

NO. 28602

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

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

NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

2008 DEC -9 PM 3:50

FILED

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.

**PLAINTIFF-APPELLANT KEEP THE NORTH SHORE COUNTRY'S  
MOTION FOR AN INJUNCTION DURING THE PENDENCY OF THE APPEAL**

**MEMORANDUM IN SUPPORT OF MOTION**

**DECLARATION OF LAURA P. COUCH**

**EXHIBIT "1"**

**CERTIFICATE OF SERVICE**

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

WILLIAM S. HUNT           1259-0  
LAURA P. COUCH           7860-0  
ASB Tower, 18th Floor  
1001 Bishop Street  
Honolulu, Hawai'i 96813  
Telephone: (808) 524-1800  
Facsimile: (808) 524-4591

COAST LAW GROUP LLP  
RORY R. WICKS, ESQ.       Cal. Bar #085340  
MARCO A. GONZALEZ, ESQ.   Cal. Bar #190832.  
[Admitted *Pro Hac Vice*]  
169 Saxony Road, Suite 204  
Encinitas, California 92024  
Telephone: (760) 942-8505  
Facsimile: (760) 942-8515

Attorneys for Plaintiff-Appellant  
KEEP THE NORTH SHORE COUNTRY

NO. 28602

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

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

CIVIL NO. 06-1-0867

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.

**PLAINTIFF-APPELLANT KEEP THE NORTH SHORE COUNTRY'S  
MOTION FOR AN INJUNCTION DURING THE PENDENCY OF THE APPEAL**

Plaintiff-Appellant Keep the North Shore Country, pursuant to Hawai'i Rules of Appellate Procedure, Rule 8 and Hawai'i Rules of Civil Procedure Rule 62, respectfully moves this Honorable Court for an order enjoining the further processing of Defendant-Appellee Kuilima Resort Company's land use permit applications by Defendant-Appellee City and County of Honolulu during the pendency of this Appeal. This issue was not raised with the trial court because it would be impracticable to do so at this juncture of the proceeding, and because the trial court previously rejected a similar request.

This Motion is based on the attached Memorandum in Support, Exhibits, and  
Declarations, and the records and files of this case.

DATED: Honolulu, Hawai'i, December 9, 2008.

A handwritten signature in black ink, appearing to read "W. S. Hunt", written over a horizontal line.

WILLIAM S. HUNT  
LAURA P. COUCH

Attorneys for Plaintiff-Appellant  
KEEP THE NORTH SHORE COUNTRY

NO. 28602

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

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

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.

## MEMORANDUM IN SUPPORT OF MOTION

### I. INTRODUCTION

During the pendency of this Appeal, Defendant-Appellee City and County of Honolulu ("City") has continued to process the various land use applications for Defendant-Appellee Kuilima Resort Company ("Kuilima"). Oral argument is concluded, the Court has taken the matter under submission, and a stay of further processing of these permits by way of injunction is warranted to ensure that no further entitlements issue, thereby maintaining the status quo pending a decision.

## II. FACTUAL SUMMARY

### A. Proceedings

On May 19, 2006, Plaintiff-Appellant Keep the North Shore Country ("KNSC") filed a lawsuit in the First Circuit Court seeking to compel the completion of a Supplemental Environmental Impact Statement before Kuilima's twenty year old upgrade plans for multiple hotels and condominiums on Oahu's North Shore ("Kuilima Expansion Project") could be resurrected. (ROA CV1:1-93; ROA CV2:41-136.)<sup>1</sup> The lawsuit was consolidated with a similar action, *Unite Here! Local 5, et al. v. Kuilima Resort Company, et al.* Civ. No. 06-1-0265-02, then pending before Judge McKenna ("Circuit Court"), also involving the Kuilima Expansion Project.

On June 5, 2006, in *Unite Here! Local 5 v. Kuilima Resort Company*, the Circuit Court denied a preliminary injunction against Kuilima and the City. (ROA V8:317-319.)<sup>2</sup> Not unsurprisingly, on December 5, 2006, in the consolidated case, the Circuit Court granted Kuilima's (and the City's) motions for summary judgment<sup>3</sup> and denied KNSC's counter-motion.

KNSC filed a timely appeal and briefing was completed on December 28, 2007. Oral argument took place on April 9, 2008 and the appeal was taken under submission by this Court. The parties are awaiting the Court's decision.

---

<sup>1</sup> 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).

<sup>2</sup> The land use permits being sought are final subdivision approval for its major construction project. (ROA CV9:75.)

