

NO. 28602

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 06-1-0265
UNITE HERE! LOCAL 5; ERIC W. GILL;
TODD A.K. MARTIN,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; a
municipal corporation; KUILIMA RESORT
COMPANY, a Hawaii corporation; DOE
DEFENDANTS 1-10,

Defendants.

KUILIMA RESORT COMPANY, a Hawaii
general partnership,

Counterclaim Plaintiff,

vs.

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

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawaii
general partnership,

Counterclaim Plaintiff,

vs.

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

Additional Counterclaim
Defendants.

CIVIL NO. 06-1-0265
CIVIL NO. 06-1-0867

APPEAL FROM THE AMENDED FINAL
JUDGMENT, filed on June 4, 2007

FIRST CIRCUIT COURT

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

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CIVIL NO. 06-1-0867

KEEP THE NORTSHORE COUNTRY, a
Hawaii non-profit corporation, and SIERRA
CLUB, HAWAI'I CHAPTER, a foreign non-
profit corporation,

Plaintiffs,

vs.

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

Defendants.

**AMICUS CURIAE BRIEF OF LAND USE RESEARCH FOUNDATION OF HAWAII,
HAWAII DEVELOPERS' COUNCIL AND HAWAII LEEWARD PLANNING
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**AMICUS CURIAE BRIEF OF LAND USE RESEARCH FOUNDATION OF
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I. INTRODUCTION

This controversy is about statutory authority and the policy implications of reversing the decisions below. The issue is whether the Hawaii Environmental Protection Act (“HEPA”) requires an EIS-approving agency (such as the Department of Planning and Permitting (“DPP”) of the City and County of Honolulu (“City”)) to further require a Supplemental Environmental Impact Statement (“SEIS”) when the project itself has not changed. It does not. The Majority Decision of the Intermediate Court of Appeals (“ICA”) got it right.

For this Honorable Court to provide such a remedy, as requested by Appellants and other Amici, would require the Court to usurp the authority of the Hawaii State Legislature and engraft upon HEPA language that is simply not there -- language that would require an approving agency to consider circumstances extrinsic to the development. Such language would be, at best, extraneous to the land use regulatory process, and, at worst, destroy what trust and credibility remains in Hawaii’s land use entitlements for landowners to commence land development in a timely manner. There are a host of land use planning, regulatory and environmental review and protection regimes beyond HEPA that “integrate the review of environmental concerns.” These regulatory processes have proved effective for the last 30 years, since HEPA’s inception, in preventing or ameliorating environmental disasters.¹ It is for the Hawaii State Legislature to consider and decide,² in the context of these existing regimes, whether it is useful or desirable to engraft further project reviews onto the existing EIS process by means of an SEIS (which the existing HEPA statute fails to so much as mention), whether it would improve the process of environmental review, or whether it would facilitate additional public participation – none of these are inquiries relevant to this controversy.

¹ See David L. Callies, Regulating Paradise: Land Use Controls in Hawaii (1984); David Kimo Frankel, Protecting Paradise: A Citizen’s Guide to Land & Water Use Controls in Hawaii (1997).

² Addressing these issues at the legislative, not judicial, level is particularly timely since the legislature commissioned a report on HEPA through the Legislative Reference Bureau for consideration next session. See Act 1 (SLH 2008), Section 10, attached as Appendix “A.”

The primary question for this Honorable Court to decide is whether there is any basis under existing law, beyond a change in a project, already exhaustively and thoroughly reviewed in a 200-plus page EIS,³ to subject it to another exhaustive and time-consuming review, simply because parties not satisfied with the original EIS seek to subject that identical project to such a review based on alleged changes in outside circumstances, most of which were identified in the original EIS in the first place.

The Land Use Research Foundation of Hawaii, Hawaii Developers' Council, and Hawaii Leeward Planning Conference (collectively, "LURF Amici") urge this Court to affirm the decisions of every agency and court⁴ that has so far considered this flawed argument and decide that there is nothing in HEPA that requires such a supplemental review, absent a change in the project. The policy implications of engrafting language, requiring an SEIS where there has been no change in the subject Project, as urged by Plaintiffs-Appellants and supporting Amici represented by Earthjustice, would be to frustrate the balance between economic development and environmental quality, which the Legislature placed at the heart of HEPA.

II. DISCUSSION

A. The Legislature Crafted HEPA to Provide "An Optimum Balance Between Economic Development and Environmental Quality".

In establishing the entities charged with monitoring and informing the Hawaii community about ecological and environmental problems (such as the Office of Environmental Quality Control ("OEQC") and the Environmental Council ("EC")), the Hawaii State Legislature found "that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration[.]" Hawaii Revised Statutes ("HRS") 341-1 (1993). Indeed, in creating the EC, the legislature ordered that its members shall be appointed from a broad and balanced range of pertinent disciplines and professions, including but not limited to architecture, engineering, real estate, visitor industry, and construction. HRS § 341-3(c) (1993) (emphasis added).

Addressing the requirements for an environmental impact statement ("EIS"), the legislature also explained that "[i]t is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate

³ The original EIS comprises 196 pages plus 675 pages of exhibits.

⁴ These include the DPP, the Circuit Court of Hawaii and the ICA.

consideration in decision making along with economic and technical considerations.” HRS § 343-1 (1993) (emphasis added).

It is through HRS section 343-6 that the EC is charged with promulgating rules: (1) prescribing the contents of an EIS; (2) prescribing procedures whereby a group of actions may be treated by a single statement; (3) prescribing procedures for the preparation and contents of an environmental assessment; (4) prescribing procedures for the submission, distribution, review, or withdrawal of a statement; (5) prescribing the procedures to appeal the nonacceptance of a statement to the EC; (6) establishing criteria whether a statement is acceptable or not; (7) establishing procedures whereby specific types of actions are declared exempt from the preparation of an assessment because they will have minimal or no significant effects on the environment; and (8) prescribing procedures for informing the public of determinations that a statement is required or not, of the availability of draft statements, and of the acceptance or nonacceptance of a final statement.

