarify what is being enjoined—those portions of the Project affected by the subdivision approval for which the Court determined an SEIS should have been required, or all areas of the Project (even though not part of the subdivision)? Given that an SEIS is merely an informational document to inform agency decision-making in connection with an agency approval, Kuilima suggests that the injunction should apply only to the portions of the Project that are included in the subdivision application, i.e., the agency approval under consideration. Limiting the injunction in this manner is consistent with the law contained in Hawaii Revised Statutes ("HRS") Chapter 343 ("HEPA"), and would, for example, allow for the continued development of Park P-1, which is outside of the subdivision area.

Furthermore, and respectfully, enjoining all work at the Project—even work that is not related to any pending agency approval— is not consistent with HEPA's purpose and intent to inform agency decision-making.

As a result, and based on the statutory construction and other law discussed below, Kuilima asks the Court to clarify that the injunction required by the Decision is limited to the portions of the Project for which subdivision approval was sought.

B. Reconsideration is Appropriate Based on Well-Established Principles Found in Hawaii Common Law and Statutory and Constitutional Provisions.

The Decision holds that the purpose of HEPA, not its plain language, allows for rules requiring an SEIS, and establishes for the first time a timing limitation in every EIS. In reaching these conclusions, the Court deviated from long-standing and well-established statutory construction, including its own recent decision.[3] Instead, the Court relied on interpretation of the intent of the legislature/environmental council expressed not in the plain language, but instead in HEPA's "purpose" section. This approach conflicts with existing Hawaii law.[4]

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[3] See Davis v. Four Seasons Hotel, Ltd., No. 29862, 2010 WL 1205230, at *23 (March 29 2010), providing:

> "Under the canons of statutory construction, 'where the language of the law in question is plain and unambiguous courts must give effect to the law according to its plain and obvious meaning.'" County of Hawaii v. C & J Coupe Family Ltd. P'ship, 119 Hawai'i 352, 362, 198 P.3d 615, 625 (2008) (quoting Mikelson v. United Servs. Auto. Ass'n, 108 Hawai'i 358, 360, 120 P.3d 257, 259 (2005)). Thus, "[i]t is well-settled in this jurisdiction that courts turn to legislative history as an interpretive tool only where a statute is unclear or

The Court ruled the 1985 Environmental Impact Statement ("EIS") for the Project is qualified by timing because (a) the EIS expressed commencement dates for the anticipated phases of the Project, (b) the EIS did not examine conditions beyond the year 2000,[5] and (c) Hawaii Administrative Rules ("HAR") § 11-200-26 provides that an EIS is "usually" qualified by timing. As a result, the Court found there has been a change in the timing of the Project. In so finding, the Court substituted its decision for that of the City and County of Honolulu Department of Planning and Permitting ("DPP") (*i.e.*, the accepting agency under HEPA), which had determined there has been no change in the timing of the Project. Though the Court may believe an EIS should not exist "in perpetuity," there is nothing in the provisions of HEPA that requires a time limit.

1. The Court's Decision is Not Consistent with the Plain Language of HRS § 343-5(g), Which Prohibits Supplemental Statements.

Under long-standing and well-established statutory construction principles, the Court should have enforced the plain prohibitory language of HRS § 343-5(g), and found that based on that language, an SEIS is not permitted. As recently as 2008, it was confirmed that HEPA is to be interpreted by following well-established principles of statutory construction:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the

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ambiguous." T-Mobile USA, Inc. v. County of Hawaii Planning Comm'n, 106 Hawai'i 343, 352, 104 P.3d 930, 939 (2005) (citing State v. Mueller, 102 Hawai'i 391, 394, 76 P.3d 943, 946 (2003)).

While the Davis Court determined that the language of HRS § 480-2 is clear and unambiguous, the Court mollified the defendants and looked to the legislative history. In so doing, the Court, nevertheless, concluded that the legislative history lacked a "clear indication" by the Legislature to contravene the plain language of the statute. Id. at *10.

[4] See Coon v. City and County of Honolulu, 98 Hawai'i 233, 249, 47 P.3d 348, 364 (2002) (citing Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 540, 40 P.3d 930, 942 (2002) ("The general rule of statutory construction is that policy declarations in statutes, whiles useful in gleaning the purpose of the statute, are not, of themselves, a substantive part of the law which can limit or expand upon express terms of the operative statutory provision.").

[5] While this is true for certain things, such as traffic, this statement is false as to other data in the EIS. For example, the EIS analysis regarding the de-silting of the bay were projected out 50 years (CROA 5/65-70, 493-494), the analysis regarding runoff for the Punahoolapa March Drainage Basin projected out the impacts for 50 years (CROA 5/94), and the EIS analysis regarding Tsunami/Flood Hazard relied on a 100-year tsunami inundation projections, and 100 year flood and 500 year flood projections (CROA 5/55).

> language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.
>
> In the event of ambiguity in a statute, the meaning of ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law.

Ohana Pale Ke Ao v. Board of Agriculture, State of Haw., 118 Hawai'i 247, 253, 188 P.3d 761, 767 (App. 2008) (citation omitted); see also Decision at 37-38. Instead, the Court in its Decision relied on the purpose of the statute without first finding an ambiguity in the text of the statute, and relied on "implied" powers allegedly granted in HRS Chapter 343, to validate the SEIS Rules. In so doing, the Court has exceeded the judicial powers delegated to it under the Hawaii Constitution by rewriting portions of the Hawaii Environmental Policy Act ("HEPA").

The Court should have applied these statutory construction rules to the plain language of HRS § 343-5(g) and found the Environmental Council's authority under HRS § 343-6 does not extend to promulgating rules for SEISs. The statute made this prohibition clear by providing that "[a] statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no *other* statement for the proposed action shall be required." HRS § 343-5(g) (emphasis added). Accordingly, an SEIS is not mentioned anywhere in HRS Chapter 343. The definitions section found in HRS § 343-2 does not define an SEIS. The limitations periods found in HRS § 343-5 does not mention an SEIS—it discusses only environmental assessments, feasibility or planning studies, and environmental impact statements. Indeed, this Court even recognized that "HEPA does not provide limitation periods for actions specifically related to supplemental assessments." Decision at 41 (emphasis in original).[6] Even looking to HRS § 343-6, regarding the Council's rule-making power, there is no mention of an SEIS (and an EA is not an SEIS). The only place an SEIS is mentioned is within the HAR. Accordingly, establishing the requirement of an SEIS is directly contrary to the prohibition in HRS § 343-5(g) that "no *other* statement for the proposed action shall be required." (Emphasis added.)

