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.	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
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.	

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STATE OF HAWAII

SEP 24 2009

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 Hawaii 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.

RESPONDENTS-DEFENDANTS-APPELLEES CITY AND COUNTY OF HONOLULU AND HENRY ENG, DIRECTOR OF DEPARTMENT OF PLANNING AND PERMITTING'S RESPONSE TO PETITION FOR CERTIORARI

and

CERTIFICATE OF SERVICE

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Respondents-Defendants-Appellees CITY AND COUNTY OF HONOLULU (the "City") and Henry Eng, Director of the Department of Planning and Permitting ("DPP"), by and through their attorneys, CARRIE K. S. OKINAGA, Corporation Counsel, and DON S. KITAOKA, Deputy Corporation Counsel, submit this response in opposition to the Application for Writ of Certiorari filed by KEEP THE NORTH SHORE COUNTRY ("North Shore") and SIERRA CLUB, HAWAI'I CHAPTER ("Sierra Club") (collectively, "Petitioners") requesting a review of the Intermediate Court of Appeals' ("ICA") Opinion filed on May 22, 2009. Unite Here! Local 5 v. City and County of Honolulu, 120 Hawai`i 457, 209 P.3d 1271 (App. 2009).

This case arose in connection with the DPP's decision not to require a Supplemental EIS ("SEIS") by Kuilima Resort Company ("Kuilima") for the Kuilima Resort Expansion ("Project') while the Bulk Lot subdivision application was under review by DPP.

PROCEEDINGS BELOW

In granting summary judgment, the Circuit Court agreed with Kuilima and the City that the applicable Hawaii Environmental Policy Act ("HEPA") regulations should be interpreted to mean that an agency can require an SEIS only when there is a substantive change in the Project itself, and the court found that Petitioners had not shown a substantive change in the Project. On appeal, the ICA agreed with Kuilima and the City and affirmed the Circuit Court's findings.

THE SUPREME COURT'S STANDARD ON REVIEW

The Supreme Court's acceptance or rejection of Petitioners' application for a writ of certiorari is discretionary. Hawaii Revised Statutes §602-59(a). The Supreme Court may only grant Petitioners' application if the ICA's decision includes "(1) grave errors of law or fact or (2) obvious inconsistencies with decisions of the Supreme Court, federal decisions or ICA's own decisions and whether the magnitude of those errors or inconsistencies dictates the need for further appeal." Id. §602-59(b). The high standard of review reflects the Legislature's intent that the ICA be the court of general appellate review, and that the Supreme Court limit its review to extraordinary cases in which there is a manifest error or inconsistency with other decisions. Petitioners have clearly not met this standard of review. The ICA in affirming the Circuit Court's decision relied upon basic rules of statutory interpretation, made no grave errors of law or fact, and was not obviously inconsistent with any prior court precedent.

I. PETITIONERS IMPROPERLY APPLY THE RULES OF STATUTORY CONSTRUCTION TO MISCONSTRUE, MISAPPLY AND SIMPLY MISREPRESENT THE APPLICABLE LAW IN THIS MATTER

The ICA examined the plain meaning of the HEPA rules and agreed with Kuilima, the City and the Circuit Court that the HEPA rules only permit an agency to require an SEIS if substantive changes to the project itself have been made. Petitioners improperly apply the rules of statutory construction to misconstrue, misapply and simply misrepresent HEPA regulations regarding when an SEIS is required. Petitioners argue that this Court "must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose," but in doing so, Petitioners circumvent "the fundamental starting point for statutory interpretation" -- to look at the plain language of the statute.[1]

The HEPA statute and corresponding administrative rules are clear and unambiguous. HRS Chapter 343 does not provide for SEISs. An accepted EIS is the final document required under HEPA, and "no other statement for the proposed action shall be required." HRS §343-5(g). Even the ICA dissenting opinion recognized that the evident purpose of HRS §343-5(g) is to provide a degree of finality in the environmental review process. 120 Hawai`i at 469, 209 P.3d at 1283.