Nowhere in HEPA is there EC enabling authority to promulgate rules for an SEIS, let alone the authority to order one for a project that already has been subjected to extensive environmental review resulting in an accepted EIS. Cf. HRS § 343-5(g) (1993 & Supp. 2008). LURF Amici respectfully urge this Court to reject the contentions of Appellants-Plaintiffs and Amici Curiae represented by Earthjustice. Adopting such an interpretation will not only fly in the face of the plain language and legislative intent of Chapters 341 and 343, but also will create insurmountable delay and cost for virtually every project, rendering Hawaii a place in which no reasonable developer will want to invest or develop.⁵

B. Hawaii’s Extensive Land Use Planning and Regulatory Process Together with Applicable Federal Statutes More Than Adequately Address Environmental Issues Once an EIS Has Been Accepted under HEPA.

This Honorable Court need not be concerned that environmental issues and impacts will be given short shrift without an SEIS, particularly when the Project already extensively reviewed under HEPA has not changed. Hawaii is the most planned and regulated state in the nation.⁶

⁵ It has been long recognized that “Hawaii regulates the use of land more tightly than any state in the nation. The limits of that regulation upon private property are therefore critical to its land policy at both the state and county levels.” David L. Callies, Preserving Paradise – Why Regulation Won’t Work 7 (U.H. Press 1994).

⁶ The legislature found that the purpose of Chapter 343 is to “integrate the review of environmental concerns with existing planning processes of the State and Counties and alert

Not only do we have a statewide zoning system administered at the state level by a state agency (the Land Use Commission (“LUC”)), but each county also has its own comprehensive zoning code, subdivision code, development code and – as applicable in this instance – coastal zone shoreline management permitting process. Likewise, not only do we have a state plan written into our statutes and a series of implementing state functional plans, but each county also has its own comprehensive general and development plans with which this Court has appropriately held land use ordinances must be consistent. Moreover, the most restrictive is applicable to a development project. In addition, there is the Federal Clean Water Act (and dredge and fill regulations issued thereunder which apply to most projects in our state), the Federal Clean Air Act, and the Federal Endangered Species Act, the last of which surely provides more than adequate protection for the Hawaiian monk seal and green sea turtle, which Earthjustice Amici Curiae have singled out for attention in this matter. Hawaiian monk seals and green sea turtles are already protected by existing Hawaii state law. Moreover, green sea turtle protection is already addressed in the original EIS. After all, the project is aptly named “Turtle Bay”. This is nothing new. Plaintiffs are in essence challenging the original EIS, and the time is long past for such a challenge.

Further, Hawaii Revised Statutes chapter 195D and the Hawaii Administrative Rules section 13-124 protect indigenous and endangered wildlife, such as green sea turtles and Hawaiian monk seals. Defendant-Appellee Kuilima Resort Company (“Kuilima”) will be required to comply with these laws.⁷

decision makers to significant environmental effects which may result from the implementation of certain actions.” HRS § 343-1 (1983) (emphasis added). Were the Court to adopt Petitioner’s’ interpretation, HEPA would no longer “integrate” with the existing planning processes, but instead, it would make the existing planning processes impracticable.

⁷ As to the issue of expansion of the critical habitat of the Hawaiian monk seals, that has so far not happened, and if and when it does, it will not affect Kuilima’s duties and obligations to comply with existing state laws regarding seals that are sighted on beaches abutting the development. See Department of Commerce, National Oceanic and Atmosphere Administration, Proposed Rules Regarding Endangered and Threatened Species: 12-Month Finding for a Petition to Revise Critical Habitat for Hawaiian Monk Seal, 74 Fed. Reg. 27988 (June 12, 2009). Lastly, with regard to construction run-off that could conceivably impact immediately adjacent offshore areas, Kuilima has already obtained a National Pollutant Discharge Elimination System Permit and must comply with applicable federal law. (CROA 3/147, 4A/368-381).

Finally, Defendant-Appellee is not only subject to continued monitoring and approval under various land reclassifications, conditions contained in unilateral agreements filed as a condition to such reclassifications and/or rezonings by the City under its Land Use Ordinance, but it is also still undergoing review and regulation under City and County subdivision review by means of a series of amendments to its final plat of subdivision, a required step under the City Subdivision Code. Clearly Defendant-Appellee was, is, and will continue to be subject to a host of land use and environmental reviews under various parts of Hawaii's complex and thorough land use and environmental regulation regime, entirely apart from HEPA, which, we beg to remind this Honorable Court, is informational only from start to finish, and with which Defendant-Appellee has already thoroughly and completely complied in its original EIS.

Furthermore, there is the matter of new reviews under amendments to existing ordinances. Kuilima has filed amendments to the final subdivision plat, a required second step (after approval of a preliminary plat) under the City's subdivision code. By so doing, it submits itself to the present regulations and additional review by the City. Such review and approval must be approved by the DPP, which decision is additionally reviewable by the Zoning Board of Appeals. Both must find compliance with the original preliminary subdivision plat and any new regulations for final plat approval.

It is thus unnecessary to load the EIS wagon with yet more environmental review by way of an SEIS when (1) there has already been a thorough process of review by way of the original EIS which, regardless of its detail, is, like the National Environmental Protection Agency ("NEPA") and unlike the California Environmental Quality Act ("CEQA"), informational only, (2) the landowner developer has gone through extensive planning and land use reviews with extensive hearings and concomitant opportunities for public input and citizen participation, and (3) the landowner developer continues to wind its way through additional administrative review as a part of its existing land use approvals, even as it commences what little land preparation it can do under state and county land use planning and regulatory controls, which actually govern the use of land in Hawaii, as opposed to an information-only EIS process.

