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

88158.3

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 RESPONSE TO BRIEF OF AMICI CURIAE CONSERVATION COUNCIL FOR HAWAI`I, SURFRIDER FOUNDATION, HAWAI`I'S THOUSAND FRIENDS, LIFE OF THE LAND, MAUI TOMORROW FOUNDATION AND KAHEA

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I. INTRODUCTION

As explained in Kuilima Resort Company ("Kuilima")'s Response to the Application for Writ of Certiorari, filed September 23, 2009, by Keep the North Shore Country and the Sierra Club ("Petitioners") ("Kuilima's Response"),[1] the role of the judicial branch is to interpret law, not to legislate. See State v. Mainaaupo, 117 Hawai'i 235, 250, 178 P.3d 1, 16 (2008).

Amici Curiae Conservation Council for Hawai'i, Surfrider Foundation, Hawai'i's Thousand Friends, Life of the Land, Maui Tomorrow Foundation, and KAHEA (collectively, "Amici") essentially mirror the Petitioners' argument seeking to reverse the Intermediate Court of Appeals ("ICA")'s Majority decision and to modify the plain language of the Hawaii Administrative Rules ("HAR") § 11-200-26 and § 11-200-27 (collectively, the "SEIS Rules"). The Amici urge this Court to allow only the consideration of a project's context, *e.g.*, changed circumstances surrounding the project or new evidence, in determining the need for a Supplemental Environmental Impact Statement ("SEIS"), even if there is no change in the project itself. In making this argument, Amici largely rely upon:

1. Federal law and cases that are distinguishable from this case due to the fact that the Hawaii Environmental Protection Act ("HEPA"), codified at Hawaii Revised Statutes ("HRS") Chapter 343, does not expressly provide for an SEIS and actually prohibits any other statements, once a statement is accepted;
2. Hawaii cases that are factually inapposite to the case before the Court; and
3. The statute's general underlying purpose of informed decision-making, despite the fact that the master-planned resort community project at the Turtle Bay Resort (the "Project") is beyond the point in which agency decisions can be informed by an SEIS.[2]

As explained in Kuilima's Response, under the plain language of the SEIS Rules, an SEIS is only required when there has been a substantial change in the action so that an

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[1] Kuilima's Response is incorporated herein by reference.

[2] Kuilima's Subdivision Application is also exempt from the environmental review process at this time, pursuant to the Comprehensive Exemption List for the City and County of Honolulu Department of Land Utilization as approved by the Environmental Quality Commission, dated August 12, 1981. See CROA 3/167-188. As explained before the Circuit Court, the relevant Subdivision Application merely readjusts boundary lines, does not increase density, and is a component part of a larger, phased Project, which has an accepted EIS.

"essentially different action" is being considered that warrants an SEIS. This interpretation is consistent with the purpose of HEPA, which requires a balance of the environmental concerns with the landowner's vested entitlements, and does not lead to an absurd or unjust result, rendering development completely intractable, unpredictable and cost-prohibitive. The Amici's reliance on Federal law (the National Environmental Protection Act ("NEPA")) in this context is misplaced, because NEPA and its regulations are different from HEPA and the SEIS Rules. Further, Kuilima's Site Development Master Application Form, submitted November 6, 2005 (the "Subdivision Application") did not trigger an SEIS, because it is a non-discretionary consent that would not be informed by an SEIS. This is consistent with the purpose of HEPA, which is to inform *discretionary* decision-making.

As the Department of Planning and Permitting ("DPP") points out,[3] HEPA and the SEIS Rules are not unreasonable, absurd, or unjust; their proper application just leads to an unfavorable result for the Amici and Petitioners. The appropriate forum for the Amici's argument is the legislature and/or the rule-making authority of the SEIS Rules – not the judiciary. Accordingly, the ICA Majority did not gravely err, and the Majority Opinion should be affirmed.

II. THE ICA MAJORITY'S DECISION SHOULD BE AFFIRMED.

A. The Plain Language of the SEIS Rules Requires a Change in the Project Before an SEIS Can Be Required and, Here, No Change Has Occurred.

1. The Amici's Interpretation Misconstrues the Plain Language and Attempts to Insert Ambiguity Where None Exists.

The Amici focus on certain words and phrases in the SEIS Rules to the direct exclusion of other words and phrases. Cardinal rules of construction provide that the Court cannot render certain words and phrases superfluous and meaningless – let alone ignore them – because they are inconvenient. 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.

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[3] See Appellees City and County of Honolulu and Henry Eng, Director of Department of Planning and Permitting (collectively, the "City")'s Response to Petition for Certiorari, filed September 23, 2009 (the "City's Response"), at 7.

