

IN THE INTERMEDIATE COURT OF APPEALS 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

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CIVIL NO. 06-1-0867

KEEP THE NORTH SHORE COUNTRY, a
Hawaii non-profit corporation, and SIERRA
CLUB, HAWAII CHAPTER, a foreign non-
profit corporation,

Plaintiffs,

vs.

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

Defendants.

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This Court must decide an issue of statewide importance not yet addressed by the appellate courts: Does the Hawai'i Environmental Protection Act (HEPA) and the Environmental Council Rules (HEPA Rules) obligate a public agency to determine whether a project requires a Supplemental Environmental Impact Statement (Supplemental EIS or SEIS) where new circumstances and evidence bring to light likely increased environmental impacts not previously dealt with in the project's twenty-two (22) year old EIS?

This Court should make the correct decision that HEPA imposes the obligation on all public agencies, because the agency with perhaps the most power to affect O'ahu's people and resources, Honolulu's Department of Planning and Permitting (Planning Department or DPP), refuses to follow the Legislature's clear mandate that public agencies are obligated to require a Supplemental EIS where there are new circumstances and evidence.

This appeal is from the judgment entered after the circuit court granted summary judgment to appellees/defendants CITY AND COUNTY OF HONOLULU, HENRY ENG and KUILIMA RESORT COMPANY against appellants/plaintiffs KEEP THE NORTH SHORE COUNTRY (North Shore) and SIERRA CLUB, HAWAI'I CHAPTER (Sierra Club) adjudicating the Planning Department did not violate HEPA when it decided a twenty-two (22) year old resort expansion project did not require a SEIS.

This Court should reverse the judgment and remand with directions to grant appellants' summary judgment motion, order the Planning Department to require a SEIS, and enjoin the project until there is full compliance with HEPA. HEPA and hard facts establish no genuine issues as to material facts and appellants are entitled to judgment as a matter of law:

One, an agency has the obligation, implied in HEPA and express in HEPA Rules,

to require a SEIS when "new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with." The agency's obligation is to make an "independent determination" whether new circumstances and evidence require a SEIS.

Two, HEPA applies to the resort owner's application for a preliminary subdivision. The application is an action seeking a discretionary consent that is not exempt from HEPA.

Three, new circumstances and evidence have brought to light likely increased significant environmental impacts from the project on traffic and species on O'ahu's North Shore not previously dealt with in the project's twenty-two (22) year old EIS. Population growth and development, and increased trips from Honolulu visitors, have caused unexpected increases in traffic on the North Shore's sole access road, resulting in traffic gridlock on Saturday afternoons, holidays, periods of high surf and special events. Threatened and endangered species, green sea turtles and Hawaiian monk seals, now bask and even give birth on beaches within the resort. New evidence including traffic studies, Federal and State reports, and expert opinion, exists.

Four, DPP did not take a hard look. DPP did not make an independent determination. DPP followed its defective practice of looking only at whether "plans conform to the permits" and "not look(ing) for (new circumstances and evidence) ourselves." Indeed, DPP's responsible employees declared they consider new circumstances and evidence "irrelevant" and testified that they did not look at the new circumstances and evidence when they prepared letters for the DPP Director disclosing to the public that DPP was not requiring a SEIS. DPP abused its discretion and violated HEPA when it failed to take a hard look at new circumstances and evidence and make an independent determination. And DPP violated HEPA Rules when it failed to file a notice with the Office of Environmental Quality Control disclosing it was not requiring a SEIS.

Five, North Shore and Sierra Club meet all requirements for prosecuting the lawsuit.

II. STATEMENT OF THE CASE

A. Statement of Facts

1. The Parties

A. Plaintiffs and Appellants

Appellants/plaintiffs KEEP THE NORTH SHORE COUNTRY (North Shore) is a Hawai'i non-profit corporation (ROA V4:3, 38)¹ and SIERRA CLUB, HAWAI'I CHAPTER (Sierra Club) is the Hawai'i chapter of a California non-profit corporation registered to do business in Hawai'i (ROA V4:2, 40).

B. Defendants and Appellees

Appellees/defendants CITY AND COUNTY OF HONOLULU (City) is a Hawai'i municipal corporation (ROA CV2:46, 222, 234); HENRY ENG (DPP Director) is an individual sued in his official capacity as Director of the DPP (*id.*); and KUILIMA RESORT COMPANY (Kuilima or resort owner) is a Hawai'i general partnership. (ROA CV2:46, 222-223.)

2. The 1985 Project Setting

The resort is located in Kahuku on O'ahu's North Shore. (ROA CV5, 3, 15, 141.) During the mid-1980's, the resort had one 487-room hotel and one golf course on a total acreage of 808 acres. (*id.*) O'ahu residents then considered the North Shore more "country" than "town." (ROA CV5:3, 121.) Hard facts supported the view:

"The region's 114,950 acres represents 30.3% of Oahu's total land area, but its 1980 population of 24,044 . . . represented less than 3.2% of the City and County of Honolulu's total population of 762,565." (ROA CV7:64-65.)

Then, as now, the only access through the North Shore and to the resort is Kamehameha

¹ Citations to the Record on Appeal shall be referred to by "ROA V" and to the Consolidated Record on Appeal as "ROA CV" followed by the Volume Number and page number(s).

Highway, a two lane, undivided state highway that varies between 20 and 24 feet in width.

(ROA CV4:122; ROA CV5:125, 127.)

3. The Project

The former owner proposed a development project which included resort expansion, infrastructure and public improvements (the project):

Expansion: The major component was the addition of 3,513 visitor units to the resort, increasing the resort from 487 hotel rooms to 4,000 hotel rooms and condos. (ROA CV3:141; ROA CV4:126; ROA CV5:13, 34-36, 129, 142, 159, 183, 185-186, 191; ROA CV7:14-15, 24-26, 79, 108; ROA CV8:94) The owner would build 1,450 new hotel rooms, 2,063 new condos, a nine-acre shopping mall, a golf course, clubhouse, tennis center and equestrian center, and would renovate the existing golf course. (*id.*) The expanded resort would introduce a "new visitor population averaging about 4,783 persons on any given day" to the North Shore. (*id.*)

Infrastructure: A second component was infrastructure, a new sewage treatment plant, water system, drainage system, and improvements to Kamehameha Highway fronting the resort. (ROA CV3:141; ROA CV4:114, 126, 133-134, 149-150; ROA CV5:13, 37, 53-54, 143-147, 178, 197; ROA CV7:14-15, 26-27, 31, 34-35, 79-82, 97; ROA CV4:88-89, 94, 96-97, 123.)

Public Improvements: The final component was the resort owner's obligation to construct four beach parks (ROA CV3:141; ROA CV4:90-92, 126, 128, 134, 141-148, 203-206; ROA CV5:142, 149, 159, 183-185, 191-193, 197, 200; ROA CV7:24-25, 79, 99-100, 104-105, 108); dedicate two parks to the public (*id.*); provide public parking, restrooms and showers at one park; maintain two private parks for public use (*id.*); construct a nature park (*id.*); provide five public rights of way through the resort to the shoreline with parking (*id.*; ROA CV4:92-95, 100, 153, 209); dedicate a public access easement along most of the resort's shoreline and then

construct and dedicate a public walkway along the easement (*id.*); improve Punahoolapa Marsh by constructing open waterways to enhance habitat for endangered waterbirds (*id.*; ROA CV4:114; ROA CV5:176, 182, 193-195; ROA CV7:24, 99); divert the ocean outlet from Kawela Bay to Turtle Bay by dredging (*id.*); provide transportation for the resort's employees (*id.*; ROA CV4:97-98, 150-151); develop affordable housing units for sale or rent to low and moderate income Hawai'i residents employed at the resort (*id.*; ROA CV4:89-90, 125, 132, 142-143); dedicate one-half acre of land and establish an employees' child care center on that land (ROA CV4:100, 153); establish an employment program for residents of surrounding communities and contribute \$500,000 to a non-profit entity to operate the program (ROA CV4:101, 125, 154); and monitor water quality at the beaches within the resort (ROA CV4,134, 210).