C. HEPA Says Nothing About an SEIS, and Although Supplemental Regulations Do, They Provide for Such a Statement Only if There is a Substantial Change in the Project First Reviewed in an Original EIS.

HEPA provides that once an EIS has been accepted, "no other statement for the proposed action shall be required." HRS § 343-5(g). As compared with the NEPA and some other state

environmental impact statement statutes, there is nothing in HEPA that addresses the authority of an agency to require an SEIS; however, the EC (charged, note, not with accepting or rejecting EISes or deciding when, if ever, additional EISes are necessary) issued rules pursuant to the authority of HEPA, which do so provide for supplementation, despite the above statutory language. Pursuant to its purported rule-making authority, the EC defines an SEIS as “an additional environmental impact statement prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use location, or timing, among other things.” Hawaii Administrative Rules (“HAR”) § 11-200-2 (1996) (emphasis added). The rules go on to say that “[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.” *Id.* § 11-200-26. The rules then note that in the event of such substantive change, the action would be different – strongly implying that the change must be so substantial that the relevant agency would be considering a different project altogether – in which case another statement – deemed “supplemental” to the original EIS – “shall be prepared and reviewed”. *Id.* But, in order to drive home the emphasis on the project rather than anything extrinsic to the project, the rules further state that “[a]s long as there is no change in a proposed action [here read “project” which is a form of action] resulting in individual or cumulative impacts not originally disclosed, the statement associated with that action shall be deemed to comply with this chapter.” *Id.* The next section provides that the relevant EIS-approving authority or the applicants shall prepare an SEIS “whenever the proposed action for which a statement was accepted has been modified to the extent new or different environmental impacts are anticipated.” *Id.* § 11-200-27 (emphasis added).

As the ICA Majority found in its decision, the relevant approving authority – here, the DPP – is therefore required, first, to determine whether an EIS is required if the action [the project here] has changed substantively in size, scope, intensity, use, location or timing. It has not, as DPP, the Circuit Court and the ICA have all found. As the ICA found and the HAR clearly indicate, if and only if the action/project has changed substantively does the reviewing agency – again, here DPP – undertake the second step of determining if the change in any of these characteristics likely have a significant effect and result in individual or cumulative impacts not originally disclosed in the main and already accepted EIS: “if the DPP answers the

first question in the negative, no further inquiry is necessary” as “no other statement will be required.” Unite HERE Local 5 v. City & County of Honolulu, 120 Hawai`i 457, 465, 209 P.3d 1271, 1279 (2009).

It is difficult to imagine a clearer statement of when, if ever, an applicant must prepare, or an agency must require, an SEIS for which HEPA makes no provision whatsoever. Appellants and Earthjustice Amici rest their contention to the contrary, virtually alone, on further language in HAR section 11-200-27, which adds “or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.” The ICA Majority found that this language “does not change the requirement set forth in HAR §§ 11-200-2 and 11-200-26” and that part of section 11-200-27 that states “there must be a substantive change in the action (the Project) before an SEIS is to be considered” and that “no other reading of the rules is possible . . . [b]ecause the rules must be consistent with [the statute and] . . . cannot be construed to require an additional SEIS unless there has been a substantive change in the action.” Unite HERE Local 5, 120 Hawai`i at 465, 209 P.3d at 1279 (citing Capua v. Weyerhaeuser Co., 117 Hawai`i 439, 446, 184 P.3d 191, 198 (2008)).

With respect, the ICA is too kind. This is not a matter of construction, but rather a matter of statutory authority. The statute says that once an EIS is accepted, no other EIS for the proposed action shall be required -- full stop. The EC created an exception - and an exception it is, make no mistake - if and only if the action - here, again, the Project - has so changed that it has become a new and different project, which must for all practical purposes stand on its own environmental impact feet, rendering the previous accepted EIS inapplicable. For Plaintiffs-Appellants to attempt to engraft yet a further exception on this first exception - an exception that is acceptable only because it assumes a virtually new and different project is before the relevant agency which it has not before reviewed and therefore for which it has not seen or required an EIS - an exception which now attempts to bring in a host of extrinsic factors which neither the statute nor the rules permit - goes far beyond “construction.” There is no basis for such an exception in the statute, and if the above-quoted language at the end of HAR section 11-200-27 meant what Plaintiffs-Appellants contends, then that language is void for lack of statutory authority. Nothing in the statute provides for another EIS once one for an action/project has been accepted. The only plausible ground for the HAR rule providing for another EIS is that the original one applies to a different action or project, and that an SEIS is necessary for a new one -

new by virtue of a substantive change in characteristics – well beyond “design” as Plaintiffs-Appellants would have it – such as size, scope, use, location or timing. Neither the relevant accepting agency – the DPP – the Circuit Court or the ICA Majority – found a scintilla of evidence of such change, substantive or otherwise.

Lastly, this clear statutory directive and limitation on SEIS are further driven home by the definition of an SEIS: “Supplemental statement means an additional environmental impact statement prepared for an action for which a statement was previously accepted, but which [referring back to “action”] has since changed substantively.” HAR § 11-200-2 (brackets added).

D. The Project in This Case Remains the Same.

The Turtle Bay expansion is a master-planned resort community that was initiated in 1985, reaffirmed in 1999 and 2000, and generally includes the development of hotels, dwellings, commercial areas, golf courses, roadways, utilities, and other facilities on approximately 808 acres located on the North Shore of Oahu. (CROA 5/4-870, 4/202-217, 237-386).