Under the applicable administrative rules, HAR Section 11-200-26 sets forth the general rule regarding SEISs and exceptions to that rule. HAR Section 11-200-26 states:

> A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. A statement that is accepted with respect to a particular action shall

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[1] "First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." Estate of Roxas v. Marcos, ____P.3d____ ,WL 2426697 (2009).

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

The general rule is 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..." The general rule is qualified by exceptions, "to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things."

Under the plain terms of HAR §11-200-26, DPP is required to conduct a two-step inquiry to determine whether an SEIS is required, that is broken down as follows:

(1) Whether the action (the Project) has changed substantively in size, scope, intensity, use, location or timing? And if so,

(2) Will the change in any of these characteristics likely have a significant effect and result in individual or cumulative impacts not originally disclosed in the EIS?

Whereas HAR Section 11-200-26 sets forth the general rule, HAR Section 11-200-27 sets forth the procedure and methodology in determining whether an SEIS is required. HAR Section 11-200-27 states:

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

> measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.

First, HAR Section 11-200-27 inquires whether the proposed action has been modified. If so, the next inquiry is whether the proposed action has been modified to the extent that new or different environmental impacts are anticipated. If so, then a review of the circumstances in which a SEIS is warranted should be considered, including whether the intensity of environmental impacts will be increased, or whether new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.

The applicable law is clear that there must be a change in the proposed action before an SEIS can be required. If there is no change in the project, "no other statement for that proposed action shall be required." In sum, the ICA majority states that "No other reading of the rules is possible," and therefore, based on statutory construction, an analysis of the context and purpose of the statute is not required. 120 Hawai`i at 465, 209 P.3d at 1279.

Further, the fundamental purpose of environmental review to "give systematic consideration to the environmental, social and economic consequences of proposed development projects prior to allowing construction to begin… [and that] assures the public the right to participate in planning projects that may affect their community," (Sierra Club v. Department of Transportation, 115 Hawai`i 299, 306, 167 P.3d 292, 299 (2007)), is not ignored by the plain reading of the HEPA regulations to limit SEIS review to substantive changes to the project's size, scope, intensity, use, location or timing. The EIS process, which includes acceptance of public comments, agency review and comments, and studies, has been fully complied with in regards to this Project and the purpose of full environmental disclosure and review has been fulfilled.

II. PETITIONERS MISINTERPRET HAR SECTION 11-200-27 BY IGNORING THE CONTEXT OF A PARTICULAR PHRASE

Petitioners argue that HAR Section 11-200-27 expressly mandates that a SEIS shall be warranted "when the intensity of environmental impacts will be increased" or "where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with." In making this argument, Petitioners first highlight the last sentence of HAR Section 11-200-27, but completely ignore the preceding sentence which states in plain language, "proposing agencies or applicants shall prepare for public review supplemental statements **whenever the proposed action for which a statement was accepted has been modified** to the extent that new or different environmental impacts are anticipated." (Emphasis added).

Once again, the initial inquiry is whether the proposed action has been modified. If a proposed action is modified to the extent that new or different environmental impacts are anticipated, then HAR Section 11-200-27 provides circumstances that an SEIS is warranted. **There must be a change or modification in the proposed action** before the requirement for an SEIS can be triggered.

III. THE ICA MAJORITY'S INTERPRETATION DOES NOT CREATE AN UNREASONABLE, ABSURD AND UNJUST RESULT, JUST AN UNFAVORABLE RESULT FOR PETITIONERS.

The ICA Majority's interpretation of HEPA regulations, which provide that an SEIS review is required only upon a substantive change in the project, is not an "unreasonable, absurd or unjust result," but simply an unfavorable result for Petitioners. By rule DPP is limited to asking whether the Project itself had substantively changed as a condition to requiring a SEIS review. For projects that have not substantively changed, developers expect a degree of finality in the land use approval process. DPP also has an interest in preserving an orderly land use

approval process that will not be subject to constant and burdensome reexaminations of issues. If every change in circumstances could lead to an SEIS challenge, even if only to determine whether such change rendered the project "an essentially different action", the land use approval process would be mired in an untenable gridlock. Limiting an SEIS requirement to those projects that have changed in size, scope, intensity, use, location or timing, provides a reasonable balance between the need for finality and the desire for environmental reexamination. Such a limitation also provides DPP with a manageable standard of SEIS review.

