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 NORTHSHORE 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.

KUILIMA RESORT COMPANY'S MEMORANDUM IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT ON APPEAL OF THE INTERMEDIATE COURT OF APPEALS FILED JUNE 12, 2008, FILED ON SEPTEMBER 8, 2009

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DEFENDANT KUILIMA RESORT COMPANY'S MEMORANDUM IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT ON APPEAL OF THE INTERMEDIATE COURT OF APPEALS FILED JUNE 12, 2008, FILED ON SEPTEMBER 8, 2009

I. INTRODUCTION

The role of the judicial branch is to interpret law, not to legislate. While the Petitioners may not like the plain language of Hawai`i's rules for supplemental environmental impact statements ("SEIS"),[1] their request to re-write the plain language of the Hawai`i Environmental Protection Act ("HEPA"), codified in Hawai`i Revised Statutes ("HRS") Chapter 343, and the plain language of Hawai`i Administrative Rules ("HAR") §§ 11-200-26 and 27 (the "SEIS Rules") and/or to read these provisions to say something they plainly do not say, is inappropriate. Their request should instead be submitted to the Legislature. The Judiciary is not the appropriate forum for the Petitioners' request.[2]

Indeed, this Court has repeatedly stated that:

> [w]e cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws. Even when the court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used.

State v. Mainaaupo, 117 Hawai`i 235, 250, 178 P.3d 1, 16 (2008).

Petitioners' Application for Writ of Certiorari (the "Application") should be denied, because the Intermediate Court of Appeals ("ICA")'s interpretation of the SEIS Rules does not constitute a "grave error of law or fact," nor is the ICA Majority's decision "inconsistent" with the prior decisions of the ICA, federal courts or this Court. The cardinal rules of statutory construction require the SEIS Rules to be interpreted according to their plain language in a manner that does not exceed their enabling legislation. The ICA followed the cardinal rules and applied them correctly, consistent with the plain language, purpose and intent of HEPA. Adopting the Petitioners' interpretation of the SEIS Rules would (i) violate the plain language of the SEIS Rules' enabling legislation; (ii) render substantial portions of HEPA and the SEIS

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[1] Petitioners largely rely on federal case law interpreting NEPA, which does not follow or include the same language as is found in Hawaii Revised Statutes ("HRS") § 343-5(g), or Hawai`i Administrative Rules ("HAR") §§ 11-200-26 and 27.

[2] At the First Circuit Court, the Petitioners interpreted the SEIS Rules as requiring a change in the Project before an SEIS could be required. See CROA 1/13, 2/54, 6/192-196, 10/235.

Rules superfluous and/or meaningless; (iii) disregard portions of the purpose and spirit of HEPA; and (iv) lead to absurd, illogical and/or unjust results, making the development process intractable.

The Application should also be denied because there has been "no change in [the] action." At the Circuit Court, the only change Petitioners alleged was that there was a change in the timing of the development of the master-planned resort community project at the Turtle Bay Resort (the "Project"); however, neither the Revised EIS nor the Project was qualified by timing. The Revised EIS contained no firm development dates, and the Unilateral Agreement and Declaration for Conditional Zoning dated September 23, 1986 ("Unilateral Agreement"), at ¶ 3, expressly contemplated a flexible schedule that could be modified or extended:

> Development of the project shall generally be based on the submitted schedule . . . . Development may deviate from this schedule due to the occurrence of changed economic conditions, lawsuits, strikes, or other unforeseen circumstances.

As this Court may be aware, and of which this Court may take judicial notice, Hawai`i's economy and the real estate development market bottomed out in 1991—much like the recent market decline and nationwide recession. The Unilateral Agreement, at ¶ 3, expressly contemplated flexibility in the Project's schedule based on economic conditions. As outlined in the record below, the Project slowed in the mid-1990s due to the economic conditions of the day. See CROA 4/219. This is not a case where the developer is attempting to evade the environmental review process[3] or where the developer is attempting to build something entirely different from what it was permitted to do.[4] In this case, an EIS was prepared for the Project, the Revised EIS was accepted, the public has had multiple opportunities to participate, environmental concerns have been addressed, and the SEIS Rules have been followed. This is an unfortunate case where a properly permitted project hit hard economic times, and has taken some time to come to fruition. Fortunately, the Project's entitlements contemplate such circumstances.

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[3] See Sierra Club v. Dept. of Trans, 115 Hawaii 299, 167 P.3d 292 (2007) (where no Environmental Assessment ("EA") was not prepared)("Superferry I").

[4] See Morgan v. Planning Dep't., County of Kauai, 104 Hawai`i 173, 86 P.3d 982 (2004) (where the plaintiff obtained a permit to build a rock revetment, but instead built a seawall and other unpermitted additions.)