The project also includes the development and construction of several items that were conditions to the approval of the project, some of which include:

- (a) A Wastewater Treatment Plant, which is currently operational and which is large enough to accommodate the needs of the entire master planned community;
- (b) Three water well facilities (“Opana Wells”), two of which are operational, and a 12” diameter Water Transmission Line, which has the capacity to assist in meeting the needs of the entire North Shore community. The first two Opana Wells have been, and the third will be, dedicated to the Board of Water Supply;
- (c) Improvements to the Punahoolapa Marsh, which includes, a deep moat built to prevent feral animals from entering the marsh and killing native birds;
- (d) Shoreline access through various places on the property and forty-four (44) additional parking stalls currently available and free to the public;
- (e) Four public parks, including 2 public beach parks consisting of a 4.8 acre park fronting Kawela Bay and a 2 acre park near Kahuku Point, a 6 acre wild life park abutting Punahoolapa Marsh, and a 37 acre park;
- (f) Modifications and upgrades to Kuilima Drive;
- (g) The establishment of a community employment program, to which Kuilima has dedicated half a million dollars; and
- (h) Affordable housing for Hawaii residents and employees employed at the Resort.

In addition, an expansion of the 18-hole Palmer Golf Course was completed in 1991 and included the construction of additional infrastructure to service the golf course, comfort stations, a club house, a cart barn, and a new maintenance facility. See id.

There has been no change to the project since its original approval. Appellants and Earthjustice Amici seek to cloud the peripheries of the issue before this Honorable Court by suggesting that the decisions below would prevent attempts to require an SEIS so long as the “design” of the project remains the same. Of course, the relevant statute and rules say no such thing. The operable language is change in the “project”. Project entails far more than design. It encompasses density, mix, and type of uses (recreational vs. residential vs. commercial and the relative percentage of each in the project area), open space allocation, setbacks, and/or dedications – in other words, all that which constitutes the use of land by the project itself.⁸ Significant changes in any of these would trigger a potential need for an additional SEIS under the Hawaii Administrative Rules. Indeed, many permits and governmental approvals deal with virtually all of these (and also have been largely completed). Review prior to the commencement of development continues to be ongoing, most particularly in the current subdivision review process, which calls for a series of governmental reviews and decisions. The EIS process is but a small – though significant – part of the process, and we beg to draw this Honorable Court’s attention to the fact that it is not a regulating, planning or permitting process, but an information process only.

E. Appellants and Earthjustice Amici’s Attempts to Bootstrap and Engraft Such a Requirement onto the Existing Statute Are Flawed.

1. NEPA and out-of-state SEIS cases are irrelevant, because their relevant statutes and rules provide for an SEIS when extrinsic circumstances significantly change.

NEPA and CEQA cases from California are all irrelevant to the issue before this Honorable Court. In all these cases, the relevant statutory language provides for SEISes when outside, extrinsic circumstances significantly change. Whether this is a good or bad policy is not the point. The point is that there is no such language in HEPA.

Thus, for example, NEPA regulations applicable to SEISes specifically provide for them in the event of “significant new circumstances or information relevant to environmental concerns[.]” 40 C.F.R. § 1502.9 (2009). The relevant California statute provides for a subsequent or supplemental EIS in the event of “substantial changes ... with respect to

⁸ See David Kimo Frankel, Protecting Paradise: A Citizen’s Guide to Land & Water Use Controls in Hawaii (1997); David L. Callies, Regulating Paradise: Land Use Controls in Hawaii (UH Press, 1984, 2010 revision submitted to UH Press September 2009 for publication).

circumstances under which the project is undertaken and which will require major revisions in the environmental impact report” or “new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.” Cal. Pub. Res. Code § 21166 (Deering 1977).

First, there is no such language in HEPA or the HAR. Only a project change can trigger an SEIS under the HAR. Second, at least three California Courts of Appeal decisions have rejected calls for SEISes even under the California “changed circumstances” rule, despite evidence of a substantial increase in traffic, increased impact on flora and fauna, and revisions to a rapid transit system alignment. In virtually every case, the court of appeal characterized the request for an SEIS as an attempt to reopen the original EIS, which had already been accepted by the relevant reviewing agency.

In Bowman v. City of Petaluma, 230 Cal. Rptr. 413 (Cal Ct. App. 1986), plaintiffs sought a Supplemental Environmental Impact Report (“SEIR”) on the basis of a developer’s substantial shift in traffic from one street to another. Noting that traffic issues had been thoroughly reviewed in the original Environmental Impact Report (“EIR”)(which had concluded there would be no significant deterioration of the street network), the court held that circumstances had not changed enough to justify repeating the review, especially given the time for challenging the original EIR had long-since expired. See id. at 418-24. In Fund for Environmental Defense v. County of Orange, 252 Cal. Rptr. 79 (Cal. Ct. App. 1988), a developer’s 1981 project had lapsed but was re-approved in 1986 without the need for supplementing the original EIR. In holding that no SEIR was necessary, despite the lapse of years and the fact that the project was now surrounded by a wilderness park, the court again noted that “an in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired,” and the question is “whether circumstances have changed enough to justify repeating a substantial portion of the process.” Id. at 82. Despite a 30% increase in the project density, increased parking, and the new nearby park, there was no evidence of “new significant environmental impacts not considered in the previous EIR.” Id. at 85-86. Especially with regard to the expanded park, the court found that

“[t]he record clearly demonstrates [that] the change raises no new adverse effects that were not raised, analyzed and discussed in the original EIR Problems that had already been analyzed and reviewed were expanded or increased by the

change in circumstances. But the record supports a finding that the increase in effects was not ‘cumulatively considerable.’”

Id. at 86. Note, here, that the Circuit Court made a similar determination. (CROA 12/14-15).