<sup>3</sup> Kuilima actually filed several motions for partial summary judgment and for judgment on the pleadings. (ROA CV3:17-CV5:872; ROA CV9:9-18.) Only Kuilima's Third Motion for Summary Judgment was granted; the remainder were denied as moot. (ROA CV12:15.)

## **B. Kuilima Permit Processing**

Despite this Appeal, recent media reports and statements at public proceedings demonstrate that the City, deliberately or indifferently, continues to process Kuilima's subdivision permit applications. See Eloise Aguilar, "Turtle Bay plan gets another extension from city," *The Honolulu Advertiser* (Sept. 29, 2008) (<http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080929/NEWS01/809290356/-1/BACKISSUES>) (Planning Director Eng stating the city could grant the extension because construction plans were approved, grading permit was issued and "*work had begun*"). Media reports suggest that subdivision approval will allow the project to be sold off "piece by piece." See Kristin Consillio, "Deadline is extended for Turtle Bay sale," *Honolulu Star-Bulletin*, (Oct. 2, 2008) [http://www.starbulletin.com/business/businessnews/20081002\\_Deadline\\_is\\_extended\\_for\\_Turtle\\_Bay\\_sale.html](http://www.starbulletin.com/business/businessnews/20081002_Deadline_is_extended_for_Turtle_Bay_sale.html)) (noting construction had begun). In fact, Mr. Stanford Carr, now development manager for Kuilima, recently testified before the Land Use Commission stating that "project improvements are going forward" and that Kuilima is "waiting subdivision approval to complete other improvements." See Land Use Commission Minutes of Meeting, October 2, 2008, attached to the Declaration of Laura P. Couch submitted concurrently herewith as Exhibit "1".

## **III. STANDARD OF REVIEW**

When an appeal is pending, this Court may stay an order of the circuit court to maintain the status quo and to preserve the appellate court's judgment:

The provisions in this rule do not limit any power of the supreme court or of the intermediate court of appeals or of a justice or judge thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to *preserve the status quo or the effectiveness of the judgment subsequently to be entered.*

Haw. R. Civ. P. Rule 62(g) (emphasis added). The appellate court examines three factors under Rule 62: (1) the likelihood of prevailing on the merits; (2) whether the balance of irreparable harm favors issuance of an interlocutory relief; and (3) whether the public interest supports granting relief. *See Penn v. Transportation Lease Hawaii, Inc.*, 2 Haw. App. 272, 276, 630 P.2d 646, 649-50 (1981) (citing *Life of the Land v. Ariyoshi*, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978)). These factors are not applied rigidly, but are balanced:

The more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits. Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction.

*Penn, supra*, 2 Haw. App. at 276, 630 P.2d at 650. "To determine which way the balance of hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of harm caused by not issuing it." *University of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999).<sup>4</sup>

#### IV. ARGUMENT

This Court should not permit the City to irrevocably alter the legal positions of the parties, *vis à vis* the various land use applications being considered by the City, while the 20+ year old environmental studies supporting the Kuilima Expansion Project remain challenged. This Court should enjoin further processing of these permit applications pending its issuance of the decision in this matter, thereby preserving the status quo and protecting the Court's appellate judgment.

---

<sup>4</sup> This Motion for Stay is properly before this Court under Haw. R. App. P.8(a), which requires that the circuit court has denied the relief sought.

**A. A STAY OF PROCESSING WILL PREVENT MOOTNESS OF ANY DECISION**

By continuing to process Kuilima's subdivision application, City is, in effect, trying to "moot" this Court's decision before it is rendered. If granted, final subdivision approval will arguably allow the immediate "sale, lease, rental, transfer of title to or interest in, any or all of such lots, parcels, sites, easements or other divisions." Revised Ordinances of Honolulu § 22-3.2. Splitting up the Property for sale to developers could render the instant appeal moot and would certainly cause further litigation about the land use entitlements flowing with this property from the current owner to the next. Should KNSC prevail on its appeal and the underlying *res* be subdivided, sold and developed, this Court's opinion might be rendered unenforceable. A stay in this Court - - for the short duration until the issuance of the Court's decision - - will maintain the status quo.

**B. INJUNCTION AND STAY OF PROCESSING WARRANTED**

**1. KNSC is Likely to Prevail on this Appeal**

As this case has already been briefed and argued, the Court is aware of the merits of this Appeal. Suffice to say, continued issuance of land use entitlements (regardless of the questionable character of them) with an out-of-date conceptual Environmental Impact Statement blatantly violates the lawfully adopted Hawai'i Administrative Rules promulgated under Haw. Rev. Stat. Ch. 343, which require a Supplemental Environmental Impact Statement.

