

Of Counsel:
 ALSTON HUNT FLOYD & ING
 Attorneys At Law
 A Law Corporation

U.S. DISTRICT COURT
 DISTRICT OF HAWAII
 HONOLULU
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WILLIAM S. HUNT 1259-0
 LAURA P. COUCH 7860-0
 BLAKE K. OSHIRO 6746-0
 18th Floor, ASB Tower
 1001 Bishop Street
 Honolulu, Hawai'i 96813
 Telephone: (808) 524-1800

J. KUBO
 CLERK

Attorneys for Plaintiffs
 KEEP THE NORTH SHORE COUNTRY
 and SIERRA CLUB, HAWAI'I CHAPTER

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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,)
)
 Defendant.)

CIVIL NO. 06-1-0265-02 (SSM)
 (Consolidated)
 (Declaratory Judgment)

**PLAINTIFFS KEEP THE NORTH
 SHORE COUNTRY AND SIERRA
 CLUB, HAWAI'I CHAPTER'S
 MOTION FOR SUMMARY
 JUDGMENT; MEMORANDUM IN
 SUPPORT OF MOTION; NOTICE
 OF HEARING MOTION AND
 CERTIFICATE OF SERVICE**

 KUILIMA RESORT COMPANY, a)
 Hawaii general partnership,)
)
 Counterclaim Plaintiff,)

vs.)

Date: NOV 13 2006
 Time: 9:45 A
 Judge: Sabrina S. McKenna

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

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a
Hawaii general partnership;

Counterclaim Plaintiff,

vs.

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

Additional Counterclaim
Defendants.

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

KEEP THE NORTH SHORE 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;
DOE ENTITIES 1-10; and DOE
GOVERNMENTAL UNITS 1-10,

Defendants.

**PLAINTIFFS KEEP THE NORTH SHORE COUNTRY AND SIERRA CLUB,
HAWAI'I CHAPTER'S MOTION FOR SUMMARY JUDGMENT**

TO: CARRIE OKINAGA, ESQ.
Corporation Counsel
DON S. KITAOKA, ESQ.
LORI K.K. SUNAKODA
Deputies Corporation Counsel
Office of the Corporation Counsel
530 S. King Street, Room 110
Honolulu, HI 96813
Attorneys for Defendants CITY AND
COUNTY OF HONOLULU

KENNETH R. KUPCHAK, ESQ.
GREGORY W. KUGLE, ESQ.
MARK M. MURAKAMI, ESQ.
Damon Key Leong Kupchak Hastert
1600 Pauahi Tower
1001 Bishop Street
Honolulu, HI 96813
Attorneys for Plaintiff/Counterclaim
Defendants UNITE HERE! LOCAL 5
and ERIC W. GILL and Plaintiff TODD A.K. MARTIN

TERENCE J. O'TOOLE, ESQ.
SHARON V. LOVEJOY, ESQ.
LANE HORNFECK MCKAY, ESQ.
733 Bishop Street, Suite 1900
Honolulu, HI 96813
Attorneys for Defendant
KUILIMA RESORT COMPANY

Plaintiffs Keep the North Shore Country and Sierra Club, Hawai'i Chapter's ("Plaintiffs"), by and through its attorneys, Alston Hunt Floyd & Ing, hereby move for summary judgment on their claims that a (1) supplemental Environmental Impact Statement must be prepared for the Project and submitted in accordance with HEPA; and (2) an injunction against further

ground work or construction by KRC relating to the Project until a supplemental EIS is completed.

This motion is brought pursuant to Rules 7 and 56 of the Hawai'i Rules of Civil Procedure, the attached memorandum, declaration and exhibits, the records and files in this case, and any additional evidence that may be adduced at a hearing on the matter.

DATED: Honolulu, Hawai'i, OCT 25 2006.



WILLIAM S. HUNT
LAURA P. COUCH
BLAKE K. OSHIRO
Attorneys for Plaintiffs
KEEP THE NORTH SHORE COUNTRY
and SIERRA CLUB, HAWAI'I CHAPTER

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

UNITE HERE! LOCAL 5; ERIC W.) CIVIL NO. 06-1-0265-02 (SSM)
GILL; TODD A. K. MARTIN,) (Consolidated)
) (Declaratory Judgment)

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**MEMORANDUM IN SUPPORT OF
MOTION**

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Counterclaim Plaintiff,)

vs.)

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

Counterclaim Defendants.)

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DOES 1-10; DOE PARTNERSHIPS)
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DOE ENTITIES 1-10; and DOE)
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

In 1985, Kuilima Development Company ("KDC")¹ prepared an environmental impact statement ("EIS") to support approval of its proposed expansion at Turtle Bay Resort and Kawela Bay.² Despite significant changes in the North Shore community and ecology over the last twenty years, the environmental impacts of moving forward with the project *today* have not been sufficiently explored. Consider the following examples, which will be discussed in detail *infra*:

- The intensity of traffic impacts anticipated to result from the Project has never been appropriately evaluated, considered, predicted nor planned. Because every study of the Project's expected impact on traffic has been based on inconsistent information and flawed methodology, no one knows how severely the Project will impact regional traffic.
- The effect of the Project on endangered species - - the green sea turtle and Hawaiian monk seal - - were never reviewed in the 1985 EIS. It is undisputed that green sea turtles and Hawaiian monk seals now utilize the shoreline adjacent to the Property as habitat and the effect of the Project on this habitat must be considered and evaluated.
- Employment needs on the North Shore have turned upside down since the 1985 EIS was prepared, and socioeconomic concerns must be re-evaluated.

¹ Kuilima Development Company ("KDC") is the predecessor-in-interest to Defendant Kuilima Resort Company's ("KRC") interests in the Project. (KRC's Answer to First Amended Complaint, ¶ 8).

² See Revised Environmental Impact Statement for the Kuilima Resort Expansion dated October 7, 1985, Ex. A to Couch Declaration ("1985 EIS").

More than two decades have passed. A more classic example of where a supplemental EIS ("SEIS") is required can hardly be imagined.