In addition to the plain language of HEPA and the SEIS Rules, this Court may also deny the Application for any of the following reasons:

1. The Site Development Master Application Form, submitted November 6, 2005 (the "Subdivision Application") is a non-discretionary approval that can not be meaningfully informed by an SEIS for the matters for which the SEIS is sought—traffic, monk seals, green sea turtles, etc.;

2. The DPP took a "hard look" at the alleged "intensity of impacts" and "new circumstances and evidence" presented by the Petitioners and properly determined that no SEIS was required;

3. The Petitioners failed (a) to show that even if a change in the timing of the Project occurred, such change was likely to have "significant effect;" and (b) to show that the change in timing will cause or result in an increase in the "intensity of environmental impacts" or "new circumstances or evidence" not originally disclosed or previously dealt with, as required by the SEIS Rules; and

4. The Petitioners' claims are time-barred.

Accordingly, because the Circuit Court correctly affirmed the DPP's determination that no SEIS is required for the Project, there is no need to correct or clarify the ICA's opinion, and the Application should be denied.

II. THE APPLICATION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The ICA Majority Correctly Interpreted the SEIS Rules According to Cardinal Rules of Statutory Construction, and Any Other Interpretation Would Contravene the Enabling Legislation Found in HEPA.

1. HEPA and the SEIS Rules Must Be Interpreted Pursuant to Cardinal Rules of Statutory Construction.

"Where the language of the statute is plain and unambiguous" the court's "**only** duty is to give effect to its plain and obvious meaning." Nuuanu Valley Ass'n v. City and County of Honolulu, 119 Hawai`i 90, 98, 194 P.3d 531, 539 (2008); see also Coon v. City and County of Honolulu, 98 Hawai`i 233, 245, 47 P.3d 348, 360 (2002) (explaining that the Court's "foremost obligation is 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.") (emphasis added). "Absent an absurd or unjust result, this court is bound to give effect to the plain meaning of unambiguous statutory language and may only resort to the use of legislative history when interpreting an ambiguous statute." Mainaaupo, 117 Hawai`i at 247, 178 at 13. In other words, the Court is not to selectively use legislative history to contravene the plain language. While

"[t]his [C]ourt must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose,"[5] this Court is "bound to give effect to all parts of a statute, [so that] no clause, sentence, or word shall be construed as superfluous, void, or insignificant [when] a construction can be legitimately found which will give force to and preserve all words of the statute." Keliipuleole v. Wilson, 85 Hawai`i 217, 221, 941 P.2d 300 (1997).

"General principles of construction which apply to statutes also apply to administrative rules." Nuuanu Valley Ass'n, 119 Hawai`i at 98, 194 P.3d at 539. "Where an administrative agency is charged with the responsibility of carrying out the mandate of a statute . . . courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." Keliipuleole, 85 Hawai`i at 226, 941 P.2d at 300.

a. The Plain Language of the SEIS Rules Requires a Change in the Project Before an SEIS Can be Required.

The ICA Majority's adoption of the DPP's interpretation of the SEIS Rules does not constitute a "grave error." The Petitioners and the Dissent mischaracterize the Majority Opinion and attempt to re-construe the opinion to a narrow holding relating solely to changes in the "design" elements of a project, as opposed to the actual holding, which requires a change in the project itself. HAR § 11-200-26 governs when an SEIS may be required and provides:

> A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things. If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed 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."

(Emphases added.) Under the plain terms of HAR § 11-200-26, the DPP is required to conduct the following two-step inquiry to determine whether an SEIS is required:

1. Has the action has "*changed substantively* in size, scope, intensity, use location or timing, among other things"? And *if so*,

[5] Nu`uanu Valley Ass`n, 119 Hawai`i at 103, 194 P.3d at 544.

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?

The last line of HAR §11-200-26 provides:

> [a]s 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.

This language is clear. Unless there is a "change in a proposed action resulting in individual or cumulative impacts," there is no basis to require an SEIS. Indeed, the rule will "deem" the statement associated with the action to comply with the SEIS Rules. When an action or item is "deemed" to constitute or qualify as something by statute or rule, there is no need to look behind it. See e.g., State v. Caleb, 79 Hawai`i 336, 339, 902 P.2d 971, 974 (1995) (interpreting a statute including the word "deemed" to mean a "per se" violation); Flores v. The Rawlings Co., LLC, 117 Hawai`i 153, 164, 177 P.3d 341, 353 (2008) (recognizing same). Adopting Petitioners' position would completely ignore this sentence and render it meaningless.

While HAR § 11-200-26 sets forth the general rule, HAR § 11-200-27 sets forth the procedure and methodology in determining when an SEIS is required:

> 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.

(Emphasis added.) The use of the term "whenever" in the text of HAR §11-200-27 makes clear that an SEIS shall only be prepared when "the proposed action" for which an EIS has been accepted "has been modified to the extent that new or different environmental impacts are anticipated." The requirement that there be a change in the action is further made clear by reading HAR § 11-200-2, which defines a "supplemental statement" 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." (Emphasis added.)

b. The ICA Majority's Interpretation of the SEIS Rules is Consistent with the Purpose of HEPA, Because it Provides a Reliable, Consistent Process that Balances Environmental Concerns with Reasonable Development.