4. The 1985 EIS

The former owner submitted a Revised EIS to the City (EIS) on October 7, 1985. (ROA CV3:199, ROA CV4:11-12.) The EIS addressed "Traffic and Roads" by disclosing that a traffic engineer's report (1985 Traffic Report), a copy of which was attached to the EIS Appendix (ROA CV5:810-852), estimated "peak traffic levels" after the project was complete and the resort was operating 4,000 visitor units, during 2000; and concluded "total peak period traffic is still well below the highway's capacity" and "is not beyond the carrying capacity of an upgraded, high quality two-lane arterial." (ROA CV5:129-140.) The EIS concluded one of the "adverse or unavoidable environmental effects" of the project is "additional traffic." (ROA CV5:14, 157.)

The EIS did not address whether operation of the expanded resort would cause impacts to green sea turtles and Hawaiian monk seals.²

² The EIS' only discussion of these species was that dredging of Kawela Bay "will be located across the area where the abundant growths of algae that are known to be important diet items of (green sea turtles) are found." (ROA CV5:66.) Indeed, Kuilima admitted the EIS did not address

The EIS discussed "TIMING" of the project by attaching a "Figure 9" which "shows the approximate phasing of development for the resort (phasing is dependent on receiving the necessary approvals)." (ROA CV5:43-44.) Figure 9 depicted construction of all hotel rooms and most condos as part of the Phase II construction, commencing between 1988 to 1989, and completed by 1996. (*id.*)³

DPP's predecessor accepted the EIS on October 30, 1985. (ROA CV4:28, 216.)

5. Twenty-Two Years Later - The 2007 Project Setting

A. The Project Has Not Been Constructed

Construction has not started on major components of the project. (ROA CV4:217-235; *see* ROA CV3:136-137, 142-143, 200-201; ROA CV4:12-14, 21, 394.)⁴ All 1,450 new hotel rooms, 2,054 of the 2,063 new condos, the shopping center, clubhouse, tennis center and equestrian center have not been constructed. (*id.*) Drainage, water and traffic infrastructures, and public improvements, have not been completed. (*id.*)

The former owner constructed part of the Punahoolapa Marsh improvements, during 1990 (ROA CV4:12, 14), the new sewage treatment plant, during 1990 (*id.*), the new golf course, during 1991 (*id.*) and part of the new water system, during 1991. (*id.*) Kuilima purchased the resort during March 1999 (ROA CV2:222-223; ROA CV3:146, 200-201; ROA CV4:12), renovated the existing golf course, during 2002 (*id.*; ROA CV3:146, 201; ROA CV4:14) and

green sea turtles and Hawaiian monk seals: "The EIS . . . *could have dealt with* monk seals and green sea turtles . . ." (ROA CV9:56; italics added.)

³ The former owner also proposed to the State Land Use Commission "to complete the entire Resort development by 1996" (ROA V4:127) and signed an agreement recorded by the City which depicted "the 'general' phasing schedule" for the project to be complete by 1996 (ROA V4:13, 21, 89, 143, 228; ROA V8:136).

⁴ Kuilima argued there had been no substantive change in the timing of the project because the former owner and Kuilima did non-construction activities on the project. (ROA CV3:129-164, 189-225.) These activities are accurately summarized in the Appendix.

added "9 additional units" when it rebuilt part of the hotel as a "resort condominium" called Ocean Villas during 2005 (*id.*; ROA CV4:394; ROA CV4A:401).

B. New Circumstances and Evidence - Traffic

The first new circumstance on the North Shore since 1985 is traffic gridlock on the sole access road Kamehameha Highway from the Haleiwa Bypass to Kuilima's resort at Kahuku during Saturday afternoons, holidays, periods of high surf, and special events:

The Court should take judicial notice of this fact under Hawai'i Rules of Evidence Rule 200(a) because it is not subject to reasonable dispute in that it is generally known within O'ahu.

The new circumstance of traffic gridlock was testified to by North Shore directors Doug Cole, Lucky Cole and Gil Riviere, and Sierra Club O'ahu Group Executive Committee member Randy Ching, in depositions Kuilima filed with the circuit court. (ROA CV4A: 164-165, 178-179, 180, 199, 201, 224, 228-229, 231, 234, 262, 272, 275, 286, 288.)

The 1985 Traffic Report and EIS did not predict traffic gridlock after the project was complete and the resort was operating 4,000 hotel rooms and condos. (ROA CV5:129-140.)

New evidence includes seven (7) traffic studies, reports and addendums prepared since 1985: The former owners' Traffic Report prepared during July 1991 (1991 Traffic Report) (ROA CV8:340-361); the Department of Transportation Highway Planning Branch's traffic counts taken on Kamehameha Highway in front of the resort dated August 2000 (ROA CV4:525); the Laniakea Beach Park Traffic Impact Analysis Report dated 2005 (ROA CV4A: 106, 131; ROA CV7:8); Kuilima's Traffic Report Update dated September 9, 2005 (2005 Traffic Report) (ROA CV4:22; ROA CV4A:401; ROA CV8:362-431; ROA V11:362-431); Kuilima's Addendum No. 1 to the 2005 Traffic Report dated February 14, 2006 (ROA CV9:62, 83, 330-336); Kuilima's Addendum No. 2 to the 2005 Traffic Report dated February 23, 2006 (*id.*; ROA

CV9:337-343); and Kuilima's Addendum No. 3 to the 2005 Traffic Report dated August 25, 2006 (*id.*; ROA CV9:344-349).

New evidence includes three (3) government reports prepared since 1985: The Department of Business, Economic Development & Tourism's "Planning for Sustainable Tourism in Hawaii Report" of December 2002 (ROA CV4A:107, 100, 131-132) and "Visitor Satisfaction Tack-On Survey (4th Quarter 2003 and 3rd Quarter 2005)" (*id.*); and the draft "Oahu Regional Transportation Plan for 2030" (ROA CV4:275; ROA CV4A:107).

New evidence includes the expert opinion of the City's most knowledgeable employee on the City's obligation to enforce HEPA, Arthur D. Challacombe (Land Use Chief Challacombe) (ROA CV8:282; ROA V11:282), who was Chief of the Environmental Review Branch of the Zoning Division from 1991 through 1999, DPP's Chief Customer Services Office from 1999 through 2006, and is now DPP's Acting Branch Chief of the Land Use Approval Branch (ROA CV4:26-27; ROA CV6:113-114, 179 n. 10; ROA CV9:122). Land Use Chief Challacombe opined that changed traffic made the resort owner's 1985 Traffic Report "not sufficient:"

"... Again, I go back to the traffic study. We, I am sure, are going to require an updated traffic study at the time of building permit application for the Kuilima development.

A 20-year old traffic study is not sufficient because, as you pointed out, there may be factors in the community that may have changed, i.e., traffic." (ROA CV8:290-291; ROA V11:290-291.)

New evidence includes the expert opinion of Tom Brohard, P.E., a recognized traffic expert. (ROA CV8:253-277; ROA V11:180-201, 253-277.) Mr. Brohard's declaration summarized his education and thirty-six (36) years experience as a traffic engineer (*id.*); summarized steps he took to arrive at an opinion including his review of the EIS, traffic studies and government reports; authenticated his Summary and Report; and expressed his opinions:

* New circumstances on the North Shore since 1985 include the unexpected increase in traffic caused by "the significant increase in the number of vehicle registrations on Oahu and increased visitor trips to the North Shore created by such factors such as the increasing popularity of observing basking sea turtles and the proliferation of surfing schools catering to tourists. . . . with half of the overnight Waikiki visitors in 2003 and in 2005 traveling to the North Shore during their Oahu stay . . ." (ROA CV8:265, 275; ROA V11:265, 275.)

* New circumstances on the North Shore since 1985 include pipeline development on the North Shore: "Pipeline development" is "projects (that) have been approved but not yet constructed or fully occupied" and "other potential projects that must be considered as 'reasonably foreseeable' in the next 15 to 25 years." (ROA CV8:26:275-276; ROA 11: 275-276.)

* As a result of the new circumstances and evidence, the EIS and 1985 Traffic Report are "outdated" and cannot "be relied upon to properly disclose, analyze, and mitigate the significant local and regional traffic impacts of the proposed multiphase resort expansion project" (ROA CV8:263, 266; ROA V11:263, 266)

* "A corrected traffic study and Supplemental EIS must be prepared . . ." (*id.*) "The revised evaluation must include vehicle trips from 'pipeline development' that come on line as the major phases of the resort expansion project are occupied," "current traffic volumes (and) appropriate background growth . . . before adding project traffic." (ROA CV8:265.)