There is no support in the text of the statute or the legislative history that supports the Court's conclusion at page 50 that a "statement" is equated only with an EIS and that section 343-5(g) only "limits the number of original EISs under HEPA, but does not specifically proscribe

[6] More relevant is that HEPA doesn't provide limitations periods for SEISs.

SEISs." Respectfully, HRS § 343-5(g) provides that once a statement is accepted, "no *other* statement for the proposed action shall be required." (Emphasis added.) That is, no statement of any kind. An SEIS is defined as a supplemental environmental impact *statement.* The plain and ordinary reading of "no *other statement* shall be required" must mean no statement of any kind, and applies to prohibit an SEIS.[7]

As a result, the Court should have enforced the plain prohibitory language of HRS § 343-5(g), and found that based on that language, an SEIS is not permitted.

2. To Reach its Result, the Court Improperly Resorted to HEPA's Purpose Without First Finding an Ambiguity in the Plain Language of the Statute.

Without first finding an ambiguity, this Court relied on the purpose of HEPA to support its holding that the SEIS Rules do not exceed their enabling legislation. Relying on Haole v. State, 111 Hawai'i 144, 152, 140 P.3d 377, 385 (2006), the Court held at page 51 that the Environmental Council has "implied powers" under HRS § 343-6 to promulgate SEIS Rules.

In Coon v. City and County of Honolulu, 98 Hawai'i 233, 47 P.3d 348 (2002), however, this Court explained that the "purpose" section of a law is "not substantive law that can expand the express terms of the operative provision of the ordinance." Id. at 249, 47 P.3d at 364 (citing Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 540, 40 P.3d 930, 942 (2002) ("The general rule of statutory construction is that policy declarations in statutes, while useful in gleaning the purpose of the statute, are not, of themselves, a substantive part of the law which can limit or expand upon the express terms of the operative statutory provision.")). The Court explained that "[a]lthough we ground our holding in the ordinance's plain language, we nonetheless note that the ordinance's legislative history confirms our view" and rejected the argument that the rules were valid because they comported with the purpose of the ordinance. Coon, 98 Hawai'i at 249, 47 P.3d at 363.

Moreover, Haole does not stand for the proposition that an executive agency can create rules for things that were never contemplated by the Legislature. In Haole, this Court explained that "an administrative agency's authority includes those implied powers that are *reasonably*

[7] Further, the Court's analysis contradicts the Court's earlier "analysis" at page 41 of the Decision discussing the statute of limitations. There, the Court accepted that an SEIS is essentially the same as an EIS, noting that the administrative rules "generally subject EIS and SEISs to some of the same procedural requirements." In other words, for statute of limitation purposes, an SEIS is the same as an EIS, but for the purpose of determining whether the SEIS Rules are beyond their enabling legislation, an SEIS is not an EIS. This contradiction is untenable.

necessary to carry out the powers expressly granted." Haole, 111 Hawai'i at 152, 140 P.3d at 385 (emphasis in original). Clearly HEPA does not *expressly* provide for an SEIS. Indeed, HRS § 343-5(g) prohibits an SEIS. As a result, promulgation of SEIS rules cannot be a power implied by HEPA to carry out powers expressly granted by HEPA.

To now uphold and construe the SEIS Rules, the Court has expanded Haole, creating new law that an executive agency has the power to create rules for things that do not even generally exist in the plain language of the statute, and which contradict express prohibitions in the statute. This cannot be what the Court intended to do. Such a new precedent is unwarranted and unnecessary under prior decisions, such as Coon.

3. The Court Overlooked Firmly Established Hawaii Precedent that Administrative Rules Should Be Read in a Manner Consistent with Their Enabling Legislation.

In rendering the Decision, the Court overlooked well-established Hawaii law that regulations exceeding their enabling legislation are "invalid and must be struck down." This Court is mistaken when it states that the ICA majority did not address Kuilima's argument that the Environmental Council exceeded its statutory authority in promulgating SEIS Rules. The ICA majority explicitly stated:

> ***No other reading of the rules is possible.*** HRS § 343-5(g) provides that once an EIS has been accepted, no other statement for the proposed action shall be required. Because the rules must be consistent with HRS § 343-5(g), the rules cannot be construed to require an additional SEIS unless there has been a substantive change in the action. Capua v. Weyerhaeuser Co., 117 Hawai'i 439, 446, 184 P.3d 191, 198 (2008)

Unite Here! Local 5 v. City and County of Honolulu, 120 Hawai'i 457, 465, 209 P.3d 1271, 1279 (App. 2009) (emphasis added). In finding that "no other reading of the rules is possible," the ICA relied on Capua, a case issued by this Court that reaffirmed the established rule this Court had announced with regard to agency's rule-making authority:

> [A] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power **within the framework of the statute under which it is conferred.** *Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down. In other words, an administrative agency can only wield powers expressly or implicitly granted to it by statute.*

Capua, 117 Hawai'i at 446, 184 P.3d at 198 (italics in original, emphasis added in bold).

This Court has consistently, until this Decision, held that regulations that exceed their enabling statute are "invalid and must be struck down." Id. at 448, 184 P.3d at 200 (striking down a regulation that held a waiver had occurred when a person received permanent partial disability, because such waiver directly contradicted the plain language of a statute that held the participation in one service shall in no way affect her eligibility to receive other benefits); Haole, 111 Hawai'i at 144, 140 P.3d at 377(explaining that "[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred[;] [a]dministrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down"); Coon, 98 Hawai'i at 251, 47 P.3d at 366 (explaining that "the court shall declare the rule invalid if it finds that it violates statutory provisions, or exceeds the statutory authority of the agency") (ellipses, brackets, and quotations omitted.); Puana v. Sunn, 69 Haw. 187, 189, 737 P.2d 867, 870 (1987) (holding an agency's authority "is limited to enacting rules which carry out and further the purposes of the legislation and do not enlarge, alter, or restrict the provisions of the act being administered"); Stop H-3 Ass'n v. State Dept. of Transp., 68 Haw. 154, 706 P.2d 446 (1985); Agsalud v. Blalack, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985) (stating "[i]t is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement"). The Court should not abandon these principles to reach a desired result in this case.