The Petitioners improperly characterize the ICA Majority's interpretation of the SEIS Rules as narrowly applying to a change solely in the "design" element of the Project instead of to any substantial change in the Project. They also selectively choose language from the purposes of HEPA to suit their position. HEPA's purpose is to "establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations," requiring a balance of environmental concerns and reasonable development concerns. HRS § 343-1 (emphasis added).

The ICA Majority's decision provides a reliable, consistent process that recognizes and balances the developer's interest and the predictability of a project's entitlements with environmental considerations. In this vein, the United States Supreme Court cautioned: "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized" explaining that "to require otherwise would render agency decision-making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 373-374 (1989) (applying federal law).

Similarly, this Court explained that "the environmental laws were neither meant to be used as a 'crutch' for chronic fault-finding, nor as a means of delaying the implementation of properly accepted projects." Price v. Obayashi Hawai'i Corp., 81 Hawai'i 171, 181, 914 P.2d 1364, 1374 (1996) (citations and brackets omitted). The SEIS Rules, as interpreted by the ICA Majority, allow the public to participate "at the earliest practicable time" in the environmental review process, while ensuring that the already lengthy and expensive review process is not unduly replicated, unless there is "an essentially different action" being considered. Indeed, the Dissent recognized that the SEIS Rules were drafted to be consistent with the "evident" purpose of HRS § 343-5(g), which is to "provide a degree of finality in the environmental review process." Unite Here! Local 5 v. City and County of Honolulu, 120 Hawai'i 457, 469, 209 P.3d 1271, 1283 (2009) (Nakamura, J., dissenting) ("Dissent").

c. The ICA Majority's Interpretation Allows All Parts of the SEIS Rules to Make Sense, and Does Not Render Any Part of the SEIS Rules Superfluous or Meaningless.

Contrary to Petitioners' assertions, the ICA's interpretation does not render the last sentence of HAR § 11-200-27 superfluous or meaningless. As discussed above, the last sentence of HAR § 11-200-27 gives examples of when an SEIS may be "justified"[6] after it has been determined that the action has changed or been "modified." HAR § 11-200-2 and HRS § 343-1, as discussed above, and HRS § 343-5(g), as discussed below, can only be read consistently through the ICA Majority's interpretation. Accordingly, the ICA Majority's interpretation of the SEIS Rules does not render any part of the SEIS Rules or HEPA superfluous and/or meaningless, because every sentence in those provisions remains effective.

2. The ICA Majority Correctly Interpreted the SEIS Rules in a Manner Consistent with the Plain Language of Their Enabling Legislation.

The SEIS Rules can not be interpreted in a manner that will contravene their enabling legislation. See Capua v. Weyerhaeuser Co., 117 Hawai`i 439, 446, 184 P.3d 191, 198 (2008) (explaining that "administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down."); see also Coon, 98 Hawai`i at 251, 47 P.3d at 366 (holding that administrative rules that conflict with the ordinance they seek to implement exceed their authority and are therefore invalid). HRS §§ 343-5 and 6 are the enabling legislation for the SEIS Rules. The unambiguous plain text of HRS § 343-5(g) provides that "a statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for the proposed action shall be required."

The ICA Majority interpreted the SEIS Rules in the only manner that would be consistent with HRS § 343-5(g) and still make sense of all parts of the Rules—which first requires a change in the action so that "an essentially different action would be under consideration." Since the change in the action would create a different action, the EIS statement that was originally accepted for the original action would be inapplicable to the "essentially different action" and it would operate as if no EIS had been accepted. Thus, an SEIS could be required without violating HRS § 343-5(g), because there would be no statement that had been accepted with

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[6] The word "warranted" means "justified" not "required." The American Heritage Dictionary 1364 (2nd College Edition 1991).

respect to the "essentially different action." See HAR § 11-200-29 (providing how and when an SEIS is to be treated like an EIS).

Furthermore, the SEIS Rules must be interpreted in a way that does not conflict with the statute they seek to implement, because the SEIS process is conceived and solely created within HAR Chapter 200. The rules are "presumptively valid and should be interpreted in such a manner as to give them effect." See Wright v. Home Depot U.S.A., Inc., 111 Hawai`i 401, 142 P.3d 265 (2006). Since there is no express provision for an SEIS in HEPA, which the Petitioners and the Dissent concede,[7] the ICA Majority correctly interpreted the SEIS Rules in a manner that ensures their validity and conforms to established cardinal rules of statutory construction. Accordingly, Petitioners' interpretation should be rejected.

B. Adopting the Petitioners' Interpretation Would Require the Court to Violate Cardinal Rules of Statutory Construction and Contravene the SEIS Rules' Enabling Authority.