**2. Balance of Irreparable Harm Favors Injunction**

"[I]rreparable injury" is "the harm that the movant will suffer during the pendency of the litigation that cannot be prevented or fully rectified by the tribunal's final decision." *See, e.g.,* John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 Baylor L. Rev. 809, 820 (1993). *See also Penn, supra*, 2 Haw. App. at 276 n.1, 630 P.2d at 650 n.1 ("Injury is irreparable where it is of such a character that a fair and reasonable redress may not be had in a

court of law.") (citation omitted). The balance of irreparable harm tips sharply in favor of granting the brief injunction. There is relatively little - - if any - - harm to Kuilima or the City, since Kuilima has asked for, and the City has granted, several six-month extensions for processing of the subdivision.<sup>5</sup> The harm to KNSC (and to the public in general), however, is much greater. If subdivision is granted and parcels are sold to developers, and construction commences on the thousands of hotel and condominium rooms, either this Court or the trial court will have to "un-ring" the bell. Why risk potentially permanent changes to the landscape and environment, which could be costly and damaging to remove? It is better to issue a temporary injunction at this point to preserve the status quo, than to deal with a mandatory ("tear down") injunction at a later date.

### **3. Public Interest Supports this Injunction**

The public interest favors preserving the status quo while the serious challenge to the trial court's decision that no Supplemental Environmental Impact Statement was required by Haw. Rev. Stat. Chapter 343. Chapter 343 is a public disclosure statute and public funds are at stake. Any temporary injunction would allow for City's land use entitlement process to be undertaken with the full advice and command of this Court's decision, when it is rendered. Any decision to approve subdivision now would take place without the benefit of the Court's ruling.

### **C. ANY ATTEMPT TO SEEK INJUNCTION FROM CIRCUIT COURT WOULD BE FUTILE AND THEREFORE IMPRACTICABLE**

Under Haw. R. App. Rule 8, KNSC may file this motion if seeking relief from the trial court is "impracticable." Oral arguments in this matter have been had and a decision may be immediately forthcoming. Further, the trial court in this matter has twice rejected the arguments made in support of an injunction pending completion of the Supplemental EIS. It denied a

---

<sup>5</sup> The City tentatively approved Kuilima's application over two years ago, on September 29, 2006. (ROA CV9:75.)

preliminary injunction, and then granted summary judgment against Appellants. As such, any attempt to seek trial court intervention to maintain the status quo would be futile since the trial court has already declined such relief.

**V.  
CONCLUSION**

For the reasons set forth above, Plaintiff-Appellant Keep the North Shore Country respectfully requests this Court to enjoin the further processing of land use permit applications by the City and County of Honolulu pending resolution of this Appeal.

DATED: Honolulu, Hawai'i, December 9, 2008.



---

WILLIAM S. HUNT  
LAURA P. COUCH

Attorneys for Plaintiff-Appellant  
KEEP THE NORTH SHORE COUNTRY

NO. 28602

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

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

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.

### DECLARATION OF LAURA P. COUCH

I, LAURA P. COUCH, declare that:

1. I am an attorney at law, licensed to practice before this Court and am one of the attorneys for Plaintiff-Appellant Keep the North Shore Country (hereinafter "KNSC") in this matter.
2. I make this Declaration based on my personal knowledge and am competent to testify about the matters contained in this Declaration.
3. Attached hereto as Exhibit "1" is a true and correct copy of the Land Use Commission Minutes of Meeting October 2, 2008. Exhibit 1 is a public record of which this Court may take judicial notice under Hawai'i Rules of Evidence, Rule 201(b). It is a document not subject to reasonable dispute because "it is capable of accurate and ready determination by

resort to sources whose accuracy cannot reasonably be questioned." More specifically, the information may be independently reviewed by this Court at <http://hawaii.gov/luc/minutesofmtgs/2008/100208honolulu.pdf>, should it wish to do so.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed in Honolulu, Hawai'i on DEC - 9 2008.



LAURA P. COUCH

LAND USE COMMISSION  
MINUTES OF MEETING

October 2, 2008

Conference Room 405  
Leiopapa A Kamehameha  
235 S. Beretania Street  
Honolulu, Hawaii

COMMISSIONERS PRESENT: Duane Kanuha, Chair  
Vladimir Paul Devens  
Lisa Judge  
Normand Lezy  
Nicholas Teves, Jr.  
Reuben Wong

COMMISSIONERS ABSENT: Kyle Chock  
Thomas Contrades  
Ransom Piltz

STAFF PRESENT: Orlando Davidson, Executive Officer  
Diane Erickson, Deputy Attorney General  
Bert Saruwatari, Staff Planner  
Caroline Lorenzo, Acting Chief Clerk  
Holly Hackett, Court Reporter  
Wade Kersey, Audio Technician

Chair Kanuha called the meeting to order at 9:23 a.m.