Mainaaupo, 117 Hawai'i at 250, 178 P.3d at 16; see also Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 252, 982 P.2d 853, 881 (1999) (wherein this Court "decline[d] to deviate from the distinct and well understood statutory policy of section 5 (a)(1) of the [Federal Trade Commission Act] in the absence of a clear pronouncement on the part of the Hawai'i legislature"), superseded in part by HRS § 480-2(e), 2002 Haw. Sess. L. Act 229 § 2 (responding to Robert's Hawaii and amending HRS § 480-2).

The Amici focus on words and phrases such as the "intensity of the environmental impacts" and "characteristics" and argue, without any authority, that this means that the Court can look at these things in the general context of a project in determining whether to require an SEIS. The Amici ignore the fact that the SEIS Rules expressly command that the crucial inquiry is whether, for example, "the action has . . . changed substantively in . . . intensity[,]" whether "there is any change in any of these characteristics [of the action,]" or whether "there is [a] change in a proposed action resulting in individual or cumulative impacts not originally disclosed[.]" HAR § 11-200-26 (emphases added). The Amici also give no heed to the third sentence in HAR § 11-200-27, which mandates that an SEIS shall be prepared "whenever the proposed action for which a statement was accepted has been modified." HAR § 11-200-27 (emphases added). Nor do the Amici acknowledge the definition of an SEIS, which is an "additional EIS prepared for an action for which a statement was previously accepted, but which has since changed." HAR § 11-200-2 (emphases added). The SEIS Rules clearly mandate that there must be a change in the action and any new or different environmental impacts must result from the changed action.[4]

2. There Has Been No Change in the Project Timing.

Contrary to the assertions of the Amici, there has been no change in the Project. As an initial matter, the SEIS Rules acknowledge that not all projects are qualified by timing. "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." HAR § 11-200-26

[4] When challenging an agency's decision not to supplement an existing EIS, the Petitioners bear the burden of showing a substantial change in the Project that will "likely" result in significantly different or increased environmental impacts not originally disclosed or previously dealt with. See Kuilima's Third Motion for Summary Judgment, filed October 11, 2006 (CROA 3/189-227), incorporated herein by reference; see also Biodiversity Assoc. v. U.S. Forest Serv Dept. of Agric., 226 F. Supp. 2d 1270, 1308 (D. Wyo. 2002) (burden of proving NEPA violation, including claim for SEIS, belongs to Plaintiff).

(emphasis added). Here, this Project is not qualified by timing. See CROA 5/43 (explaining that "[f]igure 9 shows the approximate phasing of development ([which] is dependent on receiving the necessary government approvals"); CROA 12/14 (Circuit Court Order). In fact, the Unilateral Agreement and Declaration for Conditional Zoning dated September 23, 1986, at ¶ 3, expressly provides:

> 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.

Accordingly, because the Project was not qualified by a specific time limit, the delay in the Project's construction arising from economic conditions does not constitute a "change" in the Project warranting an SEIS.

3. The Amici Rely upon Inapposite Case Law in This Regard.

The Amici, relying on Morgan v. Planning Dep't, County of Kauai, 104 Hawai'i 173, 86 P.3d 982 (2004) and Pearl Ridge Estates Cmty. Ass'n v. Lear Siegler, Inc., 65 Haw. 133, 648 P.2d 702 (1982), urge this Court to look beyond the plain language of the SEIS Rules and to apply an interpretation that supports their selective reading of the purpose of HEPA. See Amici Curiae Brief ("ACB"), at 8. These cases, however, are inapposite to the instant case.

In both cases, the application of the plain language of the statute led to an absurd result, and this Court noted that there was no other language in the statute that reinforced the plain language interpretation. In Morgan, the circuit court found that the Commission's rules, which allow the Commission (i) to revoke, amend, or modify a permit that has not been complied with or (ii) to modify or delete conditions of a permit, exceeded their enabling legislation. Morgan, 104 Hawai'i at 178, 86 P.3d at 987. In reaching this decision, the circuit court relied upon HRS § 205A-29, which provides that "action on the special management permit shall be final unless otherwise mandated by court order." Id. In looking to the Coastal Zone Management Area's purpose as the enabling authority for the Commissions' rules, this Court explained that (1) there was "[n]o language [that] appears in the statute susceptible to the circuit court's interpretation," and (2) since "it is presumed that the legislature did not intend an absurd result," the plain language interpretation could not be adopted. Id. at 186, 86 P.3d at 995. This was true because it would lead to the absurd result of leaving the Planning Commission powerless to modify the

conditions of a permit that had been violated by Morgan, the permit holder, who built something other than what was permitted and caused damage to the surrounding area. See id.