1. Adopting the Petitioners' Interpretation Would Cause HAR §§ 11-200-2, 26, and 27 to Contravene HRS § 343-5(g).

The Application should be denied because the interpretation of the SEIS Rules that the Petitioners urge this Court to adopt would exceed the enabling legislation of HEPA. The Petitioners contend that the ICA "gravely erred" by requiring there to first be a change in the Project, despite the fact that the plain language text of HAR §§ 11-200-2, 26, and 27 all expressly require there be a change to the original action. See Application at 6. Instead, the Petitioners interpret the SEIS Rules to require a supplemental statement for the Project when the action remains the same, but there is an increase in "the intensity of environmental impacts" or "new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with." Id. HRS § 343-5(g) precludes such an interpretation. With regard to this Project, an EIS has been accepted and therefore according to HRS § 343-5(g) "no other statement", including an SEIS, "shall be required." It is only when, as discussed above, and with which the Dissent concurs, "an essentially different action" is proposed that an SEIS would be permissible. Cf. Dissent, 125 Hawai`i at 469, 209 P.2d at 1283. Accordingly, this

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[7] See Application at 10 (stating that "HEPA does not expressly address SEISs"); see Dissent, 120 Hawai`i at 470-471, 209 P.3d at 1284-1285 (explaining that the SEIS Rules "were promulgated by the Environmental Council pursuant [to] its statutory authority (HRS § 343-6) to "adopt . . . necessary rules for the purposes of [HEPA].").

Court can not adopt Petitioners' interpretation, because to do so would require this Court to adopt an interpretation of the SEIS Rules that exceeds their enabling legislation.

2. Adopting the Petitioners' Interpretation Would Require the Court to Disregard the Plain Language of the SEIS Rules When There is No Ambiguity in Them.

The Petitioners urge this Court to brush aside the plain and unambiguous language of HEPA and the SEIS Rules and to adopt the "purpose" of HEPA, they claim is established through selected portions of the legislative history. See Application at 9 (Petitioners' "purpose" is taken from publication of the OEQC). It is well-established that that this Court "is bound to give effect to the plain meaning" and "cannot look to the legislative history to determine the intent of a statute unless an ambiguity exists." Mainaaupo, 117 Hawai'i at 247, 178 P.3d at 13. HEPA and the SEIS Rules are not ambiguous, and the Petitioners have not asserted that they are. Furthermore, selective portions of the legislative history may not be used to contravene the plain language. Id.

As discussed above, the plain language of the SEIS Rules and HAR § 11-200-2 explain that, to require an SEIS there must first be a change in the action. The last sentence in HAR § 11-200-27, which provides when an SEIS "shall be warranted," does not render the SEIS Rules ambiguous. The use of different words in § 11-200-27, "shall prepare" and "shall be warranted," is evidence that "warranted" does not mean "required." "Where the legislature includes particular language in one section of a statute but omits it in another section . . . , it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion." In re Water Use Permit Applications, 94 Hawai'i 97, 151, 9 P.3d 409, 463 (2000) (brackets and internal quotation marks omitted). Further, the same section makes clear the requirement of a change in the action. And as the ICA Majority points out, and as discussed directly above, "no other reading of the rules is possible." Unite Here, 120 Hawai'i at 465, 209 P.3d at1281.

3. Adopting the Petitioners' Interpretation Would Render Substantial Portions of HEPA and the SEIS Rules Superfluous and/or Meaningless.

Assuming this Court finds that an ambiguity exists, the Application should still be denied, because adopting the Petitioners' interpretation would require this Court to disregard substantial portions of HEPA and the SEIS Rules, rendering them superfluous and/or

meaningless.[8] Petitioners' sole reliance on the last sentence of HAR § 11-200-27 ignores much of the rest of the language of the SEIS Rules. It also ignores HRS § 11-200-2, which defines a supplemental statement as a new EIS for "an action for which a statement was previously accepted, but which has since changed substantially[.]" Coon makes clear that the last sentence of HAR § 11-200-27 does not provide a stand-alone basis to require an SEIS. Coon, 98 Hawai`i at 259, 47 P.3d at 374. The last sentence must be read in context with all of the language of the SEIS Rules considered, so that every part has some effect and none of it is rendered superfluous and/or meaningless. Adopting the Petitioners' interpretation would require the Court to eviscerate virtually all of HRS § 11-200-2, 11-200-26, and 11-200-27. This can not be what was intended by the Legislature or by the rule-making authority.

4. Adopting the Petitioners' Interpretation of the SEIS Rules Would Ignore Economic and Technical Considerations in the Development Process and Would Lead to an Impossible, Intractable Process.