Chair Kanuha noted for the record that Commissioners Chock, Contrades, and Piltz were absent and excused. The Chair also noted that Commissioner Wong has recused himself from the first docket item.

ADOPTION OF MINUTES

Commissioner Teves moved to adopt the minutes of September 18, 2008. Vice Chair Devens seconded the motion. The minutes were unanimously approved by voice vote.

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson reported on the following:

**EXHIBIT 1**

- October 16 and November 6 will tentatively be one day meetings. The revised TMS will be sent out to the Commissioners shortly.
- The Commission received a Notice of intent to file a 201H petition for Kula Ridge. If the petition is filed on October 31, 2008, as anticipated, there will be a 45-day approval deadline, and hearings are to be scheduled on Maui. Mr. Davidson will poll the Commissioners to determine the appropriate 4-days of hearing for this item.

Chair Kanuha requested the Commissioners to notify staff or the Executive Officer of any conflicts to the tentative meeting schedule.

#### DR08-36 Ko Olina Development, LLC (Oahu)

Commissioner Wong recused himself from the meeting on Docket No. DR08-36 Ko Olina Development, LLC, at this time.

Chair Kanuha stated that this was a continued hearing and action meeting on Docket No. DR08-36 Ko Olina Development Co., to consider Ko Olina Development LLC's petition for declaratory order which was filed on March 24, 2008.

#### APPEARANCES

Benjamin Matsubara, Esq. represented Petitioner  
 Wyeth Matsubara, Esq., represented Petitioner  
 Bryan Yee, Esq., represented State Office of Planning  
 Abbey Seth Mayer, State Office of Planning  
 Scott Derrickson, State Office of Planning

#### PUBLIC WITNESSES

##### 1. Creighton Chang

Mr. Chang provided a brief summary of his written testimony which was distributed to the Commission. Mr. Chang voiced his concerns and the concerns of the fishermen who utilized the Ko Olina boat ramp, and looks forward to the reopening of the Ko Olina boat launch ramp.

Mr. Matsubara asked Mr. Chang if he owned a boat and if he utilized the marina. Mr. Chang responded in the affirmative. There were no other questions for Mr. Chang.

##### 2. Warren Von Arnswaldt

Mr. Von Arnswaldt stated his concerns about previous testimonies from prior hearings about the lack of a boat launch facility at Ko Olina. He stated that the Commission's decision will set a precedent on future agreements made between the State and private companies.

There were no questions for Mr. Von Arnswaldt.

3. Patti Kahanamoku Teruya

Ms. Teruya stated that she agreed with the two gentlemen before her, and expressed her concerns regarding the unimproved roads at Kalaeloa, limited public beach access, inadequate parking spaces, the issue of homeless people, and that the Community does not want to be forgotten.

There were no questions for Ms. Teruya.

4. Dr. Kioni Dudley

Dr. Dudley stated that he is a member of the Makakilo/Honokowai Hale Neighborhood Board. Dr. Dudley voiced his concerns for the need for access to the Ko Olina Resort, and that there is a problem with people being turned away at the security gate. He also stated his opinion that tourists need to see Hawaiian fishermen. He gave his support should there be a favorable response to the fisherman's request.

There were no questions for Dr. Dudley.

Chair Kanuha noted that during deliberations, the Commission will not entertain additional input from the parties or the public unless called upon, and that comments should be limited to the matters asked.

The Commissioners present indicated that they have all received and reviewed the transcripts and other materials on the docket and were prepared to deliberate on the docket.

Before deliberations, Chair Kanuha asked the parties for their closing arguments and requested that they be limited to 5 minutes each.

Mr. Matsubara provided Ko Olina's closing argument. Mr. Matsubara went over the main points of Ko Olina's proposed Decision and Order and argued that because of proposed improvements to the Kalaeloa boat launch facility and the City approval of the Public Access Management Plan ("PAMP"), the Petitioner is in substantial compliance with its representations to the Commission and the current Decision and Order.

Mr. Yee provided the Commission with the State's closing argument. Mr. Yee indicated that the Office of Planning's position is that the Petitioner has not complied with its representations; however, there was no malice on the part of Ko Olina, merely a mistake. He also indicated that OP hopes the Commission's decision would be toward resolving this dispute. He also suggested a six months status report from the Petitioner.

The Commission went into recess at 9:56 a.m. The meeting reconvened at 10:01 a.m.