In Pearl Ridge, the defendants argued that the reclassification of land from conservation to urban did not constitute an "action" and, therefore, HRS § 343-5(a)(2), which required an Environmental Assessment ("EA") for "actions which [p]ropose any use within any land classified as conservation" was inapplicable. Pearl Ridge, 65 Haw. at 134, 648 P.2d at 703. Like Morgan, the Pearl Ridge Court noted that the defendants' interpretation lead to an absurd result, insofar as, "[g]iven the wording of [the statute], there could never be an [EA,] because of such use after the land had been reclassified to urban since it would no longer be classified as conservation." Id. at 134, 648 P.2d at 704. Similarly, as was the focus in Morgan, this Court explained that had defendants' interpretation been "the intent of the statute, appropriate language to accomplish such a result could easily have been drafted." Id.

This case is distinguishable from Morgan and Pearl Ridge, because the plain language of the HEPA statute and SEIS Rules, as discussed below, does not lead to an absurd, unjust or illogical result. Additionally, the plain language set forth in HRS §§ 343-1 and 343-5(g) is "susceptible" to the ICA Majority's interpretation that an SEIS cannot be required unless there is a change in the action. In fact, the plain language of HEPA supports the ICA Majority's contention that "no other reading is possible." Unite Here! Local 5 v. City and County of Honolulu, 120 Hawai'i 457, 466, 209 P.3d 1271, 1280 (2009). For example, contrary to Morgan, where the Court explained that the "Planning Commission's enabling statute is devoid of any express provision regarding reconsideration,"[5] HEPA includes HRS § 343-5(g), which expressly and unequivocally 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." Therefore, unlike Pearl Ridge, the legislature included appropriate language in the enabling statute that allows for the result set forth in the plain language of the SEIS Rules.

Alternatively, even if this Court were to apply Morgan and Pearl Ridge to this case, the Court could not adopt the Amici's interpretation of the SEIS Rules, because that interpretation does not give effect to the entire purpose of HEPA, which, as discussed infra, not only requires that "environmental concerns are given appropriate consideration in decision making" but it also

[5] Morgan, 104 Hawai'i at 183, 86 P.3d at 992.

requires appropriate consideration be given to "economic and technical considerations." HRS § 343-1; see also Unite Here!, 120 Hawai'i at 469, 209 P.3d at 1283 (acknowledging that there must also be consideration of the land owner's entitlements and the status of a project and noting that the purpose of HRS § 343-5(g) and the SEIS Rules, promulgated there under, balances these considerations with environmental concerns) (Nakamura, J., dissenting).

Furthermore, adopting the Amici's interpretation will cause the SEIS Rules to exceed their enabling authority, making them *ultra vires*. See Kuilima's Motion for Judgment on the Pleadings, filed October 11, 2006 (CROA 3/17-128) and Kuilima's Response at 7-9.

B. The ICA Majority's Interpretation of the SEIS Rules Is Consistent With the Purpose of HEPA and Does Not Lead to an Absurd or Unjust Result.

Similar to the Petitioners, the Amici selectively choose language from the underlying purpose 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." HRS § 343-1 (emphasis added); see also Pearl Ridge, 65 Haw. at 140, 648 P.2d at 707 (citing Conf. Comm. Rep. No. 27-74 in 1974 Senate Journal, at 775-76; Conf. Comm. Rep. No. 27, in 1974 House Journal, at 863-64) (Nakamura, J., concurring). In other words, HEPA requires that there be a balancing of the developer's interest and predictability of the project's entitlements with environmental considerations.

1. Agency Decision-Making Cannot Be Informed at This Time, Because the Approval of the Subdivision Application Is a Non-Discretionary Approval and Does Not Implicate the SEIS Rules.