Finally, in River Valley Pres. Project v. Metro. Dev’t Bd., 43 Cal. Rptr. 2d 501 (Cal. Ct. App. 1995), the court held a shift in alignment in the San Diego light rail transit system did not require an SEIR, observing tartly that there was “no statutory duty to prepare a new EIR whenever ‘any new, arguably significant information or data’ is proposed, ‘regardless of whether the information reveals environmental bad news.’” Id. at 509 (quoting Laurel Heights Improvement Assn. v. Regents of University of California, 864 P.2d 502, 509 (Cal. 1993)). It further observed that “the reviewing court must resolve reasonable doubt in favor of the administrative finding and decision.” Id. Even though there was evidence that the change in alignment would increase the size of a berm and dramatically change the project’s floodway, “the degree of that change has not been shown to reach the ‘watermark’ of substantial environmental ramifications to dictate major revisions to the EIR and cause the preparation of an SEIR.” Id. at 514-15. Again, see CROA 12/14-15.

Therefore, citing to such statutes and cases interpreting them is a fundamentally flawed attempt to suggest that this Honorable Court engraft a statutory change upon HEPA mirroring the statutory language in NEPA and CEQA, particularly given California’s narrow interpretation of even its “changed conditions” provisions.

In sum, Appellants and Earthjustice Amici’s attempt at a “parade of horrors” is particularly inappropriate at this juncture, first, because Appellants have been unable to demonstrate in any forum that such “horrors” in fact exist, and second, because the present statute lacks grounds for an SEIS based on such changes, if any.

2. Plaintiffs have presented virtually no evidence of changed extrinsic conditions.

As their depositions and submissions clearly demonstrate, Plaintiffs’ “changed conditions” are virtually unsupported. See Defendant-Appellee’s Answering Brief filed December 6, 2008, at 24, 25. Each of Plaintiffs’ deposition witnesses admitted they had no personal knowledge or evidence of changes in the project. One stated, “I don’t know how the scope has changed in the project.” (CROA 4A/312). Another stated he “believes” many people visit the North Shore area, and that “based on personal experience and just observation”, drives

along the North Shore take “a lot longer now.” (CROA 4A/201). Allegations and anecdotal commentary are no substitute for evidence.

Indeed, all that has transpired is time, and time alone is insufficient ground for requiring an SEIS, as several courts around the country have clearly held. Thus, in Barrie v. Kitsap County Boundary Review Board, 643 P.2d 433 (Wash. 1983), the Washington Supreme Court held that “the passage of time alone is not ‘significant new information’ which requires a new or amended EIS.” Id. at 435. Citing Barrie, two further cases from Washington came to the same conclusion, though in one of them the relevant court required an SEIS because of changes to the project itself.⁹ Likewise, in New York, in Oyster Bay Associates v. Town of Oyster Bay, 867 N.Y.S.2d 18, 28 (N.Y. App. Div. 2008), reversed on other grounds, 874 N.Y.S.2d 492 (N.Y. App. Div. 2008), the court held that

“[i]t is well-settled that the mere passage of time does not require the preparation of an SEIS to update information in the EIS, an EIS only being required if there exists factual information demonstrating significant changes in relevant conditions during the interim years which has potential for significant adverse impacts not considered in the [final] EIS.”¹⁰

Unlike Hawaii, both Washington and New York EIS statutes provide for an SEIS in the event of a change of conditions or the discovery of new information.¹¹ Even if the Court determines that there has been a change in the timing, it should not constitute a “substantive” change warranting an SEIS. See CROA 12/14-15.

F. The Present Statute Lacks Grounds for Requiring an SEIS Based on Anything but Project Changes.

The ICA Dissent expressed concern over potential changes in circumstances since the filing and approval of the initial EIS, and on this basis would reverse the Circuit Court’s decision granting Defendants-Appellees’ motion for summary judgment in favor of a trial on the merits of such alleged potential changes. With respect, the Dissent misses the point (and altogether

⁹ Bargman v. City of Ephrata, 122 Wash. App. (2004); West 514, Inc. v. County of Spokane, 770 P.2d 1065 (Wash. Ct. App. 1989).

¹⁰ New York courts have also so held. See e.g., Lazard Realty Inc. v. New York State Urban Dev. Corp., 537 N.Y.S.2d 950 (N.Y. App. Div. 1989); Stewart Park & Reserve Coal. v. New York State Dep’t of Transp., 555 N.Y.S.2d 481 (N.Y. App. Div. 1990); Doremus v. Town of Oyster Bay, 711 N.Y.S.2d 443 (N.Y. App. Div. 2000). Jackson v. New York State Urban Dev. Corp., 494 N.E.2d 429 (N.Y. 1986).

¹¹ SSEQRA, NY Comp. Codes R. & Regs. Tit. 6 § 617.9; Wash. Admin. Code § 197-11-600(4)(d).

ignores the fact that Plaintiffs also sought summary judgment and claimed there were no issues of material fact worthy of trial). While Defendant-Appellee vigorously contests that there exist such meaningful changes in circumstances, the point is that such changes are irrelevant to the EIS process at this juncture as clearly set out in HEPA. The LURF Amici urge this Honorable Court to bear in mind that this is an environmental review process only. This case is not about whether this project should in fact go forward but about disclosure of project-related environmental effects. As noted in a previous section, not only are there many opportunities for such disclosure through existing statutes, ordinances and regulations – and these are enforceable measures, not information-only measures as in an EIS – but also Kuilima was, is, and continues to be subject to and comply with such measures and conditions imposed thereunder.

As to the Dissent's concern about a hurricane or other natural disaster, surely an information-only SEIS, even if require-able under HEPA as presently written, would be a poor substitute for what would in fact almost certainly happen: reconstruction of whatever is destroyed or damaged under then-presently existing building, engineering, land use and environmental requirements, rules, regulations, ordinances, statutes and plans, of which, as before said, Hawaii has more than enough to protect our land and environment. Likewise, the Dissent's concern that an EIS might be good for as long as a half-century or more is understandable but again misplaced. An SEIS – or for that matter, an EIS – offers not a jot of environmental protection. It is to the detailed plans, ordinances, statutes and regulations actually regulating the use of land to which one looks for such protection, and, as demonstrated in other parts of this brief, of these we in Hawaii have more than enough.