The Petitioners argue that the ICA Majority "gravely erred" because its interpretation allegedly "cuts against the fundamental purpose of environmental review — encouraging informed decision making, public disclosure, and disclosure of potential harms." Application at 1. The Petitioners' selective focus ignores the entire purpose of HEPA, as explained in HRS § 343-1, which provides that "environmental concerns should be given consideration along with economic and technical considerations." Additionally, the plain language of the SEIS Rules requires that there first be a substantive change in the Project, which change must be likely to result in significant new or different environmental impacts not originally dealt with before an SEIS can be required. These plain language requirements recognize and balance the developer's interest and predictability of the project's entitlements with environmental considerations. Indeed, the Dissent recognized that, at the SEIS level, after an environmental impact statement has been prepared and accepted for a project, there must also be consideration of the land owner's entitlements and the status of a previously approved project, and that the plain language of HRS § 343-5(g) and the SEIS Rules provides that balance. See Dissent, 120 Hawai`i at 469, 209 P.3d at 1283.

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[8] Coon, 98 Hawai`i at 259, 47 P.3d at 374 (2002) (citations omitted) (brackets added) (the "cardinal rule of statutory construction is that Courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will [give] force to and preserve all words of the statute.").

Petitioners' interpretation that any "new circumstance or evidence" triggers an SEIS not only disregards all "economical and technical considerations" but it also leads to an illogical or absurd result[9] — intractable development. Petitioners argue that the "burden of proving that significant impacts will occur" should not be placed on the person alleging a change in circumstances, but instead the challenger "need only 'raise substantial questions whether a project may have significant effects.'" Application at 9. Under Petitioners' admittedly "low standard," development would no longer be feasible, because Petitioners' interpretation would allow any and every "NIMBY" to simply allege changed circumstances, with no supporting evidence, and force the DPP, an already cash-strapped agency, to stop its existing review process to investigate every allegation regardless of whether it was substantiated or not.[10] This would endlessly prolong Hawai`i's already lengthy and expensive environmental review process by always making new information outdated and precluding the possibility of certainty in environmental rules. It would create uncertainty and undue delay, and create a precedent that could shut down any and every development (especially in light of the current economy). The practical reality is that an agency would simply order an SEIS and place the financial burden on the developer.

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[9] The multiple interpretations proposed in the Dissent are impractical to apply. See Dissent, 120 Hawai`i at 470, 209 P.3d at 1284 ("Different or increased environmental impacts unrelated to design changes in the proposed project itself can create 'an essentially different action.'"); Id. at 471, 209 P.3d at 1285 ("Given this purpose, there is no logical reason to distinguish between significant changes to the anticipated environmental impacts of a development project that arise from changes to the design of the project itself, changes to conditions surrounding the project, or the discovery of new information. The agency must be apprised of and consider significant changes to the project's anticipated environmental impacts, regardless of the source of or basis for such changes, in order to make informed decisions."); Id. at 472, 209 P.3d at 1286 ("I construe the rules to mean that an SEIS is required when new circumstances or evidence reveal significant change in the anticipated environmental impacts of the proposed action that were not address in the original EIS that was accepted."); Id. ("In order to trigger the obligation to prepare an SEIS, the unaddressed environmental impacts must be significant enough that 'an essentially different action' would be under consideration.").

[10] See Friends of Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000) (applying federal law and stating "the public comment process is not essential every time new information comes to light after an EIS is prepared. Were we to hold otherwise, the threshold decision not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information could prolong NEPA beyond reasonable limits.").

More importantly, this is not a case where the developer is attempting to evade the environmental review process[11] or where the developer is attempting to build something entirely different from what it was permitted to do.[12] In this case, an EIS was prepared and accepted, the public has had multiple opportunities to participate, environmental concerns have been addressed, and the SEIS Rules have been followed. Accordingly, the Court should deny the Application, because adopting Petitioners' interpretation would be inconsistent with the purpose of HEPA and would create a mechanism to stop development in Hawai`i.

C. The Trial Court's Opinion May Also Be Affirmed on Alternate Grounds.

Alternatively, if this Court decides to accept the Application for Writ of Certiorari, the ICA Majority's decision may also be affirmed on alternate grounds. See Taylor-Rice v. State, 91 Hawai`i 60, 73, 979 P.2d 1086, 1099 (1999) (holding "this court may affirm a judgment of the trial court on any ground in the record which supports affirmance.").[13]

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[11] In Superferry I, this Court reversed and remanded the DPP's decision not to require an EA because the project was exempt under HEPA, explaining that "'all parties involved and society as a whole' would have been benefited had the public been allowed to participate in the review process of the Superferry project." Superferry I, 115 Hawai`i at 299, 36, 167 P.3d at 343. Here, unlike Superferry I, the pubic has not been prevented from participating in the environmental review process and has participated on numerous occasions including (1) the preparation of the Project's EIS in the 1980's, (2) the adoption of the Ko`olauloa Sustainable Communities Plan in 1999, (3) the City Council Zoning Committee Meetings in 2000, and (4) the public hearings regarding the Special Management Area Use Permits in 2003. See CROA 4A/356-357, 466-471; 4/85-106, 141-201, 203-216, 237-359, 361-364; 5/1-873.