The Hawai'i State Constitution requires the City to "conserve and protect Hawai'i's 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; *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 217, 140 P.3d 985, 997 (2006). In the spirit of these well-established principles in Hawai'i law, Plaintiffs and the entire O`ahu community have implored the reviewing agencies to "do the right thing" and demand preparation of an SEIS. The City and County of Honolulu (the "City"), Henry Eng and the Department of Planning and Permitting ("DPP")³ have refused to uphold the law, opting instead to simply sit on their hands as instructed by Corporation Counsel.

DPP has entirely failed to perform its mandatory duty under Hawai'i Revised Statutes ("HRS") Chapter 343 and Hawai'i Administrative Rules ("HAR") Chapter 11-200 to investigate and determine whether an SEIS is required, and yet the agency continues to process development permits with unfettered "rubber-stamp" efficiency. All the while, KRC proceeds with its development plans, heedless of the North Shore and O`ahu communities'

³ Hereafter, the City and DPP shall collectively be referred to as the "City".

unending requests that it re-examine the Project in light of the island's changed landscape and new circumstances.

On April 6, 2006, this Court determined the "plaintiffs herein have the burden of showing that [the Project] may have a significant effect on environmental factors". Specifically, the Court noted "...the plaintiff needs to show ... that the timing change or alleged intensity change may have a significant effect." (Ex. B, p. 18 to Couch Declaration). Before this action was filed, Unite Here! Local 5 asserted the position that delay, alone, established a change of significant effect. We do not disagree with the Court's analysis on this point: timing, in and of itself, is probably not sufficient to justify preparation of an SEIS without an additional showing.

Nonetheless, the passage of time, especially when it is more than twenty years, is relevant and must be considered in light of the very low threshold for requiring an SEIS under Hawai'i law. While the mere **possibility** of new significant environmental impacts - - such as those listed above - - requires preparation of an SEIS, the undisputed facts prove such previously undisclosed impacts are more than just possible, they are certain.

Because the City has utterly failed in its duty to perform the required analysis, this Court may consider uncontroverted evidence demonstrating supplemental environmental review is required as a matter of law. Plaintiffs respectfully request this Court grant its motion for summary judgment.

II. UNDISPUTED FACTS

A. The Project

In 1985, KDC proposed a project known as the Kuilima Resort Expansion for the Turtle Bay Resort. The proposal included:

- Three new oceanfront hotels and expansion of the existing hotel (a total of 1450+ new visitor units);
- Three new oceanfront and four new inland resort condominium projects (for a total of 2060+ new visitor units);
- A new 70,000+ square foot commercial complex; and,
- Other renovations to existing structures and projects.

(Ex. C to the Couch Declaration). The Project required a zoning change from "Agriculture" to "Resort". *Id.* To obtain the necessary zoning reclassifications and permits, KDC prepared, and the City accepted, the 1985 EIS, which purported to evaluate potential environmental impacts associated with the Project. (Ex. D to the Couch Declaration)

B. The 1985 Environmental Impact Statement

KDC relied upon the 1985 EIS when it requested and obtained the zone reclassification reflected in the Findings of Fact, Conclusions of Law and Decision and Order, dated March 27, 1986. (Ex. E to Couch Declaration) (the "LUC Order"). The City also relied upon the 1985 EIS when it granted the zoning change, as reflected in County Ordinance 86-99, dated August 14, 1986. (Ex. F to Couch Declaration) (the "1986 Ordinance"). Finally, the City relied upon the 1985 EIS when it approved a Shoreline Setback Variance for

the Project, as reflected Resolution No. 86-308, dated October 1, 1986 (Ex. G to Couch Declaration) (the "1986 Resolution").⁴

C. Current Status of the Project

Construction of the final phase of the Project was intended to be initiated, at the latest, by 1996. (Ex. G). Despite achieving the noted approvals, major portions of the Project, including all construction of new structures, were delayed or put on hold indefinitely. Kuilima confirms this hiatus in its *First Motion for Summary Judgment (re Statute of Limitations)* filed October 11, 2006, wherein KRC confirms the only work performed on the Project 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,
- "[I]mprovements" to Punahoolupa Marsh in March 1990.⁵

Even KRC acknowledges that at least five (5) years passed with virtually no activity on the Project, that the last elements actually completed occurred **14**

⁴ The 1986 Resolution accepted KDC's Application for Special Management Area Use Permit ("SMP Application"), which specifically incorporated by reference the provisions of the 1985 EIS. (Exs. C, p. 6; G, p. 10). Collectively, the 1986 Resolution and the SMP Application shall be referred to as the "SMP Approval".

⁵ Of course, KRC originally promised it would preserve Punahoolupa Marsh in accordance with the U.S. Fish and Wildlife Service's ("FWS") recommendations. (Exs. C, p. 55-57; G, p. 3). Since 1992, however, there is no evidence of any activity towards fulfilling that promise. As late as October 11, 2005, KRC had not obtained a final determination of the "Punahoolupa Wildlife Preservation Plan" and the Federal Endangered Species Act Section 7 review was never completed. (Ex. H to Couch Declaration).

years ago in 1992, and that KRC has constructed absolutely none of the structures contemplated by the Project (i.e., hotels, shops, or restaurants). *Id.*

D. The City Continues to Process the Subdivision Application without Complying with the Law for Subsequent Environmental Review

On October 13, 2006, Mayor Mufi Hanneman reminded everyone of the City's duty to follow applicable regulations in its review of Project applications:

At all times, the Department of Planning and Permitting **must abide by applicable laws** and **monitor compliance** with the conditions of the original land use approvals obtained 20 years ago.

(Ex. I to Couch Declaration) (emphasis added).

The City's position is that no SEIS is required. Final Subdivision Application approval is pending⁶ and DPP appears poised to grant the permit. Yet, DPP and the City freely admit no independent investigation has been made as to whether an SEIS is required. To summarize, the testimony of the City's HRCP Rule 30(b)(6) witnesses from the DPP confirmed the following:⁷

- (1) The application for subdivision approval for this project in December 2005 was an "action" triggering the provisions of HRS Chapter 343, *et seq.* and HAR Chapter 11-200, *et seq.*;
- (2) DPP admits it is required to follow that statute and those regulations;

⁶ On September 29, 2006, DPP granted temporary approval to KRC's subdivision application. (Ex. J to the Couch Declaration).

⁷ For ease of discussion, a summary is provided here and the specific facts and evidence supporting these items are set forth in detail in section IV:C herein.