The Dissent suggests that requiring an SEIS could somehow modify the existing entitlements held by the Project, either preventing the Project or reducing its size or scope. Respectfully, should government attempt to do such a thing at this stage, it runs the considerable risk of illegally interfering with the vested rights and entitlements of Kuilima. As this Court has noted before, where a developer makes reasonable irrevocable commitments toward development, its rights have vested and the developer must be compensated for subsequent regulation that interferes with development:

[T]he initial inquiry is whether a developer's actions constituting irrevocable commitments were reasonably made or were speculative business risks not rising to the level of a vested property right. Thus, the Developers may not establish a taking simply by showing that they have been denied the ability to exploit a

property interest that they heretofore had believed was available for development.. . . The particular circumstances of each case will determine whether regulation has interfered with distinct investment-backed expectations sufficient to require compensation therefor.

County of Kauai v. Pacific Standard Life Ins. Co., 65 Haw. 318, 338, 653 P.2d 774, 780 (1982) (internal quotations and citations omitted). See also Kenneth Kupchak, Gregory Kugle & Robert Thomas, Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i, 27 U. Haw. L. Rev. 17, 38 – 39 (2004). Consequently, any expenditures made in good faith by Kuilima after the last discretionary action (which are believed to exceed \$100 million in actual costs) should be recoverable if the Project were stopped altogether. (CROA 4/12 ¶ 4).

While the Dissent's concerns are understandable, they are not relevant here.

III. CONCLUSION

Appellants and Earthjustice Amici seek to persuade this Honorable Court that the consistent interpretation by the DPP, the Circuit Court, and the ICA, are restrictive, and rigid and will lead to an absurd and unjust result as a matter of both law and public policy. On the contrary, the decisions below are careful, thoughtful and accurately reflect the plain meaning of HEPA, leading to an entirely reasonable and just result. In other words, the relevant agency – DPP – has previously accepted a thorough and comprehensive review of the project. The project is the same today as it was then, and the DPP has neither reason nor statutory authority to compel a second round of environmental review simply because Appellants and other Amici are not satisfied with the first one and do not want the project to proceed at this time.

Moreover, for the past 30 years, Chapter 343 has been intended to work with Hawaii's "existing planning processes of the State and Counties", not to be used as a tool to undermine said processes. Yet, Plaintiffs have not identified any environmental disasters that have occurred in the last 30 years based on DPP not requiring an SEIS when surrounding circumstances have changed. This is because there has not been one. Hawaii's regulatory processes sufficiently "integrate the review of environmental concerns" into each step in the development process.

There is a virtue in finality, and finality there needs to be. The Legislature drafted HEPA with a balance between economic development and environmental quality, as a matter of public policy. If Plaintiffs-Appellants' version of HEPA and its interpretive rules were adopted, that balance would be destroyed. Many EISes would require supplementation and projects would immediately grind to a halt, regardless of existing land use permits and entitlements, applicable

development plans and zoning classifications. Surely this is not HEPA's intent. If there is merit in the additional concerns of Appellants and Amici, there are appropriate fora to address them, commencing with the impending session of the Hawaii State Legislature. What would be absurd and unjust is to require Kuilima to undergo a further environmental review of its project for which there is absolutely no legislative authority. Amici urge this Honorable Court to affirm the decision of the ICA Majority and hold that there is no authority to require Kuilima to undergo yet another time-consuming and unnecessary environmental review, as both the DPP and the Circuit Court have found – as a matter of law – before them.

DATED: Honolulu, Hawaii, December 16, 2009.



DAVID Z. ARAKAWA
Counsel for *Amici Curiae*

DAVID L. CALLIES
Of Counsel for *Amici Curiae*

LAND USE RESEARCH FOUNDATION OF
HAWAII, HAWAII DEVELOPERS' COUNCIL,
and HAWAII LEEWARD PLANNING
CONFERENCE

NO. 28602

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 06-1-0265

UNITE HERE! LOCAL 5; ERIC W. GILL;
TODD A.K. MARTIN,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; a
municipal corporation; KUILIMA RESORT
COMPANY, a Hawaii corporation; DOE
DEFENDANTS 1-10,

Defendants.

KUILIMA RESORT COMPANY, a Hawaii
general partnership,

Counterclaim Plaintiff,

vs.

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

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawaii
general partnership,

Counterclaim Plaintiff,

vs.

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

Additional Counterclaim
Defendants.

CIVIL NO. 06-1-0265

CIVIL NO. 06-1-0867

APPEAL FROM THE AMENDED FINAL
JUDGMENT, filed on June 4, 2007

FIRST CIRCUIT COURT

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

CIVIL NO. 06-1-0867

KEEP THE NORTHSORE 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; and DOE
GOVERNMENTAL UNITS 1-10,

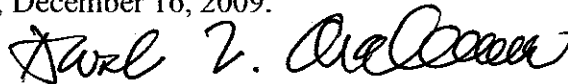
Defendants.

DECLARATION OF DAVID Z. ARAKAWA

I, David Z. Arakawa, declare under penalty of law that the following is true and correct:

1. I am an attorney for the Land Use Research Foundation, Hawaii Developers' Council and Hawaii Leeward Planning Conference.
2. I am competent to testify to the matters stated herein, and do so based on my personal knowledge.
3. I am licensed to practice law in the state of Hawai'i.
4. Attached hereto as Appendix "A" is a true and correct copy of Act 1 (SLH 2008) approved February 13, 2008.

DATED: Honolulu, Hawai'i, December 16, 2009.



DAVID Z. ARAKAWA



GOV. MSG. NO. 444

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

February 13, 2008

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fourth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

This is to inform you that on February 13, 2008, the following bill was signed into law:

HB2688 HD1

A BILL FOR AN ACT MAKING APPROPRIATIONS TO
PROVIDE FOR THE EXPENSES OF THE
LEGISLATURE, THE AUDITOR, THE LEGISLATIVE
REFERENCE BUREAU, AND THE OMBUDSMAN,
(ACT 001)

Sincerely,

A handwritten signature in black ink, appearing to read "L. Lingle".