The SEIS Rules can only apply in connection with "discretionary" consents – i.e., agency actions that can be "informed" by the environmental review process – which is not the case with the Subdivision Application. See HRS § 343-2; HAR § 11-200-2; see also Kuilima's Second Motion for Summary Judgment, filed October 11, 2006 (CROA 3/176-179) and Kuilima's Response, at 12-14. The granting of a subdivision application is a non-discretionary, or ministerial, act, because no "judgment and free will may be exercised by the issuing agency" where the subdivision application conforms to the explicit requirements of the local subdivision ordinance. See HAR § 11-200-2 (defining approval and discretionary consent).[6]

[6] A majority of courts have held that granting a subdivision application, at both the preliminary plat and final plat stages, is a non-discretionary, or ministerial, act where the subdivision

Explaining that the "the prescribed role of the EIS . . . in the state environmental protection scheme is informational," Justice Nakamura concurred in Pearl Ridge and explained that he did not believe an EA was required pursuant to HRS § 343-5(a)(2). See Pearl Ridge, 65 Haw. at 141-142, 648 P.2d at 707 (Nakamura, J., concurring). Justice Nakamura explained that "the nature and character of the environmental assessment and impact statement prescribed by HEPA suggests the [Land Use Commission ("LUC")] was not obligated to engage in an assessment," because "[the EA] would have served no constructive purpose in light of the actual constraints imposed on the commission by HRS § 205-16.1" Id. (emphasis and brackets added).

Similar to Justice Nakamura's reasoning in Pearl Ridge, information regarding regional traffic, Hawaiian monk seals, and/or green sea turtles would "serve no constructive purpose" at this time, because it would not "inform" the agency decision-making with regard to the Subdivision Application. The challenged Subdivision Application is not a discretionary consent that triggers an SEIS, because: (1) the Subdivision Application is a component part of the entire Project, which is a phased action and is covered by the accepted EIS; (2) the law generally recognizes that granting a subdivision application that conforms to all applicable laws, rules, and regulations is a non-discretionary act; (3) no judgment or free will may be exercised in granting a subdivision application that meets the requirements of the Honolulu Subdivision Ordinance (ROH

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application conforms to the explicit requirements of the local subdivision ordinance. See PTL, LLC v. Chicago County Bd. of Comm'rs, 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"); see also Reynolds, Laurie, Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion, 24 Ga. L. Rev. 525, 536 (1990) (stating that "[m]any other state courts have reached the conclusion ... that local governments may only deny subdivision approval when that denial is based on a developer's failure to conform with explicit requirements in the ordinance"); Plan Comm'n for Floyd County, Indiana v. Klein, 765 N.E.2d 632, 641 (Ind. 2002) (explaining that the plan commission is limited to determining whether the specific requirements set out in the subdivision control ordinance have been met); Reed v. Planning and Zoning Comm'n of Town of Chester, 544 A.2d 1213, 1214-1215 (Conn. 1988) ("The planning commission, acting in its administrative capacity herein, has no discretion or choice but to approve a subdivision if it conforms to the regulations adopted for its guidance.") (quotations omitted); Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 164-165 (Mo. 2006) (holding that the approval of a preliminary plat that meets the subdivision and zoning requirements is a ministerial act under a subdivision ordinance that provides, in pertinent part: "The plats review committee shall have the authority to approve or disapprove any preliminary plat; provided the preliminary plat must comply with all of the requirements of this chapter.").

Chapter 22) and applicable rules and regulations; and (4) the DPP's own actions show that granting the Subdivision Application is a non-discretionary consent. See CROA 3/179-185. . Further, as explained before the Circuit Court, the relevant Subdivision Application merely readjusts boundary lines and does not increase density. See CROA 3/167-188.

Likewise, the Amici's reliance on cases involving "discretionary approvals" or permits that could be informed by an EA or EIS is misplaced. See e.g., Pearl Ridge, 65 Haw. at 134, 648 P.2d at 703 (involving a petition to the LUC for a district boundary amendment);[7] Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 947 P.2d 378 (1997) (involving an SMA Permit);[8] Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 979 P.2d 1120 (1999) (challenging the issuance of an SMA Permit);[9] Sierra Club v. Dep't of Transp., 115 Hawai'i 29, 167 P.3d 292 (2007) ("Superferry I").

Since the Project has reached a non-discretionary stage where an SEIS can no longer inform discretionary agency decision-making, no SEIS is required.

2. The ICA 's Interpretation of the SEIS Rules Provides a Reliable, Consistent Process that Balances Environmental Concerns with Reasonable Development That Would Not Lead to an Impossible, Intractable Process.

The SEIS Rules, as interpreted by the ICA Majority, allow the public to participate "at the earliest practicable time" in the environmental review process,[10] while ensuring that the

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[7] See also Sierra Club v. State of Hawaii Office of Planning, 109 Hawai'i 411, 418, 126 P.3d 1098, 1105 (2006) (noting that HRS § 343-2 defines "approval" as a "discretionary approval" and holding that LUC's decision to reclassify property from agricultural to urban was a "discretionary approval," and, thus, triggered the environmental review process).