C. New Circumstances and Evidence - Species

The second new circumstance on the North Shore since 1985 is the use of beaches within the project by endangered and threatened species. Endangered species, Hawaiian monk seals, now bask on beaches within the resort, and even gave birth on a beach within the resort on June 1, 2006. (ROA CV8:433, 628-629; ROA CV9:169-171; ROA V4:436; ROA V11:433, 628-629.)

Threatened species, green sea turtles, now bask on beaches within the project. (ROA CV9:172-184; ROA V4:436; ROA V11:95.) These new circumstances were testified to by North Shore directors Doug Cole, Lucky Cole and Gil Riviere. (ROA CV4A:109, 112, 117, 137, 143, 166, 168, 199, 230; ROA CV10:50.)

New evidence includes three reports of the National Marine Fisheries Service: A report of aerial surveys for monk seals which reported there were no observations of monk seals at Kuilima's resort from 1984 through 2001, there have been forty-three (43) observations of monk seals at Kuilima's resort from 2002 through 2006, and there was one (1) birth of a monk seal at Kuilima's resort on June 1, 2006 (ROA CV8:432-434; ROA V11:432-434); National Marine Fisheries Service's 2003, article entitled *Abundance of the Hawaiian Monk Seal in the Main Hawaiian Islands* (ROA CV11:216-222); National Marine Fisheries Service's 2003 *Final Report on a Workshop on the Management of Hawaiian Monk Seals on Beaches in the Main Hawaiian Islands* (ROA CV11:224-279); and the Declaration of Charles Littnan, Ph.D., a marine mammal ecologist with the National Marine Fisheries Service, that "in the 1950s, 1960s and 1970s, monk seals were rarely seen, if ever, in the Resort Area;" and "in the past 20 years, . . . (t)he Resort Area - - both the beach and near shore area - - has been identified as a foraging habitat to the monk seal population." (ROA CV8:433, 628-636.)

6. Kuilima's Subdivision Application

On November 8, 2005, DPP received Kuilima's application for a "Preliminary . . . Subdivision." (ROA CV4:7-8; ROA CV4A:466-471.)

Kuilima's application applied to 743.7 of the total resort acreage of 808 acres. (*id.*) It sought consolidation of approximately one-hundred thirty (130) lots, resubdivision into approximately sixty (60) lots, and creation of numerous easements. (*id.*)

The DPP employee responsible for the application was Mario Siu-Li (Senior Planner Siu-Li). (ROA CV9:147.) He has been employed as a Senior Planner with DPP's Subdivision Branch for almost sixteen (16) years. (*id.*) He was designated as one of the City's two most knowledgeable employees on DPP's decision to not require a SEIS on Kuilima's project. (ROA CV8:304, 308; ROA CV9:145.) He concluded all hotels, the golf course, the clubhouse, the parks and all shoreline access would be built on the proposed subdivision. (ROA CV9:160-161.)

7. The Planning Department's Role

DPP is the public agency responsible for enforcing HEPA and the City's Subdivision Ordinance. Hawai'i Revised Statutes (HRS) § 343-5(b); Hawai'i Administrative Rules (HAR) § 11-200-4(b); Honolulu Revised Ordinances (HRO) §§ 22-3.3, et seq.) (Subdivision Ordinance).

Subdivisions: DPP is the public agency responsible for deciding whether a subdivision application should be approved or denied. HRO §§ 22-3.3 and 22-3.4. (ROA CV4:27, 31; ROA CV4A:550-566; ROA V6:114.)

The City's Subdivision Ordinance specifies "**Approval**" of a subdivision is required. HRO § 22-3.3; bold in original. It specifies a subdivision application can be "approved" only if the director determines the proposed subdivision conforms to all State and City laws, ordinances, rules, regulations, planning commission regulations, board of water supply regulations, the general plan, and development plans relating to subdivisions. HRO §§ 22-3.2, 22-3.3 and 22-3.4; Honolulu Subdivision Rules and Regulations § 2-203(a) (Subdivision Rules).

The Subdivision Ordinance gives clear "discretion" to the director to grant or deny a subdivision application, expressly providing his or her decision can be set aside only under the "abuse of discretion" standard. HRO § 22-3.7. It gives an applicant a right to appeal the director's decision denying a subdivision application to the Zoning Board of Appeals, but that

board may "modify or overrule the director's action only if it finds that the director's action was based on an erroneous finding of a material fact, or that the director had acted in an arbitrary or capricious manner or had manifestly abused his or her discretion." (*id.*)

Two of the City's most knowledgeable employees admitted DPP's decision to grant or deny an application is both discretionary and ministerial. Land Use Chief Challacombe testified:

"Q. Okay. Sometimes subdivision applications do require environmental impact statement, for example?

A. I have never seen a subdivision application go through an environmental assessment or impact statement, never because *they're basically I wouldn't say completely ministerial, there is discretion in there . . .*" (ROA CV9:128; italics added.)

Senior Planner Siu-Li testified:

"Q. Okay. I'm a little confused as to the difference between a ministerial and discretionary. Is subdivision approval a discretionary approval?

MR. KITAOKA: Objection, calls for a legal conclusion, also vague and ambiguous as to discretion.

. . . A. I think *the process involves a combination of both discretionary and ministerial aspects.*" (ROA CV4A:482; italics added.)

If the DPP Director approves a preliminary subdivision, a developer can argue it has a "vested right" to complete the project based on Subdivision Rules § 2-203(a), which provides:

"Tentative approval of the preliminary map means . . . it authorizes the subdivider to proceed with preparation of construction plans for streets, utilities and other improvements and requirements as may be required by the Director and to proceed with preparation of the final map."

HEPA: DPP is the public agency responsible for deciding whether a subdivision applicant should be required to prepare a SEIS. HRS § 343-5(b); HAR § 11-200-4(b). (ROA CV4:16, 27; ROA V6:114, 118.) The Environmental Council's interpretation of HAR § 11-200-4(b) is an agency must make "an independent determination of whether an SEIS is

required." (ROA CV8:297.)

However, it is DPP's practice to **not** make an independent determination. (ROA CV8:288, 316-317.) Land Use Chief Challacombe testified

"Q. And how do you get that evidence (of a significant change in the community), by somebody presenting it to the DPP?

A. Generally. There has to be a nexus. There has to be some generator. *We're not going to look for it ourselves. We're -- we review specific applications. We are not a research agency.*" (ROA CV8:288; italics added.)

And Senior Planner Siu-Li testified:

"Q. . . . (Y)ou rely on other planners or other agencies to alert you if there is a question of whether a supplemental environmental impact statement might be required before you give any approvals?

A. They will usually indicate *if the plans conform to the permits that were issued for them.*

Q. *And that's the end of inquiry, as far as you're concerned?*

A. *That's normally the inquiry that we make, that the project conforms to the approved permit.*" (ROA CV8:316-317; italics added.)

Indeed, Land Use Chief Challacombe declared new circumstances and evidence "irrelevant":

"The fact of 'whether or not the surrounding community has changed in the past 20 years' is irrelevant to DPP's determination . . ." (ROA CV9:406.)

Given the Planning Department's practice of not making any independent determination,

DPP rarely requires a SEIS. (ROA CV8:284, 317.) Land Use Chief Challacombe testified:

"A. . . . Supplemental impact statements are very rare in our Department. And in -- in my tenure, I remember only one.

Q. What was that one, do you remember?

A. That was . . . I think, in the early '90s." (ROA CV8:284.)

And Senior Planner Siu-Li testified:

"Q. In your experience at the Department, have you ever recommended that a

supplemental environmental impact statement be required for a project?

A. No.

Q. Are you aware of that ever happening?

A. Not under the subdivision review." (ROA CV8:317.)

8. The Planning Department Did Not Take A Hard Look At New Circumstances and Evidence

The DPP Director received two letters during January 2006. (ROA CV3:203.) The first was dated January 5, 2006, from Eric Gill, a union officer, and requested DPP "not grant any preliminary or final subdivision approval" until Kuilima prepared a SEIS on "changes (that) have occurred in the past two decades." (ROA CV1:146-147; ROA CV3:150; ROA CV4:23, 32-33.) The second was dated January 6, 2006, from Ben Shafer, a North Shore resident, and stated "much had changed since the approval of the EIS and SMAP some twenty years ago" and "an updated EIS" needs to be prepared. (ROA CV4:17; ROA CV6:119; ROA CV10:316.)

