

1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

UNITE HERE! LOCAL 5; ERIC W.	)	CIVIL NO. 06-1-0265-02 (SSM)
GILL; TODD A. K. MARTIN,	)	(Consolidated)
	)	(Declaratory Judgment)
Plaintiffs,	)	
	)	<b>PLAINTIFFS KEEP THE NORTH</b>
vs.	)	<b>SHORE COUNTRY AND SIERRA</b>
	)	<b>CLUB, HAWAI`I CHAPTER'S</b>
CITY AND COUNTY OF HONOLULU; a )	)	<b>MEMORANDUM IN OPPOSITION</b>
municipal corporation; KUILIMA )	)	<b>TO DEFENDANT KUILIMA RESORT</b>
RESORT COMPANY, a Hawai`i )	)	<b>COMPANY'S THIRD MOTION FOR</b>
corporation; DOE DEFENDANTS 1-10, )	)	<b>SUMMARY JUDGMENT (RE:</b>

Defendant.

**BURDEN OF PROOF) FILED  
OCTOBER 11, 2006;  
CERTIFICATE OF SERVICE**

KUILIMA RESORT COMPANY, a  
Hawai'i general partnership,

Counterclaim Plaintiff,

Date: November 13, 2006  
Time: 9:45 a.m.  
Judge: Hon. Sabrina S. McKenna

vs.

UNITE HERE! LOCAL 5 HAWAI'I, a  
Hawai'i labor organization; ERIC W.  
GILL, an individual;

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a  
Hawai'i general partnership;

Counterclaim Plaintiff,

vs.

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

Additional Counterclaim  
Defendants.

KEEP THE NORTH SHORE COUNTRY,  
a Hawai'i non-profit corporation, and  
SIERRA CLUB, HAWAI'I CHAPTER, a  
foreign non-profit corporation,

Plaintiffs,

vs.

Civil No. 06-1-0867-05 (GWBC)  
(Declaratory Judgment)

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 KEEP THE NORTH SHORE COUNTRY AND  
SIERRA CLUB, HAWAI'I CHAPTER'S MEMORANDUM IN OPPOSITION  
TO DEFENDANT KUILIMA RESORT COMPANY'S THIRD MOTION FOR  
SUMMARY JUDGMENT (RE: BURDEN OF PROOF)  
FILED OCTOBER 11, 2006**

Plaintiffs Keep North Shore Country ("KNSC") and Sierra Club, Hawai'i Chapter ("Sierra Club") (collectively, "Plaintiffs"), by and through their attorneys, Alston Hunt Floyd & Ing, hereby submit their opposition to Defendant Kuilima Resort Company ("KRC")'s *Third Motion for Summary Judgment (Re: Burden of Proof)* ("Motion").

**I. INTRODUCTION**

At the outset, much of KRC's Motion is easily refuted by Plaintiffs' own *Motion for Summary Judgment*, filed October 26, 2006. Given the extensive briefing before this Court already, and for the sake of brevity, Plaintiffs incorporate herein by reference their *Motion for Summary Judgment*, its memorandum, declarations, and exhibits in support thereof.

## II. KRC'S KEY MISCONCEPTIONS IN FACTS AND ARGUMENT

### A. The Insignificance of Work on "Other" Projects

KRC places great import on its efforts toward other "projects" (such as the much-needed renovation of the existing Turtle Bay Resort and construction of the Ocean Villas) - - but it is this Project - - the proposed expansion contemplated by the 1985 EIS, the SMP Approval, and pending Application for Turtle Bay Block Subdivision (2005/SUB-310) (the "Subdivision Application"), which is the concern of this lawsuit. Completion of environmental review for separate and distinct projects does not entitle KRC to proceed with this Project, and it is inappropriate for KRC to suggest otherwise. At the end of the day, KRC really can only point to a short list of activity on the Project (in addition to the Subdivision Application currently under review by the Defendant City and County of Honolulu (the "City") and its Department of Planning and Permitting ("DPP")). The list of activity includes:

- Construction of a wastewater treatment plant in March 1990;
- Drilling of Opana wells in March 1991;
- Construction of a golf course in March 1991; and
- "Improvements" to Punahoolupa Marsh in 1990 (but as noted in Plaintiffs' *Motion for Summary Judgment*, it appears the promised improvements were never actually completed).

(Motion, page 5-6). Even KRC acknowledges that at least five (5) years passed with virtually no activity on the Project, the last significant work was completed

14 years ago in 1992, and KRC has constructed absolutely no structures contemplated by the Project. *Id.*

**B. The "Timing" of the Project**

When initially approved, this Project was expected to begin immediately, with the last phase of construction to be initiated no later than 1996. (Ex. G to Plaintiffs' *Motion for Summary Judgment*). It is inconceivable for KRC to suggest the actual implementation of this Project is following the "approximate" timing contemplated by the initial approvals and has "not substantively changed". (Motion, page 7). In reality, KRC is "approximately" 20 years late on starting its Project.