- (3) In January 2006, DPP decided no SEIS would be required for the Project;
- (4) DPP did not perform an environmental assessment (HRS § 343-2) to determine whether the action may have a significant effect (HAR § 11-200-26) by;
- (5) DPP simply assumed the Project impacts have not changed and assumed the 1985 EIS is still adequate, contrary to the mandate that an agency cannot "use past determinations and previous statements to apply to the action at hand" without "considerable pre-examination and comparison." HAR § 11-200-13. DPP's witnesses admitted that in deciding not to require an SEIS, they did not review the prior EIS or SMP Approval and had no information as to whether the Project would or would not have any significant impact in the present day, and performed no examination or comparison;
- (6) DPP did not investigate and does not know if "the intensity of environmental impacts will be increased" even though an SEIS must be prepared if such increases *may* occur (HAR § 11-200-27); and,
- (7) The decision to not require an SEIS was not submitted to the Office of Environmental Quality for publication, as required under HAR § 11-200-27.

E. Substantial Changes Have Occurred Since 1985 Resulting in Environmental Effects not Previously Considered

Should the City affirmatively examine (as it was and is required to do) the circumstances under which the Project is now proceeding, it would have no choice but to recognize many changes have occurred and many crucial issues have yet to be studied.

New circumstances and evidence not available when the 1985 EIS was prepared have brought to light different and/or likely increased impacts

not previously addressed. H.A.R. §§ 11-20-26, 11-200-27.⁸ Because each and every traffic study related to the Project omitted key portions of the Project from its analysis, the full impact of the Project on traffic has never been evaluated nor appropriately considered.⁹ Current conditions notwithstanding, because traffic impacts have **never** been accurately studied, the community remains "in the dark" regarding what effect the Project will have on Kamehameha Highway and the North Shore/Kahuku communities.¹⁰ Endangered species, particularly the Hawaiian monk seal, indisputably inhabit the Project area,¹¹ but the Project's impacts on such species have never been considered. (Ex. A). Socio-economic conditions present in 1985 have evolved significantly, rendering a major justification for the Project -- the production of jobs -- no longer a concern in this strong economy.¹² Finally, it appears mitigation measures originally promised have been entirely abandoned. (*See* fn. 5 herein).

⁸ Again, for ease of discussion, the new impacts are summarized here and set forth in specific detail below, in section IV:D.

⁹ Declaration of Tom Brohard ("Brohard Declaration"), Ex. 1 thereto, attached as Ex. K to Couch Declaration.

¹⁰ Arthur Challacombe ("Challacombe"), the acting Chief of the Land Use Approval Branch, testified that a new traffic study would have to be done, stating "A 20-year old traffic study is not sufficient because . . . there may be factors in the community that have changed, i.e. traffic". (Ex. L to Couch Declaration, p. 81:25-82:2) (In this Motion, page designations in deposition transcripts will be followed by a colon and the lines upon which the referenced text appears.)

¹¹ Couch Declaration, ¶ 24, Ex. V, Declaration of Charles Littnan, Ph.D. ("Littnan Declaration", ¶¶ 4, 5, 6, 7, attached hereto.

¹² Declaration of Jon Kei Matsuoka (the "Matsuoka Declaration"), Ex. "1".

F. The State of Hawai'i Environmental Council's Position: An SEIS is Warranted

The State of Hawai'i Environmental Council ("Environmental Council") is the agency which promulgated the Hawai'i Administrative Rules setting forth when an SEIS must be prepared for a formerly approved project. H.R.S. § 343-6. The Environmental Council has responsibility to serve as liaison for complaints about environmental quality and to monitor the progress of state, county, and federal agencies toward achieving the State's environmental policies. *Id.* The Environmental Council has taken the position that an SEIS is warranted. "DPP should request [an SEIS] for the Turtle Bay project to conform with the Environmental Council's rules (Chapter 11-200, Hawaii Administrative Rules)." (Motion 3, May 10, 2006 meeting of the Environmental Council).¹³ (Ex. P to Couch Declaration).

The Environmental Council reminded DPP of its duties, but the advice continues to be ignored. The Environmental Council expressly voiced its concern that DPP was reviewing the application "without the benefit of an updated environmental review, which would analyze cumulative impacts of the project . . ." and requested an explanation as to why no SEIS was being required. The City's attorney refused to respond, citing pending litigation and simply stood on its *Memorandum in Opposition to Plaintiffs' Motion for*

¹³ See Letter from the Environmental Council to DPP dated March 22, 2006. (Ex. N to Couch Declaration). This letter was later amended to reflect a correction in the record, but the Environmental Council's position that an SEIS is required was unchanged. (Ex. O to Couch Declaration).

Temporary Restraining Order and Preliminary Injunction[filed March 31, 2006].¹⁴

In response thereto, the Environmental Council reiterated its concern that "DPP is not fulfilling its **affirmative obligation** to ensure compliance with these rules," specifically referring to HAR §§ 11-200-26 and 11-200-27. (Ex. P, emphasis added). The Environmental Council also articulated its concern that "DPP has not made an independent determination of whether an SEIS is required" under the HAR and affirmed that "DPP has the responsibility to make the appropriate inquiry and determination as to the necessity of an SEIS." (*Id.*, p. 2).

III. STANDARD OF REVIEW

A party seeking to obtain a declaratory judgment may seek summary judgment upon all or any part thereof. HRCF Rule 56(a). Issues pertaining to environmental review and the legal adequacy of an EIS are questions of law and the appropriate subject of a summary judgment motion. *Price v. Obayashi*, 81 Hawai'i 171, 181, 914 P.2d 1364, 1374 (1996), citing *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1191 (9th Cir. 1988). Conflicting expert opinions do not create a material issue of fact because EIS' were not intended to resolve such issues but rather, were intended to provide information to the deciding agency. *Anson v. Eastburn*, 582 F.Supp. 18 (S.D.

¹⁴ Mario Siu-Li ("Siu-Li"), a planner at DPP, testified that no one made him aware of this letter from the Environmental Council prior to signing a declaration in support of the City's Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed March 21, 2006 [filed March 31, 2006], in which he stated his belief that "no SEIS is warranted". (Continued Deposition Transcript of Mario Siu-Li dated October 11, 2006 (the "Continued Siu-Li Transcript"), Ex. Q to Couch Declaration, p. 27:10-18).