Petitioners' and the ICA dissent's reasoning, on the other hand, would lead to an unreasonable and impractical result for DPP and project developers. Assuming, *arguendo*, that not only changes to the project's characteristics but changes to conditions surrounding the project, or the discovery of any new information, could trigger an SEIS, the type and measure of conditions and information would be limitless. In response to every allegation of a change in circumstances, DPP would have to decide whether to require an SEIS based on a nebulous "essentially different action" standard. At what point is a project "an essentially different action"? In response to every conclusory allegation of changed circumstances, DPP would be burdened with legal challenges whenever it did not require an SEIS. It may even become "easier" for DPP to require SEISs for every change in circumstances surrounding a project. This would, of course hinder long-range planning and development. The limitation to SEIS review of changes in the project itself provides a more fair, reasonable and practical policy.

In the present case, Petitioners simply failed to provide any evidence whatsoever of a change or modification in the proposed action. Therefore, DPP had no factual basis to require an SEIS. Based on HAR Section 11-200-26, without any factual basis that a change in the project design occurred, DPP could not proceed further to determine whether the change would likely

have a significant effect and result in individual or cumulative impacts not originally disclosed in the EIS. Furthermore, in DPP's own review of project impacts during the subdivision process, in extensive agency and departmental reviews of the proposed Kuilima project, no evidence came to light of a substantial change or modification of the project. (ROA CV12:30-33).[2]

IV. PETITIONERS ARE ASKING THE COURT TO LEGISLATE FROM THE BENCH.

The ICA Majority's interpretation of the HEPA regulations does not provide the results preferred by Petitioners, but it is not up to this Court to change the result when the regulations are valid and were implemented accordingly by DPP. Petitioners should look to the legislature to "fix" the process that produced the result. The remedy for Petitioners and the ICA dissent may be amendment of the law to allow for DPP to expand the analysis of the need for a SEIS to include any increase in the intensity of environmental impacts and any new circumstances or evidence that reveals different or likely increased environmental impacts. For DPP's sake, that

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[2] Prior to the City being sued in this matter, no facts or other evidence whatsoever of either changes to the project or new circumstances affecting the environmental impacts of the project were presented to DPP for its consideration in determining whether an SEIS should be required. While the Bulk Lot Subdivision application was under review, DPP received a letter dated January 5, 2006, from UNITE HERE! Local 5 union boss Gary Gill in which he expressed his opinion that "the continued viability/applicability of the SMA permit and its foundational EIS must be revisited." (ROA CV4A:474, Ex.31). The letter contained generalized statements that "changes have occurred in the past two decades" and that "a Supplemental Environmental Impact Statement would be required under Hawaii Administrative Rule § 11-200-26." However no facts or other evidence supporting these statements and opinions were provided to DPP in the letter. DPP received a second letter dated January 7, 2006, from North Shore resident Ben Shafer, the contents of which are stated in its entirety below:

Aloha Mr. Ing.

Much had changed since the approval of the EIS and SMAP some twenty plus years ago. Transportation, sewage, housing, water, cultural, the Master Plan for the Koolauloa region all needs to be included in an updated EIS and SMAP. Residential input from each community from Kaneohe to Mililani needs to be updated as the impact will be severe.

If there any questions, please feel free to contact me.

Sincerely,

Ben Shafer

(ROA CV4A:538, Ex.38).