The time period of DPP's "administrative process" to make the decision whether to require a SEIS on Kuilima's project was at best two (2) weeks, from when DPP received the first letter dated January 5, 2006, to when the DPP Director signed a letter dated January 19, 2006 disclosing DPP was not requiring a SEIS. (ROA CV1:149; ROA CV3:203-204.)

DPP's "administrative record" for this two week process consists of only two writings: DPP's Environmental Check List for Kuilima's application, and the DPP Director's January 19, 2006 letter to Mr. Shafer. (*id.*; ROA CV10:180 n. 1, 200, 205-209.) Neither reflects DPP made any effort to determine whether new circumstances and evidence require a SEIS. (*id.*)

The City designated Senior Planner Siu-Li and Planner James H. Peirson (Planner Peirson) as the City's most knowledgeable employees on DPP's replies to the two letters. (ROA CV8:304, 308, 326; ROA CV9:145.) They testified to the following:

DPP gave responsibility for preparing replies to the two letters to Senior Planner Siu-Li and Planner Peirson. (ROA CV8:308, 326.)

Planner Peirson has been employed as a DPP Planner for about seventeen years. (ROA CV4A:518; ROA CV9:197.) He prepared DPP's reply to Mr. Shafer's letter. (ROA CV8:326.) He did not review the EIS. (ROA CV4A:519; ROA CV8:332.) He did not look at new circumstances and evidence. (ROA CV10:216-217.) He looked only at whether "there was substantive change to the project." (*id.*) The letter he prepared for the DPP Director, dated January 19, 2006 and addressed to Mr. Shafer, did not address the new circumstances and evidence. (ROA CV1:149; ROA CV3:204; ROA CV4:18; ROA CV6:120.) The letter referred only to the EIS and a 1986 Special Management Permit. (*id.*) The letter then stated:

"... 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 the time, the City Council indicted that the project could be developed at its own pace. Further, as a matter of law, the City cannot retroactively impose time limits or unilaterally rescind an entitlement for an approved discretionary permit." (*id.*)

Senior Planner Siu-Li prepared DPP's reply to Mr. Gill's letter. (ROA CV8:308.) He did not go to the project site. (ROA CV8:302.) He did not review the EIS or Special Management Permit. (ROA CV8:308.) He did not look at new circumstances and evidence. (*id.*) The only information available to him was Kuilima's application, Mr. Shafer's letter and the DPP Director's January 19, 2006, letter to Mr. Shafer. (*id.*) The only thing Senior Planner Siu-Li looked at was whether Kuilima's "application was not changing the existing condition of the properties." (ROA CV8:309-310.) The letter he prepared for the DPP Director, dated January 31, 2006 and addressed to Mr. Gill, did not address the new circumstances and evidence. (ROA CV1:148-149; ROA CV3:204; ROA CV4:22, 33.) The letter only enclosed a copy of the

DPP Director's January 19, 2006, letter to Mr. Shafer, and then stated:

"The matter of the EIS and SMP has been addressed by the Department in the attached letter dated January 19, 2006. In regards to the subdivision application, as long as the applicant is following procedures and satisfying the requirements of the subdivision rules, regulations, and ordinances, the City must continue to process the application and act on the proposal accordingly." (ROA CV1:148-149; ROA CV3:204; ROA CV4:22, 33.)

There is no evidence any DPP employee took any look at all at the new circumstances and evidence. (ROA CV1:148-149; ROA CV3:204; ROA CV4:18, 22, 30, 33; ROA CV4A:481, 519; ROA CV6:117, 120; ROA CV8:302, 304, 308-310, 312, 314, 326, 331-332, 337-338; ROA CV9:145, 147; ROA CV10:27, 29, 216-217.)

DPP did not submit a notice to the Office of Environmental Quality Control, for publication in the periodic bulletin, disclosing to the public that it had determined Kuilima was not required to prepare a Supplemental EIS. (*id.*)

After DPP's decision was informally publicized, the Legislature and the Environmental Council requested that DPP require a SEIS. (ROA CV8:297, 327.) DPP rejected the requests and tentatively approved Kuilima's application on September 29, 2006. (ROA CV9:75.)

B. Statement of Procedure

1. The Pleadings

A. The First Amended Complaint

North Shore filed a complaint alleging one claim for violation of HEPA (ROA CV1:1-91.) North Shore and Sierra Club then filed a First Amended Complaint (Complaint) which continued to allege the one claim for violation of HEPA. (ROA CV2:41-136.) The Complaint alleged a substantive change in the timing of the project resulting in increased environmental impacts (ROA CV2:54); new circumstances and evidence brought to light different or likely increased impacts not previously dealt with in the EIS (ROA V2:50-51); and the Planning

Department violated HEPA and HEPA Rules HAR §§ 11-200-26 and 11-200-27 when it failed to require Kuilima to prepare a SEIS (ROA V2:51-54). The Complaint sought a declaration a SEIS must be prepared and an injunction against the project (ROA V2:55).

B. The Answers

Kuilima's Answer denied the material allegations of the complaint and alleged affirmative defenses including a failure to exhaust administrative remedies, lack of standing, *ultra vires* Environmental Council rules, and statutes of limitation. (ROA CV2:221-231.)

The City and DPP Director's Answer denied the material allegations of the complaint and alleged affirmative defenses including lack of standing, failure to exhaust administrative remedies, statutes of limitation and no "discretionary consent." (ROA CV2:232-242.)

2. The Motions

Kuilima filed four motions (ROA CV3:17 - ROA CV5:872; ROA CV9:9-18):

Motion for Judgment on Pleadings: Kuilima argued a private cause of action does not exist under HEPA to require a SEIS. (ROA CV3:17-128.)

First Motion for Summary Judgment: Kuilima argued the lawsuit was barred by statutes of limitation. (ROA CV3:129-166)

Second Motion for Summary Judgment: Kuilima argued its application seeks a "non-discretionary" decision which does not trigger HEPA. (ROA CV3:167-188.)

Third Motion for Summary Judgment: Kuilima argued North Shore and Sierra Club could not meet their burdens of proof. (ROA CV3:189-227.) Kuilima's motion argued for an interpretation of HEPA Rules that an agency *cannot* require a SEIS for new circumstances and evidence *but only* if there is a substantive project change, which itself causes significant environmental impacts, which were not originally disclosed or previously dealt with in the

EIS. (ROA CV3:190-191, 196-198.) Kuilima then argued North Shore and Sierra Club could not meet their burden to establish each of these three elements. (*id.*)

Kuilima's motions did **not** directly address North Shore and Sierra Club's claim that new circumstances and evidence required a SEIS. (ROA CV3:17 - ROA CV5:872.)

The City and DPP Director filed joinders in Kuilima's motion for judgment on the pleadings and first and third summary judgment motions, but did not join in the second summary judgment motion. (ROA CV6:127-142; ROA CV10:338-341.)

North Shore and Sierra Club filed opposition briefs and evidence. (ROA CV6:162 - ROA CV8:636; ROA CV10:1-242, 320-337.)

Kuilima filed reply briefs. (ROA CV11:24-141, 301-308.)

Cross-Motion for Summary Judgment: North Shore and Sierra Club also filed a cross-motion for summary judgment (ROA CV6:162-203) which argued Kuilima's subdivision application triggered HEPA supplemental review (ROA CV6:177); enforceable HEPA Rules require a SEIS either when there are substantive project changes or new circumstances and evidence (ROA CV6:186-187); the substantive change in the timing of the project has caused, and new circumstances and evidence have brought to light, likely increased environmental impacts to traffic and species not previously dealt with in the EIS (ROA CV6:178-179, 197 201); and DPP did not take a hard look at new circumstances and evidence and violated HEPA when it decided Kuilima was not required to prepare a SEIS (ROA CV6:187-194).

Kuilima filed an opposition brief. (ROA CV9:34-428.)

North Shore and Sierra Club filed a reply brief. (ROA CV11:142-281.)