4. The Court Misconstrued the Plain Language of HAR § 11-200-26 to Imply a Timing Limitation in Every EIS, Rendering Superfluous Significant Portions of the SEIS Rules and Disregarded the Experienced Determination of the Accepting/Approving Agency.

The Court stated the proper standard of review for statutory interpretation on pages 37 and 38 of the Decision, but then Court rendered superfluous various provisions within HAR §§ 11-200-26 and 11-200-27. When construing a statute, courts "are bound to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Keliipuleole v. Wilson, 85 Hawai'i 217, 221, 941 P.2d 300, 304 (1997).

The Court stated at pages 60-61 of the Decision that HEPA's purpose would be contravened by allowing an outdated EIS to "remain valid in perpetuity." While this statement may seem appealing, in reaching its conclusion the Court ignored the plain language of HAR § 11-200-26 that

provides that an SEIS cannot be required unless there as been a "change in a proposed action resulting in individual or cumulative impacts not originally disclosed . . . ."

The accepting agency determined there has been no change in the Project, including no timing qualification. Nevertheless, the Court stated that *all* EISs are qualified by timing, including this one. The Court relied on the statement in HAR § 11-200-26 that statements are "usually qualified . . . by timing . . . ." The Court's interpretation, however, effectively redefines the term "usually" to mean "inherently." See Decision at 54. Respectfully, "usually" does not mean "inherently." See Davis v. Four Seasons Hotel, Ltd., No. 29862, 2010 WL 1502350, at *24 (March 29, 2010) (quoting Rapozo v. Better Hearing of Hawaii, LLC, 119 Hawai'i 483, 493, 199 P.3d 72, 82 (2008) (quoting Leslie v. Bd. of Appeals of County of Hawaii, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006)) (brackets omitted) ("[T]his court has said that we may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined."). "Usual" describes what is "customary or ordinary". See New Webster's Dictionary and Roget's Thesaurus 419 (1992). "Inherently" means "existing in something so as to be inseparable."[8] Id. at 200. Accordingly, use of the word "usually" means there are exceptions where EISs are not qualified by timing. Accordingly, the predicate of the Court's analysis – that all EISs are inherently qualified by timing – is fundamentally flawed.

There was no timing limitation in the EIS and land use entitlements at issue in this case. As the Court correctly noted (but did not quote), the EIS provided the following:

> D. PHASING AND TIMING OF THE ACTION
> Figure 9 shows the approximate phasing of the development for the resort (phasing is dependent on receiving the necessary governmental approvals). Note that Phase I designation generally indicates a 1986 start of construction date, Phase II, commencement between 1988 to 1989, and Phase III, commencement between 1993 to 1996.

Figure 9 shows the locations of the three phases on the Project. (CROA 5/43). As the DPP (*i.e.*, the accepting and approving agency charged with determining whether or not an SEIS is required) concluded—there is no deadline by which the Project is to be completed.

The Unilateral Agreement and Declaration for Conditional Zoning, dated September 23, 1986, ¶ 3 at 3, provide the following:

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[8] Nor are "usually" and "inherently" synonyms of each other. See id. The antonyms, however, of "usual" include "exceptional, unique, rare, uncommon, [and] unusual[.]" The Random House Thesaurus 771 (1984).

> Development of the project shall *generally* be based on the submitted schedule, identified as Exhibit III, attached hereto and incorporated herein. *Development may deviate from this schedule due to the occurrence of changed economic conditions, lawsuits, strikes or other unforeseen circumstances.*" Unilateral Agreement, at 3 (CROA 4/89).

(Emphases added). Admittedly, Exhibit III includes a projected construction schedule through 2000. Neither the EIS nor the Unilateral Agreement, however, provides that construction "shall" be completed by a certain date. Instead, the Unilateral Agreement expressly provides that development of the Project shall *generally* be based on the attached schedule and that development may deviate from this schedule under certain circumstances.

Accordingly, it is improper for the Court to impose a time limitation on the EIS as it plainly did not contain one, and where the accepting agency plainly contemplated development occurring beyond 2000 under certain circumstances.

5. The Supreme Court Exceeded Its Judicial Authority under the Hawaii State Constitution.

The power to enact laws and declare what the law shall be is reserved to the Legislature. Article III, Section 1 of the Hawaii State Constitution vests legislative power with the Legislature. Sherman v. Sawyer, 63 Haw. 55, 57, 621 P.2d 346, 348 (1980) (explaining that "[t]he legislature is vested with legislative power by the Hawaii State Constitution, art. III, sec. 1. Legislative power is defined as the power to enact laws and to declare what the law shall be."). This Court has consistently explained that:

> [w]e cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws. Even when the court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used.

State v. Mainaaupo, 117 Hawai'i 235, 250, 178 P.3d 1, 16 (2008); State v. Rabago, 103 Hawai'i 236, 257 n.5, 81 P.3d 1151, 1172 n.5 (2003) (explaining "[i]t is not this court's duty to judicially legislate. Instead, this court's primary responsibility is to ascertain and give effect to the intention of the legislature in accordance with the law's plain and obvious meaning").

Yet, as explained above, this Court effectively judicially legislated when it ruled that SEISs can be mandated despite the plain language of HRS § 343-5(g) and when it ruled for the first time that all EISs have time limits (and applied that ruling retroactively).

6. The Court Defined "Action" Variably as the Entire Project and as the Subdivision Approval, Depending on the Desired Result.

This Court stated on page 46 of the Decision: "[i]n the instant case, 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." (Emphasis added.) In essence, the Court said that in master planned developments, the overall development is the action for purposes of determining if an environmental assessment ("EA"), EIS or SEIS should be prepared, but for purposes of challenges to agency decisions, individual approvals in furtherance of the master planned development is the "action" to restart the statute of limitations.