Ind. 1983) (whether the EIS as prepared permitted informed decision making by the agency is a question of law).

The Hawai'i Supreme Court, therefore, has held because the only question presented is whether the EIS complies with applicable statutory mandates, such as H.R.S. Chapter 343 and HAR Rules Chapter 200, the issue is properly addressed through summary judgment procedure. *Id.* Here, the failure to order preparation of an SEIS was clearly improper because (1) the City failed to comply with applicable statutory and regulatory mandates in rendering that decision; and (2) the evidence unquestionably demonstrates there may be significant new impacts from the Project that were not previously considered.

A. The Environmental Council's Interpretation is Owed Deference

The Environmental Council's determination that an SEIS is required is entitled to substantial deference by this Court. The Environmental Council is charged with promulgating the rules for EIS review (HRS § 343-6(a)(4)) and has set forth specific regulations for when an SEIS is required. HAR Chapter 11-200, *et seq.* Deference to the Environmental Council's interpretation of those rules as the promulgating agency is required by the Courts. *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984);

Andrus v. Sierra Club, 442 US 347, 348 (1979) (the interpretation of NEPA by the Council on Environmental Quality is entitled to substantial deference).¹⁵

As the agency charged with environmental expertise under HRS § 343-6, courts should not substitute their own judgment for that of the Environmental Council. *Camara v. Agsulud*, *supra*, 67 Haw. at 216, 685 P.2d at 797, citing Stern, *Review of Findings and Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv.L.Rev. 70, 99-103 (1944). Finally, the Environmental Council's interpretation - - that additional analysis is required through an SEIS - - is consistent with the State's policy calling for appropriate consideration of environmental concerns and the desirability for environmental review. HRS § 343-1; *Camara, supra, citing Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Because the Environmental Council is the promulgating agency for the rules pertaining to SEIS preparation, it is the agency with expertise in environmental matters, and its determination is plainly consistent with HEPA's stated purpose to ensure environmental concerns are given appropriate consideration in decision making. HRS § 343-1. Indeed, the legislature specifically found that the process of reviewing environmental effects is a

¹⁵ It is appropriate to look to federal interpretations of the National Environmental Policy Act ("NEPA") in consideration of HEPA and its implementing regulations. *Molokai Homesteaders Cooperative Ass'n v. Cobb*, 63 Haw. 453, 464, 629 P.2d 1134, 1142 (1981) (recognizing Hawaii's environmental legislation mirrors NEPA's basic concepts); *Price v. Obayashi*, 81 Hawai'i at 181, 914 P.2d at 1374 (noting the Hawai'i Supreme Court will look to NEPA as parallel federal law for guidance on EIS law). In addition, however, it is important to note Hawai'i law calls for a **broader** range of inquiry and information than NEPA. *Molokai Homesteaders*, 63 Haw. at 465, 629 P.2d at 1143, citing *Life of the Land v. Ariyoshi*, 59 Haw. 156, 163, 577 P.2d 1116, 1121 (1978).

desirable result (*id.*), and the Environmental Council's recommendation for an SEIS specifically promotes environmental review.

DPP, on the other hand, has no agency expertise as to the meaning or intent of HAR Chapter 11-200, *et seq*, and therefore is not entitled to deference. DPP admits it conducted no independent analysis regarding whether an SEIS is required or whether there the possibility exists for new impacts not previously considered.¹⁶ DPP's interpretation is not owed deference because it is not consistent with the legislative intent of HEPA to ensure proper environmental review. Only agency decisions consistent with the legislative purpose may be given deference. *Camara, supra*, citing *Morton v. Ruiz*, 415 U.S. 199, 327 (1974).

[C]ourts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance - - or lack of significance - - of the new information." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

DPP has simply plowed forward and continues to process KRC's permit applications without any evaluation of current information readily available. Courts are free to reverse an agency's decision if affected by an error of law. HRS § 91-14(g)(4). Deference to the administrative agency's expertise and

¹⁶ See discussion at IV:C herein.

experience in its particular field is appropriate in some circumstances,¹⁷ but here, DPP is not the agency which promulgates the environmental rules; it merely follows those rules set forth by the Environmental Council.

Therefore, when considering the merits of this Motion for Summary Judgment, the Court must bear in mind the determination already made by the appropriate reviewing agency. The Environmental Council's determination is owed substantial deference, and should weigh heavily upon the decision of this Court.

IV. ARGUMENT

A. HEPA

The Hawai'i State Constitution requires the City to "conserve and protect Hawai'i's natural beauty and 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" and mandates that these resources are held "in trust ... for the benefit of the people". Constitution of the State of Hawai'i, Article XI, Section 1; *Kelly v. 1250 Oceanside Partners, supra*. To facilitate this Constitutional mandate, HEPA was enacted "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." HRS § 343-1.

¹⁷ *Camara v. Agsalud*, 67 Haw. at 216, 685 P.2d at 797.

HEPA's administrative rules, HAR Chapter 11-200, "provide agencies and persons with procedures, specifications of contents of environmental assessments and environmental impact statements, and criteria and definitions of statewide application". HAR § 11-200-1. This Project is subject to HEPA and SEIS analysis because the uncompleted, dormant portions of the proposed Project KRC currently seeks to reactivate and complete involve the use of City or State lands and funds, are within the shoreline area, and relate to a re-classification of land zoned agriculture to urban. HRS § 343-5(a); *Sierra Club v. State of Hawai'i*, 109 Hawai'i 411, 415, 126 P.3d 1098, 1103 (2006) (use of state lands for sewage or water transmission under state highways triggers evaluation under Chapter 343).¹⁸ (Exs. A, C & G). An EIS "... shall be required if the agency finds that the proposed action may have a significant effect on the environment". HRS § 343-5(c).

B. SEIS Regulatory Framework

Pursuant to HEPA, the Environmental Council is empowered to "[p]rescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and **withdrawal** of an [EIS]." H.R.S. § 343-6(a)(4) (emphasis added). Pursuant to this authority, the Environmental Council promulgated

¹⁸ See also *Kahana Sunset Owners Association v. County of Maui*, 86 Hawai'i 66, 74, 947 P.2d 378, 386 (1997) (holding that proposed drainage system, which would run under state land, was part of the project and must be addressed by an environmental assessment); *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 103, 979 P.2d 1120, 1129 (1999).

regulations detailing standards for when an EIS is no longer sufficient and an SEIS is required. Specifically, the Environmental Council has qualified the acceptance of an EIS with the following:

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 will 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.