[8] This case is further distinguishable from Kahana, because Kuilima is not attempting to circumvent the review process by submitting its permits in a piecemeal fashion. See Kahana, 86 Hawai'i at 68, 947 P.2d at 380 (where the developer sought an SMA permit for what it deemed preparatory work to install a completely new drainage system for a 300 unit residence it intended to construct.). Here, the Project is not in the initial stages of development. The Subdivision Application is not the start of this Project. An EIS has already been completed (CROA 5/4-873), and various entitlements have been granted. See CROA 4/84-106, 107-140, 202-216.

[9] SMA Permits are discretionary. See Kauai County v. Pacific Standard Life Ins. Co., 65 Haw. 318, 330, 653 P.2d 766, 775 (1982) (holding an SMA Permit is the last discretionary permit).

[10] Contrary to the Amici's assertion, the ICA Majority's interpretation of the SEIS Rules does undermine HEPA's purpose by stifling public participation. This case is not like Superferry I, where the "public was [entirely] prevented from participating in an environmental review process" as a result of DPP's grant of an exemption to HEPA. See Superferry I, 115 Hawai'i at 343, 167 P.3d at 336. Here, the public has not been prevented from participating in the

already lengthy and expensive review process is not unduly replicated, unless there is "an essentially different action" being considered. See Kuilima's Response at 6. The Amici's interpretation, by comparison, that any change in the action's surrounding "context" triggers an SEIS, not only disregards all "economical and technical considerations" but also leads to an unjust, illogical and/or absurd result — costly, intractable development. Id. at 10-11.

As explained in Kuilima's Response, and reinforced by the City's Response, 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. See id.; see also City Response, at 8. Indeed, the City recognized that under the Amici's interpretation, "the DPP would be burdened with legal challenges whenever it did not require an SEIS" and indicating that it may be "easier" for the "DPP to require SEISs for every change in circumstances surrounding the project" – which would as a practical matter "hinder long-range planning and development." Id. at 8. The Hawai'i legislature could not have intended such an absurd, unjust or illogical result. See Morgan, 104 Hawai'i 176, 86 P.3d at 995 (refusing to adopt an interpretation, as absurd, that would require the planning commission "to file a court action each time a SMA Use permit needs modification" and explaining that "this court will not permit an interpretation . . . that produces [] an absurd result.").

C. The Amici's Reliance on NEPA and Related Case Law is Misplaced.

1. The Plain Language of NEPA and its Regulations Are Completely Different.

It is uncontroverted that "in instances where Hawai'i case law and statutes are silent, this court can look to parallel federal law for guidance." Price v. Obayashi, 81 Hawai'i 171, 181, 914 P.2d 1364, 1375 (1996). In this case, however, NEPA and its regulations regarding SEISs, codified at 40 CFR § 11502.9, are not parallel to the HEPA and the SEIS Rules. As the ICA Majority points out, "the plain language of the federal regulations . . . is different from that of Hawai'i's SEIS [R]ules." Unite Here!, 120 Hawai'i at 465-66, 209 P.3d at 1279-80.

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environmental review process, but 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, 4/11-15 (Makaiau Aff.), 237-359, 361-364, 393-394, 669; 5/4-873.

First, HRS § 343-5(g) expressly provides that no other statements shall be required once an EIS is accepted. By comparison, NEPA does not contain this language. See NEPA, 1969 § 2 et seq., 42 U.S.C. § 4321 et seq. Second, the relevant NEPA regulation provides that agencies

> [s]hall prepare supplements to either draft or final environmental impact statements if:
>
> (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 CFR §11502.9 (emphases added).

Thus, unlike Hawai'i's SEIS Rules, which require a two step analysis, the first of which is a determination whether there is a change in the action, NEPA's regulation provides for an alternative basis for determination: whether there are substantial changes in the proposed action **or** there are significant new circumstances or information bearing on the proposed action or its impacts. Accordingly, the NEPA paradigm is not instructive in this case, as HRS § 343-5(g) and the SEIS Rules are clearly different from their federal counterparts.

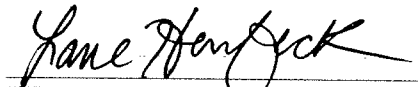
2. The Amici Rely upon Inapposite Case Law in This Regard.

Since the inquiry for when NEPA requires an SEIS is significantly different from Hawaii law, the Amici's reliance on federal cases, applying this significantly different standard to support its interpretation of the SEIS Rules, is inapposite and should be disregarded. The cases, upon which the Amici rely, focus on whether "new circumstances or information" exists, an analysis that the SEIS Rules, as written, does not include.

III. CONCLUSION

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

DATED: Honolulu, Hawai'i, September 30, 2009.



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