FORMAL DELIBERATIONS

Executive Officer Davidson went over the Proposed Findings of Fact, Conclusions of Law, and Decision and Order with the Commissioners.

Commissioner Lezy posed a question on what constitutes "accessories," as indicated in the first paragraph of the Proposed Order. He also suggested that the word "public" needed to be clarified relative to the term "boat launch ramp."

Commissioner Judge made a motion to delete the word "public" in the first sentence of paragraphs 2 and 3 of the Order before the words boat launch ramp and to add the phrase "open to public" in paragraph 2. Commissioner Lezy seconded the motion.

Commissioner Lezy requested that a friendly amendment be made to delete the word "public" in the first sentence in paragraph 1, and to also remove the reference made to "accessories" in paragraph 2 of the Order.

Commissioner Judge accepted the friendly amendment.

Vice Chair Devens requested that a new finding of fact be added stating that "Although there have been objections and concerns raised by the public regarding the location and condition of the alternative boat launch ramp, the Petitioner made good faith efforts to address the public's concerns, and to act in compliance with the Decision and Order and its amendments."

Commissioner Judge accepted Vice Chair Devens' amendment. There was then a vote to adopt the amendments offered by Commissioners Judge, Lezy, and Devens. The Commission was polled as follows:

Ayes: Commissioners Judge, Lezy, Devens, Teves, and Kanuha. The motion passed with 5 yes, 1 recused, and 3 absent.

In discussion, Commissioner Lezy stated that he supported the Proposed Order as currently framed. He also stated that the public had strong issues about this item, and was concerned that this case has generated recent discussions in connection with pending docket matters being in compliance with representations and enforcement of conditions. He posed a question, "How do we enforce compliance with conditions?"

Commissioner Judge concurred with Commissioner Lezy's concerns. She also stated that she supported the Proposed Order to re-establish the boat launch ramp back into the Marina.

Commissioner Judge moved to approve the Proposed Order as amended. Commissioner Lezy seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Judge, Lezy, Devens, Teves, and Kanuha.  
The motion passed with 5 yes, with 1 recused and 3 absent.

The Commission went into recess at 10:33 a.m. The meeting reconvened at 10:46 a.m.

At this time, Commissioner Wong entered the proceedings.

SP73-147 PACIFIC CONCRETE & ROCK CO., LTD. (OAHU)

Chair Kanuha stated that this was an action meeting on Docket No. SP73-147 Pacific Concrete & Rock Co., Ltd. to consider an amendment to the special use permit to (1) extend the life of the Makakilo Quarry resource extraction and aggregate processing operations to the year 2032; and (2) expand the resource extraction and buffer areas of the Makakilo Quarry located within the State Land Use Agricultural District at Puu Makakilo, Ewa, Oahu, Hawaii.

APPEARANCES

Douglas Ing, Esq., represented Petitioner  
Robert M. Creps, Grace Pacific Corporation  
David Hulihee, Grace Pacific Corporation  
Raymond Young, City and County of Honolulu, Department of Planning and Permitting  
Bryan Yee, Esq., represented State Office of Planning  
Abbey Seth Mayer, State Office of Planning  
Abe Mitsuda, State Office of Planning

PUBLIC WITNESSES

1. Sharie Swatek

Ms. Swatek provided a brief summary of her written testimony which she submitted to the Commission. She expressed strong concerns regarding public health issues and the negative quality of life at Kapolei because of the quarry, and suggested the need for a study that examines the toxic levels in Kapolei.

There were no questions for Ms. Swatek.

2. Michael Swatek

Mr. Swatek stated that he opposed approval of the petition, and expressed concerns regarding the impact of the quarry on the health and safety of the community.

There were no questions for Mr. Swatek.

3. Kurt Fevella

Mr. Fevella stated that he lived in Ewa Beach and was in favor of the expansion of the special permit, and did not believe there were any negative impacts from the quarry.

There were no questions for Mr. Fevella.

4. Patti Kahanamoku Teruya

Ms. Teruya expressed her support to Grace Pacific Corporation (GPC) for the expansion of the Makakilo Quarry. She indicated that GPC has supported keiki programs and scholarships in the past.

There were no questions for Ms. Teruya.

5. Warren Wegesend

Mr. Wegesend stated that he was the General Manager of the Villages of Kapolei Association (VOKA) and was present on behalf of Mr. Petersen, president of the VOKA. Mr. Wegesend stated that he appreciated the efforts of GPC in working with the VOKA. In May of 2008, VOKA voted to remove its objections to this SUP. Unfortunately, due to an oversight of the applicant in informing the VOKA of the intention to reinstall the asphalt plant in the upper quarry, the VOKA is now opposed to building a new asphalt plant in the upper quarry.