HAR § 11-200-26. HAR § 11-200-27 further provides that:

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 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. Id.**

C. The City Failed to Perform a Complete Environmental Review

The City is designated the primary guardian of the public trust on issues related to the requirement for subsequent environmental review. As such, it may not "relegate itself to the role of a mere 'umpire passively calling

balls and strikes for adversaries appearing before it,' but instead **must take the initiative** in considering, planning, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *In re Water Use Permit Application for Waihole Ditch*, 94 Hawai'i 97, 143, 9 P.3d 409,455 (2000) ("*Waihole Ditch*") (emphasis added); *see also Kelly v. 1250 Oceanside Partners*, 111 Hawai'i at 222-223, 140 P.3d at 1002-1003 (holding that the County of Hawai'i and its Planning Director had an affirmative duty to protect the waters adjacent to the master planned project under the public trust doctrine).

An SEIS is **mandatory** when "intensity of environmental impacts has increased" or "new circumstances have brought to light different or likely increased environmental impacts not previously dealt with. . ." HRS § 11-200-27. In making determinations on whether impacts have increased or if different impacts not considered exist, agencies like DPP must "thoroughly review" the proposed action to determine if there may be significant effects from the project. HAR §§ 11-200-13 and 11-200-26; *Waihole Ditch, supra.* In making its determination, DPP cannot "use **past determinations** and **previous statements** to apply to the action at hand" without "considerable pre-examination and comparison," before reaching a decision. HAR § 11-200-13; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (an agency cannot simply rest on the original document; it must be alert to new information that may alter the results of its original environmental analysis

and continue to take "a hard look at the environmental effects of the planned action, even after a proposal has received initial approval").

As set forth below, it is uncontradicted that in spite of these provisions, no inquiry or investigation, and certainly no "hard look," was performed by the City in reaching its decision that no SEIS would be required. The City improperly relied on past determinations without performing any examination or comparison.

1. The City Agrees it was Required to Consider Whether an SEIS was Necessary for the Project and Admits that it Determined - - without proper analysis - - it is Not

The City's witnesses from DPP (Arthur Challacombe, Jamie Pierson, and Mario Siu-Li) - - all designated the "most knowledgeable" on a series of issues concerning this project pursuant to KNSC's HRCP Rule 30(b)(6) deposition notice¹⁹ - - agree DPP is subject to the provisions of H.R.S. Chapter 343 and H.A.R. 11-200 when reviewing an "action," *i.e.*, "any . . . project to be initiated by an agency or applicant". H.R.S. §343-2; HAR §11-200-2.²⁰ An "action" under this section includes a subdivision proposal (Att. Gen. Op. 75-14) and DPP's witnesses agreed and understood that KRC's Subdivision Application constitutes such an "action" under the statute. (Deposition of Transcript of Mario Sui-Li Transcript dated September 28, 2006, Ex. R to

¹⁹ Summary judgment may not be defeated by submission of declarations to contradict testimony of a witness designated under HRCP Rule 30(b)(6). *Block v. City Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001) (a party cannot create a genuine issue of fact to survive summary judgment by contradicting in affidavit his earlier version of the facts).

²⁰ Challacombe Transcript, Ex. L, p. 23:7-25.

Couch Declaration, p. 20:17-20, 26:5-20). In considering whether an SEIS is required for a particular action, Pierson testified:

We will examine the impacts associated with the request, determine what agencies . . . need to review it to let us know whether there's issues that we need to be concerned about that might have changed or things that might be necessary or impacts that need to be mitigated. And when we get that kind of feedback, then we have an opportunity . . . to take an action, for instance such as requiring a supplemental . . .

(See the "Pierson Transcript", Exhibit S to Couch Declaration, p. 51:19-53:2).

Similarly, Challacombe - - the acting Chief of the Land Use Approvals Branch and Chief of Customer Services - - agreed that before approving a Subdivision

Application, "... the cumulative impact of the project on the community . . . "

must be examined, and knowledge of the surrounding community is required.

(Ex. L, p. 65:17-66:1). However, no such examination or consideration occurred here.

2. DPP Simply Relied upon Approvals Granted Twenty Years Earlier and Did No Further Investigation as to whether Allowing the Project to Proceed at this Time May Have Any Significant Effects or Impacts Not Previously Considered

There is no question DPP determined an SEIS was not required from KRC when the application for bulk subdivision approval ("Subdivision Application") was received;²¹ such determination was memorialized in a letter from the DPP Director Eng to Mr. Ben Shafer, dated January 19, 2006 (the

²¹ Curiously, Challacombe testified in his extensive experience, it would be unusual for the DPP to make a decision at the early time of the subdivision application that no SEIS would be required, as it did in this case. (Ex. L, p. 53:16-20).

"DPP Shafer Letter").²² The City's determination was reiterated less than two weeks later when DPP Director Eng sent a similar letter to Mr. Eric Gill (the "DPP Gill Letter"). The DPP Gill Letter was drafted by a different planner, Siu-Li, who testified (1) the DPP Gill Letter was intended to reflect DPP's decision that no SEIS was required for the Project and (2) such decision had already been set forth in the DPP Shafer Letter. (Siu-Li Transcript, Ex. R, p. 19:1-20:5, Ex. "3" thereto).²³

However, DPP utterly failed to follow the requirements of H.R.S. Chapter 343 and HAR Chapter 11-200, and therefore did not have any factual or legal foundation upon which to base its decision. DPP's witnesses testified that the City made no inquiry or investigation before determining that an SEIS was not required, contrary to H.A.R. Chapter 200, *et seq.*:

- Pierson never reviewed the 1985 EIS to see (a) what impacts were considered and (b) over what period of time before drafting the letter to B. Shafer and taking the position that no SEIS is warranted. (Pierson Transcript, Ex. S, p. 55:19-23);
- Siu-Li never reviewed the 1985 EIS to see (a) what impacts were considered and (b) over what period of time before drafting the letter to E. Gill which took the position that no SEIS is required.²⁴

²² Pierson Transcript, Ex. S, p. 15:11-17, Ex. 2 thereto). Although Pierson, the drafter of the DPP Shafer Letter, at first attempted to deny this letter represented the City's decision that no SEIS was required, he and other witnesses later admitted this was in fact the City's determination. (Pierson Transcript, Ex. S, p. 45:15-21).