[12] In Morgan, the Plaintiff obtained a special management area use permit ("SMA Permit") to build a rock revetment, but instead built a seawall and later made improper and unpermitted additions that caused significant environmental damage. Morgan, 104 Hawai`i at 176, 86 P.3d at 985. The court held that "the planning commission had the authority to reconsider the validly issued SMA Permit, because the enabling statute required the commission carry out the policies and objectives of the CZMA to ensure its compliance." Id. 104 Hawai`i at 182, 86 P.3d at 991 (emphasis added). Unlike Morgan, the Project is the same development that was contemplated, considered and approved in the Project's EIS.

[13] While this Court has the authority to consider any issue that arose in the litigation, this Court in State v. Bolson, 78 Hawai`i 86, 89, 890 P.2d 673, 676 (1995) noted that "when a party fails to properly challenge a ruling of the ICA, we ordinarily will not address the ruling absent plain error." The court's "power to deal with plain error," however, "is one to be exercised sparingly and with caution." State v. Nichols, 111 Hawai`i 327, 335, 141 P.3d 974, 982 (2006).

1. The Approval of the Subdivision Application is a Non-Discretionary Approval that Does Not Implicate the SEIS Rules.

Under the plain language of the SEIS Rules, before an SEIS can be required for the Project – or for any action – the Project must still be subject to the framework of Hawai`i's environmental laws. HEPA and the SEIS Rules make clear, which the Dissent and the Petitioners concede,[14] that an SEIS may *only* be required in relation to "discretionary" consents – agency actions that can be "informed" by the environmental review process. See HRS § 343-2; HAR § 11-200-2. When a project reaches a non-discretionary stage where an EIS, or SEIS, can no longer inform agency decision-making, no statement is required. See Citizens Against Rails to Rails v. Surface Transp. Board, 267 F.3d 1144, 1151 (D.D.C. 2001).

The granting of a subdivision application is a non-discretionary, or ministerial, act where the subdivision application conforms to the explicit requirements of the local subdivision ordinance. See Kuilima Resort Company's ("Kuilima") Second Motion for Summary Judgment, filed October 11, 2006 (CROA 3/167-188) and Kuilima's Answering Brief, filed December 6, 2008 ("Kuilima's Brief"), incorporated herein by reference.[15] A ministerial consent means "a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion." HAR § 11-200-2. The Subdivision Ordinance creates such a non-discretionary duty on the DPP to grant subdivision applications that conform to the Subdivision Ordinance and the Honolulu Subdivision Regulations (the "Subdivision Regulations"). Revised Ordinances of Honolulu ("ROH") § 22-3.3. Under ROH § 22-3.4, the DPP's authority in approving a subdivision application is limited to confirming that

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[14] The Dissent explains that "[a]n SEIS would serve no useful purpose if the project had already progressed beyond the point where the agency's decision-making could meaningfully affect he project or if the agency lacked the ability to exercise meaningful discretion in deciding the matter for which the SEIS was sought." Dissent, 120 Hawai`i at 476, 209 P.3d at 1290; see also Keep the North Shore Country, et. al.'s Opening Brief, filed September 27, 2007 at 40-41 (arguing "HEPA applies when an "an applicant seeks a 'consent' which requires the agency to exercise 'judgment and free will' as opposed to 'consent upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion'").

[15] See Mayor v. Town Council of Town of Elsmere v. DiFrancesco, 953 A.2d 128, 129 (Del. 2007) (explaining that the act of granting a subdivision application was "purely ministerial."); see also PTL, LLC v. Chicago County Bd. of Comm, 656 N.W.2d 567, 571 (Minn. Ct. App. 2003) (recognizing that "a majority of states ... adhere to the rule that local governments have no discretion to deny subdivision approval to proposed plats that conform to the specific prerequisites of a subdivision ordinance.") (citations omitted).

the application conforms to (1) the state and city general and development plans and (2) the requirements of applicable state and city law, rules, and regulations applicable to or relating to the subdivision. ROH § 22-3.5 then spells out what the DPP may require from subdivision applicants. Further, absent some showing of a violation of the subdivision regulations, a subdivision plat must be approved. See Subdivision Regulations § 2-203(d).

Furthermore, information regarding regional traffic, Hawaiian monk seals, and/or green sea turtles would not "inform" the agency decision making on the Subdivision Application. . DPP Senior Planner Mario Siu-Li explained that the Subdivision Application is not like the standard subdivision application which creates separate lots, because in this particular situation there is a joint development that has already been approved" and the Subdivision Application "only creates lots under [the] joint development [agreement]." CROA 4A/480 (Sui Li Depo. 15:15-16:11). In other words, the Subdivision Application essentially reconfigures certain Tax Map Key Numbers within the larger area.

Therefore, as no "free will or judgment" may be exercised by the DPP in granting the Subdivision Application, such approval is non-discretionary, and an SEIS can no longer inform the agency's decision-making. Accordingly, the SEIS Rules do not apply to the Project at this stage.