3. The Circuit Court Grants Kuilima's Summary Judgment Motion

The circuit court granted Kuilima's third summary judgment motion, denied North

Shore and Sierra Club's summary judgment motion, and ruled Kuilima's remaining motions moot. (ROA CV12:15.) The circuit court agreed with Kuilima's interpretation that HEPA Rules requiring a SEIS mean an agency can require a SEIS *only* when there is a substantive project change itself (ROA CV12:14-15); found North Shore and Sierra Club did not meet their burden of proving a substantive change in Kuilima's project (ROA CV12:15); and concluded:

"... The DPP's decision that a supplemental EIS is not required for the Project meets the rule of reason standard, and was not arbitrary or capricious. The timing of the Project has not substantively, or essentially changed. In the alternative, even if the timing had substantively changed, which the Court finds that it has not, such change is not likely to have a significant effect. ...

... (T)he Court would not find that there is a substantive change likely to result in a significant effect not originally considered or previously dealt with that would require a supplemental EIS ... " (ROA CV12:15.)

4. The Judgment

An Amended Final Judgment was entered, and notice of entry of judgment was served, on June 4, 2007. (ROA CV14:87-94.) North Shore and Sierra Club filed a timely notice of appeal on June 19, 2007. (ROA CV14:95-105.)

III. STATEMENT OF THE POINTS OF ERROR

The circuit court erred in granting Kuilima's *Third Motion for Summary Judgment (re: Burden of Proof)* filed October 11, 2006. (ROA V13:318; 14:129.)

The circuit court erred in denying North Shore and Sierra Club's *Motion for Summary Judgment* filed October 26, 2006. (*id.*)

IV. STANDARDS OF REVIEW

1. Summary Judgment Standards of Review

An appellate court reviews *de novo* the circuit court's grant or denial of a motion for summary judgment. *Sierra Club v. Department of Transportation*, No. 27407, slip op.

at 23 (Haw. S. Ct. Aug. 31, 2007) (*Dept. of Transportation*).

"The standard for granting a motion for summary judgment is settled:

[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion."

Dept. of Transportation, supra, slip op. at 24; HRCP Rule 56(c); *Kepoo v. Kane*, 106 Hawai'i 270, 287, 103 P.3d 939, 956 (2005) (*Kepoo*).

2. Interpretation of Law Standard of Review

An appellate court reviews *de novo* the circuit court's conclusions of law and interpretation of a statute. *Sierra Club v. State of Hawaii Office of Planning*, 109 Hawai'i 411, 414, 126 P.3d 1098, 1101 (2006) (*Office of Planning*).

3. HEPA Procedures and Factors Standard of Review

The appellate court reviews *de novo* conclusions whether or not an agency has followed proper procedures or considered appropriate factors in making its determination under HEPA. *Dept. of Transportation, supra*, slip op. at 29; HRS § 91-14(g)(1)-(6).

4. Supplemental EIS Standard of Review

HEPA does not provide direct guidance on what standard of review should apply to an agency's decision to not require a SEIS. However, where Hawai'i case law and statutes are silent, the Courts can look to parallel Federal law for guidance. *Price v. Obayashi Hawaii Corp.*, 81 Hawai'i 171, 181, 914 P.2d 1364, 1373 (1996) (*Obayashi Hawaii Corp.*).

HEPA was patterned after the National Environmental Policy Act of 1969, 42

U.S.C. §4321-4347, as amended (NEPA). *Dept. of Transportation, supra*, slip op. at 6; *Pearl Ridge Estates Community Ass'n v. Lear Siegler, Inc.*, 65 Hawai'i 133, 140, 648 P.2d 702, 707 (1982) (*Pearl Ridge Estates*). The standard that governs a Federal agency's decision under NEPA whether to require a SEIS is the "hard look" and "rule of reason" standard. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74, 109 S.Ct. 1851, 1859, 104 L. Ed. 2d 377, 392-93 (1989) (*Marsh*). NEPA requires "an agency to take a 'hard look' at the new information to assess whether supplementation might be necessary." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73, 124 S. Ct. 2373, 2384, 159 L. Ed. 2d 137, 156 (*Norton*). In *Marsh*, *supra*, 490 U.S. at 360, 109 S.Ct. at 1851, 104 L. Ed. 2d at 377, the Court explained:

" . . . The parties are in essential agreement concerning the standard that governs an agency's decision whether to prepare a supplemental EIS. They agree that an agency should apply a 'rule of reason,' . . . An agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand . . . *NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval.* . . . Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. . . ." *Marsh, supra*, 490 U.S. at 373-74, 109 S. Ct. at 1859, 104 L. Ed. 2d at 392-93; italics added.)

The Hawai'i Supreme Court has twice made reference to the hard look standard, warning that courts "must ensure that the agency has taken a 'hard look' at environmental factors." *Dept. of Transportation, supra*, slip op. at 101; *Obayashi Hawaii Corp., supra*, 81 Hawai'i at 182 n. 12, 914 P.2d at 1375 n. 12.

Further, the Environmental Council's interpretation of HAR § 11-200-4(b) is that

an agency must make "an independent determination of whether an SEIS is required." (ROA CV8:297.) Parallel NEPA law also provides guidance that a public agency must make an independent determination. In *Stop H-3 Association v. Lewis*, 538 F.Supp. 149 (D. Hawai'i 1982) (*Stop H-3*), the U.S. District Court concluded:

"A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. . . . When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the new information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data." *Stop H-3, supra*, 538 F.Supp. at 168-69.

The correct standard of review is whether an agency took a "hard look" at new circumstances and evidence and made an "independent determination" whether a SEIS is required.

V. ARGUMENT

A. Summary of Argument

The Court should reverse and remand with directions to grant North Shore and Sierra Club's motion for summary judgment, order DPP to require a SEIS, and enjoin the project until the circuit court determines full compliance with HEPA.

An agency has the obligation, implied in HEPA and express in HEPA Rules, to require a SEIS when "new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with" in an EIS. The agency's obligation is to make an "independent determination" whether new circumstances and evidence require a SEIS.

HEPA applies to Kuilima's application for approval of a preliminary subdivision. The application is an "action" seeking a "discretionary consent" that is "not exempt" from HEPA.

New circumstances and evidence have brought to light likely increased significant

environmental impacts to traffic and species on O'ahu's North Shore from the project not previously dealt with in the 21-year old EIS. Unexpected increases in traffic on the North Shore's sole access road have occurred, resulting in gridlock on Saturday afternoons, holidays, periods of high surf and special events. Threatened and endangered species, green sea turtles and Hawaiian monk seals, now bask and even give birth to pups on beaches within the resort. New evidence including traffic studies, Federal and State reports, and expert opinion, exists.

DPP did not take a hard look. DPP did not make an independent determination. DPP abused its discretion and violated HEPA when it failed to require a SEIS. DPP violated HEPA when it failed to file a notice with the Office of Environmental Quality Control disclosing to the public it was not requiring Kuilima to prepare a Supplemental EIS.

North Shore and Sierra Club meet all requirements for prosecuting the lawsuit: They have standing; they should be adjudged aggrieved; and the complaint was timely filed.

B. HEPA Obligated DPP To Require A SEIS For Kuilima's Project

This Court can decide the parties' competing interpretations of HEPA and HEPA Rules by using the guidance of established rules of statutory construction:

North Shore and Sierra Club contend an agency's obligation to require a SEIS is required by HEPA and enforceable HEPA Rules (ROA CV6:178-181, 186-187); HEPA Rules obligate an agency to require a SEIS *either* when there are project changes, *or* changes in the intensity of impacts, *or* new circumstances and evidence (*id.*); HEPA applies to Kuilima's application (ROA CV6:177); and DPP was obligated to take a hard look and make an independent determination whether new circumstances and evidence required a SEIS (ROA CV6:188-189).

Kuilima contends, on the other hand, that it was the Legislature's intent in enacting HEPA to never require a SEIS (ROA CV3:23 n. 2, 176, fn. 9); Environmental Council rules

requiring a SEIS are unenforceable (ROA CV3:23 n. 2; ROA CV11:34); HEPA does not apply to Kuilima's application because it is not an "action," it seeks only a "ministerial consent" and it is "exempt" (ROA CV9:47); an agency cannot require a SEIS when there are only changes in the intensity of the project's impacts (ROA CV9:40), an agency cannot require a SEIS where there are only new circumstances and evidence (*id.*), an agency cannot require a SEIS for a substantive change in the timing of a project unless the EIS imposed a rigid time schedule (ROA CV9:41-43), an agency can require a SEIS only when there is a substantive project change, which itself causes significant environmental effects, which were not originally disclosed in the EIS (ROA CV9:40-41, 48-49, 53, 57-61); and there is no private cause of action for an order requiring a SEIS (ROA V3:196-198; ROA V6:127-128, 135-137, 140-142).