²³ The decision not to require an SEIS is admitted in the City's Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed March 21, 2006 filed with this Court on March 31, 2006 and based upon the declaration of Mario Siu-Li attached to that memorandum. (Siu-Li Transcript, Ex. R, Ex. 9 thereto).

²⁴ When asked, Siu-Li admitted that ***he did no investigation or inquiry and reviewed nothing*** prior to determining that a SEIS was not required, other than reviewing the DPP Shafer Letter and confirming that a prior EIS had been approved in 1985. (Siu-Li Transcript, Ex. R, p. 21:24-22:22).

Siu-Li simply relied on the DPP Shafer Letter because "we didn't have all the comments of all the reviewers at the time" but nevertheless concluded ". . . based on the information available to us, we could respond at that time that we didn't see a need for [an SEIS]." (*Id.*, p. 25:7-16).

- Siu-Li "assumed" nothing more was to be considered because (1) he understood the decision not to require an SEIS was already made (per the DPP Shafer Letter), and (2) he concluded the Subdivision Application "wasn't really changing anything." Siu-Li's conclusion was based only on his "assumption" that "there would be no -no changes to the lots" (*id.* p. 21:24 - p. 22:5).
- Changes in a project's topography would be determined by a planner's site visit of the property (Challacombe Transcript, Ex. L, p. 77:4-12), but DPP admits it's assigned planner, Siu-Li, did not bother to do so. (Continued Siu-Li Transcript, Ex. Q, p.32:1-4).
- DPP only reviews evidence "volunteered" from outside sources. "We are not going to look for it ourselves...we are not a research agency." (Challacombe Transcript, Ex. L, p. 68:2-7).

When it comes to so-called environmental review, DPP passively and incorrectly "calls balls and strikes," waiting for evidence to be submitted before making any determination, and "if [DPP has] no evidence, then [DPP has] nothing to ... base a determination on." (Challacombe Transcript, Ex. L, p. 47:19-48:4).

DPP's position is patently improper. *Waihole Ditch, supra*. DPP made no inquiry or investigation into the Project's present impact on the environment and surrounding community, and Challacombe's rather flippant assertion that DPP is "not a research agency" (*Id.*, p. 68:2-7) merely underscores the agency's misdirection on this matter.

The Project was initially approved over twenty years ago and was projected to be completed in 1996. (Exs. A, C & G). If there is "**any** change" in a project, including the "size, scope, **intensity**, use, location or **timing, among**

other things...," then DPP "... must determine whether the project **may** have a significant effect." HAR § 11-200-26 (emphasis added). The DPP witnesses repeatedly testified that because the City Council's original resolution approving the Project²⁵ did not restrict when the Project could be built, they took the position no further inquiry was required.²⁶

The City is wrong. First, the SMP Approval "accepted the application of the Kuilima Development Company," an application which specifically incorporated the timing set forth in the 1985 EIS and SMP Application. (Ex. A, p. 31-32; Ex. C, p. 6; Ex. G, p. 10). Second, as this Court recognized at the April 6, 2006 hearing, "timing" is specifically set forth in the HAR as **one** of the criteria to be considered, but it is not the only criteria. The City cannot selectively ignore issues which must be considered by law. The law requires DPP to examine how changes such as timing and intensity of the Project, **among other things**, may have a significant effect before making the determination that no SEIS is warranted. HAR § 11-200-26. If there is any change which **may** have a significant effect, the 1985 EIS is no longer valid and an SEIS is required. *Id.*

The DPP planner responsible for reviewing the Subdivision Application understood this concept in theory and testified:

Well, you know everything has changed in 20 years. I mean, obviously, that's without even saying . . .

²⁵ 1986 Resolution, Ex. G.

²⁶ See Pierson Transcript, Ex. S, p. 59:8-16.

(Siu-Li Transcript, Ex. R, p. 30:22-31:4). However, DPP compared nothing, evaluated nothing. It simply looked at the original approvals and rubber-stamped any application that appeared to conform to the original Project plans, without performing any analysis whether there might be new effects not previously considered. The Environmental Council repeatedly advised the City of its interpretation of the rules, and its interpretation is due substantial deference by the courts. The City **ignored** the request from the Environmental Council and offered no explanation for doing so, nor did it offer any meaningful authority for a contrary position, simply citing to its briefing in opposition to a motion for temporary restraining order. (Exs. P, W).

While the evidence clearly supports the possibility of significant, previously unconsidered impacts warranting an SEIS as a matter of law, this Court should, at the very least (1) order the City to stop processing any further permits for the project unless and until, (2) the City performs an appropriate review regarding the necessity of an SEIS, this time pursuant to the requirements of the pertinent statute and regulations discussed above.

D. If the City Performed its Duty, It Would Easily Determine - - as this Court Should - - that an SEIS is Required as a Matter of Law

Even had the City purportedly performed the evaluation required under HEPA and its implementing regulations, its determination that no SEIS is required would clearly be an abuse of discretion subject to reversal by this Court. HRS § 91-14; *Dubois v. United States Department of Agriculture*, 102 F.3d 1273, 1292 (1st Cir. 1996) (Forest Service's failure to prepare SEIS was

arbitrary and capricious). KDC, the LUC, and the County all relied on the 1985 EIS in the zone reclassification and SMP Approval. (Exs. A, C, F & G). The Project proposed three phases, the first commencing in 1986, and the last commencing between 1993 and 1996. (Exhibit A at 31). Twenty-one years have elapsed since completion of the 1985 EIS. Over 20 years have passed since the anticipated start date of the Project, and at least ten (10) years have passed since the last phase of the Project was supposed to have started.

Given the purpose of HEPA to carefully examine effects of proposed actions on the human environment, an agency that has required an EIS cannot simply rest on the original document, "it must be alert to new information that may alter the results of its original environmental analysis and take a 'hard look at the environmental effects of [the] planned action, even after a proposal has received initial approval". *Blue Mountains Biodiversity Project v. United States Forest Service*, 229 F.Supp.2d 1140, 1148 (D. Oregon 2002) (holding that in the 14 years since final EIS was prepared, relevant new information was developed and made available and an SEIS was required).