The Court's use of "action" to mean the individual component approvals, however, contravenes the plain language of HAR § 11-200-7, which states:

> A group of actions proposed by an agency or an applicant shall be treated as a single action when: (1) The component actions are phases or increments of a larger total undertaking; (2) An individual project is necessary precedent for a larger project; (3) An individual project represents a commitment to a larger project; or (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

"Rules like HAR § 11-200-7 are meant to keep applicants or agencies from escaping full environmental review by pursuing projects in a piecemeal fashion." Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 338, 167 P.3d 292, 331 (2007) ("Superferry I").

A master planned development is a large project that requires a substantial investment and may take several decades to complete. The only way to "ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations" is to strike a balance. This Court's use of "action" to mean the individual component approvals that are part of a larger development project tips that balance heavily in favor of environmental activists and against economic and technical considerations.[9]

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[9] While the Court's use of "action" might be necessary to try to make one of the limitations periods in Chapter 343 fit an SEIS challenge, the mere fact such effort is required reinforces the position that HEPA does not contemplate SEISs.

C. The Court's Determinations Regarding Significant Environmental Effect.

1. The Court Disregarded the Plain Language of the SEIS Rules in Finding "a Significant Environmental Effect."

After implying a timing qualification into the EIS and finding a change in that timing, the Court next considered whether there may be a significant environmental effect. Under the plain language of HAR § 11-200-26, once there is a proper determination that there has been a substantive change in the action, the next inquiry is whether *such change in the action* may have a significant environmental effect. In reaching its result, however, the Court ignored the plain language of the rule and modified the required determination to be "whether ***the proposed action*** [and not the change in the proposed action] will 'likely' have a significant effect on the environment." (Emphasis and brackets added.) Decision at 56. The Court also reduced the burden on a Plaintiff, despite the language of the rule, by holding the Plaintiff does not have to show significant effects are likely to occur. Instead the Court adopted a federal court interpretation of different language contained in NEPA that the Plaintiff need only "'raise ***substantial questions*** whether a ***project*** may have a significant effect." Id. at 57 (Brackets and emphases in original omitted, emphases in bold added.). In other words, despite the plain language, the new analysis under HAR § 11-200-26 established in the Decision is as follows:

a. Was there a substantive change in a characteristic of the action, such as size, scope, location, intensity, use, or timing, such that the action is an "essentially different action?"

b. If the answer to the first question is yes, then the reviewing agency must determine whether substantial questions have been raised that this "essentially different action" will "'likely' have a significant effect on the environment."

The Court, however, did not apply this analysis either. Instead, the Court found that "substantial questions" had been raised "regarding changes in the project ***area*** and its impact on the surrounding communities." Id. at 57.

This analysis essentially retroactively rewrites the SEIS Rules.

2. The Court Should Have Remanded the Case to the DPP for the Determination of Whether There is Likely a Significant Environmental Effect.

As is its "primary responsibility," the Court should have interpreted the law but remanded the case for the application of the factual issues to the stated interpretation of the SEIS Rules. Instead, the Court substituted its judgment for that of the agency in deciding that judgment is

appropriate for Appellants. The Court reached its decision by relying on evidence that was never even presented to the DPP, except in this litigation. Remand will allow the DPP to properly consider the "new" evidence relied on by Appellants. The agency has the expertise needed to properly review the varying areas of "new" evidence presented by Appellants. This too is consistent with the SEIS Rules, which make clear that the determination of whether or not an SEIS is required is reserved to the agency.

As previously stated by this Court: "'[S]ignificant effect' is a relative concept. The quality and gravity of the effect on the environment which may be caused by a proposed activity varies according to the circumstances involved. Any determination, therefore is highly subjective." McGlone v. Inaba, 64 Haw. 33, 35, 636 P.2d 163, 164 (1981), modified on other grounds by Director, Dept. of Labor and Industrial Relations v. Kiewit Pacific Co., 104 Hawai'i 22, 27, 84 P.3d 530, 535 (Haw. App. 2004). Having decided that the approving agency did not properly interpret the SEIS Rules, this Court should have remanded the case to the DPP to take the "hard look" required to determine if there will likely be a "significant environmental effect."

3. In Finding a "Significant Environmental Effect" the Court Overlooked or Misapprehended Significant Facts in the Record.

In reaching its finding of a significant environmental effect, the Court relied on "(1) traffic studies that analyzed traffic impact projections through 2000 (Decision at 55); (2) the fact that visitor units, hotel demand, and population growth were also projected and analyzed through 2000 (Id.); (3) the conclusion that monk seals populations were "nearly non-existent in the project area at the time" of the EIS (Id. at 55-56); (4) alleged changes in traffic patters ***in the area*** (Id. at 57); (5) the fact that the post-1985 EIS reports did not study "***any regional areas***" (Id. at 58); and (6) the facts supporting that "beaches and near shore waters within the ***project area*** are now used by endangered and threatened species, specifically the monk seal and green sea turtle." Id. at 59

Respectfully, the first, second, and third points refer to alleged shortcoming of the 1985 EIS but fail to establish that the change in timing of the Project will likely have significant effect on the environment. The fourth, fifth, and sixth points do not focus on the "essentially different action" which itself is likely to have significant effects, but instead focus on changes in the area *surrounding* the "essentially different action" and the impacts on surrounding communities resulting from those changes in the surrounding areas—instead of the required causal connection to the action under consideration.

In any event, the Court overlooked most of Kuilima's evidence,[10] and then found there may be significant environmental effects. In so doing, the Court relied solely on the Appellants' purported evidence, much of which involved a misreading or misrepresentation of various data and reports. For example, but without limitation, as to traffic the Court overlooked or misapprehended the content of the traffic information contained in the 1985 EIS at Appendix L, and the Traffic Impact Analysis Report ("TIAR") Addendum No. 1, prepared February 14, 2006 (the "2006 Addendum"). These documents predicted the same unsatisfactory levels of service at full build out of the Project *without any type of mitigation measures* to Kamehameha Highway, and recommended the same modifications/mitigation measures to address such traffic conditions, including traffic signalization and additional lanes.

a. The Court Overlooked the Evidence Presented by Kuilima.