This lapse in timing cannot be swept under the rug as insignificant. It does not matter how much money KRC allegedly put into this Project or other unrelated projects; KRC is not entitled to sit on the initial approvals for **decades** and then argue it should be allowed to proceed unfettered. *County of Kaua'i v. Pacific Standard Life Ins.Co.*, 65 Haw. 318, 653 P.2d 766 (1982) (holding that even building permits did not create an irrevocable right to proceed with a proposed project); *Lakeview Development Corporation v. City of South Lake Tahoe*, 915 F.2d 1290 (9<sup>th</sup> Cir. 1990) (holding that even if it had a vested right, developer waited too long before indicating desire to complete construction, and restrictions on remainder of development did not constitute a taking or deprive the developer of private property without due process).

It is important not to use "guidelines" in the Project's anticipated "timing" as an excuse for failing to perform environmental review. Even if KRC had submitted its Subdivision Application in 1986, instead of 2006, the City and DPP would still have been required to assess the adequacy of the 1985 EIS' environmental review for purposes of the Subdivision Application. It is true that such assessment might have been easier back in 1986, but it still would have been required, just as it is now. Delay is not an excuse for ignoring the environmental review required by the law. Because the likelihood of new impacts not previously considered is virtually certain (and not merely "likely" as KRC refers), an SEIS is required as a matter of law.

**C. The City and DPP's Shortcomings**

KRC may be correct that DPP reviewed the Subdivision Application for changes in the number of guest rooms or golf courses, but DPP never performed the environmental review required by the Hawai'i Environmental Protection Act HRS Chapter 343 ("HEPA") and its implementing regulations at Hawaii Administrative Rules Chapter 11-200. Certainly, neither the City nor DPP made a "hard look" to see if the Subdivision Application contemplated environmental effects not previously considered, which KRC concedes is required even though the Project received initial approvals back in 1985. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-376 (1989); (Motion at p. 18). DPP simply "rubber-stamped" its approvals without providing any review of whether there are new or different environmental

impacts not previously considered. (Plaintiffs' *Motion for Summary Judgment*, discussion at III:B, p.16-23). Such cursory review does not meet the statutory and regulatory standards. At a minimum, the City and DPP must be ordered by this Court to properly consider the potential impacts not previously evaluated and determine whether an SEIS is necessary.

**D. The "Administrative Record" Is Not Complete and Does Not Represent a Public Process**

Because the City and DPP utterly failed to make any investigation, it is not surprising that KRC wants to limit the scope of this Court's review to the so-called "administrative record". First, the administrative record herein is suspect because we know key documents were missing<sup>1</sup> and the City and DPP feel they have no duty to investigate and ensure that all environmental impacts must be considered.

Second, the public process for this Project concluded many years ago, and there has never been an "agency hearing" on the issue of whether an SEIS is required. HRS § 91-14(g) and its limitation for only a "review of the record" apply only to "contested cases" as defined by HRS § 91-1.<sup>2</sup> The City and DPP have considered and acted (at least preliminarily) on the Subdivision Application as a unilateral decision with no notice and no public input. By not

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<sup>1</sup> See Plaintiffs' Opposition to Motion for Protective Order, Declaration of Laura P. Couch, ¶9.

<sup>2</sup> A "contested case" is "a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing". HRS § 91-1.

entertaining an appropriate process, KRC and the City may not contend that the record is "complete". *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9<sup>th</sup> Cir. 2000) (holding that in an action to compel an agency to prepare an SEIS, review is not limited to the record as it existed at any point in time because there is no final agency action to demarcate the limits of the record); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9<sup>th</sup> Cir. 1990) (court considered exhibits outside the administrative record in ruling on the adequacy of an SEIS).

**E. New and Different Impacts Exist that have Never Been Considered, and an SEIS is Required as a Matter of Law**

If DPP and the City reviewed the administrative record closely, it would discover, as demonstrated by Plaintiffs' *Motion for Summary Judgment*

- The intensity of anticipated traffic impacts from the Project has **never** been appropriately evaluated, considered, predicted nor planned. Every study of the Project's expected impact on traffic has been based on inconsistent information and flawed methodology, and no one knows how severely the Project will impact the already strained regional traffic on the North Shore.

If DPP and the City performed its investigative duty, the administrative record would contain the following new information about potential impacts:

- The effect of the Project on endangered species - - the green sea turtle and Hawaiian monk seal - - were never reviewed in the 1985 EIS. Green sea turtles and Hawaiian monk seals utilize the shoreline adjacent to the Property as habitat, but the effect of the Project on those creatures has never been considered or evaluated in any respect.

- Employment needs on the North Shore have turned upside down since the 1985 EIS was prepared, and the socio-economic needs once present in 1985 (1) no longer exist; and (2) have been replaced by different needs the Project cannot satisfy.

The Project's change in timing - - the passage of over 20 years - - allowed new and different environmental effects never before considered to come into existence. Those effects cannot be discarded by the City and DPP's review process, or by KRC. More than two decades have passed, and a more classic example of where an SEIS is required can hardly be imagined.

#### **IV. CONCLUSION**

Based on the foregoing, and as set forth more completely in Plaintiffs' *Motion for Summary Judgment* filed October 26, 2006, Plaintiffs' respectfully request that KRC's *Third Motion for Summary Judgment (re: Burden of Proof)* be denied.

DATED: Honolulu, Hawai'i, 11/3/06.



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