The rules require, and the courts agree, that an agency must require preparation of an SEIS if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. HAR §§ 11-200-26, 11-200-27; *Marsh v. Oregon Natural Resources Council*, *supra*; *Blue Mountains Biodiversity Project v. United States Forest Service*, *supra*. If the new information is sufficient to show that the remaining action will affect the quality of the human environment in a

significant extent not already considered, an SEIS must be prepared. *Id.*; *Marsh v. Oregon Natural Resources Council*, 490 US at 374. As demonstrated herein, the Project has changed substantively in timing from the original proposal (HRS § 11-200-26), and the change in timing will, or has already, resulted in increased intensity of impacts and/or different impacts not previously considered. HRS §§ 11-200-26 and 11-200-27.

The requirements under HAR that the City take a proactive analysis is not unique to Hawai'i, and where Hawai'i interpretative case law is limited, it is appropriate to look to federal interpretations of NEPA and its effecting regulations for guidance. *Molokai Homesteaders v. Cobb, supra*.

... It would be incongruous with [the] 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.

Marsh v. Oregon Natural Resources Council, 490 US at 372. Here, the City and KRC have the blinders on.²⁷ Adverse and previously unconsidered environmental impacts include, but are by no means limited to, the following:

²⁷ Although much of the following information is evident from the administrative record at the City, it is appropriate to look to additional information beyond the administrative record which goes to the merits of the agency determination not to require an SEIS, as here. *Blue Mountains Biodiversity Project v. United States Forest Service*, 119 F.Supp.2d at 1145.

(1) Traffic

KNSC enlisted the assistance of a traffic engineer, Mr. Tom Brohard, to evaluate whether the Project's traffic and transportation impacts had changed since the preparation of the 1985 EIS. (Brohard Declaration, Ex. K). After substantial documentary review, Mr. Brohard's expert opinion is that prior traffic studies were so poor, inconsistent, and unreliable, a proper analysis of projected impacts cannot be prepared. In short, traffic impacts have never been adequately considered because in each and every study, the true scope of the Project has been obscured. *Id.*

Mr. Brohard discovered that none of the prior traffic studies associated with the Project properly disclose, analyze, and mitigate the significant local and regional impacts of the Project. Neither the 1985 EIS (Ex. A), 1985 TIAR (Appendix L to Ex. A), the 1991 TIAR (Ex. T to Couch Declaration), nor the 2005 Update studies (Ex. U to Couch Declaration) provide a complete forecast of the trips for the proposed land uses of the Project. ***The retail component of the Project is omitted from the 1991 TIAR and 2005 Update entirely.***²⁸ Each of the studies has used ***different*** quantities of land uses than were shown in the EIS. Accordingly, each of the trip generation forecasts in each traffic study is fatally flawed and cannot be used to determine or analyze the potential traffic impacts associated with the resort expansion.

²⁸ Another inexplicable inconsistency lies with the size of the proposed commercial area at the Project. The 1985 EIS and related traffic studies contemplate 40,000 sf of commercial retail area. (Ex. A, p. 22) However, the SMP Approval contemplates 70,000 sf, nearly twice that amount. (Exs. C, p. 24; G).

Specifically, the 2005 Update omits the following:

- Analysis of at least 170 weekday PM and 280 Saturday peak hour trips associated with the Retail Component;
- 75 weekday PM and 150 Saturday peak hour trips generated by public access parking spaces; and,
- 10 weekday PM and 10 Saturday peak hour trips generated by the Equestrian Center.

These omissions result in a failure to disclose potentially significant traffic impacts of the Project and confirm that as a foundational matter, traffic impacts have really never been properly considered.

Further, the existing traffic analyses for the Project have each projected a decreasing annual background growth rate from about 4% in the 1985 TIR, to 3.5% in the 1991 TIR, and finally 2.7% in the 2005 Update. Reducing the annual ambient background growth rate is contrary to the significant increase in the number of vehicle registrations on O`ahu and increased visitor trips to the North Shore, among other things. Finally, none of these traffic analyses attempt to characterize and quantify trips from all other development projects in the study area, whether completed or reasonably foreseeable.

(2) Endangered Species²⁹

(a) *Hawaiian monk seals*

When the 1985 EIS was prepared, marine mammal habitat at the Property was non-existent, and the potential for such a habitat was not even raised in the 1985 EIS as a possible resulting impact. (Ex. A). Now, for the first time in the recorded history of the Property, endangered Hawaiian monk seals use the shoreline along the Property for habitat. (See Littnan Declaration). In light of this new evidence, Project impacts and mitigation must be considered in an SEIS.

Reports of monk seal sightings have been documented in the main Hawaiian Islands since the early 1980s. (Ex. V to Couch Declaration). Between 1985 and 2000, no more than 2 seals - - and usually no seals³⁰ - - were sighted between Kawela Bay and Kahuku Point per year. *Id.* In 2003, sightings of the endangered monk seal population in the Project area took a dramatic turn upward. In 2003, the number of sightings increased exponentially to 6. *Id.* In 2004 there were 9 sightings, followed by another jump to 21 in 2005 and 54 for in 2006. Over 90% of the recorded sightings

²⁹ In *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000) an environmental group challenged the USFW's refusal to prepare an SEIS for timber sales in the Nez Perce National Forest. DPP, like the Forest Service, is aware (or should be) of sensitive species designations and the Project's impact thereon. "NEPA required the Forest Service to make a timely review of whether the new sensitive species designations...required an SEIS." *Id.* at 559. Because the Forest Service knew several new species were designated as sensitive, and that old standards upon which the original EIS relied were inadequate, the Ninth Circuit Court of Appeals held that the Forest Service's failure to timely evaluate the need to supplement the EIS in light of such new information violated NEPA. *Id.* Similarly, here the City's failure to timely and properly evaluate the need to prepare an SEIS violates HEPA.