There were no questions for Mr. Wegesend.

6. William "Buzz" Hong

Mr. Hong stated that he supported the favorable consideration of the expansion of the Makakilo Quarry.

There were no questions for Mr. Hong.

7. Dr. Kioni Dudley

Dr. Dudley expressed his support for the development of the project. His concerns were of the visual impacts of the quarry from the freeway, and what would happen should the GPC be bought by another entity.

There were no questions for Dr. Dudley.

Mr. Yee stated that the Office of Planning supported approval of this request.

### STAFF REPORT

Mr. Bert Saruwatari provided a map orientation of the petition area referencing Exhibit 36, a map prepared by the Department of Planning and Permitting. He also stated a correction to page 10 of the staff report with reference to zoning. He indicated that the processing site is zoned AG-1. There were no questions by the Commission or the parties.

### PETITIONER'S PRESENTATION

Mr. Lee Sichter provided the Commission with an overview of the planning process. He referenced Exhibit 36, the map prepared by the Department of Planning and Permitting. He stated that the Makakilo Neighborhood Board has expressed concerns regarding the visual impacts of the project. He also stated that there have been significant and substantial changes in what was originally envisioned. A second hot mix asphalt plant will be relocated, and the intention is to remove the facilities further away from the existing community.

There were no questions by the Commissioners.

Mr. Ing referenced the staff report and addressed issues raised by staff.

Mr. Ing then requested several amendments to the Planning Commission's conditions.

Mr. Ing indicated that the tunnel will be closed in 2012, but will be a need to access the tunnel to run utilities lines through the tunnel. Mr. Ing also indicated the need to extend the hours of operation of the hot mix asphalt plant from 6:00 p.m. to 8:00 p.m. for the purpose of maintenance of equipment.

#### CITY & COUNTY OF HONOLULU'S PRESENTATION

Mr. Raymond Young of the Department of Planning and Permitting made their presentation. He stated that the Planning Commission went along with the recommendations contained in the Department of Planning and Permitting's staff report on this matter.

The Commission went into recess at 12:00 p.m. The meeting reconvened at 1:20 p.m.

At this time, Commissioner Wong was not present at the proceedings.

Executive Officer Davidson went over with the Commission the Planning Commission's imposed 14 conditions of approval, and stated that staff recommended modifying several conditions and adding Condition #15 and #16.

Vice Chair Devens posed a question to the City and County of Honolulu (C&C) if they objected to the two extra hours of operation for maintaining equipment. Mr. Young indicated that he personally doesn't have a problem with it what was presented to and approved by the county Planning Commission was based on direction from the Director of DPP.

Vice Chair Devens moved to go into executive session to consult with the Commission's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. Commissioner Teves seconded the motion. Commissioner Judge then asked the C&C a question regarding landscape material production. Mr. Young responded that the issue was brought up in writing during the planning commission but was not specifically raised.

The Commission exited the meeting at 1:27 p.m. and entered executive session immediately thereafter.

The meeting reconvened at 1:54 p.m. At this time, Commissioner Wong entered the proceedings.

Mr. Ing addressed Commissioner Judge's question regarding landscape material production. He referenced Exhibit 33, which is part of the entire record.

Commissioner Wong asked if the letter was considered by the Planning Commission. Mr. Young responded that it wasn't specifically brought up at the Planning Commission.

Commissioner Wong asked if the Planning Commission had fully discussed the duration of the extension, should it be 5 years, 10 years, or 24 years. Mr. Young responded that Commissioner Dawson of the Planning Commission proposed that term to be set for 10 years, but that part of the motion was withdrawn.

Commissioner Wong asked about the new asphalt plant to be built at Campbell Industrial Park, and if the Planning Commission had discussions on the new asphalt plant. Mr. Young responded that he doesn't recall a discussion at the Planning Commission on this subject.

Commissioner Wong indicated that staff recommended Condition #15 as to the uses and limits of the excavation area, and that staff recommended Condition #16 that the applicant shall establish the quarry expansion in substantial compliance with its representations made to the Commission, and that failure to do so may result in the revocation of the permit. Commissioner Wong then asked if applicant and county agreed to these conditions.

Mr. Ing indicated that the petitioner is in agreement. Mr. Young stated the County had no objections.

Commissioner Wong moved that the Commission approve the recommendation of the Planning Commission which encompasses 14 conditions, together with Conditions 15 and 16 as recommended by staff. Commissioner Teves seconded the motion.