The Court overlooked evidence in the Record submitted by Kuilima in support of the various motions and the opposition papers it filed. When reviewed, that evidence leads to the conclusion that there has not been a substantial question raised as to a "significant environmental effect." See e.g., Decision at 19 and 26. Accordingly, the Court improperly entered summary judgment in favor of Appellants when the Record supports instead either (a) the entry of summary judgment in favor of Kuilima or (b) remand to the Circuit Court and/or the DPP for further review.

More specifically, at page 19 of the Decision, the Court identified the evidence Kuilima submitted in support of its motion as only "the 1985 EIS and the KDC unilateral agreement." In reality, Kuilima supported its motion and thirty (30) page supporting memorandum with the affidavit testimony of eight (8) individuals and with forty-two (42) separate exhibits. CROA 3/189-227, 4/1-679, 4A/1-606, 5/1-871 or Appendices C and D.[11] In addition to the plain language of the 1985 EIS and the Unilateral Agreement, Kuilima also submitted the following evidence that the 1985 EIS was not qualified by timing:

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[10] In other words, the Court failed to review the record or selectively reviewed and referenced only those portions of the record that supported the position of Appellants – contrary to the standard for summary judgment under Rule 56 of the Hawaii Rules of Civil Procedure ("HRCP").

[11] For the ease of the various justices, we have also appended to this Motion the various motions and exhibits that Kuilima submitted to the trial court below to insure that you have the opportunity to review the record below.

- In May 1999, three (3) years after the approximate timing for Phase III, the City re-affirmed the Project by adopting the Ko'olau Loa Sustainable Communities Plan[12] which was "one of eight community-oriented plans intended to help guide public policy, investment, and decision making though the 2020 horizon" (CROA 4/236-359, 4A/356-367).

- In February 2000, four (4) years after the anticipated commencement of Phase III, the Honolulu City Council Zoning Committee, in formal session and relying on the Unilateral Agreement, confirmed that Kuilima's Project Entitlements were valid and existing and directed Kuilima to move the Project forward without delay (CROA 4/361-364).

- In November 2001, five (5) years after Phase III was anticipated to have commenced, the DPP adopted a second status report acknowledging "development may deviate from [the general phasing schedule] due to changes in economic conditions" and recognized that delays had occurred "due to changing economic conditions." (CROA 4/227-228).

- Several permits and approvals were granted after 1996, the latest date when Phase III was "generally" expected to have commenced including, but not limited to, (1) a National Pollution Discharge Elimination System Permit issued by the State Department of Health in September 2002 (CROA 4A/368-381); (2) a Special Management Area Use Permit and Shoreline Set Back Variance approved by the City Council on July 3, 2003 (CROA 4/669-679); (3) a Minor Conditional Use Permit for Joint Development issued in October 2005 (CROA 4A/457-459); and (4) a Zoning District Boundary Adjustment approved in November 2005 (CROA 4A/460-461).

- The DPP, which is the "accepting agency" of the EIS, determined the Project was never qualified by timing, and explained why the SMP permit is not stale: No time frame for development was either implied or imposed by the City Council as part of its approval. Accordingly, the developer is entitled to proceed with the project as approved. By not imposing any time limits at that time, the City Council indicated that the project could be developed at its own pace. Further, as a matter of law, the City cannot retroactively impose time limits[.] CROA 4A/472

The Court also limited its mention of Kuilima's evidence in opposition to Plaintiffs' cross-motion for summary judgment to "portions of Challacombe's deposition testimony[.]" Decision at 26. Again, this overlooks the volume and types of evidence presented by Kuilima contained in the Record. In opposing Plaintiffs' cross-motion, Kuilima supported its thirty (30) page opposition brief with the declaration testimony of five (5) experts and twenty-three (23) separate exhibits.

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[12] The Sustainable Community Plans were developed by the City Charter Commission and adopted by the voters of Honolulu in 1992, because it was concluded that "the Development Plans were overly detailed and had created processes that duplicated the zoning process. To eliminate this unnecessary duplication, the 1992 Charter amendments changed the definition of Development Plans from "relatively detailed plans" to "conceptual schemes." CROA 4/246.

At page 55 of the Decision, the Court quoted from the oral argument of Appellants' counsel: " . . . we don't know how big this project is going to be, we don't know how much density there's going to be on this project, we don't know exactly where on the property this project is going to be located," implying this information was not known when the EIS was approved. Counsel's statement shows a lack of understanding of basic land use and development on Oahu in accordance with the existing entitlements of a project, the Land Use Ordinance and the Building Code, and of the master plan that the EIS considered. As the ICA explained, the scope and size of the Project has been known for more than 20 years[13] and is clearly laid out in the EIS (CROA 5/29, 36), the Unilateral Agreement (CROA 4/142), and the Project entitlements.

The term "density" is commonly understood in land use parlance and means "the intensity of use of the land." See Young v. Planning Comm'n of County of Kauai, 89 Hawai'i 400, 401, 974 P.2d 40, 41 (1999) (referring HRS § 205A-22). It is commonly referred to as the permissible "floor area ratio" calculation for any particular project. See generally ROH Chapter 21. A review of the EIS and Unilateral Agreement will provide the Appellants the information they seek. The land use designations and zoning classifications for the various parcels are outlined in the EIS at pages 8-10. CROA 5/20-22. The Project proposed a maximum total of 4,000 visitor units, including the then-existing 487-room Turtle Bay Hotel. See CROA 5/15, 28, 31. The EIS, at pages 17-20(CROA 29-32), and the Unilateral Agreement, at pages 12-14 (CROA 4/151-153) include the basic design standards, general height limits, structural set backs from the certified shoreline, and general architectural and design goals. Finally, the Unilateral Agreement, at page 12 (CROA 4/151), expressly provides that "at each phase of development, the Declarant shall submit site plans and preliminary architectural drawings for the development to the [DPP] for review and approval to insure that the urban design objectives set forth herein, are adhered to."[14]

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[13] Unite Here!, 120 Hawai'i at 459, 209 P.3d at 1273.

[14] Given that environmental review must occur "at the earliest possible time" (see Citizens for the Prot. of the North Kohala Coastline v. County of Hawaii, 91 Hawai'i 94, 105, 979 P.2d 1120, 1131 (1999)), requiring that the "exact" location and design of the Project must be known at the EIS stage is simply untenable. That has never been required under Hawaii law and should not be required now.

b. The Court Overlooked and/or Misapprehended the Traffic Information Contained in the Record.

In determining that an SEIS is required, the Court found that "the record in this case—particularly the post-1985 EIS traffic reports—clearly 'raise substantial questions,' . . . regarding changes in the project area and its impact on the surrounding communities." Decision at 57. The Court found that the Record "suggest[ed] that traffic impacts have, indeed, changed since 1985" and relied on the post-1985 EIS traffic reports to support this broad conclusion. Id. The Court explained that the "new evidence" is the "changes in traffic patterns in the area" which are purportedly supported by the post 1985 EIS traffic reports. Id. A review of the 1985 EIS and the TIAR therein, and review of the testimony of traffic expert Randall Okeneku (CROA 9/80-87), make clear this Court's misunderstanding of the traffic evidence contained in the Record.

The 1985 EIS contemplated "changes in traffic patterns in the area." Those changes were anticipated to be significant:

- The 1985 TIAR Report specifically contemplated an increase in daily average traffic from 4.8% during non peak hours up to 49.45% during peak hours. CROA 9/205, 217, 222 or Appendix F, Exhibit M.
- At Figures 11 and 12 of Appendix L (CROA 9/222), the 1985 EIS specifically identified the potential levels of service ("LOS") generated by the Project upon the full build out, but *without any traffic modifications*, to be "D", "E", and "F" (the worst level of service).[15]
- The 1985 EIS explained in great detail that the poor level of projected traffic would need to be mitigated by several site-specific and regional upgrades designed to ease the traffic flow (CROA 5/134, 139-141).[16]

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[15] The September 9, 2005 TIAR ("2005 TIAR") (and for which the 2006 Addendum was written), at 5 (attached as Exhibit O to Kuilima's Opposition to Plaintiff's Motion for Summary Judgment) (see also CROA 9/268), LOS "A", "B" and "C" are considered "satisfactory" and levels "D", "E" and "F" are considered less than satisfactory, and/or the "desirable minimum", "undesirable condition" and "unacceptable condition", respectively. Accordingly, the 1985 EIS projected that the levels of service *without the proposed mitigation measures* would be less than satisfactory upon full build out of the Project. CROA 9/222.

[16] The mitigation measures include: (1) a left turn lane onto Kamehameha Highway at Kuilima Drive, (2) a fully channelized intersection on Kamehameha Highway that included a left turn late onto the main highway and separate right and left turn lanes onto the side road at the proposed alpha road or West Kuilima Drive and the existing airport road or Marconi Road, and (3) the installation of traffic signals at the Kuilima Drive intersection on Kamehameha Highway. CROA 5/134. The 1985 EIS also recommended regional upgrades, which included: (1) the construction of the Haleiwa Bypass, (2) improvements of Kamehameha highway between the ***proposed*** Haleiwa

- The 1985 EIS concluded by stating that "[w]hile the increased traffic [that the 1985 EIS contemplated was certain to occur] ***is significant*** when compared to the projected background conditions, it is not beyond the carrying capacity of an upgraded, high quality two-lane arterial." Id. Thus, the EIS contemplated the appropriate governmental agency would upgrade Kamehameha Highway to a high quality two-lane arterial before the Project is completed.

The Court's comparison (Decision at 58) of this information to the conclusion in the 2006 Addendum that there are "clearly" changes in traffic, solidifies the Court's misapprehension of this information. Not only did the Court take this statement from the 2006 Addendum out of context, but also the comparison itself is one of apples to oranges. In contrast to the 1985 EIS, the 2006 Addendum explained that "as Turtle Bay Resort ***continues to expand beyond the Year 2008***, the peak hour traffic operations at the intersection of Kamehameha Highway [as it currently exists, without upgrade] and Alpha Road are expected to deteriorate below satisfactory Levels of Service." CROA 9/331. The next sentence made clear that "[a]dditional improvements at the study intersection, such as traffic signalization and lane modifications, may be required to mitigate traffic impacts resulting from further development of the Turtle Bay Resort." Id. This last statement—which was disregarded by this Court—is completely consistent with what the 1985 EIS analysis and conclusions of the anticipated traffic impact of Project: traffic is bad and will get worse beyond what Kamehameha Highway can currently handle, but once ***upgraded***, Kamehameha Highway is anticipated to be able to handle the carrying capacity of this increased traffic.

Moreover, the 1985 EIS predicted a greater increase in traffic over time than what actually has occurred. In other words, there have been fewer changes to traffic in the region than originally contemplated in the EIS.[17] The 1985 EIS contemplated and based its future traffic projections on

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bypass and Kaaawa that included (a) paved shoulders, (b) bus turnouts, (c) left-turn deceleration/storage lanes, (e) possible traffic signals at key intersections and (f) a bridge widening to accommodate the full roadway width; and (3) improvements of the Kamehameha Highway at Waimea Bay. CROA 5/141.

[17] Kuilima respectfully renews its request set forth in Kuilima's Second Motion for The Court to Take Judicial Notice of Certain Facts, filed December 30, 2009. That request included the fact that the 1985 EIS contemplated that 4,783 visitors per day (a critical fact relied on by this Court in reach its decision), the 4th Addendum to the TIAR, and a Revised TIAR completed in 2009, reports that this Court explained in its opinion "are particularly relevant." Decision at 11. A primary concern of this Court, as evidenced on page 58 of the Decision, was that "none of the updated traffic studies involved regional areas." Consideration of the 2009 TIAR would alleviate this Court's concern as such regional studies are included. A separate motion is being filed concurrently herewith.