³⁰ Absolutely no seal sightings were reported in 1985, 1986, 1987, 1988, 1989, 1993, 1997, 1998, or 1999.

have taken place since the year 2000. Finally, in 2006, the first recorded pupping was documented adjacent to the Project site. *Id.* The potential effect of the Project on monk seal habitat has ***never*** been studied or considered. Federal Endangered Species Act "take" permits have not been obtained nor applied for, and mitigation of impacts has not been proposed. (Ex. A).³¹

(b) *Green sea turtles*

In addition to Hawaiian monk seals, endangered green sea turtles stand to be affected by development of the Project. (Declaration of Blake K. Oshiro) This, too, was not addressed in the 1985 EIS. The 1985 EIS only considered the habitat of terrestrial vertebrates (Ex. A, section H at p. 78-81). However, in reviewing documents maintained by the Army Corps of Engineers ("ACOE"), the Project clearly requires certain measures and precautions be undertaken for the protection of the green sea turtle.³² "Special attention will be given to the green sea turtle (*Chelonia Mydas*) because of its noted use of

³¹ In addition to the Hawaiian monk seal and green sea turtle, there is evidence to suggest that wetland birds will be affected in ways beyond those contemplated by the 1985 EIS. The Army Corps of Engineers issued Nationwide Permit NW91-092 for the proposed fill of 8.907 acres of wetlands associated with the Project. (Ex. H). In conjunction therewith, the Army Corps of Engineers ("ACOE") was required to consult with Fish and Wildlife Service under Section 7 of the Endangered Species Act. (Ex. H). From the document production by Kuilima and USFWS, it appears all efforts to secure the ACOE permit stopped, evidently in response to Section 7 review initiated by USFWS in conjunction with NW91-092. The documents from USFWS suggest more wetlands were identified at the Project and endangered wetland bird species potentially affected. In discovery requests, KNSC has asked KRC to provide information concerning the identification of additional wetlands and changes in the Project attendant thereto, due November 1, 2006, but KRC is contesting its obligation to provide such information and there is a pending discovery dispute between the parties. At the very least, significant questions exist about the impact of the Project on endangered wetland birds, and the possibility of such triggers the need for an SEIS.

³² See, Kuilima Resort Development Water Quality Monitoring Program containing Reports No. 1, dated July 1989, Report No. 2 dated September 1989, and Report No. 3, dated December 1989. (Ex. 3, 4 to Oshiro Declaration).

Kawela Bay as a foraging habitat".³³ Indeed, the "Combined Statement of Findings Environmental Assessment and Section 401(b)(1) Evaluation" by the ACOE dated January 8, 1998 concludes that even though the proposed work "would not likely adversely affect the Hawaiian population of the green sea turtle", conservation recommendations and mitigation measures are referenced and specifically made as "conditions to the permit". *Id.* p. 3-4.

Even if the ACOE concluded there would be no significant impact, this was a matter the 1985 EIS was supposed to evaluate - - impacts, mitigation and reasonable alternatives - - but failed to do so. Because the impacts of the Project on green sea turtles have not been given appropriate environmental review, an SEIS is required.

(3) Socio-Economic Conditions

When the 1985 EIS was prepared, a major "selling point" justifying the need for the proposed Project was the socioeconomic condition of the community present at the time. Jon Kei Matsuoka, Ph.D., Professor and Dean of the School of Social Work at the University of Hawai`i at Manoa, has performed an analysis detailing how socio-economic conditions have changed. (See Declaration of Jon Kei Matsuoka, attached hereto).

In 1985, it was appropriate to argue that the Project might provide a favorable option for addressing declining agribusiness and possible displacement of plantation workers. After the closure of the sugar mill,

³³ See "Nearshore Oceanographic Monitoring Program for the Kuilima Resort Development, Kahuku, Hawai`i", version 2.1 dated July 1989. (Ex. 5 to Oshiro Declaration).

however, the Project was not built according to the expected schedule. (Ex. B to Matsuoka Declaration, page 2, ¶5). The new jobs promised by KRC and the Project never materialized. Nonetheless, the advent of alternative economic activity in the area -- and indeed, Statewide -- has more than compensated for the lost jobs, the proof of which includes a current unemployment rate far below that preceding the plantation closures. (*Id.*, page 2, ¶ 5).

In addition, the housing crisis in Hawai'i has, since 1985, been spawned by a tight local housing market and the escalation of out-of-state buyers with large sums of investment capital. Many local members of the community are priced out of the market because they are competing with global investors, which leads to increased life stressors and homelessness for some families. Luxury resort development in rural areas are at least partly responsible for this crisis: such development results in increased property taxes, housing shortages, and skyrocketing housing prices and rentals. This surge in housing costs could not have been - - and was not - - accurately predicted in 1985, especially in terms of affordability based on median household income over the same period of time. In essence, the difference between income levels, housing costs, and overall living expenses in Hawai'i has grown to the point where many, many more families are living below, or near, the poverty line. (*Id.*, page 2.)

The 1985 EIS did not account for nor anticipate these actual outcomes. The present day reality of low unemployment and increased living and housing costs strongly suggest that the effect of a Project of such intensity

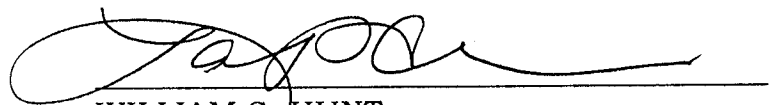
on the surrounding community will be increased, and that a social impact assessment/analysis based on actual contemporary conditions be conducted as part of an SEIS.

V. CONCLUSION

To comply with HEPA and the obligations of the City under the Public Trust Doctrine, KRC must prepare an SEIS for the remaining portions of the Project. Because DPP has, to date, continued to process KRC's application for subdivision approval and has allowed KRC to move forward without requiring a supplemental EIS, DPP is in violation of HEPA and the rules promulgated thereunder. Summary judgment must be granted to compel the City and Eng to comply with HEPA and to require KRC to prepare an SEIS.

Based on the foregoing, Keep the North Shore Country and the Sierra Club respectfully request this motion be granted and this Court issue an order mandating (1) an SEIS be prepared for the Project in accordance with HEPA and HAR Chapter 11-200; and (2) an injunction against further ground work or construction by KRC relating to the Project until an SEIS is completed and accepted.

DATED: Honolulu, Hawai'i, OCT 25 2006.



WILLIAM S. HUNT
LAURA P. COUCH
BLAKE K. OSHIRO
Attorneys for Plaintiffs
KEEP THE NORTH SHORE COUNTRY
and SIERRA CLUB, HAWAII CHAPTER