Established rules of statutory construction provide guidance: When construing a statute, the court's foremost obligation is to ascertain and give effect to the intention of the Legislature. *Office of Planning, supra*, 109 Hawai'i at 414, 126 P.3d at 1101; *Coon v. City and County of Honolulu*, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002) (*Coon*). Legislative intent must be obtained primarily from language contained in the statute itself (words used in a statute rule). *Kepoo, supra*, 106 Hawai'i at 288, 103 P.3d at 957; *Coon, supra*, 98 Hawai'i at 245, 47 P.3d at 360; *State v. Pacheco*, 96 Hawai'i 83, 94, 26 P.3d 572, 583 (2001) (*Pacheco*). Words in a statute have their usual meaning (usual meaning of the words rule). HRS § 1-14. Words in a statute must be read in the context of the entire statute (context of the words rule). HRS § 1-15(1); *Coon supra*, 98 Hawai'i at p. 245, 47 P.3d at p. 360; *Pacheco, supra*, 96 Hawai'i at 94, 26 P.3d at 583. The court can give deference to an agency's interpretation of its own rule (deference to an agency's interpretation rule). *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) (*Camara*). The Court can consider the reason and spirit of the law, and the cause which induced

the Legislature to enact it (reason, spirit and cause of a law rule). HRS § 1-15(2); *Coon, supra*, 98 Hawai'i at p. 245, 47 P.3d at p. 360; *Pacheco, supra*, 96 Hawai'i at p. 94, 26 P.3d at p. 583 (2001); *Roberts Hawaii School Bus, Inc. v. Laupahoehoe Transportation Company, Inc.*, 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999). The court can look to parallel Federal law (parallel Federal law rule) (*Office of Planning, supra*, 109 Hawai'i at 419, 126 P.3d at 1106; *Obayashi Hawaii Corp., supra*, 81 Hawai'i at 181-82, 914 P.2d at 1373-75) and does look to Federal law of NEPA for guidance on how to construe HEPA (*Dept. of Transportation, supra*, slip op. at 98; *Office of Planning, supra*, 109 Hawai'i at 419, 126 P.3d at 1106; *Sierra Club v. Hawai'i Tourism Authority*, 100 Hawai'i 242, 268-69, 272-80, 59 P.3d 877, 903-04, 907-15 (2002); *Pearl Ridge Estates, supra*, 65 Haw. at 140, 648 P.2d at 707). The court can look to parallel State law (the parallel State law rule). (*Dept. of Transportation, supra*, slip op. at 36-37, n. 26) and does look to California law of the California Environmental Quality Act, Cal. Public Resources Code §§ 21000, et seq. (CEQA) for guidance on how to construe HEPA. (*id.*) A rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable (the reasonable interpretation rule) (*Keliipuleole v. Wilson*, 85 Hawai'i 217, 221-22, 941 P.2d 300, 304-05 (1997) (*Keliipuleole*). Courts should not interpret a statute to render part of the statute superfluous or a nullity (the not render part of a statute a nullity rule). *Keliipuleole, supra*, 85 Hawai'i at 221, 223, 941 P.2d at 303, 306. And construction of law which leads to absurdity shall be rejected (the no absurdity rule). HRS § 1-15(3).

1. An Agency's Obligation To Require A SEIS Is Implied In HEPA

Four rules of statutory construction -- the words used in a statute, the usual meaning of the words, parallel Federal law, and the reasonable interpretation rule -- should guide the Court to adjudicate a public agency has an obligation implied in HEPA to require a SEIS:

HEPA does not expressly address post-decision supplemental environmental impact statements. HRS §§ 343-1 - 343-8. HEPA does provide for the creation of an appointed neutral body, the Environmental Council, to "adopt, amend, or repeal necessary rules for the purposes of" HEPA. HRS §§ 343-2, 343-6. The Environmental Council adopted rules which expressly require SEIS's. HAR §§ 11-200-26 - 11-200-29.

NEPA also does not expressly address postdecision supplemental environmental impact statements. 42 U.S.C. §4321-4347; *Marsh, supra*, 490 U.S. at p. 370, 109 S.Ct. at 1857, 104 L. Ed. 2d at 390. NEPA also provided for the creation of an appointed body, the Council on Environmental Quality or CEQ, to make recommendations with respect to NEPA. 42 U.S.C. §§ 4342, 4344. CEQ also adopted rules which expressly require SEIS's. 40 CFR § 1502.9 (1987).

In *Marsh, supra*, 490 U.S. at 360, 109 S.Ct. at 1851, 104 L.Ed. 2d at 377, the United States Supreme Court held a Federal agency's obligation to require a SEIS is implied in NEPA:

"The subject of postdecision supplemental environmental impact statements is not expressly addressed in NEPA. Preparation of such statements, however, is at times necessary to satisfy the Act's 'action-forcing' purpose. . . . It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval. As we explained in *TVA v. Hill*, 437 U.S. 153, 188, n. 34 (1978), although 'it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment,' up to that point, 'NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally "significant."'

This reading of the statute is supported by Council on Environmental Quality (CEQ) and Corps regulations, both of which make plain that at times supplementation is required. The CEQ regulations, which we have held are entitled to substantial deference, see *Robertson, ante*, at 355-356; *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), impose a duty on all federal agencies to prepare supplements to either draft or final EIS's if there 'are significant new circumstances or information relevant to environmental concerns and bearing on

the proposed action or its impacts.' Similarly, the Corps' own NEPA implementing regulations require the preparation of a supplemental EIS if "new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action." *Marsh, supra*, 490 U.S. at 370-373, 109 S.Ct. at 1857-1859, 104 L.Ed.2d at 390-392.

In this case, the Court should adjudicate HEPA imposes the same implied obligation on Hawaiian public agencies to require a SEIS as NEPA imposes on Federal agencies.

2. An Agency's Obligation To Require A SEIS Is Express In HEPA Rules

These same four rules of statutory construction also should guide the Court to adjudicate that a public agency has an express obligation to require a SEIS under enforceable HEPA Rules.

The Senate Ecology, Environment and Recreation Committee's Environmental Senate Standing Committee Report No. 2067-74 on the proposed HEPA statute, H.B. No. 2067-74, states the Legislature's intent to create a neutral appointed body to administer HEPA:

"Your Committee is in agreement with this Bill that the best procedure for establishing an E.I.S. process is to establish a Commission which shall administer the provisions of the Bill. The Commission shall be called the Environmental Quality Commission to be composed of ten members appointed by the Governor and confirmed by the Senate. The membership shall include representatives of labor, management, construction, industry, environmental interest groups, real estate groups, and the architectural, engineering and planning professions. The Director of Environmental Quality Control shall serve as an ex officio voting member." (1974 Senate Journal - Standing Committee Reports, p. 1126.)

The House Committee on Judiciary and Corrections' House Standing Committee Report No. 556-74 also states the Legislature's intent to create a appointed body to administer HEPA:

"Your Committee has amended the bill to provide for the establishment of an environmental quality commission which shall administer the provisions in the bill. The commission shall be composed of ten (10) members appointed by the governor and confirmed by the senate. The membership shall include representatives of labor, management, construction industry, environmental interest groups, real estate groups, and the architectural, engineering and planning profession. The director of environmental quality control shall serve as an ex officio voting member ." (1974 House Journal - Standing Committee Reports, p. 768.)

The Legislature then adopted HEPA. HRS §§ 343-1 - 343-8. HRS § 343-2 defines "Council" as "the environmental council." HRS § 343-6(a) then provides:

"After consultation with the affected agencies, *the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with chapter 91 including, but not limited to, rules which shall: . . . (Italics added; bold added.)*

"This chapter" is HRS Chapter 34 setting forth HEPA. HRS §§ 343-1 - 343-8. "Chapter 91" is HRS Chapter 91 setting forth the Hawai'i Administrative Procedure Act. HRS §§ 91-1-91-18. HRS § 343-6(a)(1)-(9) lists nine items for which the Environmental Council is to adopt rules including an EIS and an environmental assessment. The nine items do not include a SEIS.

The usual meaning of the words "including but not limited to" means the Legislature intended the Environmental Council was authorized to adopt rules for items which were "not limited to" the nine items specified in HRS § 343-6(a)(1)-(9).