LINDA LINGLE

APPENDIX A

Approved by the Governor
on FEB 13 2008
HOUSE OF REPRESENTATIVES
TWENTY-FOURTH LEGISLATURE, 2008
STATE OF HAWAII

ACT 001
H.B. NO. 2688
H.D. 1

A BILL FOR AN ACT

MAKING APPROPRIATIONS TO PROVIDE FOR THE EXPENSES OF THE
LEGISLATURE, THE AUDITOR, THE LEGISLATIVE REFERENCE BUREAU,
AND THE OMBUDSMAN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. There is appropriated out of the general
2 revenues of the State of Hawaii the sum of \$7,694,360 or so much
3 thereof as may be necessary for defraying any and all session
4 and nonsession expenses of the senate up to and including
5 June 30, 2009, including the 2008 regular session, twenty-fourth
6 legislature of the State of Hawaii, and pre-session expenses and
7 the expenses of any committee or committees established during
8 the interim between the 2008 and 2009 regular sessions.

9 The sum appropriated in this section shall be expended by
10 the senate.

11 SECTION 2. There is appropriated out of the general
12 revenues of the State of Hawaii the sum of \$11,670,163 or so
13 much thereof as may be necessary for defraying any and all
14 session and nonsession expenses of the house of representatives
15 up to and including June 30, 2009, including the 2008 regular
16 session, twenty-fourth legislature of the State of Hawaii, and
17 pre-session expenses and the expenses of any committee or

HB2688 HD1 HMS 2008-1466



1 committees established during the interim between the 2008 and
2 2009 regular sessions.

3 The sum appropriated in this section shall be expended by
4 the house of representatives.

5 SECTION 3. Payment of expenses of the senate during the
6 interim between the 2008 and 2009 regular sessions shall be made
7 only with the approval of the president of the senate, and
8 payment of expenses of the house of representatives during the
9 interim between the 2008 and 2009 sessions shall be made only
10 with the approval of the speaker of the house of
11 representatives.

12 SECTION 4. Before January 21, 2009, the senate and the
13 house of representatives shall each have their accounts audited,
14 and a full report of the respective audits shall be presented to
15 the senate and to the house of representatives convening on
16 January 21, 2009.

17 SECTION 5. Unless otherwise prescribed by law, the
18 expenses of any member of the legislature while traveling abroad
19 on official business of the legislature shall be \$130 a day as
20 authorized by the president of the senate and the speaker of the
21 house of representatives, respectively.



1 SECTION 6. There is appropriated out of the general
2 revenues of the State of Hawaii the sum of \$3,945,977 or so much
3 thereof as may be necessary to the office of the auditor for the
4 following expenses:

- 5 (1) The sum of \$2,910,685 for defraying the expenses of
6 the office of the auditor during fiscal year
7 2008-2009;
- 8 (2) The sum of \$885,292 for defraying the expenses of the
9 office of the state ethics commission during fiscal
10 year 2008-2009; and
- 11 (3) The sum of \$150,000 during fiscal year 2008-2009 for:
- 12 (A) Performing special studies;
- 13 (B) Improving capabilities for planning, programming,
14 and budgeting;
- 15 (C) Fulfilling other special requests made of the
16 auditor by the legislature or jointly by the
17 president of the senate and the speaker of the
18 house of representatives;
- 19 (D) Legislative studies and contractual services for
20 those studies; and



1 (E) Such other purposes as may be determined by the
2 joint action of the president of the senate and
3 the speaker of the house of representatives.

4 The sum appropriated in this section shall be expended by
5 the auditor.

6 SECTION 7. There is appropriated out of the general
7 revenues of the State of Hawaii the sum of \$2,429,360 or so much
8 thereof as may be necessary to the office of the auditor during
9 fiscal year 2008-2009 to be deposited into the audit revolving
10 fund established pursuant to section 23-3.6, Hawaii Revised
11 Statutes.

12 SECTION 8. There is appropriated out of the audit
13 revolving fund the sum of \$5,600,438 or so much thereof as may
14 be necessary to the office of the auditor during fiscal year
15 2008-2009 for the auditor to conduct or complete its audit
16 functions as provided by law.

17 The sum appropriated in this section shall be expended by
18 the auditor.

19 SECTION 9. There is appropriated out of the general
20 revenues of the State of Hawaii the sum of \$3,449,623 or so much
21 thereof as may be necessary to the legislative reference bureau
22 for defraying the expenses of the legislative reference bureau



1 during fiscal year 2008-2009, including equipment relating to
2 computer systems programming and operations.

3 The sum appropriated in this section shall be expended by
4 the legislative reference bureau.

5 SECTION 10. Notwithstanding chapter 103D, Hawaii Revised
6 Statutes, the legislative reference bureau shall contract with
7 the University of Hawaii to conduct a study of the State's
8 environmental review process. The study shall:

- 9 (1) Examine the effectiveness of the current environmental
10 review system created by chapters 341, 343, and 344,
11 Hawaii Revised Statutes;
- 12 (2) Assess the unique environmental, economic, social, and
13 cultural issues in Hawaii that should be incorporated
14 into an environmental review system;
- 15 (3) Address larger concerns and interests related to
16 sustainable development, global environmental change,
17 and disaster-risk reduction; and
- 18 (4) Develop a strategy, including legislative
19 recommendations, for modernizing Hawaii's
20 environmental review system so that it meets
21 international and national best-practices standards.



1 In addition, the study shall be conducted in accordance with the
2 provisions of any other act that addresses the comprehensive
3 study of the environmental review process described in this
4 section.

5 The study shall be submitted to the legislature no later
6 than twenty days prior to the convening of the regular session
7 of 2010 or by an earlier date expressly set by any other
8 relevant Act.