In granting summary judgment in favor of the Defendants in this case, the Circuit Court specifically concluded that "Plaintiffs' concerns that form the basis of their claims in this litigation were basically expressed for the first time in the filings before this Court." (ROA CV12:14-16). Prior to the litigation, DPP never had the slightest opportunity to assess any of the factual information that Petitioners provided for the first time to the court, and therefore had no factual information whatsoever before it in making its determination not to require an SEIS.

expansion of the SEIS analysis should include rules that provide practical guidance and reasonable limits for agencies such as DPP in determining the measure, type and or circumstances of those environmental impacts.

V. THE ICA MAJORITY'S OPINION DIVERGES FROM FEDERAL DECISIONS INTERPRETING NEPA BECAUSE HEPA AND NEPA ARE NOT THE SAME.

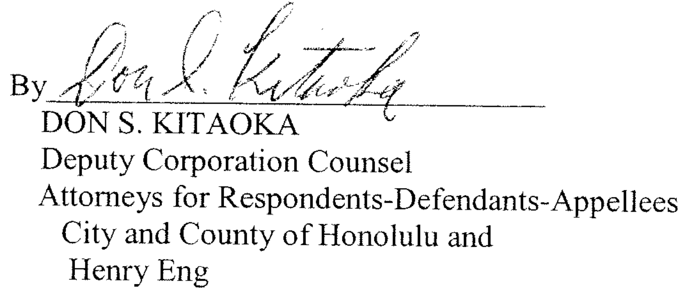
Petitioners argue that the ICA Majority diverges from federal decisions interpreting NEPA "which [HEPA] was patterned after." Petitioner draws a parallel between NEPA and HEPA where both statutes do not require SEISs, but administrative rules for each require SEISs. Petitioners point to NEPA regulation guidance that provides "if the proposal has not been implemented, . . . EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement." However, the criteria of Section 1502.9(c) of the Code of Federal Regulations, unlike the HEPA regulations, states that an SEIS shall be prepared if "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; <u>or</u> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." (Emphasis added). The HEPA regulation criteria is structured differently. As explained above, it is clearly written to require an SEIS only if there is a change in the project design. The divergence of opinion is a result of a divergence in the clear regulation language and not faulty interpretation by the ICA Majority. Therefore, regardless of precedent or other SEIS laws and regulations, the ICA Majority has correctly interpreted the regulations based on their plain and unambiguous meaning.

CONCLUSION

Based on the foregoing, Petitioners have not met the standards for issuance of a Writ of Certiorari pursuant to HRS Section 602-559(b), and thus, this Court should deny Petitioners' Application for a Writ of Certiorari.

DATED: Honolulu, Hawaii, September 23, 2009.

CARRIE K.S. OKINAGA
Corporation Counsel



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

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HONORABLE SABRINA S. McKENNA
Judges

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Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies hereof were served upon the following by mailing the same, postage prepaid, on September 23, 2009:

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DATED: Honolulu, Hawaii, September 23, 2009.

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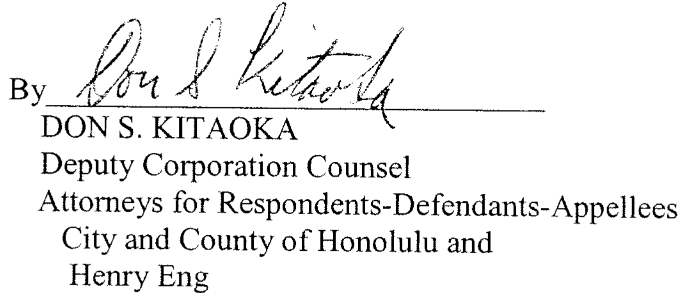

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NO. 28602, UNITE HERE! LOCAL 5; ERIC W. GILL; TODD A.K. MARTIN V. CITY AND COUNTY OF HONOLULU, ET AL. - RESPONDENTS-DEFENDANTS-APPELLEES CITY AND COUNTY OF HONOLULU AND HENRY ENG, DIRECTOR OF DEPARTMENT OF PLANNING AND PERMITTING'S RESPONSE TO PETITION FOR CERTIORARI AND CERTIFICATE OF SERVICE

06-02763/92297