The Environmental Council adopted HEPA Rules expressly requiring SEIS's at HAR Chapter 200 (Environmental Impact Statement Rules), Subchapter 10 (Supplemental Statements), HAR §§ 11-200-26 to 11-200-29. HAR § 11-200-26 provides:

". . . (A) supplemental statement shall be prepared and reviewed as provided by this chapter. . . ."

And HAR § 11-200-27 provides:

"The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental statement is required. . . ."

A public agency has an express obligation in enforceable HEPA Rules to require a SEIS.

3. An Agency Is Obligated To Require A SEIS *Either* When There Is A Project Change *Or* A Change In Intensity of Environmental Impacts *Or* New Circumstances and Evidence

Nine rules of statutory construction -- the words used in a statute, the usual meaning

of the words, the context of the words, deference to an agency's interpretation, parallel Federal law, parallel State law, the reasonable interpretation rule, the not render part of a statute a nullity rule, and the no absurdity rule -- should guide the Court to adjudicate the Legislature and Environmental Council intended an agency must require a SEIS *either* when there are project changes *or* a change in the intensity of impacts *or* "where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with."

HEPA Rules, HAR § 11-200-2, defines "supplemental statement":

". . . 'Supplemental statement' means an additional environmental impact statement prepared for an action for which a statement was previously accepted, but **which has since changed substantively in size, scope, intensity, use, location, or timing, among other things. . . .**" (Bold added.)

HAR § 11-200-26 sets forth "General Provisions" regarding supplemental statements:

"A statement that is accepted with respect to a particular action **is usually qualified** by the size, scope, location, **intensity**, use, and timing of the action, among other things. A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required, **to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things.** If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental statement shall be prepared and reviewed as provided by this chapter. As long as there is **no change in a proposed action resulting in individual or cumulative impacts not originally disclosed**, the statement associated with that action shall be deemed to comply with this chapter." (Bold added.)

HAR § 11-200-27 sets forth the "Determination of Applicability" for SEIS's:

"The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental statement is required. This determination will be submitted to the office for publication in the periodic bulletin. Proposing agencies or applicants shall prepare for public review supplemental statements whenever the proposed action for which a statement was accepted has been modified to the extent that new or different environmental impacts are anticipated. **A supplemental statement shall be warranted** when the scope of an action has been substantially increased, **when**

the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with." (Bold added.)

The words used in HAR § 11-200-26 -- "changed substantively in intensity" and "impacts not originally disclosed" -- and the words used in HAR § 11-200-27 -- "warranted," "when the intensity of environmental impacts will be increased," "or" and "where new circumstances or evidence have brought to light likely increased environmental impacts not previously dealt with" -- the usual meaning of the words, the context of the words in the "General Provisions" language of HAR § 11-200-26 and the "Determination of Applicability" language of HAR § 11-200-27, and the reasonable interpretation rule, should guide the Court to conclude a SEIS must be prepared *either*:

* When there is a **substantive change in a project's size, scope, location, use, timing, mitigation and other things** which may have a significant effect; *or*

* When there is a **substantive change in the intensity of environmental impacts** caused by the project not disclosed in the EIS, *or*

* Where **new circumstances or evidence have brought to light different or likely increased environmental impacts** not previously disclosed or dealt with in the EIS.

The rule of deference to an agency's interpretation provides guidance. The demands of the Environmental Council that DPP require a SEIS clearly reflect interpretations of HAR §§ 11-200-26 and 11-200-27 that a SEIS is required when there is a substantive change in the intensity of impacts caused by the project *or* where new circumstances or evidence bring to light likely increased environmental impacts not previously dealt with in the EIS.

Parallel Federal law provides guidance. NEPA regulations provide a SEIS must be prepared *either* when there are "substantial changes" *or* "new circumstances or information."

40 C.F.R. § 1502.9(c)(1) provides:

"Agencies (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes *substantial changes* in the proposed action that are relevant to environmental concerns; or (ii) There are significant *new circumstances or information* relevant to environmental concerns and bearing on the proposed action or its impacts. . . ." (Italics added.)

Parallel State law provides guidance. California's CEQA statute provides a Supplemental Environmental Impact "Report" must be prepared *either* when there are project "changes" or "changes with respect to the circumstances." Public Resources Code section 21166 provides:

"Changes necessitating subsequent report

When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, *unless one or more of the following events occurs*:

(a) *Substantial changes are proposed in the project* which will require major revisions of the environmental impact report.

(b) *Substantial changes occur with respect to the circumstances under which the project is being undertaken* which will require major revisions in the environmental impact report." (Italics added.)

Finally, the reasonable interpretation rule, the not render part of a statute a nullity rule, and the no absurdity rule, should guide the Court to reject Kuilima's interpretation of HAR §§ 11-200-26 and 11-200-27 that an agency *cannot* require a SEIS when there are new circumstances and evidence *but only* when there has been a substantive project change.

Kuilima's interpretation renders the express words used in HAR §§ 11-200-26 and 11-200-27 -- "changed substantively in intensity," "impacts not originally disclosed," "warranted," "when the intensity of environmental impacts will be increased," "or" and "where new circumstances or evidence have brought to light likely increased environmental impacts not previously dealt with" -- superfluous and a nullity. Any interpretation reading these words out

the HEPA Rules is unreasonable. The interpretation also leads to an absurdity: A proponent has not started construction on major components of a project after twenty-two years; there exists a new "setting" for the project because new circumstances and evidence regarding traffic and species exist; operation of the project in the new setting will cause a substantive change in the intensity of impacts, and likely increased impacts, to traffic and species not examined in the original EIS; but it was the Legislature's intent that a public agency cannot require the proponent of such a project to prepare a disclosure document to inform decision-makers about the likely increased environmental impacts from the project. That result is absurd.

4. The Reason, Spirit and Cause of HEPA

The reason, spirit and cause of a law rule should guide the Court to find the Legislature intended a public agency shall require a SEIS where there are new circumstances and evidence.

The Hawai'i State Constitution sets forth fundamental public policy that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . . and . . . promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Constitution of the State of Hawai'i, Article XI, Section 1. A county is a political subdivision of the State which has these constitutional obligations. *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 224 n. 25, 140 P.3d 985, 1004 n. 25 (2006). The City has these obligations.

HEPA's "findings and purpose" is stated in HRS § 343-1:

"Findings and purpose. The legislature finds that . . . an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations."

HEPA's "spirit and intent" is to "establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations . . . (and) alert decision makers to significant environmental effects which may result from the implementation of certain actions." *Citizens for Protection of North Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 104, 979 P.2d 1120, 1130 (1999) (*North Kohala Coastline*).

In this case, only by requiring a Supplemental EIS will Hawai'i's fundamental public policy, and the reason, spirit and cause of HEPA, be promoted. Only by making the tough but correct decision to require a SEIS will Hawaii's natural resources be protected, decision makers will be alerted to significant environmental effects which may result from a project, and the desirable process of reviewing environmental effects will be promoted. A public agency is obligated to require a SEIS where there are new circumstances and evidence.

C. DPP Did Not Take A Hard Look At New Circumstances and Evidence

Agencies must "take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *Marsh, supra*, 490 U.S. at 373-374, 109 S.Ct. at 1859, 104 L.Ed.2d at 392-392. A Hawai'ian public agency must make "an independent determination of whether an SEIS is required." (ROA V11:297; ROA CV8:297.)

In this case, DPP took no look at all. Planner Peirson admitted that when he prepared the DPP Director's January 19, 2006, letter to Mr. Shafer, he did not look at the EIS:

"Q. Did you review (the EIS) at any time before this lawsuit was filed?

A. . . . No." (ROA CV4A:519.)

He admitted he did not look at new circumstances and evidence but only whether there had been a "substantive change to the project":

"Q. . . . (L)et's just focus on your knowledge, of any investigation or consideration given by anybody at DPP between late 2005 when the subdivision application was filed, and the January 31st letter to determine whether a supplemental EIS needs to be filed? Are you aware of any consideration or investigation that was done?

A. . . . (W)e looked at what the applicant was proposing to do and what the original approvals were from 1986 *to determine if there was a substantive change to the project.*" (ROA CV10:216; italics added.)

Senior Planner Siu-Li admitted that when he prepared the DPP Director's January 31, 2006, letter to Mr. Gill, he did not visit the project site:

"Q. . . . (H)ave you ever gone out to the project site?