an annual growth rate of 4%. CROA 5/831. The 1991 TIAR found that the annual growth rate to that date had been only about 3.5% per year (CROA 9/252); while the 2005 TIAR found that annual growth in traffic on Kamehameha Highway since 1986 has averaged about 2.7 percent per year. CROA 4/273. Though contrary to the actual Record and despite the expert testimony explaining the errors in Mr. Brohard's analysis (CROA 9/80-87), the Court appears to have accepted as true that the "traffic analyses for the [project] have used a lessening annual background growth rate from 4% in 1985 to 2.7 in 2005. This conclusion misses the point—the Record reveals that the ***actual*** growth rate of traffic, ***calculated at that time from 1986***, actually has been and continues to be less than what was originally estimated in the 1985 EIS. It is important for this Court to note that the 1985 EIS incorporated the Oahu Metropolitan Planning Organization HALI study (CROA 5/831), which study ***projected*** the annual growth rate for peak hour traffic volumes on Kamehameha Highway to be approximately 4% per year through 2000. CROA 9/86. Both the 1991 TIAR and the 2005 TIAR, however, relied on ***historic traffic count*** data collected by the State DOT on Kamehameha Highway to determine what the actual annual growth rate of traffic has been. CROA 9-252, 4/273.

The decrease in actual traffic also seems to be consistent with the implementation of several of the regional improvements (*i.e.*, the Haleiwa Bypass and left turn lane into Waimea) that had been suggested as mitigation measures in the 1985 EIS, 1985 TIAR, and the 1991 TIAR. CROA 5/141, 9/234, 258-259. Thus, the Record, especially the 2006 Addendum, does not support this Court's general statement that the post 1985 EIS traffic reports represent "new evidence" that "were not contemplated by the 1985 EIS."

Lastly, the Court appears to use the fact that in the development process the landowner is often required to update various reports and information related to a project, such as traffic analyses, to conclude that the original EIS must not be valid. The purpose of the updated reports, however, is to provide the DPP with the most current information regarding the project even in connection with ministerial decisions (such as subdivision). In using the requirement for these updated reports in this manner, the Court is discouraging the creation of updated information related to the Project for fear that some "concerned citizen" may use it to claim that the mere requirement indicates an SEIS is required.

c. The Court Overlooked and/or Misapprehended the Record Regarding Monk Seals.

The Court relied on Appellants' evidence to reach the overly broad conclusion that: (1) the Project will likely result in increased impacts on the monk seal population because the Project will allegedly expose monk seals to greater human contact; (2) the alleged numerous monk seal sightings "suggest" the beaches and near shore areas are significant to the regeneration of the monk seal population; and (3) the first impact (greater human contact) will increase the impacts on the second (use by the seals of the beach areas for regeneration), such that an SEIS is required. In reaching these conclusions, the Court relied solely on a two-page report submitted by the Appellants (CROA 8/433-434, attached as Exhibit V to Appendix F). The Court appears to have ignored the evidence of the inaccurate nature of this report.

The report itself reveals its own shortcomings: (1) that monk seal sighting "reports by the general public" are "nonsystematic and not representative of overall seal use of main Hawaiian Island shorelines", and (2) little under 69% of all seals sighted are attributable to 11 known seals. CROA 8/433. The report makes clear that the reported "sightings" include multiple sightings of the same animals, and actually reflects the sighting of only 11 monk seals since 1984. CROA 8/434. The report further discloses that 35 of the 54 sightings or approximately 65% of the sightings in 2006 were actually of the same monk seal and her pup. Id. The report, however, fails to reveal how many of the remaining 55 sightings between 2003 and 2006 were of multiple sightings of the eleven identified seals that frequent the Hawaiian Islands. See Id.

In addition, the Court appears to have overlooked the affidavit testimony of expert Eric Guinther, a local ecologist and President of AECOS, Inc., submitted by Kuilima in opposition to Appellants' MSJ.[18] CROA 9/77-79 or Appendix E. Mr. Guinther explained that the "increase in reported sightings" of monk seals is easily explained by an increase in awareness, population, and/or visitors to the North Shore community. Id. He further testified that an increase in reported sightings does not "represent evidence of an increase in the actual number of individual Hawaiian monk seals at the Project area." Id. In addition, Mr. Guinther explained: "Births of Hawaiian monk seals (i.e. puppings), while extremely uncommon in the main Hawaiian islands, do occur from time

[18] Mr. Guinther regularly conducts marine and terrestrial biological studies and surveys throughout the main Hawaiian islands including the areas surrounding the Project and has knowledge and experience relating to Hawaiian Monk Seals, such that his affidavit should have raised genuine issues of material fact, sufficient to defeat Appellants' MSJ.

to time. However, a single pupping event at the Project area is insufficient evidence to ***indicate a trend of increased pupping.***" Id. (emphasis added).

Therefore, the Court appears to have failed to consider contradicting evidence and generally relied on a document that appears to contain possibly inaccurate information to support its finding of the likelihood of a significant environmental effect in terms of monk seals.

d. Throughout the Decision, the Court Incorrectly States that the 1985 EIS Only Projected Information through 2000.

The Court, on multiple occasions, states in the Decision that the 1985 EIS only projected conditions through 2000. See Decision at 55, 56, and 58. This is incorrect. For example, the EIS sections regarding the de-silting of the bay were projected out 50 years. CROA 5/65-70, 493-494. Similarly, the discussions regarding runoff for the Punahoolapa March Drainage Basin projected out the impacts for 50 years. CROA 5/94. The section regarding Tsunami/Flood Hazard relied on a 100-year tsunami inundation projections, and 100 year flood and 500 year flood projections. CROA 5/55.

At a minimum, the Court should correct these errors in the Decision.

e. Remand Would Allow the DPP to Consider the "Evidence" Presented by the Plaintiffs in the Circuit Court.

The Court stepped into the DPP's role by deciding there has been a sufficient showing of the likelihood of a significant environmental effect such that an SEIS is required. Instead, the Court should have remanded to the DPP to take the hard look at the alleged impacts that the Court found was missing.

It is a fundamental tenet of law that a Court should defer to the expertise of an agency. See e.g., Everson v. State, No. 29359, 2010 WL 1114898 *3 (March 25, 2010) ("Where both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency.") (citing Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990)); In re Waiola O Molokai, Inc., 103 Hawai'i 401, 83 P.3d 664 (2004). This is consistent with the requirements of SEIS Rules that designate the approving or accepting agency (here in both instances the DPP) as the entity charged with making the decision as to whether an SEIS is required.