2. The DPP Took a "Hard Look" at the Alleged "Intensity of Impacts" and "New Circumstances and Evidence."

Since 1985, the DPP has continued to "monitor" and "enforce the applicable" codes, ordinances, rules, and regulations in connection with the Project, the "various permits, land use and other related applications" submitted by Kuilima. See CROA 4/18-19 (Pierson Aff.). Each division[16] of the DPP that has reviewed applications submitted by Kuilima maintains a record of the Project, which is voluminous, related to the issues for which the division is responsible.[17] In reviewing Kuilima's various development-related applications and requests for approvals, the

[16] These divisions include: (a) Planning Division; (b) Land Use Permits Division; and (c) Site Development Division (as part of the Civil Engineering Branch). In addition, the DPP has sought input from City divisions such as the Department of Transportation Services, the Honolulu Fire Department, the Department of Environmental Services, the Board of Water Supply, and the Department of Parks and Recreation (CROA 9/400 (Siu-Li Aff.)) and applicable departments of the State government, including the Departments of Health, Transportation, and Land and Natural Resources. See CROA 4/20 (Pierson Aff.), 4/33 (Siu-Li Aff.).

[17] See CROA 4/26 (Lau Aff.), 4/33 (Siu-Li Aff.), 4/18-20 (Pierson Aff.), 4A/479-480 (Siu-Li Depo. 13:17-14:17), 4A/490 (Takahashi Depo. 9:13-21), 4A/512 (Wataru Depo. 9:8-24).

DPP divisions have reviewed the administrative record and ensured Kuilima's compliance with the Project Entitlements, Project Conditions and existing law. See CROA 4/17 (Pierson Aff.), 28-29 (Challacombe Aff.). The administrative record includes continual updates to traffic reports and reviews for compliance with the underlying entitlements. See CROA 4A/519-520, 524 (Pierson Depo. 10:11-11:17, 29:20-30:17, 31:16-32:10"). Additionally, DPP Senior Planner James H. Pierson and other DPP Senior Planners reviewed the applicable administrative rules relating to SEISs, conducted a comparative analysis of the nature of the Project as originally proposed with the Project as currently proposed, and thereafter based on their respective evaluations and analyses, presented their collective conclusion and recommendation to the DPP Director and Deputy Director. CROA 4/16-20, 27-38.

Additionally, the DPP has taken a "hard look" at Petitioners' "new circumstances and evidence" through the course of this litigation[18] and has determined that an SEIS is not required. See CROA 4A/519-520, 524 (Pierson Depo. 13:20-14:9 (explaining he has reviewed the EIS twice since the litigation was initiated), 29:20-30:17, 31:16-32:10 (explaining that Kuilima has and continues to update traffic studies)); see also City and County of Honolulu, et. al.'s Answering Brief, filed December 4, 2007 at pp. 20-24.

3. The Petitioners Failed to Meet Their Burden of Showing a *Substantive Change* in the Project, and Petitioners Provided No Evidence to Show That Any of the Alleged Environmental Impacts Resulting From the Project Were Not Originally Disclosed or Previously Dealt With, as Required by the SEIS Rules.

The Petitioners failed to meet their burden of showing a substantive change in Kuilima's Project, or that such change will likely result in significant impacts not originally disclosed or previously dealt with. See Kuilima's Third Motion for Summary Judgment, filed October 11, 2006 at § V (CROA 3/189-227) and Kuilima's Brief at § III(A)(3)(c), incorporated herein by reference.

[18] In Dombeck, the Ninth Circuit Court of Appeals held that a "hard look" could be taken during the course of the litigation stating "review is not limited to the record as it existed at any single point in time" and can be conducted through the course of the litigation." Dombeck, 222 F.3d at 560. The court ultimately held that the Army Corps of Engineers "performed the required analysis after the litigation began, as demonstrated by documents submitted to the court in the course of the appeal." Id.

a. There Has Been No Change in the Project.

The Petitioners' only allegation in the Circuit Court of a "change" in the Project was an alleged change in timing. See CROA 2/54, 6/162-207. As explained above, the Project, however, was not qualified by timing. See CROA 4/143, 202-216; 5/43. The Phasing Plan for the Project contemplated only a general and approximate plan for development. See CROA 5/43. Furthermore, the Unilateral Agreement, at ¶ 3, contemplated a reasonable and flexible schedule:

> Development of the project shall generally be based on the submitted schedule . . . Development may deviate from this schedule due to the occurrence of changed economic conditions, lawsuits, strikes, or other unforeseen circumstances.

CROA 4/143.

Moreover, when questioned, each of Petitioners' deposition witnesses admitted they had no personal knowledge or evidence of any other changes in the Project.[19]

b. Even if There Has Been a Change in the Project, Any Such Change is Not Likely to Have a "Significant Effect" That Was Not Originally Disclosed or Previously Dealt With.