Commissioner Wong then reiterated that the use of the hot mix asphalt plant after 6 o'clock, the use of the landscape material production, and the use of the tunnel for utility lines should be matters resolved at the County level.

Chair Kanuha and Executive Officer Davidson added that the Staff Report recommended modifications to the Planning Commission's Conditions 1, 4, 9, 11, and 12 for purposes of clarity. Commissioner Wong again so moved with friendly amendments. Commissioner Teves again seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Wong, Teves, Devens, Judge, Lezy, and Kanuha

The motion passed with 6 ayes and 3 absent.

The Commission went into recess at 2:13 p.m. The meeting reconvened at 2:22 p.m.

At this time, Vice Chair Devens recused himself from the next docket item.

#### A85-595 KUILIMA DEVELOPMENT CO. (OAHU)

Chair Kanuha stated that this was a meeting on Docket No. A85-595 Kuilima Development Co., to receive status report from Petitioner and take appropriate action, if any.

#### APPEARANCES

Terry O'Toole, Esq., represented Petitioner  
Sharon Lovejoy, Esq., represented Petitioner  
Bryan Yee, Esq., represented State Office of Planning  
Abbey Seth Mayer, State Office of Planning  
Abe Mitsuda, State Office of Planning

## PUBLIC WITNESSES

### 1. Robert Harris

Mr. Harris provided a brief summary of his written testimony which he submitted to the Commission. He requested that the Commission approve a show cause order based upon Kuilima's failure to develop the property in accordance with the conditions of approval.

There were no questions for Mr. Harris.

### 2. Reverend Bob Nakata, Defend Oahu Coalition

Reverend Nakata stated that he was the co-chair of the Defend Oahu Coalition. He also summarized his written testimony which he submitted to the Commission. He voiced his concerns that the representations made by the petitioner regarding jobs, housing, parks, and community benefits have not been fulfilled, and also that the treatment of native Hawaiian burial sites and cultural sites was another area of concern. He recommended that the Commission approve a motion for an order to show cause.

There were no questions for Reverend Nakata.

### 3. Peter Cole

Mr. Cole stated that he represented the Surfrider Foundation. He recommended that the Commission reclassify the land back to Agricultural. He voiced his concerns regarding the lack of public access to the beaches and the lack of adequate parking.

There were no questions for Mr. Cole.

### 4. Mark Manley

Mr. Manley stated that he has been living in the Haleiwa area since 1958, and was a commercial fisherman where he fishes between the areas of Haleiwa and Kahuku. He indicated that he has seen progress in the area, but strongly believes that the land should be returned to Agricultural.

There were no questions for Mr. Manley.

### 5. Ken Fonoimoana

Mr. Fonoimoana expressed his concerns about the petition area regarding cultural issues, promises made with regard to providing workforce housing and low and moderate income housing units, and parks that were never built. He also voiced the need for jobs and economic benefits.

Chair Kanuha asked Mr. Fonoimoana what the 236 acres was being used for now. Mr. Fonoimoana responded that part of it is a golf course.

6. Mrs. Benjamin Kahanui

A representative of Mrs. Kahanui attended on behalf of Mrs. Kahanui and read her written testimony. Mrs. Kahanui's concerns were that of rising property taxes when there is more development, and to keep the country country.

There were no questions for this witness.

The Commission went into recess at 3:03 p.m. The meeting reconvened at 3:14 p.m.

Commissioner Wong moved to enter into executive session to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. Commissioner Teves seconded the motion.

The Commission exited from the regular meeting at 3:14 p.m. The meeting reconvened at 3:25 p.m.

#### PETITIONER'S PRESENTATION

Mr. O'Toole provided Kuilima's status report to the Commission. He addressed comments and concerns made by the public witnesses in regards to no parks, no beach, no access. He also provided a status on the nine conditions.

Mr. O'Toole indicated that of the nine conditions in the Decision and Order, five of the nine have been substantially completed or are done. Two of the remaining four are in progress and are underway. The other two are related to the development of the hotels and low and moderate income housing. Mr. O'Toole stated the following:

#### Completed

- Condition 4 – required the developer to develop additional water resources. Completed between 1989 and 1991. Apana wells 1 and 2 were completed in 1991, and are in the process of being dedicate and put into service. Also completed were water infrastructure, service lines and laterals in the design of all highway and roadway improvements for the Project. He also indicated that the excess capacity that will come from the wells will provide additional water to the North Shore Community.
- Condition 5 – improve the marsh. Completed and currently ongoing maintenance and monitoring.
- Condition 6 – archaeological studies. Submitted the archaeological investigation report in March 2003. Melanie Chinen of the State Historic Preservation Division at the time issued a March 11, 2005 letter acknowledging receipt of the report and confirmed the report satisfied the requirements of the mitigation plan.
- Condition 8 – develop, operate private sewage treatment plant. Completed in 1990. In 2007, the resort created a public utility to operate and manage it.
- Condition 9 – Monitoring program for coastal resources. Completed and ongoing since 1999. In 2007, DLNR accepted the monitoring program, and the Department of Health accepted the water quality sampling program.