The evidence purportedly supporting the need for an SEIS was collected and presented for the first time in this litigation, and was not previously raised with the DPP for its consideration. Nonetheless this Court concluded that the DPP acted arbitrarily and capriciously, stating "[f]or the DPP to assume that conditions would not have changed over twenty years is unreasonable, especially given the 'new' evidence with respect to traffic, monk seals, and green sea turtles." Decision at 65. This conclusion is difficult to reconcile with the fact that the DPP was never presented with "the 'new' evidence with respect to traffic, monk seals, and green sea turtles" until it was used in this litigation.

The Record reflects that between December 30, 2005 and the filing of this lawsuit, the entirety of the SEIS issues that were raised with the DPP were presented through just three letters: (1) a letter from the Koolauloa Neighborhood Board No. 28, signed by Dee Dee Letts, dated December 30, 2005 (CROA 4A/535-536), (2) a letter submitted by Unite Here, Local 5 dated January 5, 2006 (CROA 4A/474-475); and (3) a letter from Ben Shafer, dated January 6, 2006 (CROA 4/538). None of the letters contained any evidence of changes in monk seals, green sea turtles or changed traffic conditions. These letters did not "raise substantial questions" regarding whether the "essentially different action" would "'likely' have a significant effect on the environment (Decision at 56-57). Therefore, the Court's statement that the DPP acted arbitrarily and capriciously, because it did not take a "hard look" at the "new" evidence (Decision at 65) is incorrect, because the DPP was never given the opportunity to review the "new" evidence.

D. This Courts' Decision May Implicate Concepts of a Judicial Taking and Vested Rights under State and Federal Constitutions.

The Court has implied a time limitation into every EIS even where none before existed. The effect of the decision also conflicts with portions of the Unilateral Agreement and entitlements that allow for a change in the proposed Project development schedule "due to the occurrence of changed economic conditions, lawsuits, strikes or other unforeseen circumstances." The Court's Decision and resulting injunction, unless reconsidered or narrowed through clarification, could prevent the project from moving forward based on delays that were clearly contemplated as permissible, interferes with Kuilima's property rights to move forward with its entitlements based on a final EIS.

While takings are generally thought of as condemnations of property through the government's exercise of eminent domain or takings through regulatory restrictions that deprive the owner of all viable use of the property, it is possible for a Court to effect a taking through its

judicial decision. See Sotomura v. County of Hawaii, 460 F. Supp. 473, 480-81 (D. Haw. 1978) (holding that the Hawaii Supreme Court violated the takings protections by radically departing from prior state law in its ruling that the seaward boundary of private property owners should be the vegetation line rather than the mean high water line). Indeed, the U.S. Supreme Court granted certiorari and recently heard argument in Walton County v. Stop the Beach Renourishment, Inc., 998 So.2d 1102 (Fla. 2008), cert. granted, 77 U.S.L.W. 3544 (U.S. June 15, 2009) (No. 08-1151), to address whether the Florida Supreme Court's decision upholding a Florida statute that eliminates certain property rights in the course of beach restoration, constitutes a judicial taking in violation of the United States Constitution.[19]

The U.S. Supreme Court has also recognized that a temporary taking may exist under certain circumstances. In First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 322 (1987), the U.S. Supreme Court held that a regulation denying an owner all reasonable use of property, even for a temporary period of time, may constitute an unconstitutional taking requiring the payment of monetary damages. See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). The delay resulting from the Court's Decision (which will necessarily include the preparation of an SEIS, and likely new lawsuits resulting therefrom) may result in a temporary taking of Kuilima's reasonable use of the Project for several years.

E. This Court Misapprehends the Effect its Decision Has on Projects Other Than Turtle Bay.

Though stating its Decision implicates only the matter before it (see Decision at 62-63), the Court's Decision effects significant change to the environmental review process, without guidance on how the holding is to be integrated into the development process. The Decision imposes time limitations on developments even when no such limitations existed, allows a lapse of time to be sufficient to require that changes in the area surrounding the project be considered for an SEIS, and reduces any protection afforded to developers by the statute of limitations by resetting the limitations period each time an approval is obtained. As written, the Decision has, at a minimum

[19] For additional discussion of judicial takings see B. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449 (1990); D. Bederman, The Curious Resurrection of Custom: Beach Access and Judicial Takings, 96 Colum. L. Rev. 1375 (1996); R. Walston, The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings, 2001 Utah L. Rev. 379 (2001); D. Sarratt, Judicial Takings and the Course Pursued, 90 Va. L. Rev. 1487 (2004).

armed any "concerned citizen" with the legal authority under the SEIS Rules to challenge developments that are outside of the time frame analyzed in its EIS, and which has not received all of its governmental approvals, regardless of the depth and breadth of other reviews of project impact, or other state and federal laws governing and protecting the area.

Hawaii is already facing difficult times as evidenced by furlough days and a mounting budget deficit, and increased unemployment. Due to the downturn in the economy, development and construction in Hawaii is slowed and development financing is already difficult to secure. In the Brief of Amicus Curiae First Hawaiian Bank ("FHB"), filed December 16, 2009 ("FHB Amicus Brief"), FHB warned that an adverse decision would "result [in a] negative impact on Hawaii's economy". FHB Amicus Brief at 4. FHB explained that any decision that empowers "any person" to "file litigation seeking an [SEIS]" 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.

The fact that "Hawaii is the most planned and regulated state in the nation" (LURF Brief at 4) does not bode well for the future of development in Hawaii. Amici LURF explained 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 permitting process . . . in addition, there is the Federal Clean Water Act . . . the Federal Clean Air Act, and the Federal Endangered Species Act". Id. at 4-5. The practical implication of being the "most planned and regulated state" is that development in Hawaii is extremely costly.

This Court's Decision may result in an increase to the costs and uncertainty associated with development in Hawaii. This cannot be what the Court intended.

III. CONCLUSION

Based on the foregoing, Kuilima respectfully asks the Court to reconsider and/or clarify the Decision.

DATED: Honolulu, Hawaii, April 19, 2010.

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