9 There is appropriated out of the general revenues of the
10 State of Hawaii the sum of \$300,000, or so much thereof as may
11 be necessary to the legislative reference bureau during fiscal
12 year 2008-2009 to contract with the University of Hawaii to
13 conduct the study required by this section.

14 The sum appropriated shall be expended by the legislative
15 reference bureau for the purposes of this section.

16 SECTION 11. There is appropriated out of the general
17 revenues of the State of Hawaii the sum of \$1,060,728 or so much
18 thereof as may be necessary to the office of the ombudsman for
19 defraying the expenses of the office during fiscal year
20 2008-2009.

21 The sum appropriated in this section shall be expended by
22 the ombudsman.



1 SECTION 12. There is appropriated out of the general
2 revenues of the State of Hawaii the following sums or so much
3 thereof as may be necessary for defraying the expenses of the
4 legislative information system:

- 5 (1) \$900,000 to the senate; and
- 6 (2) \$900,000 to the house of representatives.

7 This appropriation shall be used to pay for hardware, software,
8 consultants, installation, materials, supplies, and other
9 related costs associated with the legislative information system
10 that have been or will be incurred.

11 The sums appropriated in this section shall be expended by
12 the senate and the house of representatives, respectively.

13 SECTION 13. There is appropriated out of the general
14 revenues of the State of Hawaii the sum of \$175,000 or so much
15 thereof as may be necessary for the legislative broadcast
16 program, including the production and distribution of television
17 broadcasts of legislative proceedings.

18 The sum appropriated in this section shall be expended by
19 the legislature for the purposes of this section.

20 SECTION 14. Except for moneys in the audit revolving fund,
21 as of the close of business on June 30, 2009, the unexpended or



1 unencumbered balance of any appropriation made by this Act shall
2 lapse into the general fund.

3 SECTION 15. Each section of this Act is declared to be
4 severable from the remainder of this Act.

5 SECTION 16. This Act shall take effect upon its approval.

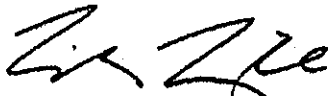


1 unencumbered balance of any appropriation made by this Act shall
2 lapse into the general fund.

3 SECTION 15. Each section of this Act is declared to be
4 severable from the remainder of this Act.

5 SECTION 16. This Act shall take effect upon its approval.

APPROVED this 13 day of FEB , 2008



GOVERNOR OF THE STATE OF HAWAII



NO. 28602

IN THE SUPREME COURT OF THE STATE OF HAWAII

CIVIL NO. 06-1-0265

UNITE HERE! LOCAL 5; ERIC W. GILL;
TODD A.K. MARTIN,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; a
municipal corporation; KUILIMA RESORT
COMPANY, a Hawaii corporation; DOE
DEFENDANTS 1-10,

Defendants.

KUILIMA RESORT COMPANY, a Hawaii
general partnership,

Counterclaim Plaintiff,

vs.

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

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawaii
general partnership,

Counterclaim Plaintiff,

vs.

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

Additional Counterclaim
Defendants.

CIVIL NO. 06-1-0265

CIVIL NO. 06-1-0867

APPEAL FROM THE AMENDED FINAL
JUDGMENT, filed on June 4, 2007

FIRST CIRCUIT COURT

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

CIVIL NO. 06-1-0867

KEEP THE NORTHSORE COUNTRY, a
Hawaii non-profit corporation, and SIERRA
CLUB, HAWAI'I CHAPTER, a foreign non-
profit corporation,

Plaintiffs,

vs.

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

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing document was duly served as indicated upon the following parties at their last known address:

	MAIL and Email	HAND DELIVERY
WILLIAM S. HUNT LAURA P. COUCH Alston Hunt Floyd & Ing 18 th Floor, ASB Tower 1001 Bishop Street Honolulu, Hawaii 96813 Attorneys for Plaintiffs-Appellants KEEP THE NORTH SHORE COUNTRY and SIERRA CLUB, HAWAI'I CHAPTER	[X]	[]

	MAIL and Email	HAND DELIVERY
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CARRIE OKINAGA, Corporation Counsel DON S. KITAOKA LORI K.K. SUNAKODA Deputies Corporation Counsel 530 S. King Street, Room 110 Honolulu, Hawaii 96813 Attorneys for Defendants-Appellees CITY AND COUNTY OF HONOLULU and HENRY ENG, Director of Department of Planning and Permitting in his official capacity	[X]	[]
KENNETH R. KUPCHAK GREGORY W. KUGLE MARK M. MURAKAMI 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 GILL and Plaintiff-(Nominal) Appellee TODD A.K. MARTIN	[X]	[]

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ISAAC H. MORIWAKE Earthjustice 223 S. King Street, suite 400 Honolulu, Hawaii 96813-4501 Attorney for Amici Curiae CONSERVATION COUNCIL FOR HAWAII, SURFRIDER FOUNDATION, HAWAII'S THOUSAND FRIENDS, LIFE OF THE LAND, MAUI TOMORROW FOUNDATION, AND KAHEA	[X]	[]
VERNON Y.T. WOO 910 201 Merchant Street, Suite 2302 Honolulu, Hawaii 96813 Counsel for Amicus Curiae NORTH SHORE CAREER TRAINING CORPORATION, THE LAIE COMMUNITY ASSOCIATION, AND THE KAHUKU COMMUNITY ASSOCIATION	[X]	

DATED: Honolulu, Hawaii, December 16, 2009



DAVID Z. ARAKAWA
 Counsel for *Amici Curiae*

DAVID L. CALLIES
 Of Counsel for *Amici Curiae*

LAND USE RESEARCH FOUNDATION OF
 HAWAII, HAWAII DEVELOPERS' COUNCIL,
 and HAWAII LEEWARD PLANNING
 CONFERENCE