In progress

- Condition 3 – Fund and design and construction of improvements to Kamehameha Highway. There have been traffic studies. There are current discussions going on between Stanford Carr and his team, on behalf of Kuilima, and the Department of Transportation about what needs to be done.
- Condition 7 – Public access to parks and shoreline. There are 40 parking stalls at the hotel, as well as beach access. There will be a 100-foot public access. Park P1 has been subdivided. There have also been discussions with the State regarding a state-initiated redesign of a bridge nearby.
- Condition regarding hotels. Working on subdivision approval.
- Condition regarding low, moderate incoming housing. Tied to hotel development. The rest of the development needs to be in order to have the housing come on line.

In response to questions, Mr. Stanford Carr, Stanford Carr Development, the project's current development manager, provided a status report on the Kuilima Resort improvements, including roadways, parks, and subdivision approvals.

Commissioner Wong expressed his concern about the lack of progress.

Mr. Carr stated that petitioner is engaged with the community, and that the project improvements are moving forward. He also stated that they are waiting for subdivision approval to complete other improvements.

Commissioner Judge asked when the Department of Transportation will resolve issues. Mr. Carr responded that the developer received a September 17, 2008 letter from Brennon Morioka of the Department of Transportation requesting a roundabout analysis in lieu of left-hand turn lanes along Kamehameha Highway and Kuilima Drive. He also responded that they are still gathering information on the analytical requirements of the roundabout study.

Mr. Yee indicated that the Office of Planning is looking for a timeline of future development from the Petitioner, which is missing from the current status report, and requested this information be included in Petitioner's next status report.

Commissioner Judge excused herself from the proceedings at 4:00 p.m.

Due to lack of quorum, Chair Kanuha stated that this item will be continued on the November 6, 2008 meeting on Oahu.

The meeting was adjourned at 4:00 p.m.

*(Please refer to the LUC Transcript of October 2, 2008 for more details on this matter.)*

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

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

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.

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served upon the following individuals via U. S. Mail, Postage Pre-Paid to their last known addresses as follows:

CARRIE OKINAGA, ESQ.  
Corporation Counsel  
DON S. KITAOKA, ESQ.  
LORI K. K. SUNAKODA, ESQ.  
Deputies Corporation Counsel  
530 S. King Street, Room 110  
Honolulu, Hawaii 96813

Attorneys for Defendant-Appellees  
CITY AND COUNTY OF HONOLULU and  
HENRY ENG, Director of Department of  
Planning and Permitting in his official capacity

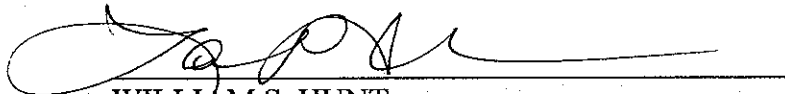
KENNETH R. KUPCHAK, ESQ.  
GREGORY W. KUGLE, ESQ.  
MARK M. MURAKAMI, ESQ.  
Damon Key Leong Kupchak Hastert  
Pauahi Tower, Suite 1600  
1003 Bishop Street  
Honolulu, Hawaii 96813

Attorneys for Plaintiff/Counterclaim  
Defendants-(Nominal) Appellees  
UNITE HERE! LOCAL 5 and ERIC W. GILL  
and Plaintiff-(Nominal) Appellee  
TODD A. K. MARTIN

TERENCE J. O'TOOLE, ESQ.  
SHARON V. LOVEJOY, ESQ.  
LANE HORNFECK MCKAY, ESQ.  
WIL K. YAMAMOTO, ESQ.  
DENNIS E. PHILLIPS, ESQ.  
Starn O'Toole Marcus & Fisher  
Pacific Guardian Center – Makai Tower  
737 Bishop Street, Suite 1900  
Honolulu, Hawaii 96813

Attorneys for Defendant-Appellee  
KUILIMA RESORT COMPANY

DATED: Honolulu, Hawai'i, December 9, 2008.



WILLIAM S. HUNT  
LAURA P. COUCH

Attorneys for Plaintiff-Appellant  
KEEP THE NORTH SHORE COUNTRY