A. No, I haven't gone to the site." (ROA V11:302; ROA CV8:302.)

He did not review the 1985 EIS:

"Q. . . . (D)id you go back and actually review the -- let's start there, 1985 environmental impact statement?

A. No." (ROA V11:314; CV8:314.)

He did not review the 1986 Special Management Permit:

"Q. Did you go back and review the original special management permit?

A. No." (*id.*)

He testified the only information available to him was the following:

"Q. And what information was available at that time?

A. The only thing that was available was the -- the letter from -- I believe it was *a letter from Mr. Shafer, the response from our Department, and the subdivision application that we were processing.*" (ROA CV10:207; ROA CV8:308; ROA CV11:308; italics added.)

... Q. Anything else that you had, other than your own review of the subdivision application, when you drafted your letter of January 31st?

A. Nothing else, I believe." (ROA CV9:151.)

He testified the only thing he did was to determine if the "subdivision application was not changing the existing condition of the properties":

"Q. And between the end of November and January 31st, what, if anything, had you or your Department done to determine whether a supplemental environmental impact statement would be required for this project?

A. Essentially, at the time we had the subdivision application, we also knew that the project also had a conditional use permit for joint development. So in our eyes, *the subdivision application was not changing the existing condition of the properties.*" (ROA V11:309-310; ROA CV8:309-301; ROA CV9:150.)

Finally, Senior Planner Siu-Li admitted no investigation had been conducted:

"Q. When you signed your declaration back on March 31st (2006), its correct isn't it, that as far as you knew, the DPP had not done any investigation to determine whether or not the project would result in changes in environmental impacts in the community?

MR. KITAOKA: Objection. Vague and ambiguous as to 'investigation.'

THE WITNESS: No actions were taken base -- to find more information about that, you know. Based on what we had, which as basically, the letters from Eric Gill and from Ben Shafer, you know, that wasn't considered to be sufficient to justify requiring a supplemental EIS." (ROA CV9:164.)

There is no evidence DPP took any look at all at new circumstances and evidence.

(ROA CV1:148-149; ROA CV3:150, 204; ROA CV4:18, 30; ROA CV6:117, 120; ROA CV8:308-309, 312, 314, 326, 331-332, 337-338; ROA CV10:27, 29, 216; ROA CV11:121.)

D. North Shore and Sierra Club Meet All Requirements For Prosecuting The Lawsuit

1. North Shore and Sierra Club Have Standing

HEPA grants a plaintiff standing to sue either on the basis of a traditional injury in fact or a procedural injury. *Dept. of Transportation, supra*, slip op. at 43. An environmental

organization has standing to challenge a ferry project when one member surfs near the project area and is concerned about the effects of the project on air and water quality. (*id.*) A homeowners' association and its president have standing to contest a cogeneration power plant project when the homeowners own properties within two miles of the project, the president regularly surfs and swims in coastal waters near the project, and the association and the president are concerned the project will cause pollution which in turn could injure the members' health and diminish their property values. *Kepoo, supra*, 106 Hawai'i at 284-85, 103 P.3d at 953-54. A neighborhood organization has standing to challenge a resort construction project when its members are long time and frequent users of the coastline. *North Kohala Coastline, supra*, 91 Hawai'i at 101, 979 P.2d at 1127. And a homeowners' association has standing to challenge a project where there is evidence of an increase in noise, traffic and congestion. *East Diamond Head Ass'n v. Zoning Board of Appeals*, 52 Haw. 518, 521, 479 P.2d 796, 798-799 (1971).

In this case, all of North Shore's directors are long-time residents of the North Shore. (ROA CV4A:127-128; ROA CV10:34-36.) Some own homes and work on the North Shore. (ROA CV4A:129-130; ROA CV10:36-37.) And North Shore's directors and supporters surf, paddle, dive, snorkel, sail, kayak, fish, walk, hike, picnic and enjoy the area of Kahuku and Kuilima's resort. (ROA CV4A:127-129, 150-151, 187-189; ROA CV10:34-36.)

Sierra Club is one of the nation's largest environmental organizations, with over 700,000 members, approximately 5,000 of which live in Hawai'i. *Dept. of Transportation, supra*, slip op. at 5. One member Reverend Teresa Baden worked as a priest at the Holy Cross Church in Kahuku. (ROA CV4A:105-106.) Sierra Club's officers and members walk, hike, bike, swim, snorkel and enjoy the areas of Kahuku and Kuilima's resort. (*id.*) Appellants have standing.

2. North Shore and Sierra Club Should Be Adjudged Aggrieved

HRS § 343-7 provides "others" and "persons" may be "adjudged aggrieved" for the purposes of bringing a HEPA action:

"(a) Any judicial proceeding, the subject of which is *the lack of assessment required under section 343-5*, . . . The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. *Others, by court action, may be adjudged aggrieved.*

(b) . . . Any judicial proceeding, the subject of which is *the determination that a statement is not required for a proposed action* . . . *Others, by court action, may be adjudged aggrieved.*

(c) Any judicial proceeding, *the subject of which is the acceptance of an environmental impact statement required under section 343-5* . . . *persons who provided written comment to such statement during the designated review period shall be adjudged aggrieved parties* for the purpose of bringing judicial action under this subsection. . . ."

HEPA does not provide direct guidance what a person must do to be "adjudged aggrieved."

The Hawai'ian courts have not addressed the issue.⁵

In this case, North Shore and Sierra Club should be adjudged "aggrieved" no matter which HRS § 343-7 subsection applies. North Shore gave DPP a written letter before the lawsuit was filed requesting a SEIS based on new traffic circumstances and evidence. (ROA V3:204.) Indeed, Kuilima admits North Shore met with DPP during April 2006 to raise the traffic issues (ROA CV3:204) and DPP received North Shore Director Gil "Riviere's April 19, 2006, letter to the DPP, addressing traffic on the North Shore." (ROA CV3:204, 220.) North Shore Director

⁵ In *Sensible Traffic Alternatives and Resources, Ltd. v. Federal Transit Administration*, 307 F.Supp.2d 1149, 1160-62 (D. Hawai'i 2004) (*Sensible Traffic Alternatives*), the U.S. District Court held a private cause of action to require a SEIS exists under HEPA; the cause of action is "the subject of which is the acceptance of an environmental impact statement" under HRS § 343-7(c); the 60-days statute of limitations from publication by the Office of Environmental Quality Control set forth in HRS § 343-7(c) applies to the cause of action; and a plaintiff must establish it gave "comments regarding the City's alleged failure to prepare . . . an SDEIS."

Jeff Johnson attended and made verbal comments at meetings on the EIS. (CV4A: 123, 138; ROA CV10:32, 45.) North Shore director Lucky Cole attended and testified against the project at public hearings including the hearing on an application for a city permit (ROA CV4A:157). And Sierra Club submitted written comments on the EIS. (ROA CV3:159; ROA V7: 137-139, 214-215, 219-221.) North Shore and Sierra Club should be adjudged aggrieved.

3. The Lawsuit Was Timely Filed

HEPA does not provide direct guidance what limitations period applies to a cause of action to compel a SEIS. The appellate courts have not addressed the issue. Two potentially applicable limitations periods are set forth in HRS § 343-7(b) and (c):

"(b) . . . Any judicial proceeding, the subject of which is the determination that *a statement is not required for a proposed action*, shall be initiated within thirty days *after the public has been informed of such determination pursuant to section 343-3 [pertaining to public records and notice]* . . .

(c) Any judicial proceeding, the subject of which is *the acceptance of an environmental impact statement required* under section 343-5, shall be initiated within sixty days *after the public has been informed pursuant to section 343-3 of the acceptance of such statement.* (Italics added.)

HRS § 343-3 provides:

"(b) The office shall inform the public of notices filed by agencies . . . of determinations that statements are . . . not required . . ."

"Office" is defined as the Office of Environmental Quality Control. HRS § 343-2.

In this case, DPP did not file a notice with OEQC (ROA CV10:6); OEQC did not publish a bulletin (*id.*); and the 30 or 60 day limitations have not expired (ROA V1:1-14, 317-330).

The only other potential limitations period is set forth in HRS § 343-7(a):

"Any judicial proceeding, the subject of which is the lack of *assessment required under section 343-5*, shall be initiated within one hundred twenty days of *the agency's decision to carry out or approve the action*, or if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty