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1ST CIRCUIT COURT
STATE OF HAWAII
FILED

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B. TERAOKA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY, a
Hawaii non-profit corporation, 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.

CIVIL NO. 06-1-0867-05 (SSM)
(Declaratory Judgment)

ORDER (1) GRANTING DEFENDANT
KUILIMA RESORT COMPANY'S
THIRD MOTION FOR SUMMARY
JUDGMENT (RE: BURDEN OF PROOF)
FILED OCTOBER 11, 2006; (2)
GRANTING THE CITY AND COUNTY
OF HONOLULU, DEPARTMENT OF
PLANNING AND PERMITTING'S
JOINDER IN DEFENDANT KUILIMA
RESORT COMPANY'S THIRD MOTION
FOR SUMMARY JUDGMENT (RE:
BURDEN OF PROOF) FILED OCTOBER
25, 2006; (3) DENYING PLAINTIFFS
KEEP THE NORTH SHORE COUNTRY
AND SIERRA CLUB, HAWAII
CHAPTER'S MOTION FOR SUMMARY
JUDGMENT FILED OCTOBER 26, 2006;
AND (4) RE DEFENDANT KUILIMA
RESORT COMPANY'S FIRST MOTION
FOR SUMMARY JUDGMENT (RE:
STATUTE OF LIMITATIONS) FILED
OCTOBER 11, 2006, DEFENDANT

KUILIMA RESORT COMPANY'S
SECOND MOTION FOR SUMMARY
JUDGMENT (RE: NON-
DISCRETIONARY ACTIONS) FILED
OCTOBER 11, 2006, DEFENDANT
KUILIMA RESORT COMPANY'S
MOTION FOR JUDGMENT ON THE
PLEADINGS FILED OCTOBER 11,
2006, AND DEFENDANT KUILIMA
RESORT COMPANY'S MOTION FOR
PROTECTIVE ORDER FILED
OCTOBER 24, 2006

Hearing Date: November 13, 2006
Time: 9:45 a.m.
Judge: Hon. Sabrina McKenna

No Trial Date Set

**ORDER (1) GRANTING DEFENDANT KUILIMA RESORT COMPANY'S
THIRD MOTION FOR SUMMARY JUDGMENT (RE: BURDEN OF PROOF)
FILED OCTOBER 11, 2006; (2) GRANTING THE CITY AND COUNTY OF
HONOLULU, DEPARTMENT OF PLANNING AND PERMITTING'S JOINDER
IN DEFENDANT KUILIMA RESORT COMPANY'S THIRD MOTION FOR
SUMMARY JUDGMENT (RE: BURDEN OF PROOF) FILED OCTOBER 25, 2006;
(3) DENYING PLAINTIFFS KEEP THE NORTH SHORE COUNTRY AND
SIERRA CLUB, HAWAII CHAPTER'S MOTION FOR SUMMARY JUDGMENT
FILED OCTOBER 26, 2006; AND (4) RE DEFENDANT KUILIMA RESORT
COMPANY'S FIRST MOTION FOR SUMMARY JUDGMENT (RE: STATUTE OF
LIMITATIONS) FILED OCTOBER 11, 2006, DEFENDANT KUILIMA RESORT
COMPANY'S SECOND MOTION FOR SUMMARY JUDGMENT (RE: NON-
DISCRETIONARY ACTIONS) FILED OCTOBER 11, 2006, DEFENDANT KUILIMA
RESORT COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS FILED
OCTOBER 11, 2006, AND DEFENDANT KUILIMA RESORT COMPANY'S MOTION
FOR PROTECTIVE ORDER FILED OCTOBER 24, 2006**

On October 11, 2006, Defendant KUILIMA RESORT COMPANY filed, the following
motions:

1. Defendant Kuilima Resort Company's First Motion for Summary Judgment (Re: Statute of Limitations);

2. Defendant Kuilima Resort Company's Second Motion for Summary Judgment (Re: Non-Discretionary Actions);
3. Defendant Kuilima Resort Company's Third Motion for Summary Judgment (Re: Burden of Proof); and
4. Defendant Kuilima Resort Company's Motion for Judgment on the Pleadings.

Furthermore, on October 24, 2006, Defendant KUILIMA RESORT COMPANY filed, the following motion:

5. Defendant Kuilima Resort Company's Motion for Protective Order.

On October 25, 2006, Defendants CITY AND COUNTY OF HONOLULU and HENRY ENG filed the following joinders:

1. The City and County of Honolulu, Department of Planning and Permitting's Joinder in Defendant Kuilima Resort Company's First Motion for Summary Judgment (Re: Statute of Limitations);
2. The City and County of Honolulu, Department of Planning and Permitting's Joinder in Defendant Kuilima Resort Company's Third Motion for Summary Judgment (Re: Burden of Proof);
3. The City and County of Honolulu, Department of Planning and Permitting's Joinder in Defendant Kuilima Resort Company's Motion for Judgment on the Pleadings; and
4. The City and County of Honolulu, Department of Planning and Permitting's Joinder in Defendant Kuilima Resort Company's Motion for Protective Order.

On October 26, 2006, Plaintiffs KEEP THE NORTH SHORE COUNTRY and SIERRA CLUB, HAWAII CHAPTER, filed the following motion:

1. Plaintiffs Keep The North Shore Country and Sierra Club, Hawaii Chapter's Motion for Summary Judgment.

The motions and joinders referenced above came on for hearing on November 13, 2006 at 9:45 a.m. before the Honorable Sabrina S. McKenna. William S. Hunt, Esq. and Laura P. Couch, Esq. appeared on behalf of Plaintiffs KEEP THE NORTH SHORE COUNTRY and

SIERRA CLUB, HAWAII CHAPTER (collectively "Plaintiffs"). Terence J. O'Toole, Esq., Sharon V. Lovejoy, Esq., Wil K. Yamamoto, Esq. and Dennis E. Phillips, Esq. appeared on behalf of Defendant KUILIMA RESORT COMPANY ("Kuilima"). Don S. Kitaoka, Esq. and Lori K.K. Sunakoda, Esq. appeared on behalf of Defendants CITY AND COUNTY OF HONOLULU and HENRY ENG (collectively "City").

Having reviewed each of the motions and joinders referenced above, and having considered the memoranda, affidavits, declarations, exhibits, arguments of counsel and the records and files herein,

THE COURT HEREBY FINDS AS FOLLOWS:

1. Hawaii Revised Statutes ("HRS") § 343-5(g) provides that an environmental impact statement ("EIS") that is accepted with respect to a particular action shall satisfy the requirements of the chapter and no other statement for that proposed action shall be required.

2. The Hawaii Environmental Protection Act, HRS § 343 ("HEPA"), allows the Environmental Council to draft rules and regulations to implement HEPA. Pursuant to that authority, rules regarding supplemental EIS's were promulgated under Hawaii Administrative Rules ("HAR") §§ 11-200-26 and 11-200-27, which provide:

HAR §11-200-26

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.

HAR § 11-200-27

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.

3. An EIS is supposed to be prepared, and environmental consequences of an action are supposed to be reviewed, at the earliest possible time. *See* HRS § 343-5(b). The Court finds that this was done with respect to the Kuilima Expansion Project (the “Project”) in 1985. The EIS for the Project was accepted in October 1985, and is a matter of public record.

4. Although there has been some delay in the Project from the community's perspective, there have been ongoing activities and actions with respect to the Project throughout the past 20 years. In addition, the Project was adopted as part of the Ko'olauloa Sustainable Communities Plan in May of 1999; the public had an opportunity to participate with respect to the adoption of that Plan.

5. The Department of Planning and Permitting of the City and County of Honolulu (the “DPP”), as the accepting authority, is responsible for determining whether a supplemental EIS is required for the Project. *See* HAR §§ 11-200-27.

6. At the end of 2005 and beginning of 2006, certain North Shore neighborhood boards, Ms. Dee Dee Letts on her own behalf, and other individuals asked the DPP whether the timing of the Project would require a supplemental EIS. The Plaintiffs did not write any of those letters. The DPP responded, indicating that it had determined that a supplemental EIS was not

required for the Project. Although it does not appear that specific reasons were given, the DPP determined that the timing of the action has not changed so as to require a supplemental EIS.

7. The October 1985 EIS contained only general statements in terms of phasing of the Project, but those statements did not impose a time limit on the Project based on that proposed phasing time frame. The October 1985 EIS does not obligate Kuilima to follow that phasing time frame.

8. The law provides that when you have a project that is to be constructed in phases, the original EIS covers everything, and the project is the action under consideration. In this case, the Project is the “action.” There has been no change to the action that would essentially make it a new action under consideration.

9. Any findings of fact constituting conclusions of law shall be so construed.

THE COURT HEREBY CONCLUDES AS FOLLOWS:

1. The law provides that courts are supposed to give deference to the expertise of agencies that deal with administrative issues. The Court is not to substitute its judgment for the judgment of an agency. If the decision of the agency meets the “rule of reason” and the decision is not “arbitrary or capricious,” the Court shall not substitute its judgment for that of the agency.

2. The DPP’s decision that a supplemental EIS is not required for the Project meets the rule of reason standard, and was not arbitrary or capricious. The timing of the Project has not substantively, or essentially, changed. In the alternative, even if the timing had substantively changed, which the Court finds that it has not, such change is not likely to have a significant effect.

3. 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. However, even if the Court

were to review those concerns, the Court would not find that there is a substantive change likely to result in a significant effect not originally considered or previously dealt with that would require a supplemental EIS.

4. Some of the concerns raised by Plaintiffs, particularly with respect to traffic, concern the sufficiency of the October 1985 EIS. Too much time has passed to assert those claims; the Court is not able to review those claims now.

5. Courts have held that claims like those asserted by Plaintiffs in this action may be decided pursuant to a summary judgment motion rather than a full-blown trial. The Court is not to conduct a trial *de novo* on these issues; rather, the Court is to review the agency's decision.

6. Any conclusions of law constituting findings of fact shall be so construed.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendant Kuilima's Third Motion for Summary Judgment (Re: Burden of Proof) is granted;
2. Defendant City's Joinder in Defendant Kuilima Resort Company's Third Motion for Summary Judgment (Re: Burden of Proof) is granted;
3. Plaintiffs' Motion for Summary Judgment is denied;
4. All other pending motions and joinders are considered moot; and
5. Judgment will be entered in favor of Defendants and against Plaintiffs.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii DEC 01 2006, 2006


SABRINA S. MCKENNA

JUDGE OF THE ABOVE-ENTITLED COURT



Keep The North Shore Country, et al. v. City and County of Honolulu, Civil No. 06-1-0867-05 (SSM); **ORDER** (1) GRANTING DEFENDANT KUILIMA RESORT COMPANY'S THIRD MOTION FOR SUMMARY JUDGMENT (RE: BURDEN OF PROOF) FILED OCTOBER 11, 2006; (2) GRANTING THE CITY AND COUNTY OF HONOLULU, DEPARTMENT OF PLANNING AND PERMITTING'S JOINDER IN DEFENDANT KUILIMA RESORT COMPANY'S THIRD MOTION FOR SUMMARY JUDGMENT (RE: BURDEN OF PROOF) FILED OCTOBER 25, 2006; (3) DENYING PLAINTIFFS KEEP THE NORTH SHORE COUNTRY AND SIERRA CLUB, HAWAII CHAPTER'S MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 26, 2006; AND (4) RE DEFENDANT KUILIMA RESORT COMPANY'S FIRST MOTION FOR SUMMARY JUDGMENT (RE: STATUTE OF LIMITATIONS) FILED OCTOBER 11, 2006, DEFENDANT KUILIMA RESORT COMPANY'S SECOND MOTION FOR SUMMARY JUDGMENT (RE: NON-DISCRETIONARY ACTIONS) FILED OCTOBER 11, 2006, DEFENDANT KUILIMA RESORT COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS FILED OCTOBER 11, 2006, AND DEFENDANT KUILIMA RESORT COMPANY'S MOTION FOR PROTECTIVE ORDER FILED OCTOBER 24, 2006

APPROVED AS TO FORM:



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Keep The North Shore Country, et al. v. City and County of Honolulu, Civil No. 06-1-0867-05 (SSM);
ORDER (1) GRANTING DEFENDANT KUILIMA RESORT COMPANY'S THIRD MOTION FOR SUMMARY JUDGMENT (RE: BURDEN OF PROOF) FILED OCTOBER 11, 2006; (2) GRANTING THE CITY AND COUNTY OF HONOLULU, DEPARTMENT OF PLANNING AND PERMITTING'S JOINDER IN DEFENDANT KUILIMA RESORT COMPANY'S THIRD MOTION FOR SUMMARY JUDGMENT (RE: BURDEN OF PROOF) FILED OCTOBER 25, 2006; (3) DENYING PLAINTIFFS KEEP THE NORTH SHORE COUNTRY AND SIERRA CLUB, HAWAII CHAPTER'S MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 26, 2006; AND (4) RE DEFENDANT KUILIMA RESORT COMPANY'S FIRST MOTION FOR SUMMARY JUDGMENT (RE: STATUTE OF LIMITATIONS) FILED OCTOBER 11, 2006, DEFENDANT KUILIMA RESORT COMPANY'S SECOND MOTION FOR SUMMARY JUDGMENT (RE: NON-DISCRETIONARY ACTIONS) FILED OCTOBER 11, 2006, DEFENDANT KUILIMA RESORT COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS FILED OCTOBER 11, 2006, AND DEFENDANT KUILIMA RESORT COMPANY'S MOTION FOR PROTECTIVE ORDER FILED OCTOBER 24, 2006