Even if this Court concludes that Petitioners have shown a "change in the timing of the Project," the Petitioners have failed to connect any new or different "significant effect resulting from" that alleged change that was not originally disclosed or previously dealt with. Despite Petitioners' attempt to tie traffic problems to the Project, traffic is not a "significant effect" *resulting from* a change in the Project; it is an island-wide issue, and the North Shore traffic congestion is a regional problem with bottle-necks in areas away from the Turtle Bay Resort and over which Kuilima has no control. Additionally, any impact the Project may have on traffic was originally considered in the Project's EIS and has been dealt with through various ongoing studies-as contemplated in the Project's EIS. See CROA 5/13-14, 36-38, 126-141, 157-158, 8/2-853. In fact, the Petitioners have relied on information that has been known, in some instances, for 15 years to support their contention.[20] Petitioners' challenge to the EIS's traffic analysis of future traffic impacts (*e.g.*, its failure to consider traffic beyond 2000) and focus on the existence of Hawaiian monks seals and green sea turtles are challenges to the adequacy of the Project's

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[19] See CROA 4A/228-229, 230-231, 244 (Riviere Depo. 41:1-42:18, 46:3-50:16, 102:2-104:12); 4A/310-312, 318, 320 (Mikulina Depo. 58:5-68:9, 92:16-24, 98:7-100:16, 101:10-106:16.

[20] See CROA 4A/239-240 (Riviere Depo. 82:24-87:16), 4A/163-165 (Lucky Depo. 57:13-63:25), 4A/267 (Ching Depo. 31:20-32:9), 2/50 (Amended Complaint, ¶ 23).

EIS, and are time-barred under HRS § 343-7(c). They should have been raised before the expiration of the statutory limitations period – more than 20 years ago.

Similarly, the presence of Hawaiian monk seals and green sea turtles does not *result from a change in the Project*, and the Petitioners failed to show how any change will impact theses animals. Additionally, the presence of these animals was well-known when the Project's EIS was prepared and reviewed (as reports of monk seal sightings have been documented in the main Hawaiian Islands since the early 1980's), and either were dealt with or could have been dealt with in the EIS. See CROA 5/13, 32, 41, 58-69; 6/199; 9/78 (Guinther Aff.); 8/434 (Table 1 showing two Hawaiian monk seal sightings between Kawela Bay and Kahuku Point in 1984). Accordingly, challenges based on those facts should have been raised during the Project's EIS process in 1986, and raising them now is simply too late. Moreover, the mere presence of *individual members* of a species does not require preparation of an EIS. See Environmental Protection Information Center v. U.S. Forest Service, 451 F.3d 1005, 1010 (9th Cir. 2006).

4. The Petitioners' Claims Are Time Barred.

As more fully set forth in Kuilima's Brief and Kuilima's First Motion for Summary Judgment, filed October 11, 2006 (CROA 3/129-166), herein incorporated by reference, Petitioners' claims are untimely and are barred by:

(1) HRS § 343-7(a), because Petitioners filed the Complaint more than 120 days after the date when the Project started or allegedly "restarted" and when Petitioners knew or reasonably should have known of the alleged change in the timing of the Project or the "new circumstances or evidence";

(2) HRS § 343-7(b), because Petitioners filed the Complaint more than 30 days after Petitioners had actual knowledge[21] of the DPP's determination that an SEIS was not required; and

(3) HRS § 343-7 (c), because the Petitioners filed the Complaint more than 60 days after Petitioners had actual knowledge of the DPP's determination that an SEIS was not required[22] and because Petitioners' allegations of

[21] In cases where formal publication does not occur, the statute of limitations runs from the date of "actual knowledge." HRS § 91-2.

[22] The Hawaii United States District Court held that a judicial challenge to a decision not to require an SEIS operates as a challenge to the acceptance of the original EIS because "challenges to EIS procedures necessarily implicate 'the acceptance of an environmental impact statement' such that [HRS] section 343-7(c) applies." Sensible Traffic Alternatives and Res., Ltd. v. Fed. Transit Admin. of the U.S. Dep't of Transp., 307 F.Supp.2d 1149, 1162 (2004).

"new circumstances and evidence" essentially constitute a challenge to the sufficiency of the Project's EIS.

III. CONCLUSION

The ICA majority did not commit a "grave error," and its decision is not inconsistent with other decisions. The Circuit Court's decision and the ICA's Majority Opinion should be affirmed, because the ICA's interpretation of the SEIS Rules (a) is the only interpretation that gives the SEIS Rules meaning without exceeding their enabling legislation, (b) conforms to the plain language of the HEPA and the SEIS Rules, (c) does not render substantial portions of HEPA and the SEIS Rules superfluous and/or meaningless, (d) is consistent with the purpose of HEPA, and (e) does not lead to absurd or illogical results.

Accordingly, for this and the other reasons discussed above, Petitioners' Application for Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, September 23, 2009.

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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 NORTHSHORE 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:

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DATED: Honolulu, Hawaii, September 